

**Sunair Hotels Ltd. Vs. N.D.M.C. and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/702250](http://sooperkanoon.com/702250)

**Court :** Delhi

**Decided On :** Oct-07-1994

**Reported in :** 56(1994)DLT177

**Judge :** K. Shivashankar Bhat, J.

**Acts :** [Constitution of India](#) - Articles 14 and 226

**Appeal No. :** C.W.P. Nos. 2197/1990 and 768 of 1994

**Appellant :** Sunair Hotels Ltd.

**Respondent :** N.D.M.C. and anr.

**Advocate for Def. :** Maheshwar Dayal, ; H.P. Sharma and ; Naveen Batra, Advs

**Advocate for Pet/Ap. :** Arun Jaitley and; Mukul Rohtagi, Sr. Advs.,; Sandeep Sethi

**Disposition :** Petition dismissed

**Judgement :**

**K. Shiva Bhankar Bhat, J.**

1. In C.W. 2197 of 1990 (referred as the I W.P.) the petitioner seeks the quashing of a communication dated 10.7.1990 (Annexure P-1); at the same time, petitioner seeks protection of its possession of a Hotel Site. Under another prayer, a

declaration is sought that payment of license fee shall commence qua the aforesaid Hotel site when possession of the entire site is handed over to the petitioner.

2. Petitioner is a public limited company. Initially it was allotted a site to construct a hotel of not less than 3 star standard, at Mandir Marg, New Delhi, in the year 1977; the allotment was out of successful bid at an open auction. When the petitioner commenced construction, allotment was cancelled. In view of the earlier allotment, another site (which is the subject matter of the present writ petition) was allotted on 9.12.1982, measuring 7109 Sq. Yds. at Gole Market.

An agreement called license deed was executed on 8.12.1982. The built area of the hotel was to be 80,000 Sq. Ft. having a rating not less than 3 star. Building was to be put up by 31.10.1986. Annual license fee of Rs. 34,01,400/- was payable. Petitioner was not given the full extent of land initially; only 34,000 Sq. Ft. of land was given, as the balance area was in possession of P & T Department. Till the year 1988, nothing came out of the petitioner's request for possession of the balance area. On 1.2.1988 a supplemental agreement was executed whereby N.D.M.C (Respondent) agreed to hand over full possession of the entire area and it was agreed that license fee was payable only from the date of the full possession being given to the petitioner. The annual license fee was enhanced to Rs.49.90 lakhs. The balance of license fee was paid on the same day, bringing the total payment of license fee to Rs.49.90 lakhs, being the advance annual license fee. There was a moratorium for the payment of the license fee for 2 years after the handing over of possession of the entire land. The license fee for those 2 years was to be payable in 10 half yearly Installments in order to facilitate construction of the hotel expeditiously. Interest thereon depended upon the Central Government's decision to levy interest on the N.D.M.C. The first Installment of the deferred payment was payable Along with the license fee falling due in the month of January 1991. Under this supplemental agreement, petitioner was allowed to have more built up area. N.D.M.C also agreed to allot another 16,0198 Sq. Ft. in addition to the earlier allotted area of 71,098 Sq. Yds. The construction of the hotel building was to be within 3 years from the date of handing over the possession of the land.' The NDMC, for a long time did not deliver

possession of a portion of land measuring 922 Sq. Ft. According to the petitioner this was a crucial piece of land without which, petitioner would not be permitted to use the building as a hotel building, by the Chief Fire Officer. Since the liability to pay the license fee, according to the petitioner, arises only on delivery of possession of the full land, petitioner did not pay the further license fee.

3. In fact, even under the agreement, the first Installment would have fallen due, only in January 1991. In the meanwhile, Realizing that N.D.M.C. may not be able to collect the license fee, N.D.M.C. asked the petitioner to pay license fee proportionate to the extent of land delivered to the petitioner. Petitioner contended that, the very purpose of the agreement was defeated by non-delivery of a portion of the land, without which the building could not be used as a hotel building. At this stage, the N.D.M.C. issued the impugned letter dated 10.7.1990 directing the petitioner to execute another supplemental agreement, agreeing inter alias to pay the proportionate fee, failing which the allotment was threatened to be cancelled.

4. According to the N.D.M.C. the portion of the land not delivered to the petitioner is a small fraction of the agreed area and even without it, building as per the sanctioned plans could be put up. N.D.M.C. also contends that it offered to allot another piece of land to make up the deficiency and asked the petitioner to execute the supplemental deed, so that building plans also could be suitably modified. Since the petitioner has unreasonably refused to comply with these demands of N.D.M.C., the latter is entitled to cancel the entire allotment.

5. The N.D.M.C. has raised a preliminary objection to the maintainability of this writ petition. According to it the dispute pertains to the terms of the agreements and that judicial review is not available in the contractual field.

6. Petitioner, on the other hand, contends, that on the admitted facts, N.D.M.C. had no competence to cancel the allotment/license and it has nowhere, a power, to demand, execution of another supplemental agreement. The public law element is intermingled with the contractual terms and the threat of cancellation held out by the N.D.M.C. is attributable only to its character as a public body.

7. Three questions require to be considered:--

(1) Whether writ jurisdiction is available to the petitioner to seek the reliefs sought in the writ petition?

(2) Whether the N.D.M.C. has any competence to demand from the petitioner to execute a Supplemental agreement, failing which, the earlier allotment could be cancelled.

(3) From what date the liability to pay the license fee arises.

