

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

% **Reserved on 23rd November, 2015**
Date of Decision: 11th December, 2015

+ W.P. (C) No.9407/2015 & C.M. APPL. No.21967/2015

VFS GLOBAL SERVICES PRIVATE LIMITED ...Petitioner
Through: Ms. Maninder Acharya, Sr. Advocates
with Mr. Samar Singh, Advocates

Versus

SOUTH DELHI MUNICIPAL CORPORATION ...Respondent
Through: Mr. Sanjay Poddar, Sr. Advocate with
Mr. Mukesh Gupta, Advocate.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

VED PRAKASH VAISH, J.

1. By way of present petition the petitioner seeks directions against the respondent for immediately taking all possible steps to ensure that the petitioner is forthwith placed in vacant and peaceful possession of 52 parking sites allotted to it, and also to ensure that no rival/contesting claims shall arise in respect to the said sites. The petitioner also prayed that in the event respondent is unable grant the aforesaid relief, then it may treat the licenses as cancelled forthwith, as void and nonest, and return to the petitioner the total amount paid by it along with interest @ 15% per annum from the date of payment till refund, deducting therefrom any amount the petitioner may have received in excess of its right under the licenses, after deducting the

expenses incurred. The petitioner also seeks direction to quash various show cause notices sent by the respondent.

2. Briefly stated, the case of the petitioner is that pursuant to tender notice dated 10.04.2015, issued by the respondent for allotment of 71 authorized parking sites, the petitioner applied for allotment of the same. The petitioner emerged as a successful bidder for 52 parking sites and separate agreements were executed by the respondent in the month of May, 2015. The petitioner furnished the Bank Guarantee in the sum of Rs.5,60,51,430/- (Rupees Five Crores Sixty Lakhs Fifty One Thousand Four Hundred Thirty only), issued security deposit in the sum of Rs.3,55,25,715/- (Rupees Three Crores Fifty Five Lakhs Twenty Five Thousand Seven Hundred Fifteen only) and furnished 37 post-dated cheques in respect of monthly license fee, being Rs.3.05 crores per month (approximately) in favour of the respondent. The petitioner paid license fees for the months of June, July, August and September, 2015, four post dated cheques have been returned to it and 33 post dated cheques for a sum of Rs.100.73 crores approximately are lying with the respondent. Thereafter, it was discovered that there are numerous problems on virtually each and every site including rival claims being raised qua the respondent's right, title and interest to the sites being licensed to the petitioner. The problems being encountered by the petitioner were brought to the notice of the respondent vide letters dated 18.06.2015, 22.06.2015 and 27.07.2015. However, the respondent instead of taking steps to rectify the problems took the stand that it is the petitioner's problem to sort out with the various authorities.

3. According to the petitioner none of the parking sites can be utilized in the manner contemplated which is the sole and fundamental purpose of the

license agreement. The petitioner has alleged that with respect to 17 sites, the rival claims prevented the petitioner taking over the site and operating thereon in a hindrance free manner. At one of the sites the rival claims prevented the petitioner from taking over the site and operating thereon to the extent of 95% and at 13 other sites the rival claims prevented petitioner from taking over the site and operating thereon to the extent of 75-94%, at 9 other sites the rival claims prevented petitioner to the extent of 65-74%, at 11 sites the rival claims prevented the petitioner to the extent of 52-64% and with respect to one site the rival claims prevented petitioner to the extent of 40%. The rival claims included the claims being raised by the Delhi Metro Rail Corporation (DMRC). Other instances include rival claims raised by RWA's/local market associations, etc. claiming either that the land does not belong to the respondent or that it does not have any right to collect parking charges, inter alia, on account of prior vested rights. Aurobindo Place Market Association filed a writ petition being W.P.(C) No.7924/2015 wherein the respondent was directed not to grant any fresh contract for parking in the concerned area without considering the proposal of the said market association. The respondent went ahead with the tender process in respect of the said site without abiding by the said order.

