

IN THE HIGH COURT OF DELHI

Writ Petition (Civil) No. 7728/2007 & CM No. 14721/2007

Judgment reserved on : 15th November, 2007
Date of decision: December 26, 2007

South Delhi Medicos & Ors. ... Petitioner
through: Mr. Valmiki Mehta, Sr. Adv. with Mr. B. K.
Dash and Mr. S. Palo, Advs.

VERSUS

New Delhi Municipal Council & Ors.Respondents
through: Ms. Anjana Gosain and Mr. Rajesh
Mahajan, Advs. for the NDMC/respondent
no. 1
Mr. Dhruv Madan with Mr. Atul Y. Chitale,
Advs. for the respondent no. 2
Ms. Jyoti Singh with Mr. Ankur Chibber, Advs.
for the GNCT of Delhi/respondent no. 3

AND

Writ Petition (Civil) No. 7709/2007 & CM No. 14695/2007

Pioneer Medicos & Ors. ... Petitioner
through: Mr. Rajiv Bajaj, Adv.

VERSUS

New Delhi Municipal Council & Ors.Respondents
through: Ms. Anjana Gosain and Mr. Rajesh Mahajan,
Advs. for the NDMC/respondent no. 1
Mr. Dhruv Madan with Mr. Atul Y. Chitale,
Advs. for the respondent no. 2
Ms. Jyoti Singh with Mr. Ankur Chibber, Advs.
for the GNCT of Delhi/respondent no. 3

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. These two writ petitions raise similar questions of law and fact and consequently are being disposed of by this common judgment .

2. The writ petitions were filed against the New Delhi Municipal Council created under the provisions of the New Delhi Municipal Council Act, 1994 and performing functions thereunder.

3. It is necessary to consider certain essential facts leading up to the filing of the writ petitions which are noticed hereafter. So far as the writ petitioner in W.P.(C) No. 7728/2007 is concerned, on or about 20th February, 1986 the NDMC had allotted a kiosk to the petitioner no. 1 – South Delhi Medicos in the year 1987. Allotment of this kiosk was transferred to the sole name of the petitioner no. 2 – Ms. Shashi Bala Gupta, by a letter of allotment bearing no. D/212/Estate dated 31st January, 2006 on terms and conditions set out in the licence deed executed between the parties on 20th February, 1986. It is an admitted position that the licence granted to the petitioner was for the purposes of running the trade of 'chemist' in the name of M/s South Delhi Medicos, the petitioner no.1 in the kiosk in question. It was so stated in the licence agreement. The period of the licence in the agreement was from 31st July, 2004 to 31st March, 2011.

4. There is no dispute that these petitioners are occupying the kiosks in terms of such licence granted to them and are running their

chemist trade therein. The petitioner no. 1 has been granted a drug licence to carry on the retail and wholesale trade of drugs by the licencing authority of the Government of NCT of Delhi in accordance with the Drugs & Cosmetics Act of 1940 and the Drugs & Cosmetics Rules, 1945 since the year 1990. This licence has been renewed from time to time in accordance with the applicable statute and rules thereunder. There is no dispute that the petitioner has a current licence which is valid up to 24th August, 2009.

The South Delhi Medicos has been so carrying on trade for the last 15 years.

5. So far as the writ petitioner in W.P.(C) No. 7709/2007 is concerned, M/s Pioneer Medicos, the petitioner has filed this writ petition through its partner Shri Arun Gandhi. It has been pointed out that his late father Shri R.N. Gandhi was allotted the kiosk bearing no. S-52 at Safdarjung Hospital main gate, New Delhi-110029 on 1st March, 1973 for the purposes of selling tea and tobacco products and allotted space of 77 sq. fts. By a letter dated 7th September, 1991, the NDMC permitted his sons, Shri Ashok Gandhi and Shri Arun Gandhi to cover the open tehbazari space of 18 sq. ft. by the side and 25th November, 1991. This was followed by a letter of 31st May, 1990 whereby permission was given to Mr. Ashok Gandhi and Mr. Arun Gandhi to use the space, measuring 6 ft x 3 ft (i.e. 18 sq. feet) by the side of the kiosk, on tehbazari. According to the

petitioner, 95 sq. ft of space was originally allotted to him. He has also paid increased licence fee when the area was increased and has been running the trade of chemist since 1991 when the NDMC permitted this change. It would thus appear that this petitioner is carrying on the chemist trade for the last 16 years for which he has valid licence from the competent authority of the Government of NCT of Delhi under the Drugs and Cosmetic Rules, 1945.

6. This writ petition has been necessitated as, the land on which these kiosks are constructed, is required by the respondents on account of a project of the Delhi Metro Rail Corporation Ltd. It appears that a total of about 40 shops/stalls/kiosks situated near the Safdarjung Hospital and the All India Institute of Medical Sciences are effected by the project of the Delhi Metro Rail Corporation Ltd. which is to be executed.

7. Upon learning of the project, the South Delhi Medicos and Shashi Bala Gupta of their own accord approached the Chairperson of the NDMC by a representation which was served on 31st January, 2007 pointing out that the grant of licence under the Drugs & Cosmetics Rules, 1945 was governed by Rule 64; that on account of an amendment effected to the rule in 1987, in order to run the trade of chemist, the premises are required to be located on a carpet area of 15 sq. mtrs. with the minimum height of 9 ft of the premises, also prescribed by the authorities. The petitioners pointed out that prior

to the amendment of 1987, there was no such prescription. The amended rule 64, however, contains a saving clause in respect of premises wherein a licence to run the trade of chemist had been issued prior to the amendment.

