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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 3021/2008 AND W.P.(C) 4034/2008

BABU LAL RAM GOPAL & ANR
UDAY SINGH & ORS.

Through

..... Petitioners
Mr. Mahipal Singh, Adv.

versus

UOI & ORS

Through

..... Respondent
Mr. Saurav Agrawal, Adv. with Mr.
D. Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

ORDER

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06.08.2009

Rule. With the consent of the counsel for the parties, the matters are taken up for final hearing and disposal. As identical questions arise for consideration, this common order will dispose of these writ petitions.

2. The petitioners herein except Mr. Babu Lal Ram Gopal had earlier filed W.P. (C) No. 3021/22008 and W.P. (C) No. 4034/2008.

3. By these writ petitions, the policy decision/circular dated 6th July, 2006 issued by the Railway Board and the letter/circular dated 5th September, 2006 issued by Indian Railway Catering & Tourism Corporation Ltd. (IRCTC for short) were challenged. By the letter/circular dated 6th July, 2006, the Railway Board had decided to delegate fixation of minimum fee for different category units at class A, B and C stations to IRCTC. The said letter/circular indicates the criteria on the basis of which IRCTC would fix the minimum license fee. The letter/circular states that after fixation, countrywide minimum licence fee for all static units at A, B and C category stations, IRCTC should advise Railway Board the details of minimum licence fee as well as the rationale for fixing the same. Pursuant to the circular, IRCTC fixed the minimum license fee for Railway stations as per their letter/circular dated 5th September, 2006, which was modified/amended by the subsequent letter/circular dated 7th November, 2006. Letter/circular dated 7th November, 2006 states that by the earlier letter/circular dated 5th September, 2006, licence fee for static units had been increased substantially and representations were received for reduction of the said licence fee. Letter/Circular dated 7th November, 2006 was issued after considering the representations.

The said letter/circular has given the basis for fixing the licence fee of static units including trollies and khomchas.

4. Thus all petitioners herein except Mr. Babu Lal Ram Gopal had earlier filed the writ petitions in this Court challenging the policy decision of the Railway Board issued vide letter dated 6th July, 2006 and the license fee fixed vide letter dated 5th September, 2006. These writ petitions were disposed of by a common order dated 24th May, 2007 holding inter alia that the Railway Board is competent to frame the catering policy and as per the Catering Policy of 2005, IRCTC is the implementing agency of the policy underlined by the Railway Board and fix the minimum licence fee. It was held that as per the circulars, it was decided not to renew any licences falling under the general category and to subject the same to an open tender bid system. In case of reserved category renewals, it was decided that it would be restricted to 25% of the units and rest of the units would be put to open bid tender. The Court noticed that most of the general category licences had already expired or would expire shortly. The question of the minimum licence fee fixation would arise only after expiry of the existing licences. During the hearing of the said writ petitions, the letter/circular dated 7th November, 2006 was brought to

the notice of the Court. The Court recorded that in view of the said letter/circular some relaxation/relief had been granted. After noticing these facts, the Court directed that cases where licences were to continue for some duration of time, would be considered at the first instance by the concerned Group General Manager and a decision should be taken by passing speaking orders after hearing the parties on the question of the revision of licence fee. Till such time the speaking orders were passed, such petitioners would not be charged the enhanced licence fee and the decision by the Group General Managers would be taken within four weeks. However the other petitioners whose licences had expired or about to expire shortly were to be dealt with in accordance with the policy. The policy would be implemented in such cases.

5. Counsel appearing for the petitioners contends that the policy and criteria mentioned in the letter/circular dated 6th July, 2006 lacks rational and is arbitrary and therefore violates the Article 14 of the Constitution of India. I do not think that the petitioners except Mr. Babu Lal Ram Gopal, can be permitted to question and challenge the letter/circular dated 6th July, 2006 all over again and question of the criteria for computation of licence fee as fixed in the said circular.

Principle of constructive res judicata applies. By order dated 24th May, 2007, the Court had rejected the challenge to the letter/circular dated 6th July, 2006 or the same was dropped as not pressed. The only question which was left open without expressing any opinion was the question of renewal i.e. the right of renewal, which the petitioners therein had claimed. Computation and criteria to be adopted for computation of licence fee fixed under the policy where licence period had expired or was to expire was accepted. The parties did not challenge or press the challenge to vires of the letter/circular dated 6th July, 2006.