8. Writ petition 768 of 1994 (referred as the IInd writ petition) arose out of the subsequent events happened during the pendency of the 1st writ petition. Relevant facts need not be detailed here, immediately.

9. I proceed to consider the three questions posed above together, having regard to the peculiar set of facts involved.

10. The main license deed is dated 8th December, 1982. The Preamble recites the factum of the offer of 7109 Sq. Yds. of land by the N.D.M.C. to the petitioner and its acceptance by the latter, to use the said plot of land for the construction and commission of a hotel building (with a covered area of 80,000 Sq. Ft.) not below 3 star rating latest by 31.10.1986 'for the purpose of housing a hotel of decent standard and other business appurtenants to furtherance of tourism in India to be run by the licensees on license basis on the terms and conditions mentioned hereinafter at an annual license fee of Rs. 34 lakhs 1 thousand 400 hundred from the date of handing over the said plot of land to the licensees'.

11. The Preamble, reflects atleast two ideas prominently--(i) the petitioner is the guarantee of a license to run a hotel; (ii) the hotel project is in furtherance of tourism in India.

12. Out of the initial license fee for the first year Rs. 2,23,483.30 was already paid and a sum of Rs. 10 lakhs was payable within 15 days from the date of agreement. Admittedly petitioner paid this amount on the very day (on 8.12.1982). Balance was payable on the day the possession of the plot is handed over to the licensees.

13. N.D.M.C. handed over only 34,000 Sq. Ft. of land to the petitioner on 9.12.1982.

14. Period of license is 99 years. The license fee payable during the year 1984 and 1985 were permitted to be paid in Installments (in view of the 'moratorium' granted to facilitate the construction). The license fee for these two years was payable in 10 half yearly Installments and interest chargeable depended upon the Central Government charging the interest. The first Installment (out of this) was due Along with the annual license fee for the year 1986. But there is another clause attached to this condition which reads :

'Save as provided in clause 2 the license fee of Rs. 34,01,400/- (Rs. thirty four lakhs one thousand four hundred only) P.A. in respect of the said plot of land shall commence from the date of handing over the possession of the said plot of land by the licensor to the licensees and the license fee of Rs. 34,01,400/- (Rs. thirty four lakhs one thousand four hundred only) shall be payable annually in advance latest on the anniversary of the handing over of the possession of the said plot of land on which the annual advance license fee falls due in each year. The licensees shall pay an interest at the rate of 15% P.A. to the licensor on the license fee remaining outstanding beyond the due date and falling in arrears. Such interest shall be charged for full month if the payments of license fee is not made by the due date with arrears, if any, and such interest shall continue to accrue to the licensor month by month till the accounts are finally squared up.'

If there is a failure to pay the license fee as above, the license was liable to be revoked/cancelled, and the licensee may seek arbitration as per Clause 49 (which provides for arbitration by the Lt. Governor of Delhi).

15. Clause 5 envisages issuance of a show cause notice before revoking or terminating the license for the breach of any of the terms and conditions of the license.

16. There are detailed provisions as to how the licensee should get approval for the plans and manner in which the construction is to be put up. These terms and conditions reminds the terms and conditions, normally found in Municipal

## Building Bye-Laws.

17. There can be no two opinions that furtherance of tourism is a matter of governmental policy. The license granted to the petitioner as per this license seems to be incidental to the implementation of this policy.

18. This license agreement is more of a license granted to do a hotel business after putting up a hotel building for the said purpose, than an ordinary license granted enabling a licensee to use one's land to put up a hotel building.

19. In *Naggappa v. State of Karnataka*; : AIR1994 Kant77 , I had an occasion to consider the scope of the writ jurisdiction in relation to contractual matters.

20. In the said case, the decision of the Supreme Court in *Vij Resins Pvt. Ltd. etc. v. State of Jammu & Kashmir*; : [1989]3SCR257 was distinguished. At page 90, after referring to the Supreme Court decision, it was held:

'This contention overlooks that the source of the contracts relied upon by the petitioners is an executive order and the scheme formulated by such an executive order. Further, the very contracts relied upon by the petitioners provide for the termination of the contracts. The rights and liabilities of the parties are governed by the terms of the contracts. Law governing the contracts would operate on the enforceability of these contracts.'

'If the contracts are terminated without providing for compensation, petitioners may sue for compensation and therefore, the ratio of *Vij Resins Pvt. Ltd.*, case : [1989]3SCR257 is not attracted. As to the requirement of an enacted 'law' under Article 300-A of the Constitution it has to be noted that provisions of the Indian Contract Act and Specific Relief Act, are enacted laws. If the contention of the petitioners is accepted, the result would be in effect compelling specific performance of the alleged contracts, which is not otherwise permitted in law.'

At page 94, it was concluded thus:--

'Thus it is clear that where the relationship between the State and the petitioners is founded on a non-statutory contract and the terms of the said contract is sought to

be enforced, jurisdiction under Article 226 cannot be invoked. The exercise of the contractual power has to be tested, if at all, by invoking the ordinary jurisdiction of the Courts. There is no scope to invoke the doctrine of promissory estoppel or of legitimate expectation, dehors the terms of the contract. If the terms of such a contract are not specifically enforceable (as in the case of building contracts), it is not possible to apply Art. 14 of the Constitution so as to in effect, compel specific performance of the terms of contract. While reading the terms of the contracts and their scope, the scheme under which contracts are awarded may be relevant, but the scheme itself would be read as forming a part of the contract; therefore, at the most, a change in the scheme by the Government shall have to be considered as an unilateral change of the terms of the contract. Whether it is permissible or not cannot be examined to enable the beneficiaries of the contracts to have the contracts specifically enforced by resort to the writ jurisdiction.'

