

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: January 04, 2018

Judgment delivered on: January 29, 2018

+ W.P.(C) 10588/2016

VIKRAM SHARMA

..... Petitioner

Through: Mr. H.S. Sharma, Adv. with petitioner
in person

versus

UNION OF INDIA

..... Respondent

Through: Mr. Jagjit Singh, Senior Standing
Counsel with Ms. Shipra Shukla, Adv.

CORAM:

HON'BLE MR JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner with the following prayers:

“It is therefore most humbly and respectfully prayed that this Hon’ble Court be pleased to:

- a) A writ in the nature of Certiorari or any other appropriate writ by quashing circular no. 5 of 2016 (Annexure P1) and letter dated 20.05.2016 (Annexure P2) and the letter dated 03.06.2016 (Annexure P3) be issued. The license of the petitioner, which has been terminated be ordered to be continued/restored.*
- b) Any other direction or order as deemed fit and proper for meeting the ends of justice and equity.*

c) *The costs of the petition be also awarded.”*

2. It is the case of the petitioner that an Agreement was entered between the petitioner and the respondent for the purpose of collecting, carrying, conveying and delivering parcels, luggage and goods as forwarding services on October 25, 2006. The said Agreement was effective from October 09, 2006 till March 31, 2008. On March 25, 2010, the validity of the Agreement was extended till March 31, 2011. It is the case of the petitioner that on January 22, 2014 all city booking agencies of Delhi area were directed to install Parcel Management System. Such a direction was reiterated on March 27, 2014. On March 30, 2015, the Agreement as referred above was extended for three months till June 30, 2015. On June 15, 2015, a notice of termination was given by the respondent. It is the case of the petitioner that between June 22, 2015 to April 08, 2016, various representations were made by the petitioner to different authorities for restoration of the Agreement. In the said representations, the petitioner had also referred to an order passed by this Court in W.P.(C) No. 6421/2015 filed by Northern Railway Out Agency (NOIDA). It is noted that as nothing was heard by the petitioner, the petitioner on April 18, 2016 filed a Writ Petition No. 3371/2016 before this Court. The said writ petition was disposed of vide order dated April 25, 2016 whereby this Court had directed the respondent to treat the writ petition as a representation and to consider the same within a period of four weeks. The

respondent was to afford an opportunity of hearing to the petitioner and pass a speaking order, which shall be communicated to the petitioner within one week of the passing of the order. There is no dispute that a hearing was given to the petitioner on May 27, 2016 and a final order was passed on June 03, 2016 whereby the respondent has rejected the request of the petitioner for renewal of the city booking agency. It is this order, which is under challenge in this writ petition, along with circular 5/2016 and letter dated May 20, 2016. The circular 5/2016, was issued, terminating the agreement with respect to seven out agencies including the petitioner herein and, the communication of the same to the Agencies vide letter dated May 20, 2016.

3. A counter affidavit has been filed by the respondent wherein a stand has been taken that vide letter dated January 22, 2014, a circular of Railway Board was issued regarding the installation of Parcel Management System in all city booking agencies in Delhi area. The agencies were directed to arrange for infrastructure for installation of PMS as per specifications given by CRIS. The PMS is a software module for online booking, delivery etc of parcels. A reference is also made to letter dated March 27, 2014 wherein the Railway Board had clarified to all including the petitioner that PMS installation done by CBAs in their premises will be certified by regional office of CRIS. Therefore, the petitioner was requested to complete the PMS work at his

premises immediately. It was also informed that if PMS is not installed in his CBA, action will be taken in accordance with the Rules. It is stated that three opportunities were given to the petitioner to follow the instructions. However, the petitioner did not comply with the directions regarding installation of PMS despite repeated request.

4. It is also stated that five reminders were also sent to the petitioner but the petitioner did not take any action in that regard. Thus, on June 15, 2015, the respondent issued a letter to the petitioner and to all CBAs and informed them that it has been decided not to renew their license further after expiry of the existing term upto June 30, 2015 and they were called upon to close their agency after expiry of the existing term on June 30, 2015 and their license will stand terminated. A reference is also made in the counter affidavit to the fact that the petitioner had approached this Court vide W.P.(C) 3371/2016 and the directions given by this Court. It is stated that the petitioner has been carrying out the agency business for last 10 years and is not a newcomer in the business, therefore he cannot plead any innocence on the ground that he was new to computer system. The computer system has been installed to ensure that the transactions done by the petitioner are transparent and should not cause any loss of revenue and safety hazard to the general public and also that there should also not be any overloading. It is further submitted that the

importance of the PMS was to obviate any act of manipulation. The respondent has justified the impugned order stating that the same has been passed after giving due opportunity to the petitioner. The respondent has also referred to the judgment passed by the Coordinate Bench of this Court as well as the judgment of the Allahabad High Court in support of their case.