8. The licence in favour of the petitioners in both the writ petitions was being renewed in respect of the premises allotted to them, only on account of their possessing a licence prior to the amendment of 1987 by virtue of the saving clause contained in the amended statutory rule. In the representation, the petitioners stated that value service was being rendered by them to the patients of the two hospitals and consequently, if they were required to relocate, the requirement of the Drugs & Cosmetics Act and Rules, 1945 was required to be kept in mind by the respondents.

9. The petitioners also requested that they be given an appropriate opportunity to explain their contentions to the authorities before a final decision was taken in the matter.

10. Smt. Shashi Bala Gupta (petitioner no. 2 in W.P.(C) No. 7728/2007) also addressed a representation dated 9th February, 2007 to the Delhi Metro Rail Corporation Ltd. which is respondent no. 2 herein. The Delhi Metro Rail Corporation Ltd. ('DMRC' for brevity) had immediately responded to the petitioner by a letter of 28th February, 2007 which stated that :-

“ xxxx The shops are being shifted temporarily for construction of Metro Station and will be reinstalled

back after the completion of work. The size of temporary shops will be finalised mutually by NDMC & DMRC Ltd. Hence you are requested to approach the concerned authority i.e. NDMC for this issue.”

(Emphasis supplied)

11. The petitioner made a further representation on 22nd June, 2007. However by a letter dated 1st August, 2007 the petitioner was informed that the NDMC would not be able to increase or change the size of the unit.

12. So far as the Pioneer Medicos (W.P.(C) No. 7709/2007), is concerned, it had addressed a representation on 27th August, 2007 and 3rd October, 2007 to the NDMC informing it about the statutory requirement of the Drugs & Cosmetics Rules, 1945 as amended whereunder a minimum carpet area of 108 sq. ft or 10 sq. mtr was required to run a chemist shop and that it was willing to pay licence fees at the current market rate for the additional area.

13. The petitioners have submitted that the NDMC cannot dispossess them from the kiosks/shops allotted to them and compel relocation to such premises which would not be in conformity or in compliance with the amended rule 64 of the Drugs & Cosmetics Rule 1945 thereby depriving them of their livelihood inasmuch as the competent authority under the Drugs & Cosmetics Rule has stated that it would not be in a position to give a licence to the petitioner in case the premises to which the petitioners were relocated, were not of the prescribed size.

14. In this behalf, the petitioners have placed reliance on the representation made to the licencing authority of the Drug Control Department on 30th July, 2007 which was responded to by this department by a letter dated 10th August, 2007 wherein it has stated thus :-

“ In this context I am to inform you that the license for sale/stocking of drugs for sale and distribution are granted under the provision of rule 64 to the Drugs and Cosmetics Rule, 1945. Accordingly an application for grant of license for retail and/or wholesale of drugs on form 20, 21 and 20B, 21B would be granted only if the applicant provides pucca built premises of an area as provided under the said rule and the same is given as under :-

1. The premises of an area not less than 10 square meter in respect of an application for grant of license in form 20 and/or 21 (for retail sale of drugs).
2. The premises of an area not less than 10 square meter in respect of an application, for grant of license in form 20B and/or 21B for (whole sale of drugs).
3. The premises of an area not less than 15 square meter in respect of an application for grant of license on form 20, 21, 20B, 21B (for both retail and wholesale of drugs).”

15. So far as the relocation is concerned, the NDMC has responded by a communication dated 11th September, 2007 to the petitioners application under the Right to Information Act, 2005. The petitioners were informed that all the shops/stalls/kiosks situated on the Safdarjung Hospital and AIIMS road would be relocated and that the size of the shops/stalls/kiosks would be the same as per the allotted size. The NDMC had also informed the petitioner that the shops/stalls/kiosks shall be relocated after completion of the

construction at the old site by the DMRC. The criterion for allotment at the relocation site would be the quantum licence fee in the descending order. It was also admitted that the blue print for the construction was not prepared by the NDMC as the construction work is to be done by the DMRC.

16. After receiving the response dated 10th August, 2007 from the competent authority under the Drugs & Cosmetics Rule, 1945 and the letter dated 11th September, 2007 from the NDMC, the petitioner had again addressed a representation dated 17th October, 2007 to the NDMC requiring it to take a relook at the matter. This writ petition has been filed by the petitioners only thereafter complaining infringement of its fundamental rights under Article 14, 19(1)(g) and Article 21 of the Constitution of India. It has further been contended that the insistence on the part of the NDMC to relocate the petitioner to a shop of the same size as occupied by it to undertake the chemist trade fails to consider the statutory requirement and is unreasonable, arbitrary and wholly illegal. The petitioners have pointed out several vacant spaces which were available wherein such shops of sufficient area could have been relocated. Reliance is placed on the representation to the petitioner that the petitioners would be relocated to the original site after the project of the Delhi Metro Rail Corporation Ltd. is over.