21. In *Life Insurance Corporation of India v. Escorts Ltd.*; : 1986(8)ECC189 a Constitution Bench of the Supreme Court observed, at page 1424:

'If the action of the State is related to contractual obligation or obligations arising out of the Court, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.'

22. There is always this difficulty of identifying the nature of the power exercised by the State (and its instrumentalities); whether the said power is relatable or equated to a private right governed by private law, or it is an exercise of the State's governmental power derived from public law, is not always easy to discern. The Supreme Court, has in the above passage pointed out the difficulty in demarcating

the frontier between the public law domain and the private law field.

23. In the instant case, the writ petition was filed in the year 1990. It was kept pending before the Division Bench between 18.7.1990 to 9.4.1992. On 9.4.1992, the Division Bench issued 'Rule', the Bench could have issued 'Rule D.B.'; but it did not do so; thus the matter, thereafter, started coming up before a Single Judge Bench. During the pendency of the matter before the Division Bench, several judicial orders were made, which have a strong bearing on the respective rights and liabilities. A touch of public law is imprinted by these orders on the mutual rights and obligations of the parties.

24. Though under the license, petitioner was to be given 7109 Sq. Yds. (which will be 63,981 Sq. Ft.), petitioner was handed over possession of only 34,000 Sq. Ft. The balance, could not be handed over as the remaining land was under the occupation of the P & T department.

25. On 1.2.1988 a supplemental deed was executed. This enabled the petitioner to increase the floor area of the construction; the license fee was also increased to Rs. 49,90,330/-. The N.D.M.C. agreed to allot additional land measuring 16,019 Sq. Ft. in addition to 7109 Sq. Yds. already allotted, so as to bring the measurement of the extra allotted plot to be 80,000 Sq. Ft. This deed stated that so far only 34,000 Sq. Ft. had been handed over to the petitioner.

26. The annual license fee of Rs. 49,90,333/- was payable 'from the date of handing over possession of the land in full'. This term 'handing over possession of the land in full' is repeated at several places in this supplemental deed. Petitioner had already paid Rs. 37,66,849.07 and a balance of Rs.12,23,483.33 had to be deposited and there is no dispute that the petitioner paid this sum also within the stipulated period. Clause 5 of the terms of this agreement reads thus:

'5. That the licensees shall be granted a moratorium in the payment of annual license fee falling due in the years 1989 and 1990 in order to facilitate the construction of the said hotel expeditiously. The accumulated license fee for the period of moratorium shall be payable in 10 half yearly Installments Along with the interest/additional interest, if the same is charged by the Govt. of India from the

licensor on the deferred payments towards the cost of land. In case Govt. of India do not charge any interest and/or additional interest on the Installments towards the cost of land from NDMC, the same shall also not be charged from the licensees. The first Installment of the deferred payments will be payable by the licensees Along with the annual license fee falling due in the month of January, 1991 and subsequent Installment after every six months till the accounts are fully squared up. Save as provided above, no interest shall be charged from the licensees on the deferred payments if paid punctually in the aforesaid manner, failing which interest will be charged at the rate of 15% per annum for the entire period till such time the accounts are finally squared up.'

Clause 8, also is relevant:

'This Supplemental Agreement will form an integral part of the license deed already executed by the licensor and the licensee on 8.12.82 and the other terms and conditions remaining the same. license deed and Supplemental Agreement will be read in conjunction with each other and both will form as one compact unit.'

27. No doubt, there is an apparent contradiction between a few terms. While the earlier part of the agreement states that the annual license fee shall be paid from the date of handing over possession of the 'land in full', clause 5 refers to 'annual license fee falling due in the year 1989 and 1990'. This contradiction has to be resolved by reference to the various terms in the deed. The deed envisages handing over possession of the entire land in the year 1988 itself immediately after the petitioner deposits the balance of Rs. 12,23,483.33 (which the petitioner promptly paid). The purpose of Clause 5 was to grant moratorium in the payment of annual license fee in order to facilitate construction of the hotel. The period of construction was implied to be two years; even in the first agreement there was a similar moratorium for 2 years. The scheme of the two agreements is quite clear. Possession of the entire land was to be handed over to the petitioner, who would take steps to start the construction and complete it within 2 years. The annual license fee for these two years is to be paid only thereafter in half yearly Installments. Interest was not payable in case Installments were paid promptly. But petitioner was not handed over a portion of the plot measuring 922 Sq.ft. This

continued to be under the occupation of F & T department. According to the petitioner, even though this portion is on a corner towards the boundary of the allotted area, it was crucial to have this land to obtain the completion certificate and use the building. Petitioner has placed material on record to show that the Chief Fire Officer has been insisting that the building cannot be used as a hotel unless there is a 8 meter maintenance corridor around the building which is independent of parking and other facilities). In fact, the Chief Fire Officer stated before this Court also that the said requirement cannot be waived. It is undisputed that without this 922 Sq. Ft. area, the building (as per the sanctioned plan) cannot be used as a hotel, in view of the legal requirement as to the vacant area to be left around the building.

