

(2009) 11 DEL CK 0129

In the Delhi High Court

Case No : Writ Petition (C) No's. 3383, 3391-97, 3408-11, 3415, 3427-28, 3472, 4898, 6259 and 8247 of 2008

Rajesh Maan and Others

APPELLANT

Vs

Delhi Metro Rail Corporation

RESPONDENT

Date of Decision : 04-11-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2009) 164 DLT 309 : (2010) 8 RCR(Civil) 1010

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Amit Sibal, Naveen Bhardwaj, Mohd. Shariq, K.K. Sabharwal, Jayant Mehta and Nitin Bhatia, for the Appellant; Anusuya Salwan and Renuka Arora, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—The Writ Petitions have similar facts and raise common questions of law. They were heard together and are being disposed of by this common judgment, with Writ Petition No. 3383/2008 titled Rajesh Maan v. Delhi Metro Rail Corporation (hereinafter referred to as DMRC, for short) as the lead case.

2. The respondent-DMRC in September 2004 had invited applications for usage of spaces on license basis at metro stations on pre- determined rates on first cum first served basis. The petitioners herein had applied for allotment/usage of spaces at metro stations at pre-determined rates. Their applications were accepted and they were allotted the specified area for which they were liable to pay license fee at pre-determined rates on per sq.mtr. basis. The license deeds executed are identical though the quantum of license fee being charged on per sq. mtr. basis was different depending upon the metro station where the space is located. The license deed was for a period of three years containing the following clause:

18. That the Agreement provided herein shall terminate at the end of the period agreed to herein i.e. three years reckoned from the days, 30 days after the date of issuance of letter of Acceptance by DMRC, except that the agreement may also be terminated earlier in accordance with the terms of this Deed.

3. It is an accepted stand of the parties that the period of three years for which the initial license was issued has expired.

4. In Writ Petition No. 3383/2008, the petitioner was permitted to use carpet area of 6 sq. mts for a kiosk at the Pitampura rail corridor station on fixed license fee of Rs. 1200/- p. sq. mtr./p.m. in addition to quarterly maintenance fee of Rs. 50/-. The area allotted to Mr. Rajesh Maan-the petitioner in Writ Petition No. 3383/2008 was increased on his request. When the license period expired in October, 2007, the petitioner- Mr. Rajesh Maan was asked to vacate by notice dated 18th October, 2007. The Petitioner requested for extension of time and the said request was acceded to and the period of license was extended to April, 2008. By letter dated 17th April, 2008, the respondent-DMRC informed Mr. Rajesh Maan that DMRC could extend the period of license on payment of enhanced license fee @ Rs. 2500/- p. sq. mtr/p.m. By letter dated 25th April, 2008, new terms and conditions of re-allotment were sent by the respondent-DMRC to Mr. Rajesh Maan. The petitioner objects to the enhanced license fee as demanded for extension/renewal of the license.

5. Learned Counsel for the petitioners submitted that the increase in license fee by respondent-DMRC is exorbitant and is not based upon any rational or logic. It was submitted this constitutes 600% increase in the original license fee of Rs. 400/- p. sq. mtr/p.m. It was further submitted that the respondent-DMRC being a State cannot act in an arbitrary manner and claim enhanced license fee.

6. In the counter affidavit filed by the respondent-DMRC, they have submitted that the license fee received from others who were allotted licenses between October, 2004 and April, 2008 formed the basis and rationale for the increase in license fee. It is stated that the respondents have re-classified metro stations into categories A, B and C depending upon commercial viability and income from kiosks located in the said stations. It is stated that fee now fixed for A, B and C category metro stations is a well informed and a considered decision which cannot be categorized as arbitrary.

7. In the rejoinder affidavit filed by the petitioners, additional and new allegations have been made against the said categorization of stations as A, B and C. It is stated that some of the metro stations like Kashmere Gate have been wrongly categorized as stations falling under category A and the ridership on line 1 is much lower than what is being projected. It is also stated that some of the kiosks are located in non-paid area i.e. the area where a person need not have a valid ticket to travel. Reference is also made to the reply furnished by respondent-DMRC in response to RTI query in which license issued in favour of Living Media India Ltd @ Rs. 2500/- p. sq. mtr./p.m. is stated to be the basis for

fixing license fee payable in kiosks in category A stations. In the rejoinder affidavit, it is pointed out that Shastri Nagar and other stations have similar ridership but have not been graded as category A stations. In the written submission filed by the petitioners, more allegations have been made to support the plea that there is lack of application of mind in categorizing the metro stations into A, B and C categories. Respondent-DMRC has filed additional affidavit to meet the allegations in the rejoinder affidavit and has also filed written submissions.