17. The writ petition as originally filed did not implead the Delhi

Metro Rail Corporation Ltd. as a party. The project in question was being undertaken by the Delhi Metro Rail Corporation Ltd. and having regard to the nature of issues raised, it was deemed necessary to implead the DMRC as a party/respondent no. 2. Accordingly, orders to this effect were passed on 24th October, 2007. Thereafter in view of the submissions made with regard to the Drugs & Cosmetics Rules, 1945, by orders passed on 2nd November, 2007, the competent authority in the Drugs Control Department of the Government of NCT of Delhi was also directed to be impleaded as a party/respondent no. 3. Counter affidavits were filed by the respondent no. 1 and the respondent no. 3. The DMRC has placed reliance on communications received by it from the NDMC by it which have been placed before the court during hearing. Counsels for the parties have been heard.

18. Ms. Anjana Gosain and Mr. Rajesh Mahajan, learned counsels for the NDMC, have submitted at length that the petitioners have no vested right to allotment; that a considered decision has been taken to temporarily shift the allottees of 40 kiosks/shops inasmuch as the site was required for the DMRC for construction of a metro station; that a meeting was held in the chamber of the Secretary, NDMC for consideration of the matter of shifting on 23rd July, 2007 when it was decided that the area originally mentioned in the original licence file would be allotted to the licensee at the relocation site being constructed by the Delhi Metro Rail Corporation. The NDMC has

further contended that the relocation to this site is not permanent in nature and that after completion of the construction of the metro station at the site in question, the licensee would be reshifted/reinstalled to the original site in question.

19. In this background, it has been contended that the NDMC cannot be required to make any exception so far as the petitioners in these writ petitions are concerned for the reason that if their request was favourably considered by the NDMC or by the DMRC, it would amount to allotment of a shop having a size of approximately three times of the existing kiosks and that such allotment would open a Pandora's box of similar representation by similarly placed occupiers/licencees.

20. Having heard learned counsel at length and having given my considered thought to the respective contentions, I find that so far as allotment of the kiosks/space allotted by the NDMC is concerned, the same is for a specific trade. So far as the two writ petitioners are concerned, it is an admitted position the kiosks allotted to them are required to be utilised for carrying on the trade of chemist in these premises with the permission of the NDMC. The writ petitioner in W.P.(C) No. 7728/2007 is so carrying on the chemist trade in these premises for the last 15 years while the writ petitioners in W.P.(C) No. 7709/2007 are carrying on this trade for more than 19 years in premises allotted by the NDMC.

21. It is also an admitted position by the NDMC that so far as the 40 kiosks/units which are to be relocated are concerned, there is only one more unit carrying on chemist trade which would be similarly placed as the petitioner. It is noteworthy that some other chemists out of these units are being relocated to sites which meet the requirements under the Drugs & Cosmetics Rules, 1945 as amended.

22. I find that the petitioner has been making representations not on account of any whimsical demand for more space but on account of the statutory compliance which is required to be satisfied. The remaining persons who are being relocated do not carry on such trade wherein there is any statutory stipulation of size of the premises by the licencing authorities. For this reason, a plea of hostile discrimination would not be available to other persons carrying on other trades in the facts and circumstances of the case. Thus the argument of the NDMC that in case these petitioners were given relief, it would open a Pandoras box, is wholly without basis and is unjustified.

23. It now becomes necessary to consider the validity of the claim of the petitioners. The NDMC has set up a plea that the petitioners in W.P.(C) No. 7728/2007 have no right in the kiosks in question for the reason that they are not the allottees. In the counter affidavit filed under the signatures of Shri Ashok Choudhary, Joint Director (Estate), NDMC, the NDMC has stated that the South Delhi Medicos

is a stranger to the knowledge of the respondent as the same was not a legal entity. I find that the licence deed was executed between the NDMC and petitioner no. 2. Such deed clearly states that the licence has been granted to enable the petitioner no. 2 Smt. Shashi Bala Gupta to carry on business under the name and style of South Delhi Medicos.

24. Mr. Valmiki Mehta, learned senior counsel for the petitioners in W.P.(C) 7728/2007 has taken a strong exception to this objection. It is further pointed out that the kiosk was even transferable. Reliance has been placed on a copy of the Council's resolution no. 6 of the ordinary adjourned Council meeting filed on 18th March, 1999. In this meeting, the Council considered the estate policy/guidelines for 'dealing with estate matters'. There were detailed deliberations on the need for having a uniform policy of increase in licence fee on renewals in the municipal market/office complexes and also revision of the 'subletting rates on partnership/subletting basis as the rates approved by the NDMC through its various resolutions, are on the lower side as compared to the value of these properties and business viability of these markets.'

25. In this behalf the Council noted the recommendations of the committee which were approved by the Chairman. To the extent relevant, these recommendations which were approved by the council in this meeting read thus :-

“XXXXXX

3. Policy on transfers.

i) to be freely allowed (except in case of reserved categories).

ii) on date of entry/deletion of partnership 30% enhancement in licence fee. After amalgamation with the original amount annual enhancement @ 70%.

iii) Policy at Annexure in case of rehabilitation markets as the base rate with annual increase @ 70% (see pages 56-58).

iv) Dependent family members to be permitted without any enhancement in licence fee. Other blood relations allowed with 30% enhancement.

v) Legal heirs only after death without any cost.

vi) Multiple transfers in cases where the request of the transfer of allotment from the first allottee is not regularised and the subsequent subletting is made, the same should also be regularised by forfeiting the amount of security deposits required to be deposited by sublettee at the time of each subletting and the entire amount as payable at each partnership would be payable by the present sublettee on its regularisation.