4. The other instances of rival claims included cases where the DDA claims the land in question or where prior possessory rights are claimed or where the RWA's and Market Associations have shown prior receipts/agreements executed with the respondent or where the parking mafia is not allowing the petitioner to take possession of the site. The petitioner has prepared a detailed chart setting out the nature of the rival claims being raised at each site and the extent to which the petitioner has been restrained from taking over the possession of the site which is Annexure-P9 to the

petition. The petitioner approached the police and other authorities several times and filed several complaints, however, no action was taken.

5. The petitioner has till date paid a sum of Rs.12,20,00,000/- (approximately) towards license fee, however, the respondent has not taken any effective steps so as to enable the petitioner to perform its obligation of providing the parking infrastructure. The petitioner sent a detailed communication dated 07.09.2015 and pointed out all the problems being faced by the petitioner and called upon the respondent either to take necessary steps to put the petitioner in vacant hindrance free possession of the 52 sites and confirm to it that the respondent has right, title and interest over the site, and no contrary title will arise or in the alternative to treat the licenses as cancelled forthwith, as void and nonest and to return the amount paid to the respondent along with interest @ 15% per annum from the date of each payment till refund.

6. Vide letter dated 24.09.2015 the respondent replied to the abovementioned letter rejecting all the claims of the petitioner being unsubstantiated and offered amicable resolution of the contract-wise issues, if any. The petitioner was also advised to meet the Commissioner or Additional Commissioner or Deputy Commissioner of the respondent for redressal of any grievance or difficulty within a period of 15 days. The respondent further informed the petitioner that during the inspection conducted by Area Inspectors, all the parking sites were found fully operational, hence the petitioner's contention for vacant possession of all parking sites was not called for.

7. In a meeting held on 28.09.2015, the petitioner met Mr. P.K. Goel Commissioner, SDMC, Mr. G.S. Meena, Additional Commissioner, and

Mr. H.S. Dogra, SDMC Consultant and the petitioner brought to their notice various difficulties and challenges that it has been facing and continues to face at the parking sites allotted to it, however, no solution was forthcoming from the respondent's side. The petitioner vide its letter dated 29.09.2015, addressed to the respondent, brought the said facts on record.

8. The respondent issued various show cause notices pointing out shortcomings in the petitioner's operation of the sites, advising the petitioner to remove the said deficiencies within 7 days failing which penal actions as provided under the contract will be initiated against the petitioner.

9. The respondent in its counter affidavit has, inter alia, stated that the petition is not maintainable. It is stated that the petitioner is seeking encroachment of the terms and conditions of the contract entered into between the parties, the petition involves disputed questions of fact which cannot be adjudicated in a petition under Article 226 of the Constitution of India. The petitioner should approach civil court for appropriate relief for breach of the contract, if any, as alleged. The petition is not maintainable due to misjoinder of cause of action, individual licenses in respect of 52 sites were executed on or around 9th July, 2015 and all the sites are independent to each other having their own factual matrix. The breaches on the part of the petitioner or the breaches alleged by the respondent are confined to the individual sites.

10. The respondent has also stated that the petitioner has committed breach of mandatory provisions of agreements and has not followed the terms of agreement and with a view to hide its own misdeeds and lapses has projected a wrong picture.

11. According to the respondent the parking sites were allotted on 'as is where is basis'. It is stated that the petitioner filed an affidavit, inter alia, admitting that it had inspected the site under offer and is ready to take the site on 'as is where is basis' and has acquainted itself with all local conditions and parking site conditions at the site. The petitioner has also affirmed that it will not hold the respondent responsible for the decline in the potential of revenue from the said site due to any reason whatsoever and shall not claim any deduction or remission in the license fee. The bidders were required to bid the amount after considering its revenue potential and the respondent was not responsible for any decline in the revenue for any reason whatsoever. The bidders were required to visit the said parking sites to understand the field of operation and current revenue administration. The petitioner failed to comply with the terms and conditions of the agreement. The respondent has filed a chart indicating the correct position against each of the instances given by the petitioner, which is Annexure R-2.

