REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2009
(Arising out of SLP (C) No. 21552 of 2007)

S.K. Jain .....Appellant

Versus

State of Haryana and Anr. ....Respondents

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Punjab and Haryana High Court dismissing the writ petition filed by the appellant under Section 226 of the Constitution of India, 1950 (in short the 'Constitution'). Prayer was to quash the Memo No.428 dated 10.1.2007

directing the appellant to deposit the amount of about Rs.1.81 crores which is 7% of the total amount claimed by the appellant before the Arbitral Tribunal (hereinafter referred to as the 'Tribunal').

3. Background facts in a nutshell are as follows:

The appellant is a contractor, who was allotted work of constructing Haryana Government office building in Sector 17, Chandigarh. On 4-3-1992 an agreement was entered into between the parties, which incorporated sub-clause (7) of clause 25-A providing for arbitration in case of any dispute. Some differences between the parties regarding payment in respect of allotted work had arisen which resulted in referring the dispute to the three members Tribunal. The appellant filed his claim before the Tribunal. The respondent-State filed its objection to the claim by principally submitting that the contractor has to comply with the mandatory requirements of sub-clause (7) of Clause 25-A of the agreement dated 4.3.1992 which obliged the appellant to deposit 7% of the total claim made. The amount so calculated comes to Rs.1,81,14,845/-. The Tribunal sustained the objection and after placing reliance on a judgment of this

Court in Municipal Corporation, Jabalpur v. M/s Rajesh Construction Company (JT (2007 (5) SC 450) has opined as follows:

> "In view of the decision of the Supreme Court, referred to above, as suggested on behalf of the respondent, the claimant is directed to deposit Rs. 1,81,14,815/- i.e 7% of the amount claimed in the statement of claim with the respondent and further arbitration proceedings would proceed only thereafter. The claimant was to comply with the above condition in agreement before steps could be taken to start arbitration proceedings. Hence, at this stage Arbitrators cannot assume jurisdiction to proceed with the arbitration. While allowing objection petition filed under Section 16 of the Arbitration and Conciliation Act, it is so ordered as above, accordingly.

Challenge before the High Court was that the Arbitration and Conciliation Act, 1996 (in short the 'Act') does not permit the parties to contract out of the provisions of the Act, and therefore the prescription under Sub-Clause (7) of Clause 25-A of the agreement was in conflict with the provisions of Section 31(8) read with Section 38 of the Act. It was submitted that the costs involved cannot be more than Rs.20 crores and, therefore, the demand of Rs.1.81 crores which is 7% of the total amount claimed is wholly arbitrary, unreasonable and capricious. The High Court did not find any substance in the plea and held that the challenge to the

legality of Sub-Clause (7) of Clause 25-A of the agreement is without any substance. Accordingly, the writ petition was dismissed.

4. It is submitted by learned counsel for the appellant that Sub-clause (7) of Clause 25-A incorporated in the agreement was a result of the unequal bargaining power of the parties and since the Government is not required to make the deposit, it is unconscionable and, therefore, the High Court has erroneously dismissed the writ petition. Additionally, it is submitted that the true effect of Sections 31(8) and 38 of the Act has not been kept in view. It is also submitted that the contract is in conflict with Sections 23 and 28 of the Indian Contract Act, 1872 (in short the 'Contract Act').

5. Learned counsel for the respondents on the other hand supported the judgment of the High Court.

6. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr. (1986 (3) SCC 156). The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated

that the concept of unequal bargaining power has no application in case of commercial contracts.

7. In Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd. (AIR 1965 SC 1288) it was observed at para 5 as follows:

> **"5.** The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "This Insurance may be terminated at any time at the request of the Insured", and "The Insurance may also at any time be terminated at the instance of the Company." These are all the words of the clause that matter for the present purpose. The words "at any time" can only mean "at any time the party concerned likes". Shortly put clause 10 says "Either party may at its will terminate the policy." No other meaning of the words used is conceivable."

8. In General Assurance Society Ltd. v. Chandmull Jain and Anr. (AIR 1966 SC 1644 at para 11) the decision was re-iterated as follows:

"11. A contract of insurance is a species of commercial transactions and there is a well established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained or it may incorporate by reference the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the term and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover note or even in the letter of acceptance including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. During the time the cover note operates, the relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens the terms of the policy are incipient but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover notes give sufficient indication that it would be so. In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberrima fides* i.e. good faith on the part of the assured and the contract is likely to be construed *contra proferentem* that is against the company in case of ambiguity or doubt. A contract is

formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes, that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being."

Sub-Clause (7) of Clause 25-A of the agreement reads as follows:

"(7) It is also a term of this contract agreement that where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the executive Engineer-in-Charge of the work a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings be adjusted against the cost, if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such cost being awarded, the whole of the sum will be refunded to him within one month from the date of the award-

	Amount of claim	Rate of Security deposit
1.	For claims below Rs.10,000/-	2% of amount claimed
2.	For claims of Rs.10,000/- and above and below Rs.1,00,000/- and	5% of amount claimed
3.	For claims of Rs.1,00,000/- and above	7% of amount claimed.

9. So far as the plea relating to Sub-Section (8) of Section 31 and Section 38 are concerned they read as follows:

"**31-Form and contents of arbitral award:-**

xx xx xx

(8) Unless otherwise agreed by the parties-

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify-

(i) the party entitled to costs,
(ii) the party who shall pay the costs,
(iii) the amount of costs or method of determining that amount, and
(iv) the manner in which the costs shall be paid.

Explanation- For the purpose of clause (a), "costs" means reasonable costs relating to-

(i) the fees and expenses of the arbitrators and witnesses,
(ii) legal fees and expenses,
(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

38. Deposits- (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of Section 31, which it expects will be incurred in respect of the claim submitted to it.

Provided that where apart from the claim a counter claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties.

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be."

10. A bare perusal of the aforesaid provisions clearly shows that the provision is to operate in the absence of agreement with regard to cost. It cannot be pressed into service to get over sub-clause (7) of Clause 25-A.

11. In addition to the various pleas, the stand taken by the appellant is squarely answered by what has been stated by this Court in Assistant Excise Commissioner and Ors. v. Issac Peter and Ors. (1994 (4) SCC 104). At para 26 it has been stated as follows:

> "**26.** Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory — at least to the extent of previous year's supplies — by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of

fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract — or rather more so. It is one thing to say that a contract — every contract — must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In *Dwarkadas Marfatia* v. *Board of Trustees of the Port of Bombay* it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. *Shrilekha Vidyarthi* v. *State of U.P.* was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a *public office*, on account of which it was held

> to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

12. It has been submitted by learned counsel for the appellant that there should be a cap in the quantum payable in terms of sub-clause (7) of Clause

25-A. This plea is clearly without substance. It is to be noted that it is structured on the basis of the quantum involved. Higher the claim, the higher is the amount of fee chargeable. There is a logic in it. It is the balancing factor to prevent frivolous and inflated claims. If the appellants' plea is accepted that there should be a cap in the figure, a claimant who is making higher claim stands on a better pedestal than one who makes a claim of a lesser amount.

13. Above being the position, the appeal is clearly without merit, deserves dismissal which we direct.

……J.
(Dr. ARIJIT PASAYAT)

……J.
(V.S. SIRPURKAR)

……..…..J.
(ASOK KUMAR GANGULY)

New Delhi,
February 23, 2009