

\$~A-45

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

% ***Date of decision:* 23.09.2019**

+ **W.P.(C) 11548/2017**

M/S BRANDAVAN FOOD PRODUCTS AND ANR..... Petitioner

Through Mr.Sandeep Sethi, Sr. Adv. with  
Mr.Manish Bishnoi, Mr.Haridya  
Iyengar and Mr.Umang Raj, Advs.

versus

UNION OF INDIA AND ORS.

..... Respondent

Through: Mr. Jagjit Singh, Sr. SC for Railways/  
R-1 and R-2  
Mr.Nikhil Majithia, Adv. for IRCTC.

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.(ORAL)**

1. This Writ Petition is filed under Article 226 of the Constitution of India seeking the following reliefs:-

“A. Issue an appropriate writ, order or directions quashing the impugned circular bearing Commercial Circular No. 67 of 2013 dated 23-10-2013 and Commercial Circular No. 32 of 2014 dated 6-08-2014 issued by the Respondents; and

B. Issue an appropriate writ, order or direction commanding the Respondents to refund an amount of Rs. 7,82,49,945.00/- incurred by the Petitioner for providing regular meal at the price of combo meal from 17.10.2013 to 30.11.2017 along with 18% interest from the date when the amount became due and payable; and / or

C. Issue a writ, rule, order or direction in the nature of Mandamus directing the Respondents to refund an amount of Rs. 1,80,57,132.42 along with 18% interest from the date

when the amount became due and payable incurred by the Petitioner for providing welcome drink from 01.08.2014 to 30.11.2017.”

2. The case of the petitioner is that the respondent floated a tender for “Provision of Catering Services on Train No.12435/36 Dibrugarh Rajdhani (Weekly) Train and 12435/36 Dibrugarh Rajdhani (Bi-Weekly)”. The apportionment charges were provided with the tender documents wherein it was clearly mentioned the types of meals to be supplied and the prices for the same were also specified. The successful bidder was to be reimbursed for all the meals and articles which were to be catered to the passengers. The petitioner submitted his bid.

3. In the meantime, before opening of the bid the respondent issued a Commercial Circular dated 9.10.2013 whereby the menu and tariff of catering services for Rajdhani/Duronto Express was revised. Respondent No.1 also introduced the concept of Combo Meal in place of regular second meal of the day in these trains. The combo meals contained much less quantity of food items as compared to a regular meal. The bid of the petitioner was accepted by the respondents and letter of award dated 2.12.2013 was issued to the petitioner. A Master License Agreement dated 24.04.2014 was entered into between the petitioner and respondent for a period of five years from 8.12.2013 to 7.12.2018. The same was renewable for another period of five years. It is an admitted fact that the contract contained an arbitration clause. It is pleaded that as the petitioner is seeking quashing of impugned circulars on the ground of them being unconstitutional and *de hors* the contract between the parties, the remedy of arbitration is neither the appropriate nor the right remedy.

4. Essentially, the grievance of the petitioner is that by circular dated 9.10.2013 the respondents had introduced the concept of combo meal which was introduced in place of regular second meal of the day where more than one meal services are provided to the passenger. The petitioners were to be reimbursed a sum of Rs.129.50 inclusive of service tax for a dinner whereas for a combo meal they were to be reimbursed a sum of Rs.66.50.

On 23.10.2013 the impugned commercial circular was issued which stated that in place of the combo meal the regular meal would stand restored, but at no extra charge. Subsequently another commercial circular was issued on 6.8.2014 which stated that regular meal would be served in place of the combo meal but the tariff applicable would be for the combo meal. Similarly, a welcome drink was to be served to all passengers of AC Classes on commencement of the journey. It is stated that no charges were payable for the welcome drink. Hence, the grievance of the petitioner is that the petitioner is being made to serve a regular meal and a welcome drink without being paid in full for the same. Reliance is placed on the tender document which contains “apportionment charges” where it is stated that for a welcome drink a price of Rs.13/19.50 is clearly stated. Similarly, charges for meals are also clearly stated. It is stated that the Indian Railways Mobile Caterers Association on behalf of licensees had made a representation on 22.6.2015 regarding the hardships being faced by the licensees. However, no action has been taken by the respondents. Subsequent reminders were also sent. Hence, the present writ petition.

