

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

+ LPA 362/2009 & CM No. 10602/2009

R.D. SHARMA & SONS Appellant
Through: Dr. A.M. Singhvi & Mr. Sudhir
Chandra, Senior Advocates with
Mr. Manish Bishnoi, Mr. L.
Nidhiram Sharma, Mr. Sanjeeb
Panigrahi & Mr. Rook Ray,
Advocates.

versus

INDIAN RAILWAY
CATERING AND TOURISM
CORPORATION LTD.
& ORS.

..... Respondents
Through: Mr. A.S. Chandiok, ASG with
Mr. Sunil Malhotra, Mr. Saurav
Aggarwal & Mr. Abhisehk Puri,
Advocates for R-1 and 2.

Mr. Neeraj Atri, Advocate with
Ms. Vineeta Atri, Advocate for
R-3.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

Reserved on : 6th August, 2009

% Date of Decision : 12th August, 2009

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

J U D G M E N T

MANMOHAN, J

1. Present Letters Patent Appeal has been filed challenging the judgment dated 30th July, 2009 by virtue of which appellant-petitioner's writ petition being W.P.(C) No. 10423/2009 challenging termination order dated 22nd July, 2009 has been dismissed. Learned Single Judge held that allegation of supply of expired buns by the appellant-petitioner was a very serious and unpardonable one. Learned Single Judge further held that as the contract in question was a commercial one, the dispute regarding its termination should be adjudicated and decided upon by an arbitral tribunal in accordance with the dispute resolution mechanism provided in the catering contract executed between the appellant-petitioner and respondent No.1.

2. Dr. A.M. Singhvi, learned senior counsel for appellant-petitioner submitted that appellant-petitioner's catering contract though valid till August, 2010, had been terminated midstream on account of a policy decision taken by respondents to departmentally take over the catering work of all Rajdhani and Shatabdi trains. He stated that even though the ostensible reason to terminate the appellant-petitioner's contract was stated to be their unsatisfactory performance, but the underlying motive was to implement the prior policy decision of the respondent-Railways. In this context, Dr. Singhvi relied upon the letter dated 4th June, 2009 written by Mr. Ashok Kumar, Executive Director (Tourism & Catering), Railway Board to the Managing Director, Indian Railway

Catering and Tourism Corporation Ltd. (in short “IRCTC”), the speech delivered by Hon’ble Minister of Railways in Parliament on 9th July, 2009 as well as an alleged letter dated 22nd July, 2009 written by IRCTC to the Railway Board enclosing a take over plan of catering services in all Rajdhani and Shatabdi trains. The relevant portion of the letter dated 4th June, 2009 is reproduced hereinbelow for ready reference :-

“Sub: Improvement in catering services

In order to bring improvement in catering services, MT had discussions with you last week and accordingly the following steps were suggested.

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(b) Except two Rajdhani trains, namely Howrah Rajdhani Express and Patna Rajdhani Express, other trains are being operated through contracts. All the Shatabdi Express Trains are contractor operated. MD/IRCTC had been advised to take over all Rajdhani and Shatabdi trains and run them departmentally. IRCTC has also been directed to advise the time-frame for taking over different trains.

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The above steps have been approved by MR. You are requested to kindly take immediate action on the above steps and send a compliance / action plan within one week’s time.

*(ASHOK KUMAR)
Executive Director (Tourism & Catering)
Railway Board”*

3. The relevant portion of the speech delivered by Hon’ble Minister of Railways in Parliament on 9th July, 2009 is reproduced hereinbelow:-

“....I have decided to get the catering work of Rajdhani and Shatabdi under the department as there is no need of outsourcing in such work. Outsourcing did not work. All passengers of Rajdhani and Shatabdi spoke against outsourcing. We will

departmentalize the catering work. Tourism will be there, but not catering corporation Tourism Corporation. We will reconstitute the corporation. Tourism yes, let them do the tourism but not catering services..... ”

4. Consequently, according to Dr. Singhvi, the termination of appellant-petitioner's catering contract on account of serving of stale buns was a mere ruse as the impugned termination order was a consequence of a prior policy decision taken by the respondents to departmentally take over the catering work of all Rajdhani and Shatabdi trains.

