IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.364 of 2019
In
Civil Writ Jurisdiction Case No.18318 of 2017

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1. Vaishali Enterprises represented through its partner Ranjeet Roy (Male) aged about 50 years, Son of Late Basant Roy, resident of village - Bidupurdi, P.S. Bidupur Bazar, District - Vaishali.
2. Kusum Devi Wife of Late Shashi Kumar Resident of Maharaja Hata, Ara, P.S.- Nawada, District- Bhojpur.
3. Shivbalak Yadav Son of Late Sanichar Yadav Resident of Village- Ashrari, Post- Bihat, P.S.- Barauni, District- Begusarai.
4. Rewati Ranjan Prasad Singh Son of Late Munishwar Prasad Singh Resident of Ramna, P.S.- Mithanpura, near Devi Temple, District- Muzaffarpur.

... ... Appellant/s

Versus

1. The Indian Railway Through Its Secretary, Ministry of Rail, Rail Bhawan, New Delhi.
2. The Railway Board, Ministry of Railway, Government of India.
3. The Indian Railway Catering and Tourism Corporation Limited (IRCTC), Eastern Zonal Office 3, Koyalaghat Street, Ground Floor, Kolkata- 700001.
4. The Regional Manager, Indian Railway Catering and Tourism Corporation Limited (IRCTC), 4th Floor, Biscomaun Bhawan, West Gandhi Maidan, Patna.
5. The Group General Manager, Indian Railway Catering and Tourism Corporation Limited (IRCTC), Eastern Zonal Office 3, Koyalaghat Street, Ground Floor, Kolkata- 700001.

... ... Respondent/s

Appearance :

For the Appellant/s	:	Mr. P.K. Shahi, Sr. Advocate
		Mr.Aditya Prakash Sahay, Advocate
For the IRCTC	:	Mr. R.K. Agrawal, Advocate
		Mr. Ravi Bharuke, Advocate
For the Railways	:	Mr. Ramadhar Shekhar, Addl. S.C.

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 30-07-2019

Heard Shri P.K. Shahi, learned Senior Counsel for the appellants, Shri Ramesh Kumar Agrawal, learned counsel for the IRCTC and Shri Ramadhar Shekhar, learned counsel for the Railways.

This appeal questions the correctness of the judgement of a learned Single Judge dated 19th February, 2019 in relation to the right of renewal being claimed by the appellants and to retain their licences with regard to vending of a Major Unit in terms of the policy of the respondents, wherein the learned Single Judge has declined to grant relief and has dismissed the writ petition on the ground that since the appellants are claiming rights with regard to the running of a major unit, therefore, the relief based on the claim of minor and special minor units is not tenable. The learned Single Judge has further on a factual indication about the categorization of the appellants held that such issues cannot be considered by the writ Court as the policy of the respondent- IRCTC was under challenge before the Supreme Court and the said challenge has failed.

Both the grounds to non-suit the appellants have been assailed and the learned counsel for the appellants contends that the findings recorded by the learned Single Judge proceeded on erroneous assumptions of fact and law and are based on a total misconstruction of the impact of the judicial pronouncements of the Apex Court. Consequently, the judgment deserves to be set aside and the reliefs prayed for by the appellants deserve to be granted.

Elaborating the submissions raised, it is contended that the new policy as enumerated in the Circular dated 15th March, 2017 proceeds on a misinterpretation of the judgment of the Apex Court in the case of **Senior Divisional Commercial, Manager, South Central Railways and others Vs. S.C.R. Caterers, Dry Fruits, Fruit Juice, Stalls Welfare Association and Another** reported in **(2016) SCC 582** and the subsequent orders that have been placed on record and, therefore, the consequential action of the issuance of a fresh tender for the operation of the refreshment room at Hajipur Junction, Muzaffarpur Junction, Khagaria Junction and Ara Junction is violative of the judgments of the Apex Court and goes to the extent of violating the fundamental rights as well as legal rights of the appellants, the relief whereof has been claimed in the writ petitions giving rise to this appeal.