6. The letter/circular dated 6th July, 2006 provides as under:-

“IRCTC should inter-alia fix minimum licence fee leased on rational factors. IRCTC should take into account State GDP, Purchasing Power, Land Value, Type of Clientele, Number of Passengers, Location of the Units, Sales Turnover etc. into consideration.

IRCTC may fix suitable minimum licence fee for:-

- 3.1 all the food plazas;
- 3.2 refreshment rooms;
- 3.3 AVMs and dispending Kisoks; and
- 3.4 All the minor Units whether General or Special Minor Units.”

7. The letter/circular dated 6th July, 2006 provides broad guidelines on the basis of which IRCTC was required to fix the licence

fee. In financial matters it is well established that sufficient flexibility and play in the joints is available to the State and Article 14 of the Constitution is not violated unless the criteria fixed is *per se* arbitrary and has no rational basis with the object sought to be achieved. Fixing licence fee on the basis of State GDP, purchasing power, land value, type of client and number of passengers etc. cannot be regarded as arbitrary and violative of Article 14 of the Constitution. The Supreme Court in the case of ***Balco Employees' Union versus Union of India*** (2002) 2 SCC 333 referred to several earlier judgments on the question when and in what circumstances Courts can interfere with policy matters relating to finance and economics. It was observed that the Court cannot strike down a policy merely because there can be a better or more equitable policy. What is important is whether the decision is irrational and falls foul on account of external factors. Policy decisions/matters are struck down if they are arbitrary, capricious or malafide. It was observed as under:-

“33. While considering the validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, this Court in *Rustom Cavasjee Cooper v. Union of India*⁵, SCC at p.294 observed as under: (SCC para 63)

“It is again not for this Court to consider the relative merits of the different political theories or economic policies. ... This Court

has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law.”

34. Applying the analogy, just as the court does not sit over the policy of Parliament in enacting the law, similarly, it is not for this Court to examine whether the policy of this disinvestment is desirable or not. Dealing with the powers of the Court while considering the validity of the decision taken in the sale of certain plants and equipment of the Sindri Fertilizer Factory, which was owned by a public sector undertaking, to the highest tenderer, this Court in *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*⁶ SCC 568 at p. 584, while upholding the decision to sell, observed as follows: (SCC para 35)

“We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a superauditor, take the board of directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration.”

35. With regard to the question of the *locus standi* of the workmen, who feared large-scale retrenchment, to challenge the validity of action taken by the Company, it was observed at p. 589 as follows: (SCC para 48)

“48. If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But, if he belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain

to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Article 226.”

36. In *State of M.P. v. Nandlal Jaiswal* the change of the policy decision taken by the State of Madhya Pradesh to grant licence for construction of distilleries for manufacture and supply of country liquor to existing contractors was challenged. Dealing with the power of the Court in considering the validity of policy decision relating to economic matters, it was observed at pp. 605-06 as follows: (SCC para 34)

“34. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government has done, unless it appears to be plainly arbitrary, irrational or mala fide. We had occasion to consider the scope of interference by the Court under Article 14 while dealing with laws relating to economic activities in *R.K. Garg v. Union of India*⁸. We pointed out in that case that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. We observed that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with,

greater play in the joints has to be allowed to the legislature. We quoted with approval the following admonition given by Frankfurter, J. in *Morey v. Doud*:

‘In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.’

What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment insofar as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call ‘trial and error method’ and, therefore, its validity cannot be tested on any rigid ‘a priori’ considerations or on the application of any strait-jacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or ‘play in the joints’ to the executive. ‘The problem of Government’ as pointed out by the Supreme Court of the United States in *Metropolis Theater Co. v. State of Chicago*

‘are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But

even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void’.

The Government, as was said in *Permian Basin Area Rate cases*, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution.”