12. Learned senior counsel for the petitioner contended that the respondent failed to fulfill its public and statutory duties, including also, its obligation under the Delhi Municipal Corporation Act, 1957 (DMC Act) to not permit unauthorized hindrances in public areas. It is no longer res integra that a writ petition under Article 226 of the Constitution of India is maintainable even in a contractual matter. Reference in this regard has been placed upon **ABL international Ltd. and Anr. Vs. Export Credit Guarantee Corporation of India Ltd. and Ors.**, (2004) 3 SCC 533 and **Food Corporation of India vs. SEIL Ltd. and Ors.**; (2008) 3 SCC 440. Further, it is settled law that a writ petition is maintainable for refund of money. Reliance in this regard has been placed on **Burmah Construction Co. vs. State of Orissa**

AIR 1962 SC 1320 and **U.P. Pollution Control Board and Ors. Vs. Kanoria Industrial Ltd.** (2001) 2 SCC 549.

13. Learned senior counsel for the petitioner further contended that the petitioner is principally seeking a writ of mandamus to direct the respondent to perform its public statutory functions. The respondent is a public statutory body, whose basic essential function includes providing adequate parking facilities to the citizens within its jurisdiction. The respondent is neglecting to perform its public function and therefore a writ of mandamus is the only efficacious legal remedy available to the petitioner. It is further argued that the letter dated 23.09.2015 issued by the respondent to various Assistant Commissioners of SDMC confirms that the problems being faced by the petitioner are also being faced by the other contractors in respect of 71 parking sites. Moreover, the letter admits that the field staff of SDMC has confirmed the said problems. The contention that problems only exist in 2 or 3 sites, is an incorrect averment and cannot stand in the face of the respondent's own letter dated 23.09.2015.

14. It was also contended by the learned senior counsel for the petitioner that vide order dated 26.11.2014 in O.A.No.21/2014, the National Green Tribunal has ordered that inter alia, the SDMC shall ensure that tarred roads meant for regular traffic are not permitted to be used for parking and that in all markets in Delhi, only one-sided parking shall be permitted. Also, by orders passed by this Court in W.P.(C) No.7741/2010, the respondent herein had been directed to not grant any fresh contract for parking in Aurobindo Place Market, Hauz Khas without first considering the proposal of the said market association. Without abiding by that order, the respondent went ahead with the tender process and awarded the said site to the petitioner,

leading the Aurobindo Place Market Association to prefer W.P.(C) No.7924/2015. The respondent is mandated to abide by the aforesaid orders and enforce it fully, qua all sites, instead the respondent has contumaciously awarded all these sites to the petitioner and other contractors. The tender documents included tarred roads within the area allotted and expressly stated that two-sided parking shall be permitted in market area. The entire tender process is vitiated on account of material suppression and misrepresentation of facts. Also in respect of the Lodhi Road Institutional Area I & II, the National Building Construction Corporation had filed a writ petition against the MCD being W.P.(C) No.3029/2011, wherein vide order dated 06.09.2011, the Court recorded a settlement that the erstwhile contractor is willing to give up the site in favour of the National Building Construction Corporation (NBCC) who shall take over and run the parking on the site, which has been ignored by the respondent and without disclosing the same, the tender in question has been awarded to the petitioner herein.

15. With regard to the specific allegations pertaining to on-site conditions raised by the respondent, the petitioner stated that since clear possession of the site has not been given, it prevented the petitioner from installing CCTV cameras. Sign Board are in place at all parking sites and the petitioner supplied uniforms to all its employees. Complaint registers have already been provided at the sites and hand-held devices are also provided.

16. Per contra, learned senior counsel for the respondent contended that the present writ petition is not maintainable and the same is liable to be dismissed summarily. The petitioner is seeking enforcement of the terms and conditions of the contract entered into between the parties. The petition also involves disputed questions of fact which cannot be adjudicated in the

writ jurisdiction under Article 226 of the Constitution of India. Both the parties to the contract are alleging breach of contract against each other and there is dispute with regard to the factual conditions prevailing at the parking site which can be decided after appreciation of evidence adduced by each party. Both the parties are bound by the terms and conditions of the agreement and it is well settled that once an agreement is executed even with the government department, other considerations are not applicable. The rights and obligations of the parties are to be examined in terms of the agreement and not otherwise. All the parking sites are independent to each other having their own factual matrix and there may be breaches which may be common to all but by such commonality, the petitioner is not entitled to combine all the cause of action which if at all accrued in favour of the petitioner in one agreement. The petitioner has combined the individual and separate alleged cause of action in respect of 52 parking sites in one petition with a view to protect the instances of two-three sites to justify its breaches in respect of other sites which is not permissible in law.

