

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

+ **OMP(I) No.344/2015 & I.A.No.13973/2015**

% **16th July, 2015**

M/S MEENA ADVERTISERS

..... Petitioner

Through: Mr. Mohan Parasaran, Sr. Adv. with
Mr. Ashwin Kumar D.S, Adv. and
Ms. V.E. Gayatri, Adv.

versus

DELHI METRO RAIL CORPORATION LTD.

..... Respondent

Through: Mr. R.V. Sinha, Adv. and Mr. Puneet
Garg, Law Officer for DMRC.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This a petition under Section 9 of the Arbitration and Conciliation Act, 1996 filed by the petitioner who has been given exclusive right to advertise on trains running on Lines-5 and 6 by the respondent/Delhi Metro Rail Corporation. Petitioner by this petition seeks restraint against the respondent for encashing the bank guarantee dated 23.9.2014 for a sum of Rs.2,50,65,000/-. Respondent is seeking to encash this bank guarantee on

account of failure of the petitioner to make payment of the license fee in terms of the letter of Award and the consequent contract signed between the parties on 10.12.2014.

2. The main grievances as a result of which petitioner seeks stay of invocation and encashment of the bank guarantee are contained in paragraph 19 of the petition, and out of these grounds the following aspects have been urged before this Court for grant of the relief prayed:-

(i) As per the contractual Clause 3.6 of the Request for Proposal (RFP) the respondent had to sign the agreement within 30 days of payment of initial amounts with the Bank Guarantee by the petitioner to the respondent, and which period of 30 days commenced when the petitioner gave the bank guarantee to the respondent on 25.9.2014, however, the respondent has signed the contract only on 10.12.2014 ie after a delay of about one and a half months and hence petitioner suffered losses because its prospective customers did not give advertisements to the petitioner on account of lack of the signed copy of the contract.

(ii) As per Clause 3.4 of the contract dated 10.12.2014, it is specified that Lines-5 and 6 are to be extended and likely dates were given in the contract for commissioning, however, respondent has delayed commissioning of

extension of Lines-5 and 6, and consequently, the petitioner has lost revenue on account of advertisements which would have been put on the stations of the extended parts of the lines and therefore respondent is guilty of breach of contract and hence cannot invoke the subject bank guarantee.

(iii) Petitioner entered into the subject contract with the respondent on the basis of representations made by the respondent in its website with respect to the ridership, however actual ridership is nowhere near what is stated in the website of the respondent. Details with respect to this argument are stated in para 11 of the petition and which talks of advertisement revenue for other lines of the respondent and in which lines one M/s E.G. Communications was said to be the successful bidder. What is therefore argued is that there is misleading material of ridership on the website of the respondent and hence petitioner was wrongly made to enter into the subject contract by the respondent.

(iv) Respondent was in a dominant position, being a large Public Sector Undertaking (PSU), and being in a dominant position it has misused the dominant position to have one sided contractual clauses and hence the entire contract needs to be renegotiated as the petitioner is suffering losses on account of the existing contract with the respondent.

(v) Lastly, it is urged on behalf of the learned senior counsel for the petitioner that petitioner has been caused losses on account of breach of contract by the respondent in not allowing fixing of advertisements during the time the trains were in the depots of the respondent.

No other aspect or issue is urged before this Court.

3. At the outset I must note that law with respect to courts interdicting payments under unconditional and on demand without demur bank guarantees such as the present one is that unless there is an egregious fraud or a case of such special equities which removes any entitlement to payment of the beneficiary, invocation and encashment of bank guarantee are not stopped. The concept of egregious fraud is well established as also the principle of special equities and to give a few examples where encashment of bank guarantees have been stayed are where to secure mobilization advance the bank guarantee is given but the mobilization advance itself is not given and yet the bank guarantee is sought to be encashed or where a bank guarantee is given for defect liability period but the defect liability period has expired and for defects beyond the defect liability period the performance bank guarantee is sought to be encashed, or if a bank guarantee is for a sum of Rs. 1 crore but the admitted liability is

only for Rs.5 lacs, but, the bank guarantee is however invoked not for the amount of Rs. 5 lacs but for the entire amount of Rs. 1 crore. Many such examples exist in various reported cases of different High Courts as also the Supreme Court and therefore the examples need not be multiplied herein. One thing however is clear that allegations of breach of contract by the other party to the contract do not entitle a person who has given the bank guarantee to seek stay of invocation and encashment of bank guarantee because issues of breach of contract, ie who is guilty of breaches thereof, are to be decided in the arbitration proceedings and not in the proceedings which seek stay of encashment of the bank guarantee. With this preliminary statement of law, let me turn to the arguments urged on behalf of the petitioner. All the arguments are essentially really not on egregious fraud but really on breaches of the respondent which are sought to create special equities in favour of the petitioner.

