(2012) 04 DEL CK 0437

In the Delhi High Court

Case No : LPA No. 154 of 2012 with W.P. (C) No. 762 of 2012

Hot ''n'' Chillz APPELLANT

Vs

Delhi Metro Rail Corporation RESPONDENT

Date of Decision : 20-04-2012

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2012) 129 DRJ 648

Hon'ble Judges : Rajiv Sahai Endlaw, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Sandeep Sethi, with Mr. Tanmaya Mehta, for the Appellant; Anusuya Salwan, Advocate with Ms. Renuka Arora and Mr. Kunal Kohli, for the Respondent

Final Decision : Dismissed

Judgement

Hon''ble Acting Chief Justice A.K. Sikri

1. This intra-Court appeal is preferred against the orders dated 13.02.2012 in the Writ petition no.762/2012 passed by the learned Single Judge whereby the learned Single Judge did not grant any ex parte interim stay and time is given to the respondent to file the counter affidavit and matter is adjourned to 21.05.2012. According to the appellant, non grant of stay would defeat the very purpose of filing the writ petition. This petition was listed for admission on 27.2.2012. The counsel for respondent DMRC appeared on advance notice. It was accepted by counsel for both the parties that arguments on stay application and decision thereon would cover the main petition as well. Therefore, both the parties agreed that Writ Petition may also be taken up for hearing. Following order was accordingly passed:

1. This appeal has been preferred against the order dated 13th February, 2012 of the Learned Single Judge of this Court in W.P.(C) No.762/2012 filed by the appellant herein wherein notice has been issued but no stay has been granted; instead respondent is given time to file the counter affidavit and the matter is

adjourned to 21st May, 2012.

2. The appellant feels aggrieved by non-grant of the interim stay. The submission of the appellant is that the respondent has invited tenders for allotment of the kiosks and the last date for submission of the tenders is 9th March, 2012 and in case the tender process is not stayed, the very purpose of filing the writ petition shall be defeated when the same would come up for hearing on 21st May, 2012.

3. At the time of arguments it was felt that this Bench will have to take view on the merits of the writ petition itself.

4. In these circumstances with the consent of the counsel for the parties W.P.(C) No. 762/2012 has also been called and arguments in the writ petition have also been advanced by the counsel for the parties.

5. We are conscious of the fact that the respondent has not filed counter affidavit so far; however the counsel for the respondent has made her submissions with reference to the record.

6. Order in LPA No.154/2012 and W.P.(C) No. 762/2012 reserved.

CM No.3392/2012 (for stay)

In view of the aforesaid position, this application has become infructuous and is disposed of.

Accordingly, we proceed to decide the Writ Petition as well, along with the present appeal. We would like to record that since counter affidavit has not been filed by the respondents, the respondents produced the original record which was perused by the Court at the time of hearing.

2. Facts in brief, sans unnecessary details, which led to the filing of the Writ Petition may be first recapitulated. The appellant was originally allotted 51 kiosks at 40 metro stations on the Metro Line I (Dilshad Garden to Rithala), Line II (Jehangirpuri to Central Secretariat) and Line III (as it then existed from Yamuna Bank to Dwarka Sector 9). At these kiosks, which were of varying sizes from 4 sq.mts. to 12 sq.mts., the appellant makes commercial sale of precooked food and beverages. These 51 kiosks wuld henceforth be referred to as the existing kiosks/kiosks on existing stations. Thereafter, vide letter dated 26.6.2009, the appellant wrote to the respondent proposing the sale of drinking water on the upcoming metro stations. As per the proposal, the appellant would sell drinking water on loss basis @ Rs. 1 per glass of 200 ml. on the upcoming metro stations at kiosks of the size of 4 sq.mts. It was stated that the license fee for 2 sq.mts. would be at commercial rates and for the remaining 2 sq.mts. it was stated that the appellant would pay a license fee of 10% more than the agency offering similar services. It was further stated that if the proposal of the appellant was accepted, the appellant would also be willing to sell drinking water at all of its existing allotted kiosks on the Line I, II and III stations with reduced rent.