17. Learned senior counsel for the respondent further contended that as per the mandatory provisions of the agreement, the petitioner was required to install CCTV cameras at all sites where license fee is more than Rs. 5,00,000/- (clause 9), provide sign boards (clause 7), provide uniforms for the employees of the contractor at site (clause 11), maintain proper register (clause 12) etc. It is further stated that the petitioner has admittedly not followed anyone of these conditions deliberately with a view to hide its own misdeeds and lapses and to project a wrong picture.

18. Learned senior counsel for the respondent also contended that the respondent conducted a pre-bid meeting before submission of the bid to

provide response to the queries of the prospective bidders. The tender document also required the bidder to conduct survey of the existing position and make independent evaluation of the scope of work. The bidders were also required to visit the said parking sites to understand the field of operation and current revenue administration. As per clause 20(p) of the agreement, the contractor was required to conduct background investigation of each of the personnel and provide a copy of the background investigation report to the respondent. The petitioner has submitted the requisite undertaking that it has gone through and understood the contents of the tender document and has further declared that it has also read and understood the terms and conditions of the tender and shall abide by the same. The petitioner has also filed an affidavit admitting that it has inspected the sites under offer and is ready to take the sites on 'as is where is' basis and acquainted itself with all local conditions and parking site conditions at the site.

19. Another submission of learned senior counsel for the respondent is that the requisite individual and separate allotment letters were issued to the petitioner in respect of the said 52 sites on 15.6.2015 and the possession of all the 52 parking sites were handed over to the petitioner individually and separately on 16.6.2015. The petitioner raised no objection at the time of handing over and taking over of possession of the said parking sites and consequently executed the agreement on 09.07.2015. The petitioner being fully aware of the site conditions inasmuch as the possession of the site was already with the petitioner w.e.f. 16.06.2015 executed all individual agreements with respect to 52 parking sites. The petitioner has violated all the mandatory conditions with impunity which has resulted in a total chaos in these 52 parking sites. If there is some obstruction in the parking, it is for

the petitioner to get it remedied as the parking site was given to the petitioner on 'as is where is' basis. It is further contended that the respondent suitably replied to the objections raised by the petitioner from time to time and on inspection by the respondent of the 52 parking sites, it was found that the objections raised by the petitioner were factually incorrect.

20. It was further contended that the petitioner has nowhere pleaded that it is not being allowed to use any parking site due to the orders passed by National Green Tribunal. The orders of NGT is not affecting the South Extension-II site at all inasmuch as one of the area in this parking site is double lane parking and is not affecting the regular traffic on tarred road as alleged by the petitioner. It is further stated that the site earmarked for parking of South Extension Part-II is perfectly within the purview of the order of the NGT and till date the respondent has not received any complaint from the local police in this regard. The respondent has already modified 17 sites which were required to be modified in terms of the NGT order. Furthermore, as regards grant of fresh contract for parking at Aurobindo Place Market, Hauz Khas without first considering the proposal of the said market association is concerned, a bare reading of the order dated 21.03.2011 in W.P.(C) 7741/2010 makes it clear that the Court had granted Aurobindo Place Market Association liberty to participate in the auction proposed by MCD. Moreover, necessary corrigendum along with modified site plans dated 20.04.2015 was issued on 30.04.2015 before the submission of the tender. The petitioner is fully aware of such changes and has submitted the bid after knowing the changes. The petitioner was found successful in respect of 11 parking sites out of 17 sites. Possession of such sites have been handed over and taken over by the petitioner in terms of the revised/modified site plan dated 20.04.2015. It is now not open to the petitioner to contend

that NGT order was suppressed by MCD or the site has not been given as per the site plan by making a reference to un-amended site plans. For this reason no complaint in respect of other 47 sites was raised by the petitioner at the time of filing of the writ petition.

21. It was lastly contended by learned senior counsel for the respondent that the remedy provided under Article 226 or for that matter suits cannot be resorted to wriggle out of the contractual obligations entered into by the licensee. Similarly, the doctrine of fairness or to act fairly or reasonably cannot be invoked to amend, alter or vary the express terms of the contract between the parties. In case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one of the parties to the contract as in such cases, the mutual rights and liabilities of the parties are governed by the terms and conditions of the contract and the laws relating to the contract.