4. So far as the first argument of delay in signing of the contract is concerned, I put it to the learned senior counsel for the petitioner to show me any correspondence of the petitioner with the respondent from 25.9.2014 till the contract was signed on 10.12.2014, that there is delay beyond 25.10.2014 up to 10.12.2014 and hence loss has been caused to the

petitioner on account of advertisers not giving advertisements for lack of signed copy of the contract, and to this it is conceded before this Court that the first correspondence in this behalf written by the petitioner to the respondent is not between 25.10.2014 to 10.12.2014 but is much later of 1.6.2015. Also, no correspondence of any advertiser who wanted to advertise with the petitioner is filed in this Court that these advertisers have not given advertisements to the petitioner on Lines-5 and 6 on the absence of a signed copy of the contract. Clearly, therefore, this argument is nothing but a ruse to seek interdiction of payment under the unconditional bank guarantee and is therefore rejected.

5(i) The second argument is that in terms of Clause 3.4 of the contract there was a mention of future expansion and since this future expansion of these lines is delayed, consequently, petitioner has been deprived the benefit of advertising from stations on the extended lines, and therefore the respondent is not entitled to claim license fee by seeking encashment of the subject bank guarantee.

(ii) Even this argument urged on behalf of the petitioner is misconceived and the fact that the argument has no legs to stand upon

becomes clear from Clauses 3.6, 6.3, 6.5 and 6.6 of the contract. These

Clauses read as under:-

“3.6 Details of the train and their configuration currently under operation in DMRC network on Line No. 5&6 is given in the table below:

Details of Metro Trains Under Operation in DMRC Network (as in March-2014)							
Line No.	Make of Trains	Train Set of 4 Coaches	Train Set of 6 Coaches	Train Set of 8 Coaches	Total Holding (In No of Train Sets)	No. of Train Sets under Operation in peak hours in week days	No. of Train Sets under Operation in non-peak hours in
Line -5	Bombardier Standard Gauge(RS-2)	17	1	Nil	18	15	13
Line -6	Bombardier Standard Gauge (RS-3)	29	1	Nil	30	26	13
Note: (a) At present, there are about 196 car coaches under operation on Line no.5 & 6. (b) Number of trains and their coaches, configuration, etc are likely to be increased/modified in future in order to meet the commuter rush and demand.							

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6.3 There are additional stations under construction on extended section of the existing operational lines of Line-5 & 6 which are under construction and likely to be commissioned and put under operation tentatively as per details above. The trains extended on these sections /

extensions shall also be part of the exclusive advertisement rights to the Licensee.

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6.5 The licensee shall pay Annual License Fee amounting to Rs.5,01,30,000/- (Rupees five crore one lac thirty thousand) to DMRC, payable for a period of 12 months. The license fee shall be payable on quarterly basis to DMRC, by the last date of previous quarter, calculated on pr-rata basis. The amount of Annual License Fee shall be enhanced @ 5% per annum with effect from 1st April of each financial year on compounding basis w.e.f. 01-04-2015.

6.6 The amount of license fee payable to DMRC shall remain valid up to 250 number of car coaches holding in Line no.5 & 6. If there is any increase in holding number of car coaches beyond 250 numbers, the amount of license fee payable to DMRC shall be increased @75% of License Fee applicable for that particular period calculated for the increase in number of car coaches beyond 250. As an illustration, if the holding of car coaches is 275, then the amount of the license fee payable to DMRC shall be as under:

License Fee applicable for that particular period up to 250 coaches + $[0.75 \times \text{License Fee applicable for that particular period up to 250 coaches} \times (275-250) / 250]$.”

6. A reading of the aforesaid clauses shows that the payment of license fee has nothing to do with the extension of lines but in terms of Clause 3.6 license fee is payable once 196 car coaches are given to the petitioner and license fee payable will remain the same for the benefit of the petitioner up to 250 car coaches. It is only after the car coaches are

increased beyond 250 then there is pro rata increase in the license fee in terms of Clause 6.6 as stated above. There is no case laid out before this Court and nor is it so argued that the petitioner has not got 196 car coaches and hence license fee is not payable. Counsel for the respondent in fact states that at present approximately petitioner has a total of 234 coaches for putting advertisements. Clearly therefore, the argument urged on behalf of the learned senior counsel for the petitioner is misconceived that on account of non-extension of lines, petitioner has lost advertisement revenue, and that there is a case of special equities. Also, I may note that the relevant clause only talks of likely dates of commissioning of the extending of the lines and that too without any co-relation to the clause of payment of license fee which commenced on petitioner having with it 196 coaches. This argument is therefore rejected.

7(i) The third argument urged on behalf of the petitioner is that there was misrepresentation given as to ridership and revenue from advertisement on the website of the respondent qua other lines and the petitioner was misled by such statements made on the website of the respondent to enter into the subject contract and hence petitioner is not liable to pay the license fee. In fact, this argument is connected with the next

argument that respondent being in dominant position should renegotiate the contract and reduce the license fee in the facts of the present case.

