
(2004) 05 DEL CK 0023
In the Delhi High Court

Kamal Kumar

APPELLANT

Vs

New Delhi Municipal Council and Others

RESPONDENT

Date of Decision : 31-05-2004

Acts Referred:

Citation : (2004) 75 DRJ 262

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : N.K. Kaul and Vijay Nair, for the Appellant;

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—In this Writ the Petitioner has prayed for a remission in the rate of license Fee for the right to display advertisements on electric poles falling within Zone-II and Zone-III in the NDMC area. This remission is prayed for on the premise that the Deputy Commissioner of Police (Traffic) has disallowed the display of advertisements on poles within close proximity of traffic signal lights; of allocation of certain areas to the Delhi Metro Rail Corporation in Zone II and III which areas cannot, Therefore, be exploited by the Petitioner; and non-availability of electric poles for display of advertisements in Jor Bagh, Golf Links and Amrita Sher Gill Marg areas due to obstruction and resistance faced from Resident Welfare Association in those areas.

2. The concerned tender document inter alias stipulates thus:-

NEW DELHI MUNICIPAL COUNCIL

PRAGATI BHAWAN: JAI SINGH ROAD:

NEW DELHI-110 001

1. Cost of Tender Application Form Rs. 1,500/-

2. Last date of issue of Tender Form 07-11-2003 (up to 1:00 PM)

The system cannot accept the time entered. Enter the new time: (up to 3.30 PM)

(To be dropped in the Tender Box placed outside the room of Director (Enf), NDMC, 4th floor, Pragati Bhawan, Jai Singh Road, New Delhi)

4. Date and time of opening of tender in the room of Director (Enf), NDMC, 4th floor, Pragati Bhawan, Jai Singh Road, New Delhi) 07.11.2003 at 4.00 PM

5. Amount of Earnest Money in the form of Bank Draft to be enclosed with each Tender form Rs. 1,00,000/-

(a) The tenderers are advised in their own interest to visit/inspect and satisfy themselves with regard to the number of electricity poles in question falling in each Zone dispute/request with regard to the number of electric poles or for proportionate decrease in amount of license fee or refund on this score shall be entertained after acceptance of the tender during the term of contract.

(b) Tender/Application form duly filled in and property sealed together with Bank Draft as Earnest Money mentioning the number and date of Bank Draft on the cover of the envelope should be dropped only in the Tender Box specified for the purpose and placed outside the room of Director Director (Enf), NDMC, 4th floor, Pragati Bhawan, Jai Singh Road, New Delhi. Covers containing tenders not super scribed with details of Bank Draft on account of Earnest Money and Zone No. shall not be opened and considered

(c) Incomplete forms and/or forms having cuttings, over-writings, erasing etc. will not be entertained and are liable to be rejected. In this connection, decision of the competent authority shall be final and binding.

(d) The allotment shall be made purely on 'As Is Where Is Basis' in each zone and no representation on any account, whatsoever, shall be entertained in this regard.

(e) The Council reserves the right of allotment/withdrawal of said Electricity Poles for Display of Advertisement on Kiosk and to reject any/all tenders without assigning any reason whatsoever.

6. Details of roads/places where display of Advertisement is not allowed.

S.No. Name of the Road/Place 1. Dandi March, S.P. Road. 2. In the vicinity of PM House. 3. Round-about of Teen Murti 4. Shanti Path, Moti Bagh 5. C-Hexagon, India Gate 6. Tolstoy Marg 7. Rajpath

7. Zone wise Delineation of NDMC area Along with map indicating the Zones in different colours for display of advertisement is attached.

8. The advertisement shall be displayed on a standard size board measuring 30"x 40" in vertical position to be provided at a height of 8ft. (2.44 mtrs) from the surface of the ground and shall be in proper alignment. Only one such board containing double sided advertisement will be displayed on each pole.