4. Renewals

in the case of shops/stalls/kiosks/tharas/office units/restaurants etc. the licence will be removed for a period of 10 years on year to year basis subject to enhancement in licence fee at the uniform rate by 7% per annum.

7. Permissibility in change of trade.

i) no trade in the negative list shall be permitted. Negative list to be notified within a month after approval of the Chairman.

ii) list where licence is required under any prevailing legislation to be permitted only after licence is legally obtained and additionally NDMC's permission is taken on availability of space and safety factors.

iii) Where Council has decided in public interest that a market or a portion of market is meant for any

specific trade, no change will be allowed.

iv) changes will be freely permitted amongst the trades which are not listed in the noticed negative list or where licence is not mandatory.”

In view of the above policy there is therefore substance in the submissions on behalf of the petitioner.

The objection taken by the NDMC that the petitioners are not valid allottees is wholly misconceived. Apart from the licence deed noticed above, in fact in the light of the policy decisions of the NDMC, such objections could not have been possibly taken.

26. It is the case of the NDMC before this court that the relocation is temporary. As a result of this relocation and restoration to the original site, no other person is effected on account of intervention of any statutory rules.

27. My attention has been drawn to the requirement of the Drugs & Cosmetics Rules 1945 as amended in 1987. Ms. Jyoti Singh, learned counsel appearing for the Government of NCT of Delhi, has placed the rule prior to its amendment and thereafter before this court. Perusal of the rule 64, prior to its amendment in 1987 would show that there was no prescription of the carpet area of the premises which an applicant was required to possess for grant of an appropriate licence.

28. It is an admitted position that the Rule was amended in 1987. After this amendment, the Rule reads thus :-

“Rule 64. Conditions to be satisfied before a licence

in [Form 20, 20B, 20F, 29G, 21 or 21-B is granted –
(1) A licence in [Form 20, 20B, 20F, 20-G, 21 or 21-B] to sell, stock exhibit [or offer for sale, or distribute drugs shall not be granted or renewal] to any person unless the authority empowered to grant the licence is satisfied that the premisses in respect of which the licence is to be granted are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies and are in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs :

Provided that in the case of a pharmacy a licence in Form 20 or 21 shall not be [granted or renewed] unless the licensing authority is satisfied that the requirements prescribed for a pharmacy is not operating such licence maybe [granted or renewed] to a chemist and druggist].

(2) In granting a licence under sub-rule (1) the authority empowered to grant it shall have regard -

(i) to the average number of licences granted during the period of 3 years immediately preceding and

(ii) to the occupation, trade or business ordinarily carried on by such applicant during the period aforesaid :

Provided that the licensing authority may refuse to grant or renew a licence to any applicant or licensee in respect of whom it is satisfied that by reason of his conviction of an offence under the Act or these rules, or the previous cancellation or suspension of any licence granted or renewed thereunder, he is not a fit person to whom a licence should be granted under this rule. Every such order shall be communicated to the licensee as soon as possible.

[Provided further that in respect of an applicant for the grant of a licence in Form 20-B or Form 21-B or both, the licensing authority shall satisfy himself that the premises in respect of which a wholesale licence is to be granted are :-

(i) of an area of not less than ten square metres ; and

(ii) in the charge of a competent person, who

(a) is a registered pharmacist, or

(b) has passed the Matriculation Examination or its equivalent with four years experience in dealing with

drugs].

(c) holds a degree of a recognised University with one year's experience in dealing with drugs :|

[Provided also that --

(i) in respect of an application for the grant of a licence in Form 20 or Form 21 or both, the licencing authority shall satisfy itself that [the premises are of an area] of not less than 10 square meters, and

(ii) in respect of an application for the grant of a licence --

(A) in Form 20 or Form or both, and

(B) in Form 20B or Form 21B or both,

the licencing authority shall satisfy itself that the premises are of an area not less than 15 square meters:

Provided also that the provisions of the preceding proviso shall not apply to the premises for which licences have been issued by the licensing authority before the commencement of the Drugs and Cosmetics (1st Amendment) Rules, 1997.]

[(3)]. Any person who is aggrieved by the order passed by the licencing authority in sub-rule (1) may, within 30 days from the date of the receipt of such order, appeal to the State Government and the State Government may, after such enquiry into the matter as it considers necessary and after giving the appellant an opportunity for representing his views in the matter, make such order in relation thereto as it thinks fit.”

Therefore, after the amendment of 1987 coming into force, in order to be entitled to the licence in respect of an application for grant of a licence in form 20 or form 21 or both, a person is required to satisfy the conditions laid therein. The same position subsists when applying for a licence in form 20B or form 21B. The licencing authority is required to satisfy itself that the premises are of an area not less than 15 sq. mtrs. The amended rule 64 also contains a

proviso that these conditions shall not apply to the 'premises for which licences have been issued by the licencing authority before the commencement of the Drugs & Cosmetics (First Amendment) Rules, 1992.'

29. Ms. Jyoti Singh, learned counsel for the office of the Drugs Controller & Licencing Authority of the Government of NCT of Delhi has pointed out that inasmuch as the petitioners were satisfying the applicable requirements at the time of grant of original licence, they were granted such licence which, after the amendment, has been kept renewed in view of the above proviso. It has further been pointed out that it is an admitted position that the premises which are occupied by the petitioners are measuring less than 15 sq. mtrs.