8. Learned counsel for the respondent-IRCTC has referred to the decisions of the Single Judge and the Division Bench of the High Court of Gujarat upholding the policy decision in the letter/circular dated 6th July, 2006. The Division Bench noticed that letter/Circular dated 7th November, 2006 was issued after taking into consideration views of Group General Managers of various IRCTC Zones. The Division Bench noticed that the Supreme Court had approved the earlier policy decision with regard to catering and license fee in the case of ***N.B. Krishna Kurup versus Union of India and others*** 2005 (12) SCC 261.

9. By another circular dated 30th September, 2008 further reliefs/concessions have been granted to the licensees in view of the recommendations made by the Group General Managers after the representations were received from the licensees.

10. On the basis of the said concessions this Court has disposed of several writ petitions directing IRCTC to consider the cases of the licensees in terms of the said circular/letter dated 30th September, 2008. Licensees were also given liberty to file representations disclosing special circumstances for reduction of licence fee and arrears beyond 25%. One of the such writ petition W.P.(C) 7090/2009 titled ***Surjeet Singh & Others Vs. Union of India and Others*** was disposed of 24th February, 2009 quoting with approval and affirming the following observations made in the judgment dated 24th May, 2007:-

“....After hearing counsel for the parties, it appears that under the new Catering Policy of 2005, as amended by the aforesaid two circulars, the Railway Board has decided not to renew any licences falling under the general category and to subject the same to an open tender bid system. It also appears that insofar as the reserved category is concerned, which is limited to 255 of all the units, the same shall be permitted to be renewed. However, the impugned circular dated 06.07.2006 would be applicable to both general and reserved category units for the purposes of fixation of minimum licence fees. In other words, the distinction between the general and

reserved categories is only with regard to the question of renewal. There is no distinction between the two categories insofar as fixation of the minimum licence fees is concerned. The present petitions pertain only to the question of fixation of minimum licence fee, and therefore, the distinction, which the petitioners have sought to bring about between the general and reserved category, would be of no consequence.

It is apparent that licences falling under the general category, which have expired or would shortly expire, would be covered under the Catering Policy of 2005 as amended and would be subject to fresh bids under a competitive system.

x x x x x

In this context, I feel that the right course to follow in the present cases would be that insofar as the petitioners whose licences are to subsist for some duration of time are concerned, their cases for revision in the licence fee should be considered in the first instance by the concerned Group General manager and a decision be taken by them through speaking orders after hearing the parties. Till such time the speaking orders are passed, such petitioners would not be charged the enhanced licence fee. The said decisions by the Group General Managers be taken within four weeks. To enable the Group General Managers to initiate the process, such petitioners who fall under this class, shall file their representations within two weeks of this order. Insofar as the petitioners who do not fall in the said class are concerned, they would, as per the Catering Policy of 2005, as amended, be dealt with in accordance with the policy. It is made clear that in these petitions the question of renewal has not been taken up nor has any opinion been expressed on that.

The interim order dated 01.02.2007 in WP(C) 747/2007 stands superseded by this order. These writ petitions and all pending applications stand disposed.”

11. In view of the aforesaid discussion, I do find any merit in the

present writ petitions and the same are dismissed.

12. However, there is one aspect in the case of Mr. Babu Lal Ram Gopal, which requires consideration. Mr. Babu Lal Ram Gopal's licence was valid from 1st November, 2005 and expired on 31st October, 2008. As per the terms of the said licence, Mr. Babu Lal Ram Gopal was to pay fee @ 12% of the gross turnover or such other percentage as may be fixed. No minimum licence fee was prescribed. It is a case of IRCTC that gross turnover was understated and, therefore, they are entitled to charge the minimum licence fee as per their circulars/letters. The licence agreement under clause 39 provides for arbitration. It is open to Mr. Babu Lal Ram Gopal to invoke the arbitration clause in respect of the said demand pertaining to the licence fee up to 31st October, 2008. However, he shall be liable to pay enhanced licence fee in terms of the circular dated 30th September, 2008 for the period after 1st November, 2008. In case Mr. Babu Lal Ram Gopal requests and approaches the respondent IRCTC for appointment of an arbitrator, the said request will be considered in accordance with law and decided preferably within a period of four weeks from the date request is made.

In the facts of the case there will be no order as to costs.

SANJIV KHANNA, J.

**AUGUST 06, 2009
NA/P**