REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.9466 OF 2003

MARY ...APPELLANT

VERSUS

STATE OF KERALA AND ORS. ... RESPONDENTS

JUDGMENT

CHANDRAMAULI KR. PRASAD,J.

The appellant, aggrieved by the judgment and order dated 13.6.2002 passed by the Division Bench of the Kerala High Court in Writ Appeal No.1734 of 1995 setting aside the judgment and order dated 4.8.1995 passed by learned Single Judge of the said High Court in Original Petition No.12514 of 1994; whereby it had directed for refund of an amount of Rs.7,68,600/- along with interest, is before us with the leave of the Court.

The appellant, Mary was a successful bidder in an auction conducted on 24.3.1994 for sale of privilege to vend arrack in Shop Nos. 47 to 55 and 57 in Kalady Range –III for the period 1.4.1994 to 31.3.1995. Her bid was for a sum of Rs.25,62,000/-. The sale of the privilege to vend arrack is governed by the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 (hereinafter referred to as 'the Rules'). The officer conducting the sale declared the appellant to be the 'auction purchaser' in terms of Rule 5(8) of the Rules. Being declared as auction purchaser, she deposited 30% of the bid amount i.e. Rs.7,68,600/- on the same date and executed a temporary agreement in terms of Rule 5(10) which was subject to confirmation by the Board of Revenue. Rule 5(19) makes this deposit as security for due performance of the conditions of licence. Kalady is the holy birth place of Adi Sankaracharya and adjoining thereto existed a Christian pilgrim centre associated with St. Thomas. The residents of those areas objected to

the running of any abkari shop. A large number of people collected and offered physical resistance to the opening of the abkari shops and the law and order enforcing agency could not assure smooth conduct of business. The aforesaid circumstances led the appellant to believe that it was impossible for her to run the arrack shop in the locality in question. The appellant, therefore, by her letter dated 3.4.1994 addressed to the Board of Revenue, District Collector and Assistant Commissioner of Excise, informed them that because of mass movement it was not possible for her to open and run the shops. Accordingly, she requested them not to confirm the sale in her favour as it was impossible for her to execute the privilege for the reasons beyond her control. She also requested that the proposed contract may be treated as rescinded. She further reserved her right to claim refund of the security amount. There is nothing on record to show that after the appellant refused to carry out her obligations,

the State Government took any step to re-sell or re-dispose the arrack shops in question.

Notwithstanding that, the Excise Inspector of Kalady Range sent a notice dated 8.4.1994 to the appellant, inter alia, stating that the sale has already been confirmed in her favour. The appellant was asked to accept the confirmation notice and enter into a permanent agreement. By the said notice the Excise Inspector also called upon the appellant to show cause as to why further proceedings as contemplated under the Rules should not be initiated against her. The appellant filed her reply to show cause on 17.4.1994 reiterating her inability to run the arrack shops and further requested that all proceedings pursuant to the auction held on 24.3.1994 be cancelled and the amount already deposited by her be refunded to her. It seems that the cause shown by the appellant did not find favour with the authority and the Assistant Excise Commissioner, by notice dated 20.4.1995, called upon the appellant to pay a sum of Rs.33,41,400/- towards the balance amount

payable by her, together with interest at the rate of 18% thereon. Revenue recovery notice dated 30.6.1995 was also issued for realisation of the aforesaid amount. The appellant challenged the aforesaid notices issued to her in a writ petition filed before the Kerala High Court which was registered as Original Petition No.9976 of 1995 (Mary vs. State of Kerala & Others). While challenging the aforesaid notices and further proceedings, the appellant contended that Rule 5(15) and 5(16) are arbitrary and violative of Article 14 of the Constitution of India. The appellant filed another writ petition, inter alia, praying for direction to the State authorities to refund an amount of Rs.7,68,600/- paid by her as initial deposit. This writ petition was registered as Original Petition No.12514 of 1994 (Mary vs. State of Kerala & Others).

Both the writ petitions were heard together and the learned Single Judge vide judgment dated 4.8.1995 allowed both the writ petitions. The learned Single Judge quashed the notices and all

the proceedings initiated against the appellant and further directed the refund of the amount of Rs.7,68,600/- deposited by her along with interest. However, learned Single Judge did not strike down Rule 5(15) and 5(16). While doing so, learned Single Judge observed as follows:

> "15. The undisputed and uncontroverted facts as appearing above clearly attract the doctrine of frustration and impossibility leading to the conclusion that the contract from its inception becomes void and discharged. Consequently, it is needless to consider and decide other contentions urged as regards excesses of delegated legislation in the forms of the rules, as they are unnecessary altogether in view of the above conclusion. Both these petitions succeed accordingly."