28. N.D.M.C. was suggesting to the petitioner, that building work may be commenced for which non-availability of this area was not a 'hindrance'. N.D.M.C. also wanted the petitioner to modify the plan in order to facilitate handing over some other parts of the locality to the petitioner to make up the deficiency. On 12.7.1988, the Director (Estate) of the N.D.M.C. wrote to the petitioner as follows:--

'With reference to your letter dated 16.4.88, 3.5.88, 11.5.88 and 2.6.88 on the subject cited above, I am to inform you that the matter has been examined in detail by the committee of officers under the Chairmanship of Financial Adviser, NDMC and to state that the possession of the land measuring 79077.82 sq. ft. has already been handed over to you on 2.2.88. For remaining land, you were asked to accept the land according to the modified drawing furnished to you vide letter No. HA/CPC/ Estate/380/P dated 8.4.88 but did not accept the same. As such, the license fee in respect of the land measuring 79077.82 Sq. Ft. which has already been handed over to you will commence from the date of handing over i.e. w.e.f. 2.2.88. However, no license fee will be charged in respect of the land measuring 922.18 sq. ft. which could not be handed over to you due to existence of Bungalow of P&T; Deptt. thereon. It is further informed that this small piece of land measuring 922.18 sq. ft. would not create any hindrance for construction of the hotel building, therefore, the question of any delay in the hotel project on this account hardly arises.

29. On 18.10.1988 N.D.M.C. insisted that license fee for the area handed over be paid with effect from 2.2.1988 and on 20.4.1990, asked the petitioner to execute another supplemental agreement failing which, NDMC would be cancelling the allotment/license.

30. While the NDMC exhibited belligerency towards the petitioner, its real understanding of the situation is reflected in its letters to the Government of India. In a letter dated 10.5.1988 (Annexure P-10) by the Director (Estates) of the NDMC to the Deputy Land and Development Officer of Ministry of Urban Development (Government of India), it was stated:

'As per the provisions of the license deed the license fee of the same will commence w.e.f. the date of handing over the complete possession of the land. The Committee has already handed over the possession of the land measuring 79,077.82 sq. ft., but the possession of remaining land measuring 92.18 sq. ft. could not be handed over due to the existence of a Bungalow occupied by the staff of P & T Deptt. This may create hindrance for construction of the hotel besides loss of revenue to the committee as the license fee is to commence only from the date of handing over the possession for the complete land.'

Again, on 15.6.1988, in another letter (Annexure P-11), the NDMC reiterated the same with the Government of India. The letter reads :--

'Kindly refer to this office letter No. HA/CPC/Estate/370/P dated 25.2.88 and subsequent reminder No. HA/CPC/Estate/ 810/P dated 10.5.88 on the subject cited above. The Bungalow of the P&T; Deptt. still exists on the hotel site at Gole Market Sub District Centre and as a result of this office has not been able to hand over the complete possession of the land to M/s. Sunair Hotels Ltd. This will cause loss of revenue to the Committee because as per the terms of the license Agreement executed between M/s. Sunair Hotels Ltd. and NDMC, the license fee of the hotel site will commence w.e.f. the date of handing over of the possession in full.'

On 26.8.1988 (as per Ex. P-12) above statement was repeated in another similar letter.

But, on 10.7.1990 the NDMC issued the impugned letter to the petitioner.

31. The letter refers to a proposal made by the NDMC to the petitioner, asking the petitioner to accept a slightly modified dimension of the plot and to modify the sanctioned plan accordingly. The letter further states that the petitioner obtained bulk portion of the allotted land already and non-handing over of 922.18 Sq. ft. would not hinder the construction work and therefore, NDMC was entitled to the license fee from 2.2.1988 itself. The letter refers to the demand made by the NDMC directing the petitioner to execute a supplemental agreement with respect to the commencement of the license fee w.e.f. 2.2.1988 in respect of the land already handed over to the licensee, failing which the allotment would be cancelled. The relevant part of this impugned letter reads as follows:

'That the licensor NDMC vide show cause notice No. HA/CPC/Estate/415-16/P dated 20.4.90 directed the licensee to execute a Supplemental Agreement with respect to the date of commencement of the license fee w.e.f. 2.2.88 (in respect of the land already handed over to them) within 7 days. It was made clear in the said notice that in case of non-compliance the NDMC will be left with no other alternative but to cancel the Allotment/license in respect of plot of land. However, they have failed to furnish their consent within the prescribed period.

That M/s. Sunair Hotels Ltd. have failed to execute the Supplemental Agreement as aforesaid, the Administrator, NDMC has cancelled the allotment/ license w.e.f. 3.7.1990 in respect of plot of land allotted to M/s. Sunair Hotels Ltd. at Gole Market Sub-District Centre, New Delhi. You are, therefore, requested to stop the use of the plot of land Along with structure thereon, if any, for any purpose whatsoever, forthwith and hand over the vacant possession of the premises to the Executive Engineer (North) NDMC and allow the representatives of the NDMC to exercise the right of re-entry within 10 days of the date of receipt of this notice. M/s. Sunair Hotels Ltd. are further called upon to pay Rs. 80,76,441.10 as per details given below on account of arrears of license fee and interest thereupon up to 2.7.1990 in respect of the said plot of land within 7 days:--

1. Arrears of license fee up to 2.7.90 at Rs.49,32, 808.00 P.A. in respect of land already handed over:Rs. 69,15,979.00 2. Arrears of interest at the rate of 15% up

to 2.7.1990:Rs. 11,60,462.10Total:Rs. 80,76,441.10

The amount of interest on arrears of license fee shall continue to accrue to the licensor, till the accounts are finally squared up.

Please note that if the above amount is not paid or if any interference is caused to the NDMC or its officers or employees are prevented from exercising the right of re-entry, legal action shall be taken against you as per law.