8. Clause 18 of the license fee, quoted above, does not give contractual right to the petitioners' claim for extension of license period at a pre determined/fixed rate. Clause 18 stipulates that after expiry of license period, the respondent-DMRC upon its sole discretion can extend the duration of the agreement on mutually agreed terms and conditions. There is no contractual right for extension of the license period. Clause 14 of the License Deed provides for increase in license fee by 5% after completion of each year on compounding basis. The said clause is applicable during the term of the license and not after the license period has expired by efflux of time as in the present case.

9. Respondent-DMRC is a State and cannot act in an arbitrary manner. Their actions should be guided by reason and cannot be discriminatory and arbitrary. Respondent-DMRC has explained that the petitioners were allotted kiosks in 2004 on fixed rate on first come first served basis at different railway stations on line 1. Respondent- DMRC had started operations in 2004 and this was their first attempt to generate revenue by allotting kiosks to third parties. Thereafter, kiosks were allotted on fixed rate basis in the years 2005, 2006, 2007 and 2008 at enhanced rates of Rs. 1260/-, Rs. 1323/- and Rs. 1390/- p. sq. mtr./p.m. respectively with a clause for 5% increase every year. Good response was received to the invitation for offer of allotments and kiosks were allotted on the basis of fixed license fee. It is pointed out that w.e.f. May, 2008 a new policy was framed and different railway stations were graded as Category A, B and C stations and the rates were rationalized at Rs. 2500/-, Rs. 1500/-, Rs. 1100/- p. sq. mtr./p.m. for category A, B and C metro stations respectively. This categorization has been done keeping in view not only the total ridership but also the overall demand and other factors like the commuter profile in a particular location, demand of kiosks in the area, attractiveness of the area due to commercial and residential areas nearby. As per the chart filed by the respondent-DMRC, there has been re-categorization of the metro stations and some metro stations have been upgraded or down-graded.

10. Keeping these aspects in mind, the stand of the respondent- DMRC in categorization of different metro stations into category A, B and C and fixation of different license fee for the said metro stations cannot be held to be arbitrary. The respondent-DMRC is performing a public function by operating metro in the city of Delhi. The travel fare has to be kept low and attractive so that large number of persons can utilize public transport. The respondent-DMRC is earning

money by giving kiosks on license fee basis at the railway stations. The license fee earned augments and adds to the income of DMRC and is a relevant factor while fixing fares/ticket charges.

11. The petitioners are commercial traders/retailers who have taken space on license fee basis because they find it to be a viable business proposition. The license fee has to be fixed on the basis of market forces. The petitioners cannot claim any concession or right to concession in fixing of license fee. It may be appropriate here to mention that several others similarly situated license holders have agreed to and have executed license agreement on the basis of the enhanced license fee.

12. On the question of fixation or quantum of costs or rate of license fee, court's power to interfere while exercising power of judicial review under Article 226 of the Constitution of India is limited. In policy matters relating to costs and fixation of license fee, the State has wide discretion and flexibility especially when it relates to commercial properties. (Refer, Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, Delhi Development Authority Vs. Ashok Kumar Behal and Others, License fee/costs can be struck down only if it is contrary to the contract and is per se arbitrary and discriminatory when different license fees are being charged from identically situated persons without any rationale. The explanation and reasoning given by the respondent DMRC does not disclose arbitrariness and discrimination.

13. In K.T Corporation and Anr. v. India Tourism Development Corporation and Anr. LPA No. 441/2008 decided on 18th May 2009, it was observed as under:

12. ITDC does not enjoy monopoly and is in open and direct competition with privately run hotels which are in abundance in Delhi. ITDC does not enjoy any special privilege or advantage being an instrumentality of the State, unlike Development Authorities or housing boards under special statutes constituted for social and public purpose and obligations in mind. Appellants per force because of status of ITDC as a State are not compelled to negotiate, deal and interact with the ITDC. ITDC does not enjoy a dominating position or substantial market share to control market rents/license fee for floor spaces in five star hotels. In a competitive market, ITDC is competing with others and cannot charge exorbitant license fee. Market or license fee is per se determined and fixed by market forces. Letting of shops and offices is a part of the business of ITDC and constitutes a portion of its profits and commercial activity. ITDC being a hotel and in hospitality business has to be given full freedom and play in joints to determine and decide what is more beneficial and commercially profitable for them, unless for some justified public reason ITDC being a State should not be permitted to do so or act in a discriminatory manner in violation of Article 14 of the Constitution. ITDC while taking commercial or financial decision have to be given freedom of play in joints. It is for ITDC to determine how and in what manner they want to manage and run the hotel including shops and offices which are let out/given to third parties on license fee basis. Renting out is a part of the

commercial venture and contributes to their income. In purely commercial or financial matters, the Courts should not substitute their judgments for that of ITDC. The Court cannot supplant its own views for they are more equitable, reasonable, better suited or viable. The Court is only concerned with the decision making process and whether extraneous matters have been taken into consideration for reaching the final conclusion and whether the decision falls foul of Article 14 being arbitrary or discriminatory. The action of the ITDC cannot be faulted on the said grounds and its desire and attempt to get market license fee is not arbitrary or unreasonable.