5. It is the case of the respondent that they intend to float new tenders and the petitioner has a right to participate along with general public but it cannot claim any right to continue indefinitely. The respondent seek the dismissal of the writ petition.

6. A rejoinder has been filed by the petitioner. In the rejoinder, it is stated that any policy decision, which does not form part of the detail Contract entered between the petitioner and the respondent cannot be introduced at a later stage to the detriment of the petitioner. In other words, it is the case of the petitioner that the respondent could not have directed the petitioner for installation of the PMS. It is the case of the petitioner that the impugned order is a non speaking one and the order has been passed by a person not authorized or competent to pass the order dated June 03, 2016. The petitioner has filed additional documents being letters dated February 01, 2016 and May 25, 2016 of the DRM, Northern Railway and Manual of Indian Railway Code for Traffic (Commercial) Department, Chapter XVII thereof, which give

reference to clause 1706 relating to tenure of Contracts.

7. Mr. H.S. Sharma, learned counsel for the petitioner submitted that the order dated June 03, 2016 has been passed / issued by the Divisional Railway Manager, who is not competent to issue the same. He submitted, on one hand the petitioner vide letter dated May 19, 2016 was informed that the DRM was not competent to decide the representation. On the other hand, vide letter dated May 26, 2016 the petitioner was directed to appear before the DRM for hearing. This also shows the arbitrariness and malafide on the part of the respondent. That apart, it was his submission that the non renewal/termination of the Contract is on the ground that the petitioner has not installed PMS. According to him, the direction to install PMS could not have been issued as the same would amount to varying the terms of Agreement as executed between the parties. That apart, circular No. 5 of 2016 and letter dated May 20, 2016 have been issued without any opportunity to the petitioner. It was his submission that the notification issued by the respondent to close seven city booking agencies is a vindictive act. It is his submission that the petitioner had never refused to install PMS. He all along been seeking necessary clarification from the Authorities. In this regard, he has drawn my attention to the letters written by the petitioner. He stated, the petitioner is ready and willing to install the PMS if ordered by this Court. He pleaded

discrimination, inasmuch as the Northern Railway Out Agency, Noida was allowed to install the PMS and was granted renewal of the Agreement for a further period. He stressed on the fact that there was no complaint against the petitioner. He stated, the earlier petition has been disposed of only on the ground of non installation of PMS and it is only that ground, which needs to be seen while deciding whether the action of the respondent is justified or not.

8. On the other hand, Ms. Pinki Anand, learned Additional Solicitor General, would submit the petition is not maintainable as there is an Arbitration Clause in the Agreement between the parties and the remedy for the petitioner is to invoke the arbitration clause. On merits, she would justify the impugned circular / letters by stating that as on date there is no Contract of city booking agency/Out Agency in operation in Delhi division. In other words, it is her submission, no Agreement of the Out Agencies in the city have been renewed. It is her case that the Out Agency Agreement was executed with the petitioner in the year 2006 and the petitioner has been operating the same for the last 10 years on the basis of renewal given from time to time with the approval of the Competent Authority. She has also drawn my attention to a letter dated September 20, 2017 of the Vigilance Branch, which had undertaken a study of the working of Parcel office at New Delhi, Delhi and Hazart Nizammudin stations and detected the irregularities

and given suggestions for improving the system including appointing agencies through the process of tender. She submitted, as and when the tender is issued, the petitioner can also apply against the same. She submitted that the Agreement with the petitioner for the agency cannot be continued in perpetuity as the same would be arbitrary. In other words, the agreement has come to end by efflux of time and has not been continued further. She stated that calling for tenders would ensure fairness and transparency and every person would have equal opportunity to bid for an out agency. She relied upon the judgments of this Court in the case of *M/s. Goel and Goel and ors. v. Union of India, W.P.(C) 5751/2015* decided on September 7, 2016 and *M/s. Deepak and Co. v. Union of India and Ors. W.P.(C) 3188/2016* and connected petitions decided on September 20, 2016 in support of her contention, justifying the impugned action. Further, she submitted that the present petition needs to be dismissed as the petitioner has given up his challenge for renewal of the Agreement as the petitioner has already made a claim for damages before the District Court. That apart, she has drawn my attention to a letter dated August 18, 2017 written by the petitioner to the respondents claiming back an amount of Rs.4 lacs, which has been deposited by the petitioner vide a fixed deposit.