The main thrust of the argument is that the Apex Court has clearly extended the benefits of the judgment in the case of **Senior Divisional Commercial, Manager, South Central Railways and others Vs. S.C.R. Caterers, Dry Fruits, Fruit Juice, Stalls Welfare Association and Another** (supra) in relation to major units as well. For this reliance is placed on the judgment of the Apex Court in the case of **M/s Sheikh Nanhey & Sons & Ors. Vs. Union of India and Ors. (Civil Appeal No. 3195 of 2016 connected with Civil Appeal No. 3196 of 2016, W.P. No. 848 of 2014, W.P. No. 207 of 2015 and W.P. No. 177 of 2015) decided on 29th of March, 2016.**

It is further submitted that the stand of the respondents as taken herein was also raised by way of a review application before the Apex Court wherein ground No. 'C' in the review petition was specifically aimed at seeking a review of the judgment dated 29.03.2016 on the basis that the earlier judgments were in relation to minor and special minor units and not in relation to major units. It was therefore prayed that the judgment dated 29th March, 2016 should be reviewed as it had proceeded on an erroneous consideration of fact as well as law both.

The said review application was dismissed on 17th

November, 2016 and, therefore, the learned counsel for the appellants contends that once this aspect has been finally dealt with by the Apex Court, the learned Single Judge while delivering the impugned judgment has committed an error in ignoring the impact of the aforesaid orders dated 29.3.2016 and 17.11.2016 as well as the subsequent order dated 30th of October, 2018 by the Apex Court in the case of **Vendors Co-operative Society Ltd. & Ors. Vs. The Union of India & Ors. (Writ Petition(C) No. 373 of 2017).** With the aid of the aforesaid orders, it is submitted that there is no dispute that the appellants are running major units and were licence holders for the same and, therefore, the question as to whether they are entitled to the benefit of the orders dated 29.3.2016 and 17.11.2016 or not is the core issue which has to be determined in this appeal.

For this, learned counsel for the Railways has taken the Court extensively through the Catering Policy of 2017 dated 27th of February, 2017 to contend that since a new policy had been introduced in 2017, the applicability of the aforesaid judgments does not arise inasmuch as the judgments were in respect of the 2010 policy and not in relation to the policy of 2017. Secondly, this policy of 2017 did not grant any such concession as is being claimed by the appellants for which the relevant clauses, including the Tenure Clause 11, the Applicability Clause 20 and the description and distinction between the Major and Minor Units in Annexure-1 of the said policy have been pressed into service.

Shri Agrawal, learned counsel for the IRCTC has therefore contended that the learned Single Judge even otherwise in his conclusion is correct inasmuch as the 2017 policy clearly governs the issue where the appellants cannot claim any such renewal or continuance of a single unit in terms of the judgments referred to hereinabove.

Shri Agrawal has further submitted that not only this, even assuming for the sake of argument though not admitting, the concession which was given by the counsel before the Apex Court and is recorded in the order dated 29th March, 2016 would not apply as a concession nor any benefit can be extracted by the appellants on the strength thereof, inasmuch as, that was a concession in relation to Minor and special Minor Units and not in relation to the policy of 2017. He, therefore, submits that even otherwise the said concession runs counter to what is contained in the policy of 2017 and, therefore, it cannot be read as a tool in aid to interpret the present cause set up by the appellants claiming a relief of retention of one major unit.

It is further pointed out that the Railways or the respondent-IRCTC had never extended any such offer to the appellants for a major unit and, therefore, in the absence of any such offer, there is no occasion for the appellants to claim any benefit arising out of the judgments in relation to the policy of 2010 which was, according to the respondents, only in respect of minor and special minor units. In sum and substance, the argument on behalf of the respondents is that the appellants are not entitled to claim any such benefit for major units on the strength of the orders of the Supreme Court dated 29th March, 2016 and 17th November, 2016 or any orders passed thereafter.

From the facts as pleaded in the writ petition as well as in the appeal, we find that the appellants were continuing as licencsees but their licences stood unrenewed by virtue of the introduction of the policies that was introduced from time to time. This gave rise to several litigations and as indicated above, the first litigation that went up to the Supreme Court arising out of the 2010 policy was in relation to minor and special minor units where ultimately, the Supreme Court in paragraph Nos. 32 to 34 ruled as under:-

"**32.** Keeping in view the evolving concept of social justice, we allow the members of the respondents who are the licensees to continue their petty business, especially in the absence of employment potentiality in the country on account of non-governance and non-implementation of the constitutional philosophy of an egalitarian society, which provides the opportunity to all individuals to lead a life of dignity. The right to life with dignity has been interpreted to be a part of right to life by this Court in *Francis Coralie Mullin* v. *UT of Delhi* [*Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212] , as under: (SCC pp. 618-19, para 8)

> "*8.* … We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum

expression of the human-self."