Please, also note that you are liable to pay damages as per Clause 43 of the license Deed at double the rate of existing rate of license fee i.e. Rs. 98,65,616.00 per annum from the date of cancellation of license w.e.f. 3.7.90. In the event of default in the payment, you will also be liable to pay interest at the rate of 15% per annum on each defaulted payment.'

32. The impugned letter was issued, therefore, not because of any alleged breach of the terms of the existing agreement, but because the petitioner did not comply with the direction to execute the demanded supplemental agreement, the existing agreement was to be cancelled. The source for the exercise of this power can be attributed only to the executive power of the NDMC as a public body. The exercise of the power, here, is similar, to the exercise of the power of cancelling any license to trade. The impugned letter, as well as the earlier letters of the NDMC, clearly indicate that, but for a fresh agreement it cannot demand the license fee w.e.f. 2.2.1988. The basis for the very demand for executing the supplemental agreement is that such an agreement is necessary to claim license fee w.e.f. 2.8.1988. The several letters written by the NDMC to the Government of India also show that, the petitioner was not liable to pay any license fee until the entire extent of land is handed over to the possession of the petitioner. The tone and tenor of this demand are truly the tone and tenor of an authority rather than that of a private person exercising a contractual power.

33. Petitioner has already paid to the NDMC a large sum over Rs.49 lakhs (nearly Rs. 50 lakhs); The petitioner has spent quite a considerable sum of money towards getting a plan of the building prepared and sanction obtained for the same. At this juncture, when the petitioner realised the risk involved in putting up

the building without the entire area in its control, and demanded it, NDMC has thought it expedient on its part to insist for the payment of a proportional license fee with a demand to execute another supplemental agreement. The situation is almost similar to the situation of unemployed persons entering into an agreement with an employer and the latter imposing unconscionable terms of employment on the job seekers, referred in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Anr., : (1986)ILLJ171SC . Such a power as the one now exercised by the NDMC cannot be read into the agreement between the parties, in the absence of clear words, because of its arbitrariness and unforeseen situations in which the power of terminating the allotment/license is likely to be exercised.

34. The power of terminating the allotment/license, is exercised here for a reason (because the petitioner did not agree to execute a supplemental agreement), not flowing out of the terms of the agreement. If so, exercise of the power is totally with Gut jurisdiction. In such a situation, assuming the termination, is a termination of contractual relationship, the said termination can be the subject matter of a writ proceedings (vide Express Newspapers and Ors. v. Union of India; : AIR 1986 SC872 ). In the instant case, actually, rights and liabilities of the parties under the two agreements need not be gone into at all on the admitted facts; Court is called upon to decide the correctness of the action taken to terminate the relationship resulting in the termination of the license.

35. The two basic facts found in favor of the petitioner are:--

(i) Liability to pay the subsequent license fee commences only after possession of the entire land is given to the petitioner; and

(ii) NDMC has no power to demand and insist that the petitioner should execute one more supplemental agreement.

36. These facts are too obvious and glare at anyone who is appraised of the facts as revealed from the material on record placed by the NDMC itself.

37. State of U.P. and Ors. v. Maharaja Dharminder Prasad Singh and Ors. : [1989]1SCR176 is relied upon by the respondents. Two matters were involved in the writ proceedings, in the said case; (i) Cancellation of lease by the State Government; (ii) Cancellation of an earlier order granting permission to develop the lease hold property. The competence of the State Government as the Lesser to terminate the lease was indisputable. But, the basic facts giving rise to the termination no e were disputed. The relevant question was referred at page 1002, thus:

'We may first ke up the appeals of the State Government and of the LDA assailing the order of the Hi Court quashing he cancellation of the lease. Sri Yogeshwar Prasad for the appellants submitted that the High Court fell into an error in allowing a matter, which should properly have been the subject matter of a civil suit, to be agitated in proceedings under Article 226 of the Constitution. Learned Counsel submitted that the relationship between the parties was one of Lesser and Lessee; the dispute between them pertained to the question whether there were breaches and non-performance of the covenants and conditions of the lease justifying the forfeiture of the lease, and that these matters, pertained to a private law situation and were not appropriately matters for enforcement of public law remedies. Learned Counsel further submitted that the question whether there were breaches of covenants on the part of the lessee involved the construction of the terms of the lease deed and required evidence on the matter. Disputes of this nature, learned Counsel submitted, could not be resolved on mere affidavits. Thirdly, Sri Yogeshwar Prasad submitted that on the merits of the contentions, the High Court should have noticed that even on the facts admitted, there were clear violations of the covenants and conditions of the lease. Learned Counsel also submitted that the view of the High Court that a reasonable opportunity of being heard had been denied to the respondents was erroneous and that, at all events, no hearing could be contemplated in the context for forfeiture of a lease of this nature.'

The Court held at page 1003:

'We do not propose to go into the merits of these grounds and their sufficiency in law to support the purported forfeiture as, in our view, this exercise, having regard

to the disputed questions of fact that are required to be gone into in that behalf, are extraneous to proceedings under Article 226 of the Constitution'.

Again in para 14 the Court held:

'On a consideration of the matter, we think, in the facts and circumstances of this case, the High Court should have abstained from the examination of the legality or correctness of the purported cancellation of the lease which involved resolution of disputes on questions of fact as well.'

Thereafter the Court referred to the observations of the Supreme Court in Express Newspapers Case : AIR 1986 SC872 .

38. In the instant case, the agreement in question is not merely to allot land to the petitioner; allotment of land is intermingled with the particular purpose of constructing a three star hotel in it and run a hotel. The permission to develop the land in a particular manner cannot be separated from the mere purpose to occupy the land with a liability to pay the license fee annually.