5. Dr. Singhvi also referred to letter dated 25th June, 2009 written by the Officer who had issued the termination order, wherein he had himself issued advance directions to hire cooks and buy utensils. According to Dr. Singhvi, this showed that the impugned order was a consequence of a premeditated exercise and a predetermined decision. Consequently, Dr. Singhvi submitted that the impugned decision to terminate appellant-petitioner's catering contract was a colourable exercise of power and vitiated by legal malice and, therefore, the present writ petition was maintainable. In this context, Dr. Singhvi relied upon the judgments of Supreme Court in ***Harbanslal Sahnia & Anr. Vs. Indian Oil Corpn. Ltd. & Ors.*** reported in (2003) 2 SCC 107, ***para 7*** and ***Siemens Ltd. Vs. State of Maharashtra & Ors.*** reported in (2006) 12 SCC 33, ***para 9***.

6. Dr. Singhvi further submitted that the alleged incident of stale

buns stood exhausted, closed and condoned by respondent-IRCTC's letter dated 9th May, 2009 whereby a fine of Rs. 20,000/- had been imposed and appellant-petitioner had been warned to avoid reoccurrence of such incidents in future. Therefore, according to Dr. Singhvi, respondent-IRCTC could not have issued, on the same issue of stale buns, a fresh show cause notice on 9th June, 2009 for termination of the catering licence.

7. Dr. Singhvi stated that twenty-four passengers' complaints relied upon in the termination order had not been supplied to appellant-petitioner along with the said show cause notice. He stated that the said twenty-four complaints were negligible in number in comparison to the 4 ½ lacs meals served by appellant-petitioner during the contractual period. He pointed out that in departmentally run trains, the number of complaints was far larger.

8. Dr. Singhvi lastly submitted that the punishment of termination of contract was grossly disproportionate to the allegation leveled against the appellant-petitioner. He pointed out that appellant-petitioner had invested a huge amount of money by way of advance concession fee amounting to Rs. 2.56 crores for complete tenure of five years i.e. up to 19th August, 2010 along with security deposit of Rs. 20 lacs as well as huge investment in creating infrastructure for setting up base kitchens en route the trains in question.

9. Mr. Amarjit Singh Chandiok, learned Additional Solicitor General of India appearing for respondent nos. 1 and 2 contended that the appellant-petitioner's catering contract had been terminated due to appellant-petitioner's failure to comply with the terms and conditions of contract and the termination order had been passed in accordance with the contract itself. Mr. Chandiok reiterated the statement made by learned Attorney General before the learned Single Judge that though it had been decided in principle that catering work in Rajdhani and Shatabdi trains would be undertaken departmentally, the existing contracts were not to be terminated on account of this new policy.

10. Mr. Chandiok referred *in extenso* to the show cause notice dated 9th June, 2009, appellant-petitioner's reply dated 17th June, 2009 and termination order dated 22nd July, 2009 to show that a large number of complaints against appellant-petitioner had been consistently received by the respondents and further a large number of deficiencies had been consistently noticed during various inspections carried out by respondents' officials. He stated that one of the complaints against the appellant-petitioner was subsequent to the imposition of fine of Rs.20,000/- vide letter dated 09th May, 2009. He further pointed out that the said twenty four complaints had been referred to in the show cause notice dated 9th June, 2009 and the same, in fact, had been replied to by the appellant-petitioner in their reply to show cause notice. Therefore, according to Mr. Chandiok, appellant-petitioner could not now contend that neither they were aware of nor they had been supplied

with the twenty four complaints relied upon and referred to in the impugned termination order.

11. Since during the hearing Dr. Singhvi had referred to respondent-IRCTC's letter dated 22nd July, 2009 addressed to the Railway Board regarding taking over of catering services in all Rajdhani and Shatabdi trains, we had vide our order dated 4th August, 2009, directed respondent-IRCTC to produce all letters/communications addressed by IRCTC to Railway Board during the months of June and July, 2009 regarding catering services in Rajdhani and Shatabdi trains.