33. Therefore, we have to hold that the provisions of the Catering Policy, 2010 are applicable to the respondents concerned. The action of the Railways in not granting renewals of the licences to the members of the respondents is arbitrary, unreasonable, unfair and discriminatory, and the same cannot be allowed to sustain in law.

34. For the reasons stated supra, this Court cannot interfere with the impugned judgment and order of the High Court. The civil appeals are dismissed. The order dated 11-04-2014 granting stay of the impugned order shall stand vacated. We, however, make it clear that only those licensees may be eligible for renewal of their licences who can declare on affidavit that they do not have the licence of more than one shop or kiosk in their name or benami licence at the railway stations with periodical reasonable increase of licence fee. All pending applications are disposed of."

This judgement was rendered on 29th of January, 2016. It appears that a large number of vending units seeking similar benefits filed writ petitions directly in the Apex Court and one of them is Writ Petition No. 177 of 2015 which on record appears to be a writ petition filed by a vendor holding a licence for a major unit. This writ petition was heard along with the other cases before the Apex Court where the same was disposed of after granting leave on 29th March, 2016 by the following order:-

> " 1. Leave granted.
>
> 2. The issue raised in these cases pertains to the renewal of licence of the appellants, by the Railways.
>
> 3. It is fairly submitted by the learned counsel on both sides that the issue in principle, is covered by the decision of this Court in Civil Appeal Nos. 618-620 of 2016 decided on 29th January, 2016. Therefore, these appeals are allowed directing the Railways to take the required action in the light of the said judgment, within six weeks.
>
> 4. The impugned judgments are set aside and appeals are allowed as above.
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> W.P. Nos. 848/2014, 207/2015 & 177/2015
>
> The issue on renewal of licence in principle, is covered by the decision of this Court in Civil Appeal Nos. 618-620 of 2016 decided on 29th January, 2016. Therefore, these writ petitions are disposed of with direction to the Railways to take the required further steps in the light of the judgment dated 29th January, 2016, within six weeks."

A perusal of the said order demonstrates that learned counsel for both the sides had conceded on the issue in principle and further that the said matters were covered by the decision dated 29th of January, 2016.

It is here that Shri Agrawal has raised a debate about the nature of the concession contending that such a concession would not give any benefit to the appellants as the same would not bind the appellants or give any benefit to them.

We may first deal with this objection raised by Shri Agrawal. The language used in the said judgment is qualified by the word 'fairly' and which therefore raises a presumption that the learned counsel who had offered the concession were fully aware of the text and context of the earlier judgment dated 29th of January, 2016 and the principles laid down therein which are contained in paragraph Nos. 32 to 34 of the judgment extracted hereinabvoe. The principle on which the earlier case had been disposed off clearly delineates that the licencees were found entitled to retain one unit keeping in view the constitutional philosophy on the basis whereof such a judgment was delivered. This, therefore, was a concession not only on principle, but also on facts and was not a concession in law. The nature of the concession, therefore, being that on the facts of the case was about legal rights being negotiated by the parties on principle as well as on facts.

The Apex Court in the case of **B.S.N.L. and others Vs. Subash Chandra Kanchan and another** reported in **(2006) 8 SCC 279**, paragraph No. 20 and 21 are illustrative on the issue which are extracted hereinunder :-

> "**20.** Furthermore, in terms of Order 3 Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the appellant in its written statement before the High Court the learned advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted.
>
> **21.** In *Ramdev Food Products (P) Ltd.* v. *Arvindbhai Rambhai Patel* [(2006) 8 SCC 726 : (2006) 8 Scale 631] this Court observed: (SCC

paras 73-76)

> "*73*. The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant Company, could he claim the said right indirectly? The answer to the said question must be rendered in the negative. It is well settled that what cannot be done directly cannot be done indirectly.
>
> *74*. The term 'waiver' has been described in the following words:
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> > '*1471*. Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. ... A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. ...

