

\$~11 to 24

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 22nd February, 2021
+ **W.P.(C) 11219/2020 & CM APPLs. 35003-04/2020**
KAKE FINVEST PVT. LTD. Petitioner

versus
DELHI METRO RAIL CORPORATION LTD. Respondent

12 to 24

+ **W.P.(C) 11220/2020 & CM APPLs.35005-06/2020**
+ **W.P.(C) 11221/2020 & CM APPLs.35007-08/2020**
+ **W.P.(C) 11222/2020 & CM APPLs.35009-10/2020**
+ **W.P.(C) 11224/2020 & CM APPLs.35013-14/2020**
+ **W.P.(C) 11225/2020 & CM APPLs.35015-16/2020**
+ **W.P.(C) 11227/2020 & CM APPLs.35020-21/2020**
+ **W.P.(C) 11228/2020 & CM APPLs.35022-23/2020**
+ **W.P.(C) 11229/2020 & CM APPLs.35024-25/2020**
+ **W.P.(C) 24/2021 & CM APPLs.76-77/2021**
+ **W.P.(C) 28/2021 & CM APPLs.84-85/2021**
+ **W.P.(C) 29/2021 & CM APPLs.86-87/2021**
+ **W.P.(C) 30/2021 & CM APPLs.88-89/2021**
+ **W.P.(C) 31/2021 & CM APPLs.95-96/2021**

Appearances: Mr. Rakesh Tikku, Senior Advocate with Mr. Arun Batta, Ms. Indira Marla and Mr. Abdul Vahid, Advocates for the Petitioners. (M: 9810064103, 9971936388)

Ms. Vibha Mahajan Seth, Advocate for DMRC. (M: 9810702410)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done by video conferencing.
2. The present writ petitions have been filed by various parking

contractors who have been awarded parking contracts by the Delhi Metro Rail Corporation (*hereinafter*, 'DMRC').

3. These petitions challenge the scheme awarded by the DMRC vide letter dated 1st December, 2020, for payment in respect of the period when the Covid-19 lockdown was in effect. The case of the Petitioners is that during the lockdown period, the DMRC has granted exemption from payment of licence fee for the period from 23rd March, 2020 to 11th September, 2020. Thereafter, however, a scheme has been devised for payment on a percentage basis, compared to the previous years' average metro train journeys.

4. Mr. Rakesh Tikku, Id. Sr. counsel appearing for the Petitioners submits that, on the one hand, traffic in the metro trains has not been the same as what it was in the previous years. Secondly, owing to the various conditions which have been imposed i.e., seats to be kept vacant and other terms for social distancing, traffic in the metro trains has considerably reduced. Id. Senior counsel also submits that the apprehension of contracting Covid-19 and the concept of '*work from home*' becoming the trend has also considerably reduced the traffic. It is submitted that the Petitioners, who are parking contractors, did not originally wish to quit but had sought for much more reasonable conditions during the time when the pandemic is continuing. However, now the contractors wish to terminate the contract but the DMRC is imposing very onerous terms. The final submission is that in the proposed chart as to amounts payable, which has been given to the Petitioners by the DMRC, instead of taking the average of the *total train journeys* from the previous year, the total number of *passengers* ought to be taken into account.

5. On the other hand, Ms. Vibha Mahajan, ld. counsel appearing for the DMRC submits that there are three types of tenders which were floated in respect of parking contracts.

- The first type was an '*Old tender*' where the period of license was three years and security deposit of four months' licence fee was taken. In the said kind of tender, four months' notice had to be given for termination, failing which, the security deposit would be forfeited.
- The second category of tenders are '*short term licences*' for a period of six months for which two months' licence fee is taken as security deposit. If the termination is prior to six months, the security deposit is forfeited.
- Final category are those which are awarded, in an '*open tender process*'. The period of licence in such tenders is four years and six months' licence fee is to be provided as security deposit. The lock-in period is of 12 months and after the lock-in period, 180 days' notice is to be given for termination. If termination is during the lock-in period or prior to the expiry of the 180 days' notice period, the security deposit is forfeited.

6. Ms. Mahajan, ld. counsel submits that in all three types of contracts, there are two levels of dispute resolution. Firstly, a conciliation process and secondly, an arbitration mechanism. It is submitted that all the Petitioners in these cases have multiple parking contracts of one or some of the above-mentioned categories and are well aware of the DMRC's conciliation and arbitration process. Ld. counsel finally relies upon the benefits given by the DMRC in respect of licence fee during the lockdown and submits that the waivers etc., given by DMRC are very reasonable.

7. On a specific query from the Court, Ms. Mahajan, Id. counsel, sought a clarification from Mr. Sushant Tripathi, Legal Officer, DMRC. Id. Counsel then submits that the total journeys which are contemplated in the scheme for payment of licence fee would, in effect, be total *passenger* journeys and not total *train* journeys.