9. Having heard the learned counsel for the parties, the only issue, which

arises for consideration is whether the respondents were justified in issuing circular 5 of 2016, letters dated May 20, 2016 and June 03, 2016. Before I deal with the issue on merits, I intend to deal with the submission made by Ms. Anand with regard to the maintainability of the petition in view of the arbitration clause. I am of the view, the respondent having filed their statement on the dispute by way of a counter affidavit to the writ petition, is now precluded from taking the plea that there exists an arbitration agreement between the parties and the petitioner must invoke the said agreement, in view of the settled position of law in terms of the judgment of this Court in the case of ***S.D. Buildwell Pvt. Ltd. v. Rail Land Development Authority*** ***MANU/DE/1568/2015 W.P.(C) No. 3332/2012 decided on May 18, 2015***, wherein this Court in para 52 has held as under:-

“52. On the issue raised by the respondent that there was an Arbitration Clause, therefore, the petitioner should approach the Arbitration Tribunal. It is relevant to note that as per Section 8 of the Arbitration and Conciliation Act, 1966, an application should be filed before the party files its first statement on the substance of the dispute. However, the respondent had filed its counter-affidavit on 08.08.2012 whereas the application under Section 8 of the Act was filed on 07.09.2012. Therefore, since the respondent chose to file its application after filing of its first counter-affidavit, the said application is not maintainable.”

10. Further, the Supreme Court in the case of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors. Civil Appeal No. 5440/2002***

decided on April 15, 2011 MANU/SC/0533/2011 AIR 2011 SC 2507, in para

17, has held as under:-

“17. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a Defendant prior to the filing of the writ statement will be construed as ‘submission of a statement on the substance of the dispute’, if by filing such statement/application/affidavit, the Defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration. But filing of a reply by a Defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.”

Hence, this plea of Ms. Anand is rejected.

11. In so far as the plea of Mr. Sharma, that, the impugned circular and letters dated May 20, 2016 and June 3, 2016 have been issued / passed by a person who is not competent, is concerned, the plea is an after-thought. A perusal of Paras (b), (c), (d) & (p) of grounds of the writ petition shows, the petitioner concedes, that the impugned orders are the acts of the competent authority. That be so, Mr. Sharma cannot contend otherwise. Even otherwise, it is noted, the circular 5/2016 was issued by the Chief Commercial Manager, the authority competent to issue the same, as per the petitioner’s own case. The letter dated May 20, 2016 is only a communication conveying

the circular of 5/2016, by Sr. Divisional Manager. No doubt, the letter dated June 3, 2016 was issued by DRM, New Delhi, but the agreement executed between the parties also vide clause 17 (b) contemplates DRM to terminate the agreement. That apart, it is noted no such objection was taken by the petitioner during the hearing on May 27, 2016, before the DRM, as the order dated June 3, 2016, doesn't record so. Further, no prejudice is pleaded, nor proved, which requires interference with the impugned letter dated June 3, 2016. The plea is rejected.

12. Insofar as merit is concerned, there is no dispute that the initial Agreement was executed between the parties on October 25, 2006. It is also a conceded fact that the Agreement was renewed from time to time till June 30, 2015 for almost 10 years. No doubt, when the petitioner had filed a petition being W.P.(C) No. 3371/2016, the petitioner had relied upon the order passed by this Court in W.P.(C) No. 6421/2015 titled ***Kamal Kumar Baugh v. Railway Board & Ors*** and the plea of the petitioner was primarily with regard to the installation of the PMS. A perusal of the impugned order would suggest and as is clear from paras 3 and 4 that the reason for the respondents not to renew the contract is also that a Contract executed cannot be renewed after a particular period of time. A reference in that regard was made to a letter dated April 23, 2003 and also paras 1706, 1701 to 1716 of the Code

relating to period of contract / renewal / revival of the terminated contracts. I

reproduce paras 3 and 4 of the impugned order as under:-

*“3. This is also pertinent to mention that no contract should be awarded for an indefinite period. Kind attention is invited to the Para 1706 of Indian Railway code for traffic (Commercial, which mentions that **“Contract should not be awarded for an indefinite period but should be usually limited to 3 to 5 years with a clause for termination in the event of unsatisfactory service, and subject to renewal at the option of the Railway Administration”**. Moreover, as per freight circular letter point A (13) of letter No. 19-RD/CBA/Policy/Transfer dated 23 Apr 2003 **“The Contract for allotment of City Booking Agency/Out Agency should be awarded for a period of three years”** and point B (9) of letter states that **“Only those agencies should be considered for renewal of contract for a full term of three years, whose all the confidential reports are found ‘excellent’. In other cases the contract should be renewed for a shorter period for watching the improvement”**. Therefore, in view of these instructions and guidelines, it is clear that the **maximum period for a renewal of contract could be up to 3 years.***