12. On 6th August, 2009, Mr. Chandiok produced the file pertaining to correspondence between respondent-IRCTC and Railway Board which showed that no letter dated 22nd July, 2009 had been written by IRCTC to Railway Board. During the course of hearing, on the said date, Dr. Singhvi handed over an additional affidavit in which it had been averred for the first time that Regional Director of IRCTC had written a letter dated 28th July, 2009 to Group General Managers, South Central Zone, West Zone and North Zone informing them that it had been decided to departmentally take over catering services in three Rajdhani trains.

13. Having heard the parties and having perused the file, we are of the opinion that the policy decision of 4th June, 2009 and the statement of Hon'ble Minister of Railways dated 9th July, 2009 are neither

contrary to nor in conflict with the statement and submissions advanced by learned Additional Solicitor General before this Court and learned Attorney General before the learned Single Judge. Undoubtedly, respondents have taken a policy decision to departmentally carry out the catering work of Rajdhani and Shatabdi trains but it is apparent that the existing catering contracts were not to be taken over till the contractors failed to abide by the terms and conditions of the contracts.

14. From a perusal of the documents on record, we are of the opinion that the termination order in the present case had been passed in terms of the contract itself and not because of an alleged policy decision. We are fortified in our view by the admitted fact that even as of today a large number of private catering contracts are in subsistence in Rajdhani and Shatabdi trains. If the appellant-petitioner's argument with regard to premeditated exercise and predetermined decision were correct then not only the appellant-petitioner's catering contract but also all other catering contracts in Rajdhani and Shatabdi trains would have been taken over. Consequently, we are of the view that in the present case, the show cause notice had not been issued with a premeditated mind.

15. As far as the terminating authority's order for hiring cooks and buying utensils in advance is concerned, we are of the opinion that if an order had not been placed in advance, then public interest would have suffered as passengers cannot be asked to go without food till alternative arrangements are made post termination. Since there cannot

be a hiatus/vacuum of catering services, directions in advance had to be issued to hire cooks and buy utensils. Moreover, in our view, just by placing an order for buying utensils a few days prior to the termination order, would not vitiate the termination order on the ground of legal malice.

16. Further, we are of the view that allegation of service of stale buns is a very serious one and the same coupled with twenty four complaints over a period of time shows that the services rendered by appellant-petitioner was unsatisfactory. Though it seems that before the learned Single Judge an attempt had been made to rebut on merits the allegation of stale buns, but before us no such explanation/rebuttal was offered. We may also refer to some of the findings in the impugned termination order dated 22nd July, 2009 which are as follows :-

“4. Since, for quite some time, your services were not found to be satisfactory and there were a number of persistent passengers complaints, IRCTC was constrained to issue you a show cause notice on 09.06.2009 on various grounds as set out in the show cause notice.

xxxxx xxxxx xxxxx

7. For service in AC I coaches, where the service of the highest standard was required from you, soup was to be supplied along with buns. To state that the buns were fresh and only a wrong manufacturing date was stamped is completely false. The buns were examined by the IRCTC officials who had inspected the train and found that they were in rotten condition. Since the issue was very serious, the buns were immediately sent to the laboratory (Microchem, an accredited laboratory) for test analysis. The lab test report shows that sample is failed. Copy of this report was also forwarded to you for your comments.

8. In your response, you have taken all technical and vague pleas to avoid the findings of the lab test. You have stated that the procedure adopted for testing

is not correct and report is incomplete, without stating how and on what basis the plea was being taken. Earlier in your response dated 17.06.2009, you had asked us to refer to the lab test report, which clearly shows that a sample had been collected to your knowledge for lab test. Now, that the lab test report has showed negative results, you have started disputing the very lab test report. Despite the lab test confirming presence of mould in the bun, you have gone to the extent of saying that the mould count test was unnecessary. Presence of mould of the extent specified in the report would clearly mean that the bun was not at all of edible quality and was not due to moisture content in the bun.