30. Reliance is also placed on policy decision of the concerned authorities dated 15th December, 2003 on adequacy of the premises under rule 62B and rule 64 of the Act. It was clarified under this policy decision that so far as adequacy of the premises was concerned, the premises should be pucca built and should have the minimum carpet area prescribed in the rules. This policy decision also requires that the height of all rooms shall not be less than 2.75 mtrs measured from the surface of the floor to the lowest point of the ceiling.

31. By another decision taken by the drug authorities on 20th January, 2000, it has been directed that, for grant of the wholesale drug licence, the area required should be in the same room or in

adjoining rooms on the same floor.

32. The primary argument on behalf of the authorities under the Drugs & Cosmetics Act before this court is that the statutory licence is granted against premises. Upon relocation, the authority would be required to consider grant of licence against a new premises which cannot be treated as a renewal of the existing licence in favour of the petitioner. It is thus contended by Ms. Jyoti Singh, learned counsel, that in case the relocated site does not meet the requirement of the area prescribed under the amended rule 64, the respondent no. 3 would not be in a position to grant the licences to the petitioner inasmuch as no relaxation to these conditions is permissible.

33. Learned counsel submits that even if the petitioners were to be relocated back to the same site as occupied by them at present after completion of the DMRC project, they would be required to apply afresh under the statutory act and rules. In such eventuality also the respondents would be required to meet the conditions laid in the amended rule 64. In case the premises which were allotted to them were not of such area as prescribed under the statutory rules, the respondent no. 3 would not be in a position to grant the licence to the petitioner.

34. The admitted position which thus emerges on record is that the respondent no. 1 is effectuating relocation for the same trade and for the same area which has been licenced to the different allottees. It is

also an admitted position, that on account of the amendment to the rules, upon relocation the chemist trade cannot be carried out in the proposed relocation sites contemplated by the NDMC for these petitioners. Such chemist trade would also not be legally permissible in the premises to which the NDMC proposes to restore the petitioners, upon completion of the project.

35. The petitioners had approached the NDMC at the earliest. In W.P.(C) No. 7728/2007, the first representation made by the petitioner was dated 31st January, 2007 which was much before the NDMC and the Delhi Metro Rail Corporation Ltd. had formulated or finalised any plans towards the construction.

The NDMC has placed before this court the minutes of its meetings wherein it has considered the issue of this relocation. It appears that the Chairperson of the NDMC had constituted a committee comprising of the Secretary, Director (Estate) and the Additional Financial Advisor for relocation of the units.

36. The estate department of the NDMC had proposed shifting of the shops/stalls/kiosks on the principal that the licensee paying the highest licence fee per square feet would be relocated nearest to the Safdarjung Hospital. It was the proposal of the estate department which was considered by this three member committee on 23rd July, 2007, when it decided that the area mentioned in the files only would be allotted. This committee also noticed the decision of the

Chairperson of the NDMC permitting clubbing of sites by the licencees. The authorities were of the view that the shifting/relocation of the licencees is an administrative matter. This decision was therefore placed before the New Delhi Municipal Council only for its information.

37. It is noteworthy that the committee had also noticed that the 40 shops which are to be relocated were providing services to the patients/attendants, patients and employees working in these hospitals/institutions and that they were being relocated within 125-150 mtrs.

38. The NDMC has also disputed the contention of the petitioner in W.P.(C) No. 7709/2007 that it was earlier allotted an area of 77 sq. ft. Before this court it has been urged that the original area allotted to the predecessor in interest of the petitioner was only 59 sq. ft and upon the increased area of 18 sq. ft permitted on tehbazari in 1991, the area in its possession became 77 sq. ft.

39. It is necessary to now consider the facts relating to the construction with regard to the shops/kiosks at the relocation sites. The DMRC had informed the petitioner Mrs. Shashi Bala Gupta on 28th February, 2007 that the size of the temporary shops would be finalised mutually by the NDMC and the Delhi Metro Rail Corporation Limited. It had requested the petitioner to approach the NDMC on this issue. As noticed above, the three member committee

of the NDMC took the decision that the allottees would be allotted shops of the same size as per the allotment which existed on the files.

40. Mr. Dhruv Madan, learned counsel appearing for the Delhi Metro Rail Corporation Ltd. before this court, has filed two letters dated 24th July, 2007 and 27th September, 2007 received by the DMRC from the New Delhi Municipal Council. By the letter dated 24th July, 2007, the NDMC had conveyed the list of shops/kiosks/stalls for relocation in the descending order and had also intimated the area as indicated in the list which was enclosed. A modified list was sent to the DMRC with the letter dated 27th September, 2007.

41. The final list issued by the NDMC to the DMRC - respondent no. 2 shows that the NDMC has permitted clubbing of two shops in the list. This list also contains relocation of three premises for carrying on the trade of chemist to premises having the area which is between 133.37 to 157 sq. ft. One Bhutani Medicos which was occupying two units, being nos. 38 and 39 each measuring 69.18 sq. feet has been permitted clubbing, thereby bringing its total area to 138.36 sq. feet. 37.