14. The contention of the petitioners is that increase in rates of unpaid area in line 1 is completely unjustified as there has not been any substantial increase in the ridership on the said line. It is pointed out that the rates quoted by the respondents-DMRC are in respect of lines 2 and 3 where there has been a substantial increase in the ridership by 530% but the said increase in the ridership cannot be applied to line1 where in fact there has been an increase of 69.3%. It is claimed that there is no increase in footfalls between 2004-08 in the Kashmere Gate metro station. The aforesaid argument of the petitioners cannot be accepted because the rates have not been fixed only on the basis of ridership but by taking into consideration several other factors like commuter profile, existence of other kiosks and attractiveness of the area due to its location. Kashmere Gate station is a well known and is frequented not only by the railway commuters but also by others who go to the said area for shopping purposes and to visit inter-state Bus Terminal. The metro station at Kashmere Gate is a prime property in the said area and the Inter-state Bus Terminal which is one of the largest in the country is also located next to it. The respondent-DMRC has therefore justified why Kashmere Gate station has been classified as category A station. Respondent-DMRC has also justified why Rithala, Netaji Subhash Place and Inderlok stations have been classified as category A stations due to their locations which are high in demand and have commercial viability. Also, Netaji Subhash Place and Inderlok stations have special features like malls and shopping centres.

15. The contention of the petitioners that some of the allottees, who happen to be multi-national conglomerates, have withdrawn their bids because of high license fees may be correct, however this does not answer the contention of the respondent-DMRC that there are several others who are paying the same license fee in the same location from where the petitioners are running their kiosks. In case benefit of lower license fee is granted to the petitioners, the respondent-DMRC will be compelled to grant the same benefit to others. The petitioners like others enjoy considerable flexibility as per the terms of the license deed, in respect of products they can retail. The license deed provides that a license holder can use the space for commuter related services like bookshops, communication services, mineral water, medical shops, etc. Kiosks are therefore not allotted for one particular or specific retail item. The license holders can change the usage within the specified categories and commuter related services.

16. It is important to state here that the respondent-DMRC has made an offer that the petitioners that if they so desire, can be allotted kiosks in category B and C stations and thereby they will have to pay a lesser license fee. The petitioners were however reluctant to accept the said offer.

17. In the written submissions, the petitioners claim that M/s. Planet Advertisers were allotted kiosks for three years in February 2006 by way of a private contract @ Rs. 200 p. sq. mtr/p.m. for Line 1, Rs 450 p. sq. mtr/p.m. for Line 2 and Rs. 200 for Line 3. No such allegations have been made in the writ petitions. During the course of arguments, it has been explained that M/s. Planet Advertisers were allotted space to sell mineral water only at a pre-determined rate of Re.1/- per glass. It was stated that earlier attempts to sell packed mineral water at a pre-determined rate in the interest of the consumers had failed as the allottees refused to accept the said offer as it was economically unviable to sell packaged water @ Re.1/- per glass. In these circumstances, M/s. Planet Advertisers were permitted to sell water @ Re.1/- per glass on payment of license fee @ Rs. 200-450/- p. sq. mtr/p.m. It is further pointed out by the respondent DMRC that the said rates have been fixed for only 2 sq. mt. area and for the balance area occupied by the said Planet Advertisers, they are charged identical higher license fee. Accordingly, M/s. Planet Advertiser have been permitted to sell beverages, biscuits, etc. from the said kiosks. Similarly, the petitioners cannot be equated with parties who have been allotted substantially large areas.

18. The plea of legitimate expectation raised by the petitioners has no merit. There is no past conduct of the respondent-DMRC on which the petitioners rely. The initial period of the license has expired and it is the first case of allottees claiming renewal/re-allotment. Further legitimate expectation by itself only entitles a party to fair hearing and is not a legal right to ask for issue of Mandamus to re-allot and extend the license period.

19. In *India Tourism Development Corporation and Anr. (supra)*, the Court dealt with the doctrine of legitimate expectation. It was observed that legitimate expectation is not a legal right but a benefit, relief or a remedy which may ordinarily flow from a promise or an established practice. The term "established practice" refers to regular, consistent and practicable certain conduct, process or activity of the decision making authority. However, the expectation should be legitimate i.e. logical, reasonable and valid. As legitimate expectation is not a right, it is not legally enforceable as such and is given a class just above "fairness in action" but below promissory estoppel. The said principle was referred in *Ram Pravesh Singh and Others Vs. State of Bihar and Others*, wherein the Supreme Court has observed that legitimate expectation can only entitle a person to seek opportunity to show cause before the expectation is dashed or ask for explanation as to the cause of denial.