39. The arbitrariness in the impugned action of the NDMC, in the instant case, incites the writ jurisdiction, by the application of principles stated in Dwarkadas Marfatia and Sons v. Board of Trustees, Bombay Port : [1989]2SCR751 . There, the instrumentality of the State invoked its power to evict its tenants. Question was whether the Court can examine the reasonableness of the exercise of the power. It was held at page 1647:

'We are unable to accept the submissions. Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction'.

40. Again in para 23, the Court held:

'The contractual privileges are made immune from the protection of the Rent Act for the respondent because of the public position occupied by the respondent authority. Hence, its actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason not whimsically for any ulterior

purpose. Where any special right or privilege is granted to any public or statutory body on instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.'

41. The Court also pointed out that the power of judicial review is limited to the grounds of illegality, irregularity and procedural impropriety and that in the case of arbitrariness, the defect of irrationality is obvious.

42. No detailed decision is necessary to arrive at the principle that every action of the State without jurisdiction or based on extraneous considerations, will be arbitrary and irrational, and if so, in view of the above principles, said action could be subjected to judicial review, unless there is any other forum available to challenge the said action.

43. I may quote a passage from Judicial Remedies in Public Law by Clive Lewis (1992 Edn.) at page 54:

'..... Public law remedies will not be available when a contract specifically deals with a particular issue such as the procedures to be followed on dismissal and the individual is seeking to enforce the specific provisions or rights that arise by necessary implication from those specific provisions. Apart from those situations, public law principles and remedies may still govern the actions of public authorities even in a contractual context. This is a desirable development. Public authorities are meant to act in the public interest and should not be given the same freedom of contract as would an individual. The Courts should ensure the proper exercise of discretionary power by public authorities, whatever the precise source of that power.'

At page 53, the learned Author said:

'The Courts have been prepared to superimpose public law principles on to a contractual situations, and to ensure the observance of those principles by way of judicial review. They are prepared to do this even if the effect of granting a public

law remedy is to vary the rights existing under a contract as for example, where a decision to terminate a contract is quashed, and the contractual provisions then revived.'

In the instant case before me, Court need not go into the question of interpreting any of the terms of the contract at all. The basic question is whether the public authority (NDMC) has a power to impose fresh terms by demanding execution of a supplemental agreement, failing which, to cancel the earlier allotment/license. Here, the Court is not called upon to go into the wider area of judicial review.

44. The Court is not required to interpret any terms of the agreement in question. Question of interpretation arises when there is a dispute as to the applicability or scope of any term. Primarily, this writ petition involves the power of the NDMC to demand from the petitioner to execute a supplemental agreement. Admittedly, no term in the two agreements envisages vesting of such a power in the NDMC, I find the demand, ex facie arbitrary and unwarranted and the NDMC resorted to this kind of demand only because it has the power of a State (as its instrumentality).

45. Certain developments have taken place by virtue of the interim orders of this Court. These cannot be now ignored to limit the judicial review.

46. On 10.7.1990 the Division Bench stayed the impugned communication. On 17.1.1991, the Counsel for the respondents sought time to seek instructions regarding delivery of possession of the remaining land measuring 922.82 Sq. ft. On 6.2.1991 the Bench directed the Competent Officer to be present before the Court on 27.2.1991. On the said date it was reported that steps were being taken to take possession by NDMC of the remaining portion after demolishing the existing structure and therefore to deliver possession of the portion of land to the petitioner. The matter was again adjourned on 5.4.1991 because the respondent's Counsel sought time to settle the matter. In the meanwhile the period of sanction given to the plan expired. The respondent's Counsel agreed before the Court on 25.4.1991 to revalidate the plan and to restore electricity within a week. Regarding the 'No Objection Certificate' required by the petitioner to obtain a loan, Counsel for the respondent took time to seek instructions. Court also directed notice to the Chief Fire Officer.

47. The 'No Objection Certificate' was necessary from the NDMC for production before IFCl (a Statutory body) to enable the latter to sanction the requisite loan. Matter was also being adjourned from time to time and on 30.5.1991 it was recorded by the Court that the Chief Fire Officer was not prepared to relax the sanctioned plan. Hence writ petition was directed to be heard on 31.7.1991. On the same day, Court directed the NDMC to issue the 'No Objection Certificate' within 10 days in terms of Clause 5 of the agreement. Obviously the writ petition could not be heard. On 4.2.1992, Court directed the Director of Estates to attend the Court to point out as to the alternative land which could be allotted to the petitioner and also to explain the steps taken to hand over the remaining portion of the land. Ultimately on 3.3.1992 it was recorded that, 'some formalities for handing over the full possession of the plot is yet to be completed'. It was also recorded that NDMC had issued a letter of 'No Objection Certificate' (NOC for short) to IFCl to enable the petitioner to obtain the loan, which was not in the required form. Counsel for the respondent agreed to issue the NOC in the required form within 2 days. On 24.3.1992, it was recorded that possession of only one out of four quarters was obtained by NDMC and the remaining three quarters are locked by the previous allottees and that NDMC was not in a position to demolish the quarters. However, on 30.3.1992 full possession was given to the petitioner as recorded on 9.4.1992.

48. However, while recording the above facts, the Court issued 'Rule', resulting in the writ petition being shifted to the Single Judge for hearing.