At the same time, so far as the petitioner in W.P.(C) No. 7709/2007 is concerned, this writ petitioner has been informed that it would be relocated in an area of 77 sq. ft. So far as the writ petitioner in W.P.(C) No. 7728/2007 is concerned the NDMC has

informed that it would be relocated on an area of 66 sq. ft only.

42. It now becomes necessary to consider the argument on behalf of the NDMC that the area allotted on the file is sacrosanct and has to be so maintained. The argument is that consequently, the stand taken by the NDMC stand before this court is irrational, arbitrary and illegal as the petitioners are being relocated with continuity of trade to premises of such dimensions for which they would not be given the licence. The petitioners point out that accepting the statutory mandate of these statutory rules, the NDMC increased the area of four chemist shops in the AIIMS subway as they did not satisfy the size stipulation.

43. The NDMC has answered this contention substantially admitting the facts pleaded by the petitioner. It is stated that in the year 1998-99, NDMC built 16 shops in the subway at AIIMS/Safdarjung Hospital out of which the shop nos. 1, 8, 9 and 16 had been reserved for the chemist trade. The shop nos. 1, 9 and 16 were allotted after inviting tenders for the same for this purpose. These shops were having carpet area of 97.48 sq. ft. each. After the allotment of these shops, it was brought to the notice of the NDMC that the area of the shops was less than the carpet area required under the Drugs & Cosmetics Rules, 1945 for running a chemist shop. NDMC has stated, that for this reason it increased the area of the shop no. 1 by 11.56 sq. ft; and, of the shop no. 9 by 8.37 sq. ft by

removing the partition wall. So far as shop no. 8 is concerned, it is stated that as allotments had not been finalised, therefore, tenders were invited afresh in respect of the shop in 1999 for an increased carpet area of 145.63 sq. ft.

44. Ms. Anjana Gosain, learned standing counsel for the NDMC, has urged at great length that the allottees of these shop nos. 1, 8, 9 and 16 are paying a huge amount as licence fee for these shops and that no parity can be drawn between them and the petitioners. Reliance has also been placed on Section 141 of the NDMC Act to contend that the consideration for any immovable property which may be sold, leased or otherwise transferred by the NDMC shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition.

45. From the correspondence noticed above, and in view of the submissions made by the respondent nos. 1 and 2 before this court, it is evident that the shops in question are not ready for occupation even as yet. The petitioner has handed over in court rough site plans pointing out several locations wherein space is available so that the respondents can make appropriate provision for the proposed chemist shops/kiosks of such area as is required under the rules for relocation of the petitioners.

46. The last argument on behalf of the NDMC was to the effect that the petitioners have no right to relocation site. Certainly this could

have been validly contended if the NDMC did not have a scheme for relocation. It has decided to relocate the 40 shops in public interest in view of the services being rendered by them. It has made a considered decision to effect such relocation and to bring the allottees back to the original site on completion of the project. The NDMC has also identified the allottees including these petitioners for relocation when it has sent the list to the respondent no. 2 as well. The NDMC allots these kiosks and permits a specific business/trade therein. The allottee is not permitted to carry on any other trade. The impact of these stipulations is really relocation of the business/trade of the allottees.

47. As a statutory authority the NDMC is bound to comply with statutory mandate. It is as much bound by provisions of the Drugs & Cosmetics Act of 1940 and Rules thereunder, as the petitioners and other respondents. Its scheme of relocation of the trade of chemists is consequently required to abide by the statutory provisions. Looked at from these aspects, it is not open to the NDMC to contend that the petitioners would have no enforceable right to relocation of its business in an appropriate premises.

48. The NDMC has contended that the DMRC in all fairness has formulated a scheme for relocation of such persons who are required to be displaced on account of the Metro Rail Corporation project. While the project is in public interest, such a scheme for their

relocation is formulated only to further the ends of public interest so that none suffers by any displacement on account of the project.

49. Law respects juridical possession. It is well settled that even an owner of the property, under law can resume possession after the expiry or earlier termination of the allotment only by due course of law. The state or its instrumentalities are not in any higher or better position. Certainly the petitioners cannot be removed by an administrative or executive order or merely by termination of the allotment. (Ref:- **Anamallai Club vs. Government of Tamil Nadu & Ors. (1997) 3 SCC 169; State of U.P. vs. Maharaja Dharmender Prasad Singh (1989) 2 SCC 505 (SCC pgs 516, 17 paras 30, 31); Bishan Das v. State of Punjab (1962) 2 SCR 69 pg. 79, 80 = AIR 1951 SC 1570; Midnapur Zamindary Co. Ltd. vs. Kumar Naresh Roy AIR 1924 PC 144).**

50. Due course of law in each particular case means such exercise of the powers by a duly constituted tribunal or court in accordance with the procedure established by law under such safeguards for the protection of private rights. It would imply the right of the person affected thereby to the present before the tribunal; to be heard, by testimony or otherwise, and, to have the right determination of the controversy by proof, every material fact which bears on the question of fact or liability be conclusively proved or presumed against him. It has been so laid down in **East India Hotels Ltd. vs. Syndicate**

Bank 1992 Supp. (2) SCC 29 (paras 29, 30 & 32).

51. The statutory prescription for eviction of unauthorised occupants of public premises is to be found in the Public Premises (Eviction of Unauthorised Occupants) Act, 1972. The state has also available to it the right to statutorily acquire other property as is required for a public purpose under the scheme of compulsory acquisition provided under the Land Acquisition Act.