It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.' (See *Halsbury's Laws of England*, 4th Edn., Vol. 16, para 1471.)

75. Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel. (See *Halsbury's Laws of England*, 4th Edn., Vol. 45, para 1269.)

76. In *Indu Shekhar Singh* v. *State of U.P.* [(2006) 8 SCC 129 : (2006) 5 Scale 107] this Court held: (SCC p. 142, para 26)

'*26*. They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal.'

Apart from this, another decision to the same effect, though not dealing very elaborately, reiterates the same principles in the case of **Vimaleshwar Nagappa Shet v. Noor Ahmed Shariff,** reported in **(2011) 12 SCC 658.** Paragraph No. 13 and 14 that are extracted hereinunder:-

> **13.** The statement made by the counsel before the High Court, as recorded in the impugned judgment and order, cannot be challenged before this Court. (Vide *State of Maharashtra* v. *Ramdas Shrinivas Nayak* [(1982) 2 SCC 463 : 1982 SCC (Cri) 478] , *Shankar K. Mandal* v. *State of Bihar* [(2003) 9 SCC 519 : 2003 SCC (L&S) 1145] , *Roop Kumar* v. *Mohan Thedani* [(2003) 6 SCC 595] and *Guruvayoor Devaswom Managing Committee* v. *C.K. Rajan* [(2003) 7 SCC 546] .)
>
> **14.** It is also clear that the High Court has recorded in the impugned judgment dated 3-3-2009 that the counsel agreed with instructions from the plaintiff and reiterated this fact in its order dated 28-8-2009 in Miscellaneous Civil Application No. 13474 of 2009 in the abovementioned RFA while rejecting the plea of the counsel for the appellant herein that he did not give consent that he had no instructions from his clients A concession made by a counsel on a question of fact is binding on the client, but if it is on a question of law, it is not binding. (Vide *Nedunuri Kameswaramma* v. *Sampati Subba Rao*

> [AIR 1963 SC 884 : (1963) 2 SCR 208], AIR p. 890 : SCR p. 225 and *B.S. Bajwa* v. *State of Punjab* [(1998) 2 SCC 523 : 1998 SCC (L&S) 611] , SCC pp. 525-26.)"

Applying the principles as enunciated by the Apex Court on the issue of concession, we are of the clear opinion that the concession given before the Supreme Court was in relation to the issues raised and not a concession on law. The same cannot be permitted to be now withdrawn on any legal submission or otherwise. The said concession was not a concession in law so as to enable the respondents to seek any protection on that count.

We are further fortified in our view in that respect on account of the own conduct of the respondents, inasmuch as, the railways filed a review petition so as to wriggle out of the said concession and exclude major units from seeking any benefit of the said judgment. Ground No. 'C' as taken in the said review application is extracted hereinunder:-

> "Because this Hon'ble Court has not appreciated that the judgement dated 29.01.2016 in Civil Appeal Nos. 618-620 of 2016, only Minor units were involved while in the present WP No.177 of 2015 and Civil Appeal No.3195 of 2016, CA No.3196 of 2016, WP Nos. 848 of 2014 & WP

No.207 of 2015 both Minor and Major units are involved. As per paragraph 16.1.1 of the Catering Policy, 2010, tenure of all Major units is fixed as 5 years, without any right of renewal. Therefore, the present matter could not be decided only on the basis of the principles laid down in Civil Appeal Nos. 618-620 of 2016, as the same principles would not be applicable herein."

This review application categorically raises the very same issue that has been advanced by Shri Agrawal before us that the judgment dated 29th March, 2016 does not apply for major units. The review application was dismissed by a speaking order by the Apex Court on 17th November, 2016 which is extracted hereinunder:-

" Delay condoned.

We have perused the Review Petitions and record of the Writ Petitions and are convinced that the order of which review has been sought does not suffer from any error apparent warranting its reconsideration.

The Review Petitions are, accordingly, dismissed."

It is, therefore, evident that this was a clear issue raised and decided on the asking of the respondents holding that the judgement dated 29th March, 2016 was very much applicable in the case of major units and who were entitled to the same benefits on principles as the minor and special minor units that was extended in the earlier case by the Apex Court. The binding effect of this judgement, therefore, is clearly on the respondents as they cannot now take a different stand in order to wriggle out of the acceptance of the principles and its applicability to major units.

