IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.05.2022

PRONOUNCED ON : 17.05.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.NOS.881, 888 & 891 OF 2022 AND
W.M.P.NOS.968, 971, 975, 976, 977, & 979 OF 2022

Rishi Ad Promoters,
Rep. By its Founder,
Kamaludeen Azad,
S/o.A.A.H.Azad,
Office at No.189/1, Abinaya Complex,
Aladi Road Curved, Kanmani Nagar,
Virudhachalam - 606 001.

Now having office at
No.123/88, Mount Road,
Chennai - 600 002.

... Petitioner
in all writ petitions

Vs.

The Managing Director,
Metropolitan Transport Corporation Chennai Ltd.,
Pallavan House, Anna Salai,
Chennai - 600 002.

... Respondent
in all writ petitions

Prayer in W.P.No.881 of 2022:

Writ petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent in Letter No.04/13004/Advt.Rev./MTC/2021 dated 05.01.2022 and quash the same and direct the respondent to award the license for display of advertisement on 630 buses as per the agreement dated 26.02.2021.

Prayer in W.P.No.888 of 2022:

Writ petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent in Letter No.03/13003/Advt.Rev./MTC/2021 dated 05.01.2022 and quash the same and direct the respondent to award the license for display of advertisement on 500 buses as per the agreement dated 26.02.2021.

Prayer in W.P.No.891 of 2022:

Writ petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent in Letter No.02/13002/Advt.Rev./MTC/2021 dated 05.01.2022 and quash the same and direct the respondent to award the license for display of advertisement on 400 buses as per the agreement dated 26.02.2021.

(in all W.Ps.)

For Petitioner : Mr.P.Chandrasekar

For Respondent : Ms.C.Sangamithirai
Special Government Pleader.

COMMON ORDER

The writ petitioner is engaged in the business of promotion of advertisements. It is a MSME firm. The respondent Corporation invited tenders for award of licenses to display advertisements on the buses run by them. The number of buses are 1530. They were split into three (500+630+400). The writ petitioner emerged as the successful tenderer. Three tender agreements were entered into with the writ petitioner. The license period was to be valid for 11 months starting from 26.02.2021 to 25.01.2022. This was described in the tender agreement itself as the first spell. The contract between the parties contemplated renewal for two subsequent spells of 11 months each subject to satisfactory performance by the licensee during the previous license period and prompt payment of licence fee and other charges. Due to pandemic situation, the operation of the buses was affected and the petitioner could not enjoy the fruits of licence fully. Yet, they were called upon to pay the monthly licence fee. The petitioner submitted representation dated 09.06.2021 to the respondent seeking the following reliefs:-

(a) Full waiver of license fee during the full lockdown period.

(b) Payment of license fee only for the utilized buses during the partial lockdown periods.

(c) Grant of 30 days grace period.

The petitioner sent a reminder on 16.06.2021 reiterating their request. Since there was no response, the petitioner filed W.P.No.13329 of 2021. By order dated 25.06.2021, it was disposed of and the respondent was directed to consider the petitioner's request. The respondent vide communication dated 16.07.2021 informed the petitioner that his request could not be considered and the petitioner was directed to remit a sum of Rs.69,87,960/- on or before 22.07.2021. It was made clear that in the event of failure on the petitioner's part, the tender would be cancelled. Questioning the same, the petitioner filed W.P.Nos.15378 and 16633 of 2021. The Writ petitions were disposed of on 01.10.2021 in the following terms:-

> “9. In the given factual matrix, this Court, having regard to the circumstances under which the petitioner is due to pay the licence fees ie., pandemic situation on account of covid-19 and also taking note of the fact that the petitioner has already paid Rs.1.7 crores by way of security deposit, which is lying with the respondent and other Transport Corporations granted some concession to the similarly placed companies, directs the respondent to consider the claim of the petitioner seeking waiver/reduction of the licence fees during the lockdown period and pass appropriate orders, within a period four weeks from the date of receipt of a copy of this order.”

Pursuant to the aforesaid direction, the respondent passed the order dated 17.11.2021 accepting the request for waiver of the licence fee for the full lock down period from 10.05.2021 to 20.06.2021 (42 days) and called upon the petitioner to pay a sum of Rs.2,49,68,376/- on or before 24.11.2021. Since the demand was not fulfilled by the petitioner, the impugned communication dated 05.01.2022 was issued terminating the agreement dated 26.2.2021. The petitioner was also informed that the security deposit, EMD etc., remitted by the petitioner stood adjusted against the pending dues. Challenging the same, these writ petitions came to be filed.

2. The respondent Corporation has also issued a fresh tender notification. The petitioner wants this Court to quash all these adverse communications and notifications and direct the respondent to issue license for the second spell also.

3. The respondent Corporation strongly opposed the writ prayers. A common counter affidavit has also been filed. According to the respondent, the writ petitions are not maintainable for more than one reason. The primary contention of the learned Standing counsel is that pursuant to the direction

given on the earlier occasions by this Court, the case of the petitioner was duly considered and suitable relief was also given. It is not open to the Court to enter into micro details and re-write the terms of the contract. The petitioner with open eyes entered into an agreement with the Corporation. He had undertaken to remit the licence fees. Admittedly, the petitioner did not remit the licence fees as per the terms of the agreement. Therefore, he is not entitled to any renewal. The learned Standing counsel submitted that the petitioner has been successively vexing the Corporation by filing writ petitions before this Court. The agreement had already expired. Therefore nothing survives for further adjudication. On account of the conduct of the petitioner, the respondent had suffered substantial loss of revenue. The learned Standing counsel strongly pressed for dismissal of the writ petitions.