9. *The PFA as well as the license agreement clearly specifies that food products which have expired would not be supplied to consumers. Hence, to say mould count is not specified in the PFA cannot be accepted as an excuse when expired food is found. The manufacturing date stamped on the bun, the physical examination of the bun at the time of inspection, passenger complaint as well as the lab test report clearly proves that the bun found was beyond the date of its expiry.*

10. *Microchem to which the sample of bun was sent has very clearly in no uncertain terms stated that the sample as declared fail due to excessive mould count. This mould could not have set in case of freshly produced/freshly procured buns, which was your contention in the response dated 17.06.2009.*

11. *Your further defence that the buns were never served is also not acceptable. The service of the buns was stopped pursuant to a passenger complaint to our control centre regarding supply of rotten buns, which immediately swung into action and directed your pantry car manager to immediately stop supply of the buns. Even assuming that the buns were not consumed because of the timely intervention by the IRCTC, one cannot fail to imagine the problems which the consumption of these buns could have caused to the travelling passengers.*

12. *Further, with reference to the above mentioned contagious buns you are diverting the attention by misplacing facts that it was on account of your vigilant staff who noticed this deficiency and did not allow the service of the same. On the contrary it was on receipt of telephonic message from travelling passengers regarding the buns, which deterred your staff from serving the bun in the train. It is once again reiterated*

that infact it was the vigilant information from the train which deterred you from serving these buns, which were infected from high mould count and could have been reason for health hazard for passengers. Your contention that it was your vigilant staff which acted in time but on the contrary it was passenger who was vigilant enough to inform the issue of supply of expired bun which dissuaded you to stop its further supplies.

In that view of the matter, your explanation is not accepted.

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14. Complaints have been received such as insects in thermos flasks, poor quality of curd supply with fungus, expired dated bread sticks, cold tea, stinking snacks, poor quality of rice, sub-standard eatables, waiters being rude and not serving properly, panner vegetable not eatable, cold and raw cutlets and not serving of complaint book as and when required by passengers so as to avoid complaints. Your contention that these complaints were on account of change of menu are no where reflected by the above mentioned deficiencies. On the contrary these are as the results of your callous attitude and careless supervision, which is amply demonstrated in each and every complaint.

15. The inspections by various officials after January, 2009 (dated 26.04.09, 01-02.01.09, 31.03.09, 26.02.09, 19.02.09) still continued to bring out some deficiencies but also the added deficiencies in reference to the procedure and the protocol/norms to be followed as per ISO standards were also commented upon. In addition to this non-availability of licence under Prevention of Food Adulteration Act (PFA) for Base Kitchen at ADI, this is the main source centre for food production and service centre of on-board services.

Inspections also reported that no procedures as per ISO norms were being followed and availability of ISO certification is simply in cosmetic nature and by the way to fulfill the norms. Although you did procure ISO certification, but it has never clearly reflected in quality aspects in catering with reference to quality of food and quality of service, which have been adversely reflected in the complaints/inspections conducted from time to time.

16. It is also necessary to bring to your notice that in the recent inspections conducted by IRCTC shows

that there were serious deficiencies in service with reference to poor quality of soup stick, no fruit being offered, no bun/croissant offered with soup, non-service of fruit juice in glasses as per the applicable menu. Moreover the ISO base kitchen during inspection on 25.6.09 had no documents like quality manuals, absence of refrigerator which are a gross breach of ISO norms. Still, up till 25.6.09 no PFA license has been procured.”

17. Keeping in view the aforesaid serious findings, we are of the opinion that the termination order dated 22nd July, 2009 has not been passed for an irrelevant and non-existent cause. The impugned termination order is certainly not a disproportionate punishment. With the aforesaid observations, present petition and application are dismissed but with no order as to costs. Interim protection granted by learned Single Judge and extended by us is accordingly vacated. However, we clarify that we have made the aforesaid observations only in context of present Letters Patent Appeal and none of our observations would prejudice the appellant-petitioner in case it were to invoke the arbitration clause.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 12, 2009

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