20. Learned Counsel for the petitioners heavily relied upon the decision of the Delhi High Court in *C.P. Mittal and Ors. v. Union of India 2007(ix) AD (Del) 330*. In this decision, a single Judge of this Court had struck down enhancement of

license fee by 102% payable by PCO operators in the railway station platform. In the said case, the PCO operators were given agency as a measure of rehabilitation and on compassionate basis like disability and unemployment. The allotment was a social welfare measure. In these circumstances, it was observed that standard of highest bidding would be inappropriate because the underlining social welfare measure would be undermined. With regard to the facts, the Court considered it to be unconscionable to have a take it or leave it attitude adopted by monopolistic State, especially when the bargaining powers of the petitioners therein was unequal. The State must act reasonably and in a non-arbitrary manner even in contractual and commercial subjects. The ratio of the said decision does not support the petitioners who are pure and simple commercial persons and are engaged in profit making activities. Lower license fee in fact, will cause prejudice to the social purpose for which the respondent-DMRC has been established i.e. to provide public transport in Delhi at a reasonable cost. Subsidizing commercial establishments of the petitioners for their personal gains at the cost of DMRC's revenue would violate Article 14 of the Constitution of India.

21. In Delhi State Industrial and Infrastructure Development Corporation Vs. Yashpal Madan and Others, it was held that a decision in respect of pricing should not be arbitrary or irrational and only relevant factors should be taken into consideration. In the said case, Division Bench of this Court has held that it would be wrong to conclude, that the cost of land as demanded was not appropriate. Actual expenditure had been incurred by DSIDC towards the cost of development. The decision in the case of Palika Palace Traders Association v. New Delhi Municipal Corporation (Writ Petition No. 937/2000 decided on 7th February, 2002) is also inapplicable to the present case in hand as in the said case the allotment was made as a rehabilitative measure to persons who were squatting. The allotment was to accommodate squatters and allotment was made on no loss- no profit basis. In the case of Indian Oil Corporation v. Union of India Writ Petition (Civil) No. 3823/1992 decided on 29th November, 2006 it was held that the lease rent was increased arbitrarily on the assumption that the business was profitable but the said assumption was arbitrary in the absence of any material and therefore was struck down.

22. Similarly, decision in Food Corporation of India v. Kamdhenu Cattle Field Industries (1993) 1 SCC 91 is also not applicable. In the said case, the respondent's highest tender was superseded by a significantly higher bid made during the negotiations, with all tenderers been given an equal opportunity to compete by revising their bids. The Supreme Court observed as under:

...the fact that it was a significantly higher bid obtained by adopting this course was sufficient to demonstrate that the action of the appellant satisfied the requirement of non-arbitrariness, and it was taken for the cogent reason of inadequacy of the price offered in the highest tender, which reason was evident to all tenderers invited to participate in the negotiations and to revise their bids.

23. In fact, the Supreme Court in *M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another*, upheld the increase in lease money from Rs. 2,671/- p.m. to Rs. 14,000/- p.m. after expiry of the earlier lease period. Referring the stand taken by Union territory of Chandigarh that the shops in question were occupied by private individuals and some of them were further let-out, the Supreme Court agreed that the State Authority was entitled to charge market rent and the same was justified, reasonable and constitutional. The judgment of the High Court was upheld and it was held that the procedure adopted and made basis for enhancing the rent to market value cannot be said to be arbitrary, discriminatory or unreasonable. In the said case, the Supreme Court also reiterated the principle that inaction in respect of some individual/tenants cannot be made basis for setting aside action initiated against others. Similarly in *Chandigarh Administration and another Vs. Jagjit Singh and another*, it has been held that if an order in favour of a third person is found to be contrary to law, such illegal or unwarranted order cannot be made the basis for issuing a writ compelling the authority to repeat the illegality or to pass another unwarranted order. In such cases, a party cannot urge violation of Article 14 of the Constitution alleging discrimination.

24. In view of the aforesaid, I do not find any merit in the present Writ Petitions and the same are liable to be dismissed.

25. The petitioners are however given an opportunity to agree to payment of higher license fee as demanded by the respondents within four weeks. The petitioners are also given opportunity to exercise option and relocate themselves at some other metro stations of their choice subject to availability. A list of such stations for exercising their choice will be made available to the petitioners within two weeks and the petitioners will have a right to exercise their option within two weeks thereafter.

In the facts and circumstances of the cases, there will be no order as to cost.