8. On this clarification being given, Mr. Rakesh Tikku, Id. Sr. counsel, submits in rejoinder that since payment is linked to the average total *passenger* journeys of the previous year, the same should be on the basis of passengers who entered from the parking entry points and not otherwise.

9. Heard Id. counsel for the parties. The COVID-19 pandemic has undoubtedly disrupted various services which are provided and the DMRC is no exception to that. Metro trains were under a complete lockdown till 11th September, 2020 and were allowed to reopen only from 12th September, 2020. As per the charging mechanism which the DMRC has proposed vide letter dated 1st December, 2020, the parking contractors would be liable to pay as under:

<i>Charging of License Fee in Parking Contracts during Covid-19 Pandemic upto 31st December 2020</i>			
<i>Sr. No</i>	<i>Contract Type</i>	<i>Recommendation</i>	
<i>1</i>	<i>Parking Contracts</i>	<i>License Fee is proposed to be charged as under:-</i>	
		<i>Period</i>	<i>Proposed License Fee</i>
		<i>22.03.2020-11.09.2020</i>	<i>0%</i>
		<i>From 12.09.2020, it shall be 25%(fixed)+remaining 75% linked to the Average Total Journeys for the month as compared to the same month last year</i>	

		(2019-20 as Parking Contracts as under:-	
		Average total journeys	License fee for remaining 75%
		From 0% upto 25%	25%
		Above 25% upto 50%	50%
		Above 50% upon 75%	75%
		Above 75% upto 100%	100%

From the charging mechanism fixed by the DMRC it is clear that the DMRC has considered Covid-19 to be a *force majeure* event and has given complete waiver of licence fee from 22nd March, 2020 to 11th September, 2020. Obviously, this waiver is completely acceptable to all the Petitioners. The point of contention is the question as to what is payable post 12th September, 2020.

10. A perusal of the above table shows that the DMRC proposed that parking contractors would be liable to pay 25% of the licence fee, which would be a fixed amount, and the remaining 75% would be linked to the average '*total journeys*' for the same month in the previous year. With the clarification given today by Id. counsel for DMRC, the average '*total journeys*' would be the '*total passenger journeys*' and not the '*total train journeys*', for a specific month which would be compared to the same month of the previous year. The apprehension of the Petitioners that the '*total journeys*' would be the '*total train journeys*' is thus assuaged. To explain the same in simple terms, if the average total passenger journeys undertaken in a specific month during the year 2019-2020 on a specific route were 100 in number, if the same gets reduced to 25 this year for the

same month, then the Contractor would have to pay 25% of the licence fee as a fixed amount plus 25% of the remaining 75% license fee paid last year. As the number of passenger journeys increase and reach the same levels as the previous year, i.e., the pre-COVID phase, the remaining slabs would also be calculated.

11. This Court has perused the scheme dated 1st December, 2020 and with the clarification which has been given today during the course of arguments, there appears to be no doubt that the DMRC has scaled down the payments considerably. Since there is a conciliation and an arbitration clause and some benefit has been given to the parking contractors, this Court does not wish to examine the same in exercise of its writ jurisdiction. The conciliation and arbitration mechanism in all these three types of contracts are set out below:

Clause 38 of the Old Tender:

“38. In the event of any dispute, difference of opinion or dispute or claim arising out of or relating to this agreement or breach, termination or the invalidity thereof, shall firstly be attempted to be settled by conciliation.”

All disputes relating to the agreement on any issue whether arising during the progress of the services or after the completion or abandonment thereof or any matter directly or indirectly connected with this service agreement shall in the first place be referred to a sole conciliator appointed/nominated by GM/Civil on receipt of such requests from either parties.

The conciliator shall make the settlement agreement after the parties reach agreement and shall give an authenticated copy thereof to each of the parties.

The settlement agreement shall be final and binding on the parties. The settlement agreement

shall have the same status and effect of an arbitration award.

The views expressed or the suggestions made or the admissions made by either party in the course of conciliation proceedings shall not be introduced as evidence in any arbitration proceedings.

Any dispute that cannot be settled through conciliation proceedings shall be referred to arbitration in accordance with the procedures given in Para given below.

The parties agree to comply with the awards resulting from arbitration and waives their rights to any form of appeal insofar as such waiver can validly be made.”

Clause 13 of the Short-Term Licenses and Open

Tender:

“Dispute Resolution & Arbitration Procedure

13.1 In the event of any dispute, difference of opinion or dispute or claim arising out of/or relating to this agreement or breach, termination or the invalidity thereof, shall firstly be attempted to be settled by conciliation.

13.1.2 All disputes relating to this agreement or on any issue whether arising during the providing of the services or after the completion or abandonment of the contract or any matter directly or indirectly connected with this license agreement shall in the first place be referred to a sole conciliator appointed/nominated by HOD/Civil on receipt of such requests from either parties.