We may further put on record that the retention of single unit in the judgment referred to hereinabove was canvased once again in Writ Petition No. 373 of 2017 after the introduction of the new policy in 2017. The Apex Court again interfered and passed orders of status quo and then finally on 30th October, 2018 allowed the writ petition clearly holding that licencees who have been doing business on the railway platforms are not merely individual persons, but are co-operative societies, partnership firms and HUF, each of these associations of persons have been holding more than one licence. It was ruled therein that the earlier judgment had not considered the case of associations or co-operative societies or partnership firms which were holding more than one licence and accordingly the Apex Court observed that we are constrained to direct that the number of existing licences in addition to one held by the co-operative societies, partnership firms and H.U.F. shall be allowed to be renewed as before in accordance with the existing policy.

At this juncture, we may further now come to the terms and conditions of the 2017 policy which Shri Agrawal contends would not affect the claim of the appellants or give any benefit to them. In this regard, it is relevant to point out that the policy dated 27th February, 2017 defines tenure as follows in Clause 11.1 and 11.2:-

> "11.1 Tenure of all major units being handed over to IRCTC will be governed as per Catering Policy 2010 till the expiry of the contracts. IRCTC shall further manage these units as per the provisions of this policy.
>
> 11.2 Tenure of Food Plaza shall be for a period of 9 years. Tenure of all other catering units (Major Units & Minor Units) will be for a period of 5 years only. There will be no further extension/renewal, except for units specifically referred to in para 3.8.1.

A perusal of the said clause would indicate that the tenure prescribed was the same as in the earlier policy of 2010 i.e., for a period of five years in respect of major unit and minor units. At the same time, the said clause also prescribes that all major units that are being handed over to the IRCTC would be governed as per the Catering Policy of 2010. There is, therefore, a thread of continuity already contained in the Tenure Clause which indicates that the renewal of a licence would be on the same principles as the policy of 2010.

Consequently, it is this 2010 policy which was under consideration before the Supreme Court where it has been interpreted and ruled extending the benefit of retention of one unit and, therefore, in our opinion, the said benefit would continue to be available to all such licence holders, even after the promulgation of the 2017 policy. The 2017 policy, therefore, does not prohibit the extension of any such benefit and has to be interpreted on the same terms as held by the Apex Court in the orders referred to hereinabove. We see no valid reason or logic to take a different view in the matter and interpret the policy so as to arrive at a contrary conclusion.

The applicability of the new policy has been indicated in Clause 20.1 and 20.2. The same is extracted hereinuder:-

> "20.1 The revised catering policy will be applicable with immediate effect i.e. from the date of issue. This policy supersedes all prior policy circulars issued from time to time unless

specifically referred to in this policy document.

20.2 **Tenders that have been finalized and LoA issued prior to the date of notification of this policy, shall be allowed to continue as per policy guidelines prevailing at that time.** Zonal Railways will cancel all such tenders and return the earnest money to the tenderers in cases, where LoA has not been issued before issuance of this circular."

A perusal of the Clause 20.2 leaves no room for doubt that the tenders that had been finalized and LoA issued prior to the date of policy shall be allowed to continue as per policy guidelines prevailing at that time. This clearly also indicates the continuance of the earlier policy 2010 in which the appellants were governed and which has been interpreted by the Apex Court to extend benefits to major units as well as held hereinabove. The right of retention accrued to the appellants as observed above.

The definition of major, minor units as contained in the said policy, in our opinion, does not create any distinction when once we have found that the benefit of continuance to the major units would be governed by the judgment of the Apex Court as extracted hereinabove.

The aforesaid relevant aspects do not find any consideration in the entire judgment of the learned Single Judge. This, therefore, impels us to interfere in the matter and we accordingly, set aside the impugned judgment dated 19th of February, 2019 and allow the writ petition as well as this appeal with a direction to the respondents to extend the benefits to the appellants in terms of the judgment and the directions given by the Supreme Court in the judgement dated 29th March, 2016 and 17th November, 2016, subject to completion of other formalities.

The appeal stands allowed accordingly.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

Saif/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	01.08.2019
Transmission Date	N.A.