49. Since NOC was not issued by NDMC in the form in which it was issued to others similarly situated, and the NOC issued in the case of the petitioner was not acceptable to IFCl, petitioner had to move the Court again by way of C.M. 2135/1993. On 17.3.1993 the Court directed the respondent to produce copies of NOCs issued to others and to bring NOC in the name of the petitioner also in the same manner, on 24.3.1993. However, on 24.3.1993, respondent sought adjournment to comply with the earlier order. On 30.3.1993, the Court ordered as follows:

'Certificate as prayed by the petitioner be issued in the form as had been issued in the case of Meridian Hotel within one week. This order would be without prejudice

to the rights of the parties which are yet to be decided in the writ petition.

Counsel for the respondent may also take instructions regarding re-validation of the map as it was re-validated earlier also under the orders of the Court. Re-validation of the map be also considered within two weeks.'

The petitioner had to file a petition seeking punishment of the respondent for not complying with the order and ultimately, when faced with the contempt of Court proceedings, the NDMC complied with the Court directions. The NOC was in fact delayed by over 14 months.

49A. On 14.9.1993, the NOC was handed over. In the meanwhile revalidation of plan was done by imposing several conditions, which were also withdrawn (obviously, in view of the 'Contempt of Court action'). But an endorsement was made on the revalidated plan as follows:--

'The plans are revalidated subject to the outcome of the writ petition No. 2197/90'.

50. The petitioner had paid over Rs.20 lakhs to IFCI as commitment charges while seeking the loan. Since NOC was not issued by the NDMC in time, IFCI rejected the loan application and the commitment charges was forfeited. Petitioner, thus lost this sum, for no fault of the petitioner.

51. Initially, NDMC had insisted that petitioner should pay a late fee of Rs. 4,31,608/- for the revalidation of the plan Along with another sum of Rs. 40,100/- as stacking charges. I find the letter dated 11.5.1993 demanded a sum of Rs. 12,94,824/- as late applying fee and Rs. 1,29,244/- as stacking charges, though application for revalidation had been filed on 6.4.1993, and admittedly, 3rd, 4th and 5th April, 1993 were public holidays during which time the previous revalidation had expired. Petitioner relies on this aspect of the conduct of NDMC to highlight the arbitrary approach adopted by NDMC while dealing with the petitioner. Petitioner also pointed out that revalidation was ordered by this Court and no condition was imposable by NDMC, without the permission of the Court. Anyhow, ultimately this illegal demand was withdrawn to avoid punishment in the contempt proceedings.

52. The Counsel for the NDMC was unable to point out any Rule or Bye-law enabling the NDMC to levy such 'late applying fee'. If Municipal land is not used for stacking, charges on that count also were not leviable.

53. The history of this litigation requires one more event to be narrated. Order to revalidate the plan and to issue NOC was made on 30.3.1993. NDMC filed a Letters Patent Appeal No. 48/1993 against this order, which was dismissed by the Bench. The revalidation letter was issued on 11.5.1993 wherein there was a demand for late fee of Rs. 12,94,824/-. Earlier revalidation was in force till 5.4.1993 and the petitioner's application was on 6.4.1993. 3rd, 4th and 5th April were public holidays. The Contempt petition was filed on 17.5.1993 (CCP 157/1993) against the Administrator, the Director and the Architect of the NDMC. In the meanwhile, against the dismissal of Letters Patent Appeal, the Supreme Court was moved by the NDMC in S.L.P. 9542/1993 which was dismissed on 30.7.1993; only thereafter NDMC handed over the NOC on 14.9.1993, and waived all penalties, and conditions imposed for revalidation of sanctioned plans. The manner in which the NDMC fought the litigation and its demand for late fee (when on the face of it no such fee could have been demanded) is another indication of its approach towards the petitioner. But the endorsement that 'The plans are revalidated subject to the outcome of writ petition No. 2197/1990' remained. Against this the Hnd writ petition No. 768/1994 was filed by the petitioner.

54. In view of the revalidation (subject to the condition as to the result of the first writ petition), petitioner could have proceeded to put up the construction. As a fact, some work was being carried out. As the work was in progress, NDMC wrote to the petitioner on 12.4.1994 as follows:--

'It has been observed by the field staff that you have started excavation work relating to the construction of basement in respect of Sunair Hotel, at Bangla Sahib Road, New Delhi. You are required to let us know the circumstances under which the construction has been started at site.'

On 19.4.1994 the plans were again revalidated; the letter of NDMC informs and reads:--

'With reference to your building application received vide Scheme No. 1837 dated 18.3.1994 on the subject cited above, it is to inform you that the plans have been Revalidated by the Administrator vide Reso. No.7 dated 12.4.94 for a period of one year i.e. up to 6.4.1995 subject to compliance as under:--

1. Final outcome of writ petition No. 2197 of 1990 of Delhi High Court pertaining to cancellation of license deed and party be also advised not to undertake construction till the decision of the Court.
2. Party depositing Rs. 37,160/- (Rupees thirty seven thousand one hundred sixty only) as security deposit for removal of malba from the Municipal land.
3. Party submitting an undertaking that they shall not stack building material on municipal land.

You are therefore, required to comply with the above conditions and get the Revalidated plans released.'

55. In the course of arguments, the learned Counsel for the petitioner placed before the Court another letter of the NDMC, dated 12.7.1994, addressed to the petitioner on the subject of construction. The letter points out that the revalidation of the plans was subject to the result of writ petition No. 2197/1990 and further states:-- 'you are also advised not to undertake construction till the decision of the Court'. Thirteen requirements to be complied with were also referred (which can be considered as regulatory and certainly permissible conditions).