(ii) The third and fourth arguments of the petitioner are to be rejected because there is no assurance under any contractual relationship, even if it is by a PSU, that the contracting party will undoubtedly make profits. Though there are many judgments of the Supreme Court in this regard, I would refer to one judgment of the Supreme Court in the case of *Assistant Excise Commissioner and Others Vs. Issac Peter and Others (1994) 4 SCC 104* wherein the Supreme Court has observed that where the contractor under open bidding conditions with open eyes enters into a contract with the arm of the government or PSU, there is no implied guarantee that contractor is bound to make profits under the contract. The Supreme Court has clearly specified that whenever contractual relations take place, the contracting party takes a calculated risk and there is no law that a person can be relieved of his obligations under the contract on account of the contractor not making profit, inasmuch as, profit and losses are normal incident of a business and suppose a contractor makes more profits than he estimated under the contract then surely the PSU will not get additional contractual fee on that ground. Parties are therefore bound by the contract

which is a package deal and a mutually achieved final position in terms of the contract clauses, without there being implied assurance that the contractor will make profits. Relevant paras of the judgment in this regard in the case of *Issac Peter (supra)* are paras 23, 24, 25 and 26 and these paras read as under:-

“23. May be these are cases where the licensees took a calculated risk. May be they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contract. It is well known that in such contracts - Which may be called executory contracts - there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit. Take the very case of arrack contractors. In one year, there may be abundance of supplies accompanied by good crops induced by favourable weather conditions; the contractor will make substantial profits during the year. In another year, the conditions may be unfavourable and supplies scarce. He may incur loss. Such contracts do not imply a warranty - or a guarantee - of profit to the contractor. It is a business for him - profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out or the contractual obligations entered into by the licensees.

24. Learned Counsel for the Respondents sought to invoke the Rule of Promissory estoppel and estoppel by conduct. The attempt is a weak one for the said Rules cannot be invoked to alter or amend specific terms or contract nor can they avail against statutory provisions. Here, all the terms and conditions of contract, being contained in the statutory Rules, prevail.

25. Learned Counsel for the Respondents also sought to rely upon the Rule of legitimate expectation which the licensees entertained in view of the practice during previous years. Firstly, the Rule cannot be invoked to modify or vary the express terms or contract, more so when they are statutory in nature. No decision has been brought to our notice

supporting the said proposition. Secondly, in view of the scarcity that had developed during the last two months of the previous excise year (i.e., during February and March, 1981), the plea of legitimate expectation sounds quite weak. That the bidders were apprehensive and highly sceptical of alleged official assurances is proved by the repeated adjournment of auction and the fact pleaded by the licensees themselves that during the said excise year (1981-82) half the shops in the State remained unsold. It is inconceivable that the licensees yet expected legitimately that additional supplies equal to the previous year's additional supplies would be supplied during this year. The plea is unacceptable.

26. Learned Counsel for Respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory - at least to the extent of previous year's supplies - by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness of the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They

are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licensees to lift all that stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers- loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned, counsel for the licensees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay* : (1989) 3 SCC 293, it was held that where a public authority is exempted from the operation of a Statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. *Shrilekha Vidyarthi v. State of U.P.* : (1991) 1 SCC 212 was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case non-government servant holding a *public office*, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned Counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms 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 anyone 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 no guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a businesses 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 not necessary to say more than this for the purpose

of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.”

(underlining added)

8. The arguments therefore urged on behalf of the petitioner that the contract must be renegotiated or the license fee has to be renegotiated on account of alleged statements made on the website of the respondent are misconceived arguments. The argument with regard to misrepresentation is also misconceived because general statements made on the website of the respondent are different than specific representations made qua the specific contract and it is not in dispute that there is no specific representation which is made by the respondent to the petitioner under the subject contract of a particular figure of ridership or revenue and hence petitioner cannot claim that petitioner by misrepresentation was made to sign the contract. Petitioner did so as a businessman and now cannot start claiming equitable doctrines or a basis that the State must act ‘reasonably’ as alleged by the petitioner, and both of which arguments stand rejected by the Supreme Court in *Issac Peter’s* case (*supra*).

9. The last argument urged on behalf of the petitioner is that petitioner has suffered losses because respondent did not allow petitioner’s workers to fix advertisements in the depots of the respondent, however, I

asked the learned senior counsel for the petitioner that where is it specified in the contract that the petitioner has a right to work in the depots, and in response no clause of the contract or any letter written by the respondent to the petitioner giving such a right to the petitioner, was pointed out to this Court. This argument therefore is also rejected.

10. In view of the above, in my opinion, no case of egregious fraud or special equities is made out by the petitioner.

11. Dismissed.

JULY 16, 2015
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VALMIKI J. MEHTA, J.