There is no dispute that the premises in question are public premise. At the same time, the NDMC could oust these petitioners from their occupancy only by following due process of law and taking appropriate remedy. Even if proceedings were initiated under the Public Premises (Eviction of Unauthorised Occupants) Act, 1972, it would be still take longer than if the occupants agreed to the relocation. Such delays not only frustrate project aspirations but also grossly exaggerate the costs involved.

52. Even the process of compulsory land acquisitions of private properties under the provisions of the Land Acquisition Act is normally time consuming as the persons on the land take recourse to protracted litigation to protect their occupation.

Thus, by such schemes of relocation, the project implementing authority is saved of the exorbitant cost of land acquisition and the delays which result in completing the process. The respondents are simultaneously saved from protracted eviction proceedings.

Equally important, additionally there is no displacement of the persons whose premises are temporarily required for the purposes of completion of the project. In the instant case, the petitioners have very fairly agreed to be relocated in principle.

53. As noticed hereinabove, the decision to relocate the petitioner is an administrative decision taken by the three member committee which was placed before the council for information. The NDMC has on an earlier occasion recognised the fact that in order to run a chemist trade, it is necessary to comply with the Drugs & Cosmetics Rules, 1945 as amended. It is an admitted position by the NDMC that it has permitted the petitioners to carry on the chemist trade. The petitioners are so conducting their business for over fifteen years. They are being relocated for carrying on the same trade despite the knowledge of the NDMC that the petitioner cannot be granted a drug licence for running the chemist shop in the size of the shop to which they are being relocated.

54. The NDMC has recognised this fact on an earlier occasion when it has increased the size of shop no. 1, 9 and 16 in the subway between AIIMS and Safdarjung Hospital.

55. The NDMC was fully aware of the requirement which has been framed under statute. It has also granted the licence to the petitioner to carry on the trade of chemist at the kiosk in question. It has stated that the petitioner is required to carry on the same trade and would

be relocated to the original site after completion of the project to carry on the same trade. In this background it certainly cannot mandate relocation to a premises wherein such a trade cannot be occupied.

56. The relocation policy has been carved out in public interest. Such policy has to be rational, reasonable and fair. Whether by tender or auction or by allotment on licence, the same is only one out of the many modes of allotment of the immovable property by the NDMC. Section 141 has merely mandated that such property would be transferred on values as would be arrived at any normal and fair competition.

57. So far as the additional area is concerned, the petitioners before this court have fairly contended that they are willing to pay such rates as could be fetched by the NDMC in normal and fair competition. This was also stated by the petitioners in the various representations made to the NDMC.

The offer of the petitioner in fact supports the spirit, intendment and purpose of Section 141 of the statute.

58. The decision of the committee arrived at on 23rd July, 2007 fails to consider the requirement of the Drugs & Cosmetics Rules, 1945 or the aforementioned facts. Such facts were certainly material and relevant for arriving at a considered and fair decision. More so having regard to the admitted action of the NDMC in deciding to

increase the size of the shop nos. 1, 9 and 16 in view of the amendment to the rule. The NDMC has also not considered the offer made by the petitioners to pay the current market rates which may be prevalent towards the increase in area which may be necessary.

59. The NDMC is a statutory authority and certainly is bound to act reasonably and fairly. The NDMC has recognised the need for such chemist shops. It is for this reason that it has permitted these petitioners to carry on the trade of chemist. Additional chemists have been permitted thereafter. The NDMC has thus accepted the fact that the petitioners are rendering valuable service in public interest. The Safdarjung Hospital is known to be the largest hospital in the city. Thousands of patients visited these hospitals every single day. There are huge wards wherein patients are admitted. Certainly the requirement of the chemists near the two hospitals i.e. the All India Institute for Medical Sciences and Safdarjung Hospital, which are the major hospitals in the city, cannot be contended to be unnecessary or not in the interest of the patients and public. It is evident that the respondents are implementing the scheme for relocation so far as the chemists are concerned, for this reason alone. It is also the respondent no. 1's contention that the relocation is for the same area and for the same trade which is being carrying on by these petitioners for 15 years and 19 years respectively.

60. In the instant case, the NDMC is relocating the allottees to premises of different measurements based on the area allotted to them. In the case of the other chemists noticed above, it has admittedly complied with the statutory mandate and increased the area of the kiosks. The scheme of relocation does not postulate shops/kiosks of identical sizes.

61. In this background, fully knowing the requirement of the Drugs & Cosmetics Rules, 1945, the NDMC cannot require the petitioners to be relocated to a premises wherein they would become disentitled to the licence under the applicable rules. The NDMC is as much required to comply with the mandate of applicable rules under the Drugs & Cosmetics Act of 1940 as the petitioners and other respondents are.

62. As per the list submitted by the NDMC to the Delhi Metro Rail Corporation Ltd. with its letter dated 27th September, 2007, so far as the chemist trade is concerned the respondents have permitted such clubbing to M/s Bhutani Medicos which had been allotted nos. 38 and 39. According to the NDMC, the covered area of each of these units is only 69.18 sq. feet. and this concern would be able to satisfy the requirement of the amended rule under the Drugs & Cosmetics Rules, 1945 only on account of the clubbing whereby its total area would admittedly become 138 sq. feet.