22. For establishing his contentions learned senior counsel for the respondent has relied upon **State of Kerala & Ors. Vs. M.K.Jose, 2015 (8) Scale 737; National Highways Authority of India vs. Ganga Enterprises & Another, 2003 (7) SCC 410; M/s Radhakrishna Agarwal & Others vs. State of Bihar & Others, 1977 (3) SCC 457; Noble Resources Ltd. vs. State of Orissa & Another, 2006 (10) SCC 236; Assistant Excise Commissioner and Others vs. Issac Peter and Others, 1994(4) SCC 104; M/s Meena Advertisers vs. Delhi Metro Rail Corporation Ltd., OMP (I) No.344/2015 & I.A.No.13973/2015; and JCL Infra Ltd. (Formerly known as J.Sons Co. Ltd.) vs. Govt. of NCT of Delhi through Chief Secretary and Anr., 2015 (3) AD (Delhi) 586.**

23. I have heard learned senior counsel for both the parties and carefully perused the material on record.

24. The respondent Corporation no doubt is an instrumentality of the State. Discharge of its public duties fairly, justly and reasonably which are the requirement of Article 14 of the Constitution of India, is the obligation of the State. It is also public function of the State to discharge their obligations to the public fairly, justly and reasonably. It is no more *res-integra* that even in contract works and also in entering into contract agreement with the private party the State cannot act like a private individual inasmuch as the State has to act justly, fairly and reasonably even in contractual matters and the State's constitutional obligations co-exists with the contractual obligations. In this regard reference may be made to the decision of the Apex Court in the case reported as **Kumari Shrilekha Vidyarthi v. State of U.P.**, AIR 1991 SC 537, wherein the Apex Court held as under:-

"Unlike the private parties the State while exercising its powers and discharging its functions, 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. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. 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."

With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several

instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14. Thus the argument of learned counsel for the respondent regarding maintainability of the writ petition does not impress this Court. The judgments relied upon by the respondent are not applicable to the facts of the present case.

25. The State is still the State when it acts in the matter of granting largesse and it cannot act arbitrarily and thus it does not stand in the same position as a private individual. The question as to whether the writ petition under Article 226 of the Constitution of India to enforce contractual obligations of a State or its instrumentality by an aggrieved party even if the contract is not statutory contract is maintainable or not has now been settled. It would not be correct to argue that the writ petitions under Article 226 to enforce contractual obligations of the State by an aggrieved party in the case where the actions of the State in contractual matters do not have a touch of public functions or discharge of public duty by acting fairly, justly and reasonably is not maintainable inasmuch as there is nothing which militates against the concept of requiring the State always to act fairly, justly and reasonably even in contractual matters. The Apex Court as early as 1954 in case reported as **K.N. Guruswamy v. The State of Mysore**, AIR 1954 SC 592 clearly observed that though the writ petition was not issued in that case on a given set of fact, if the State acts in an arbitrary manner even in matter of contracts, aggrieved party could approach the Court by way of writ under Article 226 of the Constitution and the Court depending upon the fact of the case is empowered to grant the relief. The Apex Court again

reiterated this position in the case reported as **D.F.O. South Kheri v. Ram Sanehi Singh**, AIR 1973 SC 205 as under at page 206:-

“The Power of judicial review in the matter of awarding contract conferred by Article 14 is wide, which enjoins the public authority to act fairly, reasonably by excluding irrationality and arbitrariness. But the power of judicial review in a concluded contract is limited and is not all pervasive as in the matter of awarding of contract. The Writ Court in exercise of judicial review can intervene even in respect of concluded contracts if the contract is statutory contract or there is a public law element in it.”

26. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, as in the present case for public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken by the tenderer.