3. According to the appellant, the purpose behind selling water at a loss basis

was that the appellant would recover its investment from the sale of commercial products at the same kiosk. Thus, water was to be sold in an area of 2 sq.mts. and in the remaining 2 sq.mts. the appellant would sell commercial products so as to recover its investment. Vide letter dated 27.7.2009, the respondent accepted the proposal of the appellant to sell water at all kiosks - existing and upcoming, subject to certain conditions. Some important terms of the agreement are quoted as follows:

(b) License fee of already allotted kiosk will not be reduced, additional areas of 2 sqm @ Rs. 550/- per sqm per month may be allotted at these locations depending upon feasibility. However, it will be mandatory for the licensee to make drinking water available at existing kiosks as well even if the additional space could not be provided.

(c) The license fee for water vending area (2 sqm) will be charged @ Rs. 550 per sqm per month remaining area (min. 2 sqm) will be charged as per policy for new locations. Other maintenance charges and taxes will be as per existing policy. The licensee fee, other maintenance charges and refundable security deposit will be increased by 5% on yearly basis.

xxx xxx xxx

(g) 2 sqm area is to be dedicated for water and beverage vending and their storage.

4. The appellant states that a perusal of the agreement would show that the appellant was to provide water at all kiosks, existing and upcoming; at the existing stations, water was to be provided and no reduction in license fee would be provided; at the upcoming stations, the kiosks would have a dedicated water vending area (2 sq. mts.) and a remaining commercial area (2 sq. mts.); at upcoming stations, insofar as the water vending area was concerned, a reduced rate of licensee would be payable, and for the remaining commercial areas, the normal commercial license fee would be payable.

5. As per the appellant, the entire basis for accepting the proposal to sell water at a loss basis at the existing commercial kiosks without any rate of reduced license fee and selling water at a loss at upcoming stations, was that by doing so, the appellant would get allotted kiosks at all upcoming metro stations, where from the commercial area of 2 sq.mts. per kiosk, the appellant would recover its investment. Thus, the entire business model was that the loss from water vending would be recovered in a two-fold manner, firstly, from the commercial sales from the commercial area of 2 sq. mts. Per kiosk at upcoming stations and secondly, bulk vending, i.e., setting up of kiosks at all upcoming metro stations. Accordingly, the entire success of the appellants venture circled around the promise and agreement on the part of the respondent to allot kiosks at all upcoming metro stations.

6. The Appellant accepted the aforesaid conditions vide its letters dated

31.7.2009 and 18.1.2010. The respondent thereafter issued letter dated 29.1.2010 stating as under:

In continuation to your unconditional acceptance of referred letter no. (1), you are directed to install water vending kiosks on all recently commenced and upcoming stations for existing kiosks, action to be initiated as per referred no. (1) i.e. LOA.

Letter of Acceptance dated 22.7.2009 will constitute a binding agreement with you and DMRC till the execution of the final agreement. Copy of referred LOA is attached.

With regard to you no. of kiosks exceeding 60 appropriate decision will be taken by DMRC as per extant DMRC policy.

7. On the basis of aforesaid facts and plea taken by the appellant, the appellant claims that it is entitled to get the kiosk at all the metro stations which have come up or are to be established by the respondent. Grievance is that though 60 more stations have come up, the appellant is allotted only 13 thereof and the respondent vide letter dated 04.8.2011 have taken the stand that request for further allotment of kiosk could not be considered in view of the DMRC Policy for allotment of kiosk known as "Kiosk Policy". Para 5 of this Policy deals with existing allotment and reads as under:

5. Existing allotments:

? Cases where kiosks already allotted outside - continue till natural or premature termination. Renewals to be only taken up for those cases where encroachment or nuisance is a problem and aesthetic look of station is not compromised. Renewals to be done with the approval of competent authority (General Manager/ Operations).