Signature of Tender/Applicant

Address

Date:

ENFORCEMENT DEPARTMENT

ZONEWISE DELINEATION OF THE ENTIRE AREA UNDER THE JURISDICTION OF NEW DELHI MUNICIPAL COUNCIL, FOR THE PURPOSE OF LICENSING OF ELECTRIC POLES FOR DISPLAY OF ADVERTISEMENTS

Zone No. II

The dividing line for Zone No. II shall start from State Entry Road leading towards Radial No. 4, thence passing through the middle of Central Park, Connaught Place leading towards Radial No. 1, thence leads towards Janpath up to roundabout of Claridge's Hotel, thence leads towards South End Lane up to the junction of Prithvi Raj Road and thence leads towards Prithvi Raj Road up to the junction of Aurobindo Marg and towards Aurobindo Marg up to the territorial jurisdiction of NDMC. The area falling between dividing line of Zone No. I and on the left side of the dividing line for Zone II shall form "Zone II". The electric poles on both sides of the dividing line/road and those in the middle and roundabouts mentioned above shall form part of Zone II. The area shown in 'pink colour' on the enclosed map shall form Zone No. II.

Zone No. III

The area towards east side of dividing line or right side of dividing line of Zone No. II shall be termed as Zone No. III. The area shown in 'blue colour' on the enclosed map shall form Zone No. III. license is for a period of two years in the first instance on "as is where is basis". Clause 8 states that the Licensor shall not be responsible liable for any damage caused by theft of advertisement boards fixed on electricity poles by the advertiser or for any temporary obstruction caused to the advertisement including pasting of posters etc. by any unauthorised person and no rebate or compensation on this account shall be allowed. Thereafter Clause 20 preserves the right of the Petitioner of surrendering licensed poles before the expiry of the term of the license by giving 3 months notice or three months license fee in lieu of notice. These clauses should not be ignored.

4. It appears that the acceptance of the Petitioner's Tender was challenged before the Division Bench of this Court but proved to be abortive and futile as that Writ Petition came to be dismissed on 18.12.2003. The NDMC thereupon called upon the Petitioner to furnish Bank Guarantees in the sum of Rs. 1,13,44,000/- for Zone No. II and Rs. 87,52,000/- for Zone No. III in terms of its Letter dated 23.12.2003 which also adverted to its previous letter dated 19.11.2003. The needful appears not to have been carried out as is evident from a reading of the Petitioner's Letter dated 24.12.2003 in which the Petitioner had

stated that they had failed to receive firm orders of advertisements because a certified copy of the Order of the Division Bench had not been obtained. By a Letter of even date the NDMC had called upon the Petitioner to take over the possession of the electric poles in Zone No. II and III in the NDMC area with effect from 26.12.2003. The liability to pay license fee has been pegged to 26.12.2003 by the NDMC in their letter dated 30.12.2003. After some remonstrations the Petitioner accepted that the rent liability would commercial from 1.1.2004.

5. The subject contract, however, appears to have continued to run into troubled waters. On 27.1.2004 the Petitioner had written to the NDMC informing them that they were not being permitted by the Traffic Police to put up the kiosks on some roundabouts and Red Lights and that they were being asked to leave two poles in all directions of a Crossing, T. Junction and all type of traffic signals. They also informed the NDMC that due to the Republic Day celebrations the kiosks were removed from the outer circle of India Gate, Mansingh Road, Janpath and K.G. Marg. This was repeated in their letter dated 12.2.2004. Thereafter, on 16.2.2004 the Petitioner informed the NDMC that they were facing hindrance in fixing kiosks in Jor Bagh, New Delhi due to the resistance of the Resident Welfare Association. Hearings were granted by the Traffic Police in which the Respondents appears to have supported the Petitioners, as is abundantly clear from a reading of the NDMC Letter dated 1.4.2004 to the Joint Commissioner of 8.4.2004 the Petitioner had also lodged a complaint with the SHO, Tuglak Road, New Delhi in the presence of the A.S. (Enf.), NDMC. However, no solution to the problem could be found.