27. Pursuant to the award of tender, the license was given to the petitioner for providing parking spaces on the lands which belong to the respondent which necessarily implies that the respondent has full control thereof and right, title and interest thereon to be in a position to hand over vacant and hindrance free possession of the site to the petitioner so as to enable the petitioner to perform the function entrusted to it by the respondent. This

would be the very strong pillar of the entire license and the basis of the understanding between the parties. The petitioner is paying the handsome amounts as monthly license fee to the respondent, the consideration thereof from the respondent was handing over and making available the sites. This itself was done in furtherance of public interest and the public policy of creating basic public infrastructure in Delhi. However, on receipt of consideration from the petitioner, this entire exercise falls apart due to non-fulfillment of the promise and assurance of the respondent to hand over vacant, hindrance free possession of the 52 sites, which consideration was in fact received by the respondent. The respondent being a public authority is charged with the responsibility of dealing with the public assets belonging to it in a responsible manner. Even the grant of license to use such public assets can only be for the furtherance of public interest and public policy. The respondent as a public authority cannot seek to unlawfully profit out of such purported grant of licenses, without discharging its own responsibility. The failure of the respondent to do so is not only a violation of its responsibility to the petitioner, but a violation of its responsibility to the public at large, to whom it owes a duty to utilize assets within its control to provide necessary and essential infrastructure.

28. The respondent being an instrumentality of the State, is mandated to act fairly, equitably and responsibly in its contractual dealings. In case the respondent is unable to place the petitioner in vacant and peaceful possession of the 52 parking sites as allotted to it, and also to ensure that no rival or contesting claims shall arise in respect of the said sites, then the respondent cannot be permitted to unjustifiably and illegitimately enrich itself at the cost of the petitioner. The respondent cannot be allowed to relinquish and wriggle out from its responsibility on a matter which goes to the very root of

the license and ask the petitioner to sort out the issues with various authorities, thereby failing to fulfil its public and statutory duties including its obligations under the DMC Act to not permit unauthorized hindrances in public areas.

29. There is no dispute to the fact that order dated 26.11.2014 passed by the National Green Tribunal clearly stipulates that there shall be no parking on both sides of the roads in the markets and also there should not be any parking on the tarred roads. The respondent in its counter affidavit or even during the arguments, has neither contested the existence of the said order of the National Green Tribunal nor has the respondent placed on record anything to suggest non-applicability or modification of the said order. Further, the conduct of the respondent even though being a public body and under the obligation of acting fairly, has been absolutely culpable and highly unfair. The respondent after around five months of the passing of the order by the National Green Tribunal issued notice inviting tender for allotment of 71 parking sites and in response to the bid of the petitioner allotted 52 parking sites to the petitioner. The petitioner has vehemently pointed out that out of these 52 parking sites, a substantial number of parking sites are affected by the order of the National Green Tribunal. Further, the Market Association of Aurobindo Place also filed a writ petition being W.P.(C) No.7924/2015 wherein the respondent was directed not to grant any fresh contract for parking in the concerned area without considering the proposal of the said market association. In spite of the said order, the respondent went ahead with the tender process in respect of the aforesaid site. Thus in utter disregard of the orders aforesaid, the parking sites were allotted to the petitioner by the respondent. In such a situation, the petitioner could not

have any iota of doubt regarding as the notice inviting tender had been issued by a statutory body and not by a profit making body.

30. The contention of the respondent that the writ petition involves disputed questions of fact appears to be misplaced and untenable inasmuch as the petitioner has placed on record a letter dated 23.09.2015 (Annexure-P15) addressed by the respondent wherein the respondent has itself admitted that it was confirmed by the field staff of RP Cell that there are encroachments in many of the parking sites and the contractors are approaching this department again and again for removal of the said encroachments. The said letter issued by SDMC is reproduced hereinbelow:-

“SOUTH DELHI MUNICIPAL CORPORATION
Office of the Dy. Commissioner (RP Cell)
Dr. Shyama Prasad Mukherjee Civic Centre (22nd floor)
Jawaharlal Nehru Marg, New Delhi-110002

No.DC (RPC)/SDMC/2015/114

Dated: 23/9/15

Subject: Parking sites allotted by Remunerative Project
Cell, SDMC- reg. encroachments

R.P. Cell/SDMC through tender allotted 71 parking in Central Zone, West Zone and South Zone (list already circulated amongst all concerned zones) and possession had been given in the month of June 2015. As reported by the parking contractors and confirmed by the field staff of RP Cell, there are encroachments in many of the parking site and the contractors are approaching this department again and again for removal of the said encroachments. Matter has already been brought into the knowledge of concerned zones.