13.1.3 The conciliator shall make the settlement agreement after the parties reach agreement and shall give an authenticated copy thereof to each of the parties.

13.1.4 The settlement agreement shall be final and

binding on the parties. The settlement agreement shall have the same status and effect as that of an arbitration award.

13.1.5 The views expressed or the suggestions made or the admissions made by either party in the course of conciliation proceedings shall not be introduced as evidence in any arbitration proceedings.

13.1.6 Any dispute that cannot be settled through conciliation procedure shall be referred to arbitration in accordance with the procedure given in Para given below.

13.1.7 The parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can validly be made.

13.2 Arbitration Procedure

13.2.1 If the efforts to resolve all or any of the disputes through conciliation fail, then such disputes shall be referred within 30 days to a sole arbitrator who would be nominated by Director DMRC. The venue of such arbitration shall be at Delhi/New Delhi. The award of the sole arbitrator shall be binding on all parties. The cost of Arbitration shall be borne by respective parties.

13.2.2 Rules governing Arbitration Proceedings: The Arbitration Proceedings shall be governed by Indian Arbitration and Conciliation Act 1996, as amended from time to time including provisions in force at the time the references made. During the pendency of arbitration proceedings, the License shall continue to perform and make due payments to DMRC as per the License Agreement.

*13.2.3 **Jurisdiction of Courts:** The Court at Delhi/New Delhi shall have the exclusive jurisdiction to try all disputes between the parties arising out of this agreement."*

12. Upon instructions from the DMRC, ld. counsel submits that the

conciliator proposed by DMRC is Mr. Anirudh Jain, who is the Advisor, Property Development in the DMRC. Accordingly, in accordance with the conciliation clause, all the Petitioners are referred to the conciliator - Mr. Anirudh Jain, who shall hear the parking contractors and give his conciliation report. The report of the conciliator shall be binding on the parties, however, if the parking contractors are not happy with the decision of the conciliator, they are free to approach the Id. Sole arbitrator. The conciliation proceedings shall continue till 31st March, 2021.

13. Parties agree that a sole arbitrator may be appointed so that there is no delay in reference of disputes to arbitration if the conciliation process fails. The panel of DMRC has been emailed to the Court Master. However, considering the nature of disputes, this Court appoints **Justice (Retd.) V.K. Jain (9650116555)** to act as the Sole arbitrator to resolve the disputes, if the Conciliation process fails.

14. During the pendency of the conciliation proceedings and until further orders are passed, either by the conciliator or the Id. Arbitrator, from 12th September, 2020, payment in terms of the scheme, as per the understanding which has been set out above, shall be made by the parking contractors to the DMRC. The said payment shall be without prejudice to their rights and contentions, either in the conciliation proceedings or in the arbitration proceedings.

15. Mr. Tiku, Id. Sr. counsel submits that the exit plan which has been given to shop owners i.e., without any forfeiture or penalty, ought to be extended to parking contractors. Ms. Mahajan, Id. counsel submits that the terms of the contracts for shop owners and for parking contractors are completely different. In view, thereof, the exit plan given to shop owners to

exit from one type of contract, cannot be extend to parking contractors. This Court agrees with Ms. Mahajan that the termination or exit clauses of one contract cannot be read into another set of contracts, at this stage. It would be for the Id. Arbitrator to take a final view in the matter. However, if any of the Petitioners wish to invoke the termination clause and discontinue the parking contract, they are permitted to give notice of termination in terms of the contract and the parties shall proceed in accordance with the terms of the contract. If any parties wish to invoke arbitration after terminating the contract, they are permitted to file their claims before the Id. Sole Arbitrator appointed by this Court.

16. The DMRC shall raise invoices for the period from 12th September, 2020 onwards strictly in terms of today's order. If the invoices already raised are in conformity with this order, the same shall be intimated to the Petitioners by 5th of March 2021, so that payments can be made.

17. Upon receiving either the invoices or confirmation from DMRC, the contractors shall make payments for the period 12th September, 2020 to December, 2020 by 15th March, 2021. Insofar as the payments for January, 2021 and February, 2021 are concerned, the same shall be cleared by 31st March, 2021. If the payments are not made, the DMRC is free to forfeit the security deposits or take any other steps, in terms of the contracts.

18. Upon the claims being filed before the Id. Arbitrator, he shall be free to monetarily quantify the claims and upon quantification, the fee of the Id. Sole arbitrator shall be in terms of the Schedule to the Arbitration & Conciliation Act, 1996. If the conciliation process fails, parties to appear before the Id. Sole arbitrator on 15th April, 2021.

19. The present petitions are disposed of in the above terms. All pending

applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 22, 2021

dj/T

(corrected and released on 1st March, 2021)