? Cases where LOA already issued for spaces allotted outside but the kiosk not installed at the handed over site - No allotment should be done. Either they may be relocated at alternate space inside same station and if the alternate space is not given then the security deposit taken for that space may be refunded and license fee will not be charged. The tenure will be co-terminus with the main agreement.

? Kiosks allotted to parties outside but removed due to action of civic agencies - Alternate locations may be provided inside same/alternate station subject to availability and as per extant scheme, to be co-terminus with the main agreement. No extension of license period. If the alternate space is not given then the security deposit taken for that space may be refunded and license fee will not be charged.

? Spaces inside stations for which the LOA has already been issued and kiosks are still to be placed may be permitted, subject to availability and feasibility of the space. In case there is any change in the commitment made by DMRC, e.g. if there is change in discount structure for license fee because of spaces not being given by DMRC, then the license fee will be charged as per the discount structure already committed by DMRC.

? Existing kiosks allotted under the extant discount policy will be allowed to continue till the natural or premature termination and the tenure of all additional kiosks allotted under this scheme shall be co-terminus with their respective original agreements. Renewals of the existing kiosks can be done after negotiating the rates and as per mutually agreed terms and conditions. All vacated sites will be offered under auctioning scheme only.

8. Para 6 of the said Policy deals with pending allotments and Para 7 stipulates how the future allotments would be made. Relevant portion of Paras 6 and 7 are as under:

6. Pending allotments:

? In Noida - Anand Vihar line, allotment is to be done as per published scheme on first-cum-first serve basis/draw of lots, with no outside spaces & a principle of only 4 food kiosks per station without dilution of any criteria as in the published scheme.

? For Qutub Minar - Huda City Centre line, the allotments will be made as per the published scheme without any dilution in criteria as in the scheme.

7. Future allotments:

? Future allotments shall be done station wise through a process of open tendering for big areas and auction for standard kiosks without dilution of any criteria and stringent verification of identification, like requirement of PAN card, Bank a/c & residential proof etc. All food kiosk shall provide 200 ml of water @ Rs. 2/-.

This Policy has been promulgated in February, 2011.

9. Submission of Mr. Sandeep Sethi, learned Senior Counsel appearing for the appellant was that insofar as the appellant is concerned, it had acquired a right to get the allotment in future of the earlier concluded agreement and therefore, allotment of these kiosks cannot be made only because the DMRC has come up with the aforesaid policy. It was further argued that even as per this Policy, the existing commitments were to be fulfilled inasmuch as the Policy provides that even where the Kiosks allotted to the parties were removed due to action of civic agencies and alternate locations to be provided. He referred to the letter dated 26.8.2011 where the appellant itself was given alternate kiosks site at Central Secretariat Metro station on account of demolition of allotted kiosk at New Delhi Metro Station by Northern Railway Authorities. In that letter, it was mentioned that "this allotment shall be as per extant kiosk policy". He also argued that the Policy was not cast in stone as relaxation in this Policy, many others were allotted kiosks. The particulars whereof were given in Ground (e) of the appeal.

10. Learned counsel for the respondent, on the other hand, argued that no indefensible right had accrued with the appellant. The appellant had no legal right to claim allotment of kiosk in its favour in respect of metro station which has yet to come up. In this manner, it was argued, the appellant was staking claims for allotment of kiosk to be built in future and that too in the absence of any terms for such allotment and therefore, it cannot be said that any concluded contract had to come into operation. It was also argued that after the "Kiosk Policy" was formulated in February, 2011 which was aimed at achieving transparency, the respondent had a right to follow that policy for any allotment thereafter. She further submitted that the claim of the appellant was anti-competitive and it should not have any monopolistic right. She also brought to our notice the fact that the DMRC has categorized the metro stations in three categories, i.e., A, B and C and rate per sq.mts. for these three categories were fixed. It is also mentioned that for Category A, though the rate was Rs. 2,500/- per water kiosk, water kiosk was allotted @ Rs. 500/- per sq.mts., i.e., at much concessional rate which was done to take care of the cheaper rates at which the water was to be sold and therefore, the appellant could not raise the bogey of selling the water at loss. Further 20% discount was offered to those who included the appellant, who had taken 20 or more stations, out of which 50% or more Category B/C stations. This discount went up to 25% if the kiosk space is taken on 40 or more stations. The appellant was the beneficiary of the said discount as well.