*(4) It is pertinent to mention that instructions from Head Quarter letter No. 19-RD/CBA/Policy/OA/15 dated 01/04.2016 were given where it is mentioned that **“the representation against termination of CBA contracts in Delhi area was considered in headquarters. The technical and legal view opined by GM/Law revealed that the subject contracts of CBAs stand terminated as on date, and there is no provision in agreement, Para 2601-2647 of Commercial Manual Vol-II and Para 1701-1716 of Commercial Code for revival of the terminated contracts”**.*

13. It is not the case of the petitioner that he has been singled out. All the out agencies in Delhi city have been similarly treated inasmuch as the agreements with those out agencies have also not been renewed, i.e., they

have been terminated w.e.f July 01, 2015. The reason for not renewing the agreements is primarily because of extensive study of working of the parcel office at New Delhi, Delhi Junction and Hazrat Nizamuddin stations by the Vigilance Branch, the irregularities detected and suggestions for improving the system, which includes calling of tenders for appointment of new agencies. Moreover, it is noted that for the last 10 years, the petitioner has been operating the out agency on the strength of renewal of the agreement, which, according to this court appears to be unusual, more so, when one of the parties-the respondent is a public body, which is expected to be fair/transparent in its dealings. Further para 1706 of the India Railway Code for traffic (Commercial) stipulates, a Contract should not be awarded for an indefinite period but should be limited to 3 to 5 years with a clause for termination in the event of unsatisfactory service subject to renewal clause. Such a clause, cannot be read to mean that, the renewal should be for an indefinite period denying the benefit of out Agency to other eligible persons/concerns, creating a monopoly in favour of few like the petitioner herein. The submission of Ms. Anand that the process of tendering has been evolved to make contracts more fair and transparent against which the petitioner can also apply, if eligible, is appealing. No fault can be found with such a decision. Surely, it is not a case which violates Article 14 of the Constitution of India. I may note here the agreement with Northern Railway

Out Agency (NOIDA) has also not been renewed.

14. Ms. Anand is justified in relying upon the judgment of this Court in the case of *M/s. Goel & Goel and Ors. (supra)*, wherein the Coordinate Bench of this Court in Paras 5 and 6 has held as under:

“5. Since admittedly in the present case the contract between the parties has expired, there is no pre-existing legal right in favour of the petitioner to file a writ petition to seek renewal of the contract and that too only on the basis that the contract contains a provision for renewal. This Court is of the view that it would not be justified in issuing a direction for re-writing the W.P.(C) 5751/2015 Page 3 of 3 contract and for enforcement of a non-existing contract; non-existing in the sense that the contract between had already come to an end by efflux of time.

6. Moreover, the Supreme Court in Union of India and Others vs. M.K. Sarkar, (2010) 2 SCC 59, has held as under:-

"26. A claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same. On the other hand, where a benefit was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit. If such a request is accepted, it would amount to perpetuating the irregularity. When a person is refused a benefit to which he is not entitled, he cannot approach the court and claim that benefit on the ground that someone else has been illegally extended such benefit. If he wants, he can challenge the benefit illegally granted to others. The fact that someone who may not be entitled to the relief has been given relief illegally, is not a ground to grant relief to a person who is not entitled to the relief. (emphasis supplied)"

15. She is also justified in relying upon the judgment of this Court in the case of *M/s Deepak & Co. (supra)* wherein the coordinate Bench of this Court in Paras 10, 11 and 12, has held as under:

“10. It is settled law that where a benefit has been illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach the Court for extension of a similar illegal benefit.

11. The Supreme Court of India in Union of India vs. M.K. Sarkar; (2010) 2 SCC 59 has held that if such a request is accepted, it would amount to perpetuating the irregularity. It was further held that when a person is refused a benefit to which he is not entitled, he cannot approach the Court and claim that benefit on the ground that someone else has been illegally extended such benefit.

12. This Court is further of the view that the circulars do not confer any right of extension, as has been sought to be urged by learned counsel for the petitioners, as the contracts of the petitioners have already expired by efflux of time.”

16. That apart, the submission made by Ms. Anand that the petitioner has already filed a suit seeking damages against the respondent would also show that the petitioner has no grievance against the non renewal of the Agreement for a further period. That apart, the fact, the petitioner has, vide his letter dated August 18, 2017, sought the refund of the fixed deposit of Rs.4 lacs would also demonstrate that the petitioner is no more interested in the renewal of the Agreement. For these reasons also, this Court is of the view that the petitioner is not entitled to any relief as prayed for. The writ petition is

dismissed. No costs.

V. KAMESWAR RAO, J

JANUARY 29, 2018/ak