4. I carefully considered the rival contentions and went through the materials on record.

5. Though there is an arbitration clause in the tender agreements, these writ petitions cannot be thrown out on that ground. No objection as to maintainability was raised on that score. That apart, this is not the first time the petitioner is knocking the doors of this Court. Pursuant to the direction given on the earlier occasion, some relief was given to the petitioner. Therefore, the existence of the arbitral remedy cannot be cited as a reason for non-suiting the petitioner. More than anything else, the respondent Corporation is a State instrumentality and therefore, its actions ought to be just, fair and reasonable. Even the commercial activities of the respondent are not exempt from the aforesaid mandate.

6. A three-judges Bench of the Hon'ble Supreme Court of India in the decision reported in (2020) 6 SCC 438 (SBI V. Radhey Shyam Pandey) applied the principles of fairness and reasonableness in the field of contract. It was held that the agreement is not always void in its entirety for it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. Though this Judgment was rendered in a case arising out of a service dispute, the principles enunciated therein can very well be invoked in the present case. This is all the more so when one party to the contract is in a dominant position.

7. Following the earlier decisions of the Hon'ble Supreme Court reported in (2004) 3 SCC 214 (Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and another) and (2007) 6 SCC 81 (Bharat Petroleum Corporation Limited Vs. Maddula

Ratnavalli), I held that Article 14 of the Constitution of India will apply even in the case of licensee-licensor relationship and that the conduct of the authority can be examined under the scanner of the said provision. This approach was upheld by the Hon'ble Division Bench in W.A.(MD)No.428 of 2021 dated 22.03.2022.

8. I can take judicial notice of the fact that pandemic situation can be taken as “force majeure” event. Even if the agreement between the parties did not contain an explicit “force majeure” clause, it can be taken as implied term. Section 51 of the Indian Contract Act, 1872 states that when a contract consists of the reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promise is ready and willing to perform his reciprocal promise. As per Section 54 of the Act, performance of the reciprocal promise cannot be claimed till the other promise has been performed. In this case, the writ petitioner was obliged to pay a certain amount as license fee for being permitted to display the advertisement boards on the buses run by the respondent Corporation. This obligation could have been enforced in toto only if the petitioner had been able to display the advertisement board on all the 1530 buses and the buses were also fully operational. But that was admittedly not the case. The Corporation which could not run all the buses mentioned in the three agreements as per the usual timings cannot expect the petitioner alone to pay the license fee in full.

9. The fact remains that the entire Nation including the State of Tamil Nadu was under lock down and severe restrictions on movement and transportation were in place. Even according to the respondents, for 42 days, there was total lock down. In fact, this figure is patently incorrect. The period of total lock down was much longer. That apart, there was also partial lock down. Sundays witnessed total lock down. The movement of the buses was also severely restricted. Therefore, the respondent was obliged to re-visit the quantum of license fee payable by the petitioner. When the petitioner prayed for waiver atleast for the total lock down period, the stand of the respondent was in the negative. Only following the intervention of this Court, there was waiver for the period of 42 days alone. In fact, the order of this Court, as already pointed out, was not only for considering the case for waiver for the total lock down period but also for reduction of the license fee for the partial lock down period.

10. As already pointed out, the petitioner made a three fold requests. The request made by the petitioner was not at all properly considered. When this Court directed the respondent to consider the petitioner's request and pass appropriate orders,

the respondent must have risen to the occasion and displayed due application of mind. The respondent must have taken into account all the relevant factors. In Paragraph No.9 of the order dated 01.10.2021, this Court had indicated that the other transport corporations had granted concession to the similarly placed companies. The other transport Corporations are also State instrumentalities coming under the Government of Tamil Nadu. The respondent in their order ought to have indicated the nature of concession shown by the other Corporations. If the respondent wanted to make departure, it should have indicated reasons for doing so. The impugned communications of the respondent are rather mechanical. It does not contain the relevant details. There is nothing on record to show that all the relevant aspects were taken into account.

11. I am more than satisfied that the impugned communications of the respondent do not reflect the ground reality. They are also patently unfair. The learned counsel for the petitioner stated that they are ready with the demand draft so that they can make substantial payment. Since normalcy has returned, the petitioner will have to necessarily abide by the terms of the agreement originally entered into as regards the second spell. The petitioner is entitled to parity of treatment which other Corporations had extended to similarly placed individuals. Since in this case such a treatment was not accorded to the petitioner, I hold that the mandate of equality enshrined in Article 14 has been violated.

12. In this view of the matter, the impugned communications are quashed. The Writ Petitions are allowed. The respondent is directed to issue license to the petitioner for the second spell as per the terms under the agreements dated 26.02.2021. As regards the liability of the petitioner to make payment for the first spell, the issue shall be revisited. The petitioner shall be afforded an opportunity of personal hearing before final orders are passed. A fresh order shall be passed on merits and in accordance with law within a period of four weeks from the date of receipt of a copy of this order. The adjustment of the security deposit, EMD, etc., remitted by the petitioner towards his dues will be subject to and abide by the said order to be passed by the respondent. No cost. Consequently, connected miscellaneous petitions are closed.

Sd/-
Vacation Officer

//True Copy//

rmi/pmu Sub Assistant Registrar

To:

The Managing Director,
Metropolitan Transport Corporation Chennai Ltd.,
Pallavan House, Anna Salai,
Chennai - 600 002.

+3ccs to Ms.C.Sangamithirai, Advocate, S.R.No.31617, 31618, 31619

W.P.Nos.881, 888 & 891 of 2022

PA(CO)
PM/27/05/2022