6. Ms. Kohli has directed attention towards the observations of the Apex Court contained in this passage from *Tata Cellular Vs. Union of India*, which has been made keeping the *Wednesbury* principles in view:-

1. Whether a decision/making authority exceeded its powers?
2. Committed an error of law.
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to (sic) fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality** : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. vs. Secretary of State for the Home Department, ex Brind*, Lord Diplock refers specifically to one development, namely

In *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, , the Apex Court was no doubt concerned with a contract between the parties which was governed by statutory provisions, but the ratio would also (sic) one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on any one to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is

7. The Petition as well as the Prayer has been resisted by learned counsel for the NDMC, principally by relying upon the Judgment of this Court in *C.J. International Hotels Ltd. Vs. New Delhi Municipal Council*, . After considering the plethora of precedents on the interesting subject of the parameters of jural interference in commercial transactions between the State and an individual, my learned Brother, A.K. Sikri, J. had distilled the case law by enumerating the following propositions:-

(i) At the stage of entering into contract, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional power.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations. However, the discrimination involved should be at the very threshold or at the time of entering into the field of consideration of person with whom Govt. could contract at all. Writ petition would be maintainable to challenge such discriminatory action of the State at the time of entering into contract.

(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) After the State has entered into the filed of ordinary contract, the relations are no longer governed by the Constitutional provisions but by the legally valid contract which rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other Constitutional provision when the State or its agents purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only. If some breach of contract is alleged writ is not the remedy unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

(v) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(vi) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the term of contract which the parties had accepted with open eyes. It cannot ever be 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.

(vii) Ordinarily, where a breach of contract is complained of the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages.

(viii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(ix) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under

Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

(x) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. Apex Court is still maintaining that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(xi) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xii) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjud

8. Ms. Kohli, learned counsel for the Respondent has submitted that this court ought not to entertain the present Petition since a purely commercial transaction had come into effect. She had also drawn my attention to the fact that after the dismissal of the Writ Petition filed by C.J. International Hotels Ltd., the temporary injunction prayed for by it in Civil Suit No. 610/2000 in C.J. International Hotels Ltd. Vs. New Delhi Municipal Council, was also declined by S.K. Mahajan, J. observing that since an agreement had been entered into a temporary injunction could not be granted on the ground that the licensee was finding the trading transaction unprofitable. Since the learned counsel for the parties have relied on the cases already considered by my learned Brother A.K. Sikri, J., dealing with each of the decisions separately would make this Order needlessly prolix. Suffice it to state that Mr. Kaul with his usual brevity and candour has stated that it was always open to the Court to decide not to exercise the extraordinary powers contained in Article 226 of the Constitution, if it considers it inappropriate to do so. He has vociferously submitted that there is no blanket ban on the exercise of judicial review even in contractual matters. He has relied on a number of precedents in which the Hon'ble Supreme Court had entered upon a judicial review of purely contractual and commercial transaction, and had come down

heavily on the State/Authorities where it is found that their action was contrary to the imperatives of Article 14. The Hon"ble Supreme Court has repeatedly enunciated that the State must essentially act without mala fides and should always discharge its role as the guardian of the public weal.

9. The Hon"ble Supreme Court has always constantly remained dynamically abreast of societal changes and demands. With the ever increasing participation of the Government in non-sovereign activities and its entry into the commercial field, the watershed between State immunity is getting washed away year upon year. There has been numerous litigation on the question of whether judicial review is permissible under Article 226 of the Constitution where the action of the State which is in dispute is purely of commercial character. An analysis of the precedents on this interesting nodus will disclose that the foundation for jural interference in this aspect of State activity has been crystallised and cemented in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, where it has been observed as follows:-

Actions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction

Apart from relying on this case Mr. Kaul has also underscored that this position has been reiterated in *M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another*, in which, after adverting to *Shrilekha's* case (*supra*) the Apex Court Non-arbitrariness, being a necessary concomitant of the rule of law, it is

imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power. Action of renewability should be gauged not on the nature of function but public nature of the body exercising that function and avoid referring to plethora of precedents on this point. But suffice it to refer to three other decisions where the same principle has been enunciated. In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, the Hon"ble Supreme Court held that every Authority must not act arbitrarily even in contractual matters and its action must be motivated only by public interest. The Appellant was the Tenant under the Respondent and in the context of an allegation of partiality it was held that a public Authority is not expected to behave like a private landlord, and if its actions are not for public benefit or for a public purpose it would be liable to be struck down in judicial review. This approach manifests itself again in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, , in which the Petitioner challenged the decision of the Respondent by which the latter denied and discontinued the supply of sundry lubricants even though the relationship was not covered by a formal contract. The Apex Court took note of the fact that the Indian Oil Corporation had attempted to bring to an end a relationship which had continued for almost two decades. The Court considered it imperative that the procedure followed by IOC should be reasonable, fair and just and that the Appellant ought to have been taken into confidence before terminating the relationship. The supply arrangement was ordered to continue till such time as the Company had concluded a fresh consideration. In *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, , the Petitioners" dealership in petroleum products, which was their bread and butter, came to be terminated for irrelevant and non-existent causes, a ite of availability of alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principl

10. There can be no gainsaying that the High Court while exercising jurisdiction under Article 226 of the Constitution should be slow and circumspect in exercising judicial review of commercial transactions. Equally, since its jurisdiction is not completed mining sub-lease was illegally terminated and Therefore fall in the sphere of public law, despite the fact that the cause of action had arisen out of or related to a contract. In *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, , the Hon"ble Supreme Court did not find any impediment in issuance of a writ of mandamus for specifically performing the obligation to grant a loan already sanctioned by it.

11. In the present case, however, the NDMC had made it palpably clear that beyond demarcating the zones in which the Petitioner would be contractually authorised to display its kiosks/advertisements, no other assurances were being given. In previous litigation which had come up before me I had to decide on

whether a party could legitimately complain about a shortage of electric poles/ lampposts where their number had been indicated in an approximation. It was my opinion that once a number is indicated, a drastic reduction there from would entitle the licensee to articulate a complaint. Ms. Kohli states that it was for this reason that the NDMC has abjured from quantifying any number of lampposts available and has also mentioned that the contract was on "a is where is basis". It is also not in dispute that the NDMC had given its assistance both moral and physical in endeavoring to find a solution for the problems encountered by the Petitioner. Jural interference would be justified where the State or its instrumentality or any other Authority acts in variance with or contrary to any of its contractual obligations. In such cases even though the specific performance of a contract was heretofore being considered restricted to a civil action, the Hon"ble Supreme Court has not resisted from in permitting judicial review under Article 226 of the Constitution. Similarly, if the State or Authority is transgressing any of its obligations contained in the contract, the existence of an alternative remedy, such as the arbitration etc., has not precluded the Court from stepping in and enforcing the purpose of a contractual obligations. The ratio of these judgments, however, do not apply to the facts of the present case. The NDMC has not violated any of the terms of the contract; it has on the contrary extended cooperation to the Petitioner so that it could overcome obstacles that had come in its path.

12. There is yet another reason why this court ought not to interfere in the factual matrix which has occurred in this case. Commercial prudence and realism would demand a "hands off" policy of this Court since the Petitioner could have ended the contract by giving three months advance notice, or payment of three months license fee in lieu thereof. There can be no legitimate expectation that immediately upon entering into a commercial transaction a presumption of profit can be nurtured. The principle of legitimate expectations has to be applied with great circumspection. It would ensure to the benefit of an individual where it does not come into conflict with public interest, and where it is restricted to an action expected from the State or Authority. can do no better than to refer to National Buildings Construction Corporation Vs. S. Raghunathan and Others, , which is a Restatement of the law pertaining to legitimate expectations. A e and comprehensive clarification on the cognate principle of promissory estoppel can be found in Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others, . Its parameters can be set down by considering the absurdity of a claim in which a party complains that it has not succeeded in receiving sufficient numbers of advertisements for making a profit from a transaction similar to the present one. In the present case the Petitioner's complaint of obstruction in reaping the full benefits under the contract is attributable not to the NDMC but to the third parties. Had the NDMC faltered or retracted from the performance of any of its contractual obligations, jural interference would be justified.

11. For these manifold reasons I do not consider it appropriate to exercise the

extraordinary jurisdiction of this Court as bestowed by Article 226 of the Constitution.

12. The Petition is dismissed, leaving it open to the Petitioner to avail of any other remedy available to it in law. Parties shall bear their respective costs.