5. Respondent No.4/IRCTC who is defending the petition on behalf of the respondents has filed a short reply. It has been pleaded in the said reply that the present petition is highly belated and suffers from the vice of delay

and latches as the Writ Petition is filed after a period of 4 years. It is further stated that there is no explanation for the enormous delay in filing of the present Writ Petition. It is further stated that in case a Civil Suit was to be filed by the petitioner the same would be barred by limitation and hence the circuitous route of filing a Writ Petition has been adopted by the petitioner.

It is further stated that the petitioners have sought recovery of amount which is not permissible by means of a Writ Petition. It is urged that the provisions of Article 226 of the Constitution of India cannot be invoked for the purpose of initiating recovery proceedings against such entities. Reliance is placed on the judgment of the Supreme Court in the case of ***Joshi Technologies International Inc. vs. Union of India and Others, (2015) 7 SCC 728.***

It is further stated that in the said License Agreement dated 24.4.2014 Article 20 provides for an arbitration clause. Hence, it is stated that the present proceedings under Article 226 do not lie.

6. I have heard learned counsel for the parties. Learned counsel for the petitioner has reiterated his above contentions, namely, that the respondent cannot force the petitioner to serve a meal/welcome drink without making payment for the same. He relies upon the judgment of the Supreme Court in the case of ***Harbanslal Sahnia and Anr. vs. Indian Oil Corporation Ltd. and Others, (2003)2 SCC 107*** to submit that the Supreme Court has held that existence of an arbitration clause does not exclude writ jurisdiction and in an appropriate case the High Court can still exercise writ jurisdiction in stated contingencies. He has relied upon other judgments of the Supreme Court to argue that there is no bar in filing a Writ Petition even if an alternative remedy of approaching the Civil Court in view of the arbitration

clause is available.

7. I may note that the letter of Award was given to the petitioner on 2.12.2013. The parties entered into the Master License Agreement on 24.4.2014. The first impugned circular dated 23.10.2013 which has been challenged by the petitioner was issued prior to the award of the tender to the petitioner. The petitioner have without protest signed the agreement with the respondent knowing about the circular dated 02.12.2013.

8. Reference may also be had to some of the relevant clauses of the Master License Agreement dated 24.4.2014. Clause 8.1 and 8.3 read as follows:-

“8.1. Railway reserve the rights to change catering tariff and menu for the Train at any time after the award of the License. In the event of any such change by the Railway, the Licensee shall maintain the same quality and hygiene standards for preparation, supply and service of food/meals to passengers on the Train as it were prior to such change.

8.2....

8.3 In the case of any revision in catering tariff, the Licensee shall be allowed to sell food/meals at the revised rates to the passengers. In this event, the license fee payable to Railway shall be increase on pro-rata basis/reassessment of the Sales or both as the case may be.”

9. Clearly, in terms of the above clause the respondents can change the catering tariff and menu any time after award of the license. Further, in case of revision in the catering tariff, license fee payable to the railways was to be increased on pro rata basis/assessment of the sales or both. In the present case prior to execution of the Master License Agreement via a commercial circular dated 23.10.2013 it was directed that in place of the combo meal the caterer shall provide a regular meal. It was also directed that the said change

would be done without any increase of charges. Hence, even prior to issue of the letter of Award or execution of Master License Agreement to the petitioner the commercial circular clearly stated that without any increase in the rates instead of a combo meal the petitioner would have to supply a regular meal. It is the case of the petitioner that for a full meal in 2AC the petitioner was to be paid a sum of Rs.112/- under the revised rates dated 9.10.2013. However, for a combo meal the petitioner was to be paid Rs.66.50. Hence, the grievance is that for Rs.66.50 the petitioner was obliged to supply one of the two meals instead of the sanctioned rate of Rs.112/-. A free drink was also to be served as stated.