11. It was further argued that there were various complaints received not only qua the manner in which kiosk were allotted earlier, but public complaints specifically against the appellant were received as well. Commenting upon the inferior/sub-standard quality of water was supplied by the appellant.

12. In respect of above, DMRC produced the relevant records for our perusal.

13. We have considered the respective submissions with reference to these records and the pleadings before us. We are inclined to agree with the submission of the DMRC that no right accrues in favour of the appellant in respect of all kiosks to be build in future. There cannot be any agreement in law, when no terms and conditions on the basis of which the Kiosks are to be allotted were ever decided or agreed upon. Furthermore, the extant Kiosk Policy as framed by the respondent is not only in public interest, but would ensure transparency and open competition. The competition would attract best persons who are able to sell quality stuff at competitive rates and in the process, the DMRC would also be able to get best price for kiosk. Once such a policy comes into force, the DMRC has not only right, but is duty-bound to make allotment in terms of Policy to avoid any allegations of favouritism.

14. We do not find any force in the submissions of the learned counsel for the appellant that Kiosk Policy is given a go-bye in certain cases. Main target in this behalf was allotment of space to M/s. Inter Globe Enterprises, who are given space to set up retail outlets at various metro stations. Learned counsel for the

DMRC has produced the record relating to the "allotment of spaces to M/s. Inter Globe - Hudson (USA) - Retails stores" which included the Minutes of Negotiating Committee Meeting. In the first instance, it may be mentioned that this allotment relates to retail stores and not kiosks and is, therefore, not even covered by the said Policy. That apart, Minutes of Negotiation Committee Meeting reveal that the Committee was influenced by the fact that since DMRC is the first fully functional MRTS having state of art stations, it was necessary for such a Body to provide and maintain high standards of services to commuters and policy decision was taken that national and international brands be encouraged. M/s. Inter Globe Retail Pvt. Ltd. (Hudson, USA) vide letter dated 02.2.2011 expressed their interest to have an association with DMRC and requested for allotment of spaces to operate Hudson Brand retail outlets. Being an international brand, the request was taken up for consideration by a Committee constituted by DMRC. M/s. Inter Globe Retail Pvt. Ltd. (Hudson, USA) gave their presentation on 29.3.2011, which was highly appreciated and thereafter formal discussion started. It was in that backdrop that the proposal of M/s. Inter Globe Retail Pvt. Ltd. (Hudson, USA) was considered.

15. We also find merit in the submission of the learned counsel for the respondent that this cannot be treated as comparison with the case of the appellant. We have also seen that hundreds of commuters have made complaints against the quality of water/product sold by the appellant. At the time when the appellants had given their initial offer and allotted 51 kiosks at 40 metro stations, they took advantage of not only getting the water kiosks allotted at much concessional rates, but in respect of other kiosks, they availed 25% discount as kiosk space was taken on 40 metro stations. Thus, they have already been given the benefit of the previous allotments. Giving them right to take the kiosks which are built up thereafter and are to be built up in future more particularly after the formulation of kiosk policy in February, 2011 is not only anti-competitive, but against the public interest as well. This Court, therefore, in exercise its extra-ordinary jurisdiction under Article 226 of the Constitution cannot grant such a relief to the appellant. This appeal as well as writ petition before the learned Single Judge are accordingly dismissed with cost quantified @ Rs. 20,000/-.