56. Counsel for the petitioner contended that in the face of this kind of threat and advice against the construction, it was impossible for the petitioner to proceed with the construction and the delay in completing the project is entirely due to the fault of the NDMC and therefore, the liability to pay the annual license fee would get postponed till the construction work is completed. It was further contended that since the validation of the plans was subject to the result of the first writ petition as per the endorsement thereon, petitioner could not take any risk in constructing the building.

57. The basic question is the validity of the impugned letter dated 10.7.1990 (Annexure P-1 in the 1st writ petition). The events leading to the issuance of the said letter reveal that NDMC was not in a position to hand over full possession of the entire plot of land. The NDMC had been insisting that license fee be paid to it, proportionate to the area of land handed over and that petitioner may put up the construction. However, NDMC nowhere stated that it will be responsible to get the requisite certificate or permission of the Chief Fire Officer, if the building is completed and the balance area of the land is not made available to the petitioner to comply with the legal requirements governing fire-safety measures. NDMC has been over anxious to receive its dues, rather than cooperate with the petitioner to complete the project. NDMC entirely ignored the high risk involved for the petitioner if the petitioner proceeds to put up the construction. The NDMC even did not care to cooperate by issuing the requisite certificate (NOC) to enable the petitioner to obtain the loan from Industrial Finance Corporation of India (IFCI), resulting in petitioner losing a very large amount paid as commitment charges to IFCI. NDMC has not shown as to how it can demand from the petitioner to execute another supplemental agreement. While NDMC was telling the Government of India that the petitioner was not liable to pay the license fee until the full extent of land is handed over to the petitioner, it adopted a different attitude while dealing with the petitioner. No further material is necessary than this particular attitude of the NDMC to show that it has been acting unfairly and unreasonably towards the petitioner. Neither the agreements entered into between the parties, nor any law empowers the NDMC to insist that a supplemental agreement shall be executed providing for the payment of proportionate license fee to the extent of the land delivered or to allot the extent of the land allotted to the petitioner.

58. In the circumstances, I am constrained to hold that the impugned letter dated 13.7.1990 was issued without jurisdiction; in addition, the requirements insisted in the said letter are not traceable to any of the terms of the license/ agreement and are arbitrary and unfair and hence violate Article 14 of the Constitution. The impugned letter (Annexure P-1) dated 10.7.1990 (in C.W.P. 2197/1990) is accordingly set aside. The respondents are restrained from giving effect to the contents of the said letter.

59. The demand for late applying fee does not survive in view of its withdrawal.

60. In the IInd writ petition, petitioner questions the endorsement made while revalidating the plans. The said endorsement automatically gets ineffective since the first writ petition is allowed. Petitioner seeks a further relief that license fee is payable only after the date of issuance of an unconditional, sanctioned plan. Further the petitioner has asserted in the 2nd writ petition that in identical situation NDMC had granted moratorium to M/s. Bharat Hotels Ltd. for payment of license fee of 6 years from the handing over of the possession and liability to license fee commenced only from the date of handing over the land in full.

61. License fee is payable for the period after handing over possession of the land in full. This was how NDMC itself understood the agreement. Full possession was given to the petitioner on 30.3.1992. But the question of moratorium for any period subsequent to the date of handing over of possession is a matter of applying the terms of the agreement. There is a specific clause in the agreement for resolving such a dispute by referring the same to the arbitration of the Lt. Governor of Delhi. I do not think, it is proper for this Court to go into the said question. The writ jurisdiction is normally not available to resolve disputes arising out of the terms of an agreement. However, in the circumstances of the case, and the delay occasioned by the unreasonable attitude of the NDMC, the petitioner should be permitted to proceed with the construction and on completion commence business (if otherwise construction and completion are according to law); Petitioner shall also pay the license fee for the years 1995 and thereafter in terms of the agreement subject to any modification that may be decided by the Lt. Governor. The liability of the petitioner for the years 1993 and 1994 (that is for the two years on handing over possession) and the moratorium thereon and any other modifications or concessions regarding the subsequent years shall be determined by the Lt. Governor in the reference for arbitration in this regard. However, petitioner shall have to pay some amount towards those two years commencing from 30.3.1992, which as an interim measure, I compute at Rs. 10 lakhs as a condition for commencement of further works. This payment, again, will be subject to the decision of the Lt. Governor.

62. The NDMC is directed to make a reference of all the disputes to the Lt.Governor, within eight weeks from today.

63. In the result I make the following order:

(i) C.W.P. No.2197 of 1990 is allowed; the impugned letter (Annexure P-1) dated 10.7.1990 is set aside; the respondents are restrained from enforcing the contents of the said letter.

(ii) The question of the license fee for the period of 2 years subsequent to and commencing from 30.3.1992 shall be referred to the arbitration of the Lt. Governor of Delhi. The NDMC is directed to make the reference in this regard within 8 weeks from today.

(iii) The petitioner shall be permitted to proceed with the construction and commence business on the land in action, if otherwise they are according to law (including the terms of the agreements), subject to the condition, the petitioner pays the license fees in terms of the agreements for the periods subsequent to the expiry of two years from 30.3.1992 and a sum of Rs. 10 lakhs in token of the license fee for the first two years commencing with 30.3.1992, all of which shall be subject to the award of the Lt. Governor.

(iv) In addition to the aforesaid sum of Rs. 10 lakhs, petitioner shall also pay the license fee as and when the liability accrues in terms of the agreements, payable during the years 1995 and onwards, which also, shall be subject to the award of the Lt. Governor.

(v) Having regard to the entirety of circumstances, each party shall bear the respective costs of this litigation.

Ordered accordingly.