10. In my opinion, in view of the clause 8.1 of the aforesaid Master Service Agreement the respondent was well within its right to change the catering tariff and the menu of the train. The said instructions issued by the impugned circular dated 9.10.2013 cannot be faulted with or challenged as stated. At best, the petitioner may have some right to claim that as a consequence of reduction in rates appropriate changes in the license fees as stated in clause 8.3 of the said agreement would have to be considered by the respondent.

11. However, I am not inclined to pass any consequential directions in this regard keeping in view the following aspects:-

As noted above, on merit itself in my opinion under Clause 8.1 of the License Agreement, the respondent has the right to change the catering tariff and menu for the train at any time. The change so affected hence was within the powers of the respondent.

Secondly, I cannot but help noticing that the impugned circular was issued on 09.10.2013. The letter of award in favour of the petitioner was

issued on 02.12.2013. The Master License Agreement between the parties was entered into on 24.04.2014. Hence, the petitioner has executed the agreement knowing well about the impugned circular dated 23.10.2013 and its consequences.

Further the petitioner continued to operate on the tariff and menu as stipulated in the circular dated 23.10.2013 without any challenge. It is true that some representations were made. Now in 2017 i.e. roughly four years after the impugned circular was issued, the petitioner has chosen to file the present writ petition. The action of the petitioner is clearly hit by delay and laches.

12. Reference in this context may be had to the judgment of the Supreme Court in the case of *State of MP vs. Nand Lal Jaiswal, (1986) 4 SCC 566* where the Supreme Court held as follows:-

“24. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important

factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction. We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. We may only mention in the passing two decisions of this Court one in *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489 : AIR 1979 SC 1628 : (1979) 3 SCR 1014] and the other in *Ashok Kumar Mishra v. Collector* [(1980) 1 SCC 180 : AIR 1980 SC 112 : (1980) 1 SCR 491] . We may point out that in *R.D. Shetty case*, even though the State action was held to be unconstitutional as being violative of Article 14 of the Constitution, this Court refused to grant relief to the petitioner on the ground that the writ petition had been filed by the petitioner more than five months after the acceptance of the tender of the fourth respondent and during that period, the fourth respondent had incurred considerable expenditure, aggregating to about Rs 1.25 lakhs, in making arrangements for putting up the restaurant and the snack bar. Of course, this rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But, such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the court; ex hypothesi every discretion must be exercised fairly and justly so as to promote justice and not to defeat it.”

13. The other reason why I do not wish to pass any further consequential appropriate remedy qua the petitioner was that the petitioner ought to have taken steps by initiating arbitration proceedings. In this context reference

may be had to the judgment of the Supreme Court in the case of ***Joshi Technologies International Inc. Vs. Union OF India and Others (supra):-***

“69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.”

14. In ***Harbanslal Sahnia & Anr. vs. Indian Oil Corpn. & Ors. (2003) 2 SCC 107***, the Supreme Court held as follows:-

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1].) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants

should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

15. The case of the petitioner is that the present writ petition throws up constitutional issues as the action of the respondent is arbitrary and illegal and also contrary to Article 19(1)(g) of the Constitution of India.

16. In my opinion, the plea is misplaced. What the petitioner is claiming is purely a money claim arising out of a contractual obligation. There are no issues of public law character in the issues raised in the present case. It cannot be said that this is a case where there is a breach of fundamental right or principle of natural justice. It also cannot be said that the proceedings were wholly without jurisdiction. Further there are disputed questions which arise for consideration in the present case.

17. It is for the petitioner to take up the issues before an appropriate forum. Liberty is granted to the petitioner to take steps for appointment of an arbitrator to look into the grievance of the petitioner. In case such arbitration proceedings are initiated, the learned arbitrator may adjudicate the disputes raised by the petitioner uninfluenced by any observations made by this court.

18. The petition stands disposed of. Pending application, if any, also stands disposed of.

**JAYANT NATH, J**

**SEPTEMBER 23, 2019/n**  
corrected & released on 28.12.2019