63. It is well settled that actions of the State, its instrumentalities

and public authorities or of persons whose actions bear the insignia of public law element or public character are amenable to judicial review and that legality of such actions would be tested upon the anvil Article 14 of the Constitution.

64. The Court has defined the contours of the public law remedy as intervention in exercise of the judicial review power where the actions of State or its agencies bearing the imprint of public interest element, can be examined. It is trite that non-arbitrariness and fairness are considered as such cornerstones of the principle of equality which form the immutable legal behavioral standard. Every action, policy or even change of policy in the realm of activity of the State or its instrumentality therefore, has to be informed, fair and non-arbitrary.

In appropriate cases, actions informed by reason may be questioned as arbitrary in proceedings under Article 226 (Ref. **AIR 1979 SC 1628 R.D. Shetty v. International Airports Authority of India; AIR 1980 SC 1992 Kasturi Lal v. Lakshmi Reddy; AIR 1991 SC 537 Kumari Srilekha Vidyarthi; AIR 1990 SC 1031 Mahabir Auto Store v. Indian Oil Corporation; 1994 (6) SCC 651 Tata Cellular v. UOI and 144 (2007) DLT 824 C.P. Mittal v. UOI & Anr.**)

65. It is well settled that policy decision taken in exercise of executive power must be made fairly and applied uniformly and not give the impression that it was done arbitrarily or by any ulterior

criteria. The Apex Court was called upon to examine a decision to change a policy in its pronouncements reported at **(2003) 4 SCC 579 UOI vs. International Trading Company** and laid down the principles thus :-

“While the discussion to change the policy in exercise of the executive power when not trampled by any statute or rule, is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the fields of activity of the State is an expected tenet. The basic requirement of Article 14 is a fairness in action of the State and non-arbitrariness in essence and substance is the heartbeat of fair play.”

66. In this behalf it would also be appropriate to consider the observations of the Apex Court in **JT 2004 (10) SC 500 Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer & Ors.**, wherein it was held thus :

“9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning

and rule import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.”

67. In **(1994) 2 SCC 729 State of U.P. v. U.P. University Colleges Pensioners' Association**, the court had held that it is only if a policy decision was unreasonable or against public interest that the same could be subjected to a judicial review.

68. In the instant case the respondents have recognised the need of chemist shops especially having regard to the large number of patients visiting the hospitals. For this reason, both the petitioners were permitted to change the trade to run chemist shops for over a decade. Over a period of time, it can be presumed that having regard to increase in the requirement of the chemist shops, additional chemist shops were admittedly constructed and allotments made by the respondents. No submission to the contrary has been placed before this court and it would appear that the petitioners who are in the trade of chemist shop are required at the location in public interest as well.

69. The petitioners have valid allotments and the statutory licences as on date. If they continue at the same site where they are located today, there is no impact on their business at all. They are being required to be relocated at the instance of the respondents for the

purposes of expeditious execution of another project. The NDMC has stated that it has no proposal to permanently relocate them and has proposed to relocate the petitioners to the existing site upon completion of the project. By such action of the respondents, the rights of the petitioners shall be adversely impacted and also there is no compliance of the statutory requirements.

70. The respondents have not placed any material or rational for implementing its relocation policy in such manner even though it has moulded earlier allotments to ensure statutory compliance. No reasons of economics or any other exigencies have been taken or placed. The Delhi Metro Rail Corporation has also submitted that it is bound by the decisions taken by the NDMC and would be willing to implement any directions made to it. Examined in this background, it would clearly appear that the action of the respondents is irrational and arbitrary and would therefore be subject to judicial review.

71. The DMRC is constructing the premises for the NDMC and has raised no objection to construction of bigger premises. It is constructing kiosks of such area as notified by the NDMC. None of the respondents has urged that space is not available or that there is any other technical reason which could prohibit construction of the larger premises.

The only explanation given by the NDMC for not doing so is that the same would open a Pandora's box.

As discussed hereinabove, this submission has no basis.

72. It is trite that the state in all its activities must act fairly and cannot act arbitrarily. Equity and good conscience should be at the core of all state functions. It is now well settled that every executive action which operates to the prejudice of a person must have the sanction of law. In **(2003) 1 SCC 591 Hindustan Times v. State of U.P.**, the Apex Court had held that the respondents being a state cannot, in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of 'take it or leave it'.

For all the foregoing reasons it has to be held that the petitioners can be relocated only to a premises which would meet the requirements of the amended rule 64 of the Drugs & Cosmetics Rules, 1945.

73. In the light of the discussion there is merit in the contentions of the petitioner. The letter dated 1st August, 2007 to the extent that it refers to the petitioners is therefore set aside and quashed. It is held that the allottees running a chemist trade could be relocated only to premises which would meet requirements of the amended rule 64 of Drugs & Cosmetics Rules 1945 and it is so directed.

It shall be for the respondent nos. 1 and 2 to work out the best manner in which the statutory requirements are complied with.

The petitioners shall remain bound by the offer made by them to pay the market rate towards the area which would be in excess of

the area, which they are occupying at present. So far as the area occupied at present is concerned, the petitioner would be required to pay the same rate as the others. It shall be for the NDMC to determine the same and to inform the petitioners of the decision taken at the earliest.

The interim orders passed on 24th October, 2007 shall continue to operate till implementation of the above directions.

These writ petitions are allowed in the above terms.

(GITA MITTAL)
JUDGE

December 26, 2007
kr