ACs of Central Zone, West Zone and South Zone, are once again directed to look into the matter at their personal level and get removed the encroached from the parking sites in

their respective areas. They are also directed to cooperate the parking areas in smooth running of parking sites as SDMC is earning a handsome revenue from these sites.

Sd/- Dy. Commissioner (RP CELL)”

31. Thus a perusal of the aforesaid letter clearly shows the admission of the respondent that there are encroachments on various parking sites therefore concerned ACs were directed to get removed the encroachment from the parking sites in their respective areas.

32. The parking sites were tendered and allotted to be used by the general public for parking purposes. Obviously if there are encroachments at the parking sites the whole purpose of the petitioner taking the same on license and offering the sites to the public at large for parking purposes is defeated. It is futile for the respondent to contend that the parking sites were tendered on ‘as is where is’ basis. The respondent is misconstruing and misinterpreting the scope of the expression ‘as is where is’ basis. The said expression cannot be extended or interpreted to take within its ambit a situation where the subject matter of the license i.e. parking sites in question are encroached and have various claims to the knowledge of the respondent. The expression ‘as is where is’ basis also does not entitle an instrumentality of the State like the respondent to intentionally conceal the order dated 26.11.2014 passed by the NGT restricting parking only on one side of the road besides directing that there should not be any parking on the tarred roads. Likewise the direction in the writ petition filed by the Aurobindo Place Market Association in W.P(C) No.7741/2010 not to grant any fresh contract for parking would also not be covered by the expression ‘as is where is’ basis.

33. The restricted use of the parking sites as a direct consequence of the said order of the NGT as well as the existence of encroachments on the parking sites were matters well within the knowledge of the respondent and despite these restrictions, the respondent proceeded to float the tender and allot parking sites to the petitioner who paid exorbitant amounts in pursuance of the license agreements including furnishing of the Bank Guarantee and Security Deposit.

34. The respondent being an instrumentality of the State is expected to act fairly, honestly and diligently by making full, complete and honest disclosures of the material facts pertaining to the parking sites. It was the bounden duty of the respondent to inform the potential and prospective tenderers about the orders passed by the NGT and the directions passed in the said writ petition filed by the Aurobindo Place Market Association. The contentions of the respondent justifying its actions in issuing the show cause notices impugned in the present petition and in opposing the present petition are demolished by the letter dated 23.09.2015 (Annexure-P15).

35. It is settled law that the contracts entered into by concealment, suppression and fraud, are voidable. The license agreements in respect of those parking sites where encroachments, rival/contesting claims exist are tainted as the respondent suppressed and concealed material facts from the tenderers and as such the petitioner was misled into entering into license agreements. These license agreements are, therefore, voidable at the option of the petitioner.

36. The respondent in view of the admitted position as recorded in the letter dated 23.09.2015 (Annexure-P15) is duty bound to remove the encroachments and other claims which may be in conflict with the claims

and rights of the petitioner expeditiously to ensure that the petitioner is able to use the parking sites to their full potential which would obviously serve the public interest as the parking sites are meant for public use.

37. In light of the aforesaid discussion and keeping in view the facts and circumstances of the present case, the respondent is directed to clear the encroachments and all rival/contesting claims from the parking sites where such encroachments exist within a period of three months from today. If the respondent fails to comply with the aforesaid direction and encroachments etc. are not removed, the parking contracts in respect of only those parking sites shall stand cancelled and the petitioner shall accordingly be entitled to get refund of the bank guarantee as well as the security deposit, but the respondent would be at liberty to require the petitioner to furnish fresh Bank Guarantee and Security Deposit proportionate to the parking sites where there are no encroachments or rival or contesting claims. As in view of the NGT order the petitioner is prevented from fully utilizing the parking sites, the respondent is directed to proportionately reduce the license fee in respect of such parking sites.

38. With the aforesaid directions, the petition and application stand disposed of accordingly. No order as to costs.

(VED PRAKASH VAISH)
JUDGE

DECEMBER 11th, 2015
hs