The State of Kerala and its functionaries, aggrieved by the aforesaid judgment, preferred separate appeals. Both the appeals were heard together and disposed of by a common judgment. Writ Appeal No.1722 of 1995, filed against the recovery of the balance amount was dismissed. While allowing Writ Appeal No.1734 of 1995 which was against the direction of the learned Single

Judge for refund of the initial deposit, the Division Bench held that the State is justified in forfeiting the said amount in view of Rule 5(15). While doing so, the Division Bench observed as follows:

> "**8**……However, where there are statutory provisions, the contractual terms are defined by the statutory provisions which must govern the relationship between the parties. Where the statute governs the relationship, it is the statutory terms which have to be applied for deciding the disputes between the parties. In this view of the matter, particularly when the contention of invalidity of sub-rule (15) and (16) of Rule 5 was negatived by the learned Single Judge, we are of the view that the rights and liabilities between the parties have to be worked out purely in accordance with the applicable rules."

Accordingly, the Division Bench found that the offer of the appellant having been accepted, same could not have been withdrawn. For coming to the aforesaid conclusion, the High Court placed reliance on sub-rules (10)&(15) of Rule 5 and observed as follows:

> "**10.** It is on the basis of these rules that the rights of the parties have to be determined. These rules really form the substratum of the contract between the parties, though all disputes arising between the parties have to be resolved in accordance with the principles of contract law, taking the rules as forming the basic contract between the parties. That the accepted offer is incapable of being withdrawn, is clear from the provisions under sub-rule(10) of Rule 5. The first respondent, therefore, could not have purported to withdraw the offer or rescind the contract by letter dated 3.4.1994. That the first respondent did not carry out several obligations as provided in sub-rule (10) of Rule 5 is also beyond dispute. Consequently, by reason of sub-rule(15) of Rule 5 of the Rules, the State was entitled to forfeit the entire deposit amount of Rs.7,68,600/-. Thus far, there is no difficulty. "

In the present appeal, we have been called upon to examine the validity of this part of the judgment whereby the Division Bench held that the State was entitled to forfeit the entire deposited amount of Rs. 7,68,600/-.

We have heard Ms. Neha Aggarwal for the appellant and Ms. Mukta Chowdhary for respondents.

Ms. Aggarwal contends that the appellant could not carry out her obligation as it became impossible in view of the mass movement and resistance which State could not contain. In this connection, she has drawn our attention to Section 56 of the Contract Act. In support of the submission reliance has also been placed on a decision of this Court in the case of ***Sushila Devi v. Hari Singh, (1971) 2 SCC 288,*** and our attention has been drawn to Paragraph 11 of the judgment which reads as follows:

> **"11.** In our opinion on this point the conclusion of the appellate court is not sustainable. But in fact, as found by the Trial Court as well as by the appellate court, it was impossible for the plaintiffs to even get into Pakistan. Both the Trial Court as well as the appellate court have found that because of the prevailing circumstances, it was impossible for the plaintiffs to either take possession of the properties intended to be leased or even to collect rent from the cultivators. For that situation the plaintiffs were not responsible in any manner. As observed by this Court in *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*,(1954) SCR 310, the doctrine of frustration is really an aspect or part of the law of

> discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract."

Yet another decision on which Ms. Aggarwal has placed reliance is the decision of this Court in ***Har Prasad Choubey v. Union of India, (1973) 2 SCC 746,*** in Paragraph 9 whereof it has been held as follows:

"9. This elaborate narration would make it clear that the appellant had bid for the coal under the honest and reasonable impression that he would be allowed to transport the coal to Ferozabad, that this was thwarted by the attitude of the Coal Commissioner, that later on the parties proceeded on the basis that the auction sale was to be cancelled and the appellant refunded his money. But apparently because by that time much of the coal had been lost and the Railways would have been in difficulty to explain the loss they chose to deny the appellant's claim. We can see no justification on facts for such a denial and the defendants cannot refuse to refund the plaintiff's amount. The contract had become clearly frustrated. We must make it clear that we are not referring to the refusal to supply wagons but the refusal of the Coal Commissioner to allow the movement of coal to Ferozabad in spite of the fact that it was not one of the conditions of the auction. The appellant is, therefore, clearly entitled to the refund of his money. Furthermore, the contract itself not being in accordance with Section 175 of the Government of India Act is void and the appellant is entitled to the refund of his money. We are unable to understand the reasoning of the High Court when it proceeds as though the appellant was trying to enforce the contract. We can see no justification for the lower Court refusing to allow interest for the plaintiff's amount at least from the date of his demand, or the latest from the date of suit."

Ms. Chowdhary, however, contends that in the case in hand, the terms and conditions for grant of privilege is governed by the Rules and in view of specific consequences provided for non-compliance of the terms and conditions of the contract i.e. forfeiture of the security money, the Division Bench of the High Court has not committed any error in holding that the State was entitled to forfeit the entire deposit.

In view of the rival submission we deem it expedient to go through the relevant rules. Rule 2(a) defines Abkari shop to include an arrack shop with which we are concerned in the present appeal. Chapter IV of the Rules provides for general conditions applicable to sale of Abkari shops. It consists of only one Rule i.e. Rule 5 but it has 22 sub-rules. Sub-rule 15 of Rule 5 reads as follows:

> **5.** xxx xxx xxx
>
> **(15)** In addition to the solvency certificate and cash security mentioned in sub-rule(10) the auction

purchaser shall furnish such personal sureties as may be required of him to the satisfaction of the Assistant Excise Commissioner. The Board of Revenue may, if in their opinion it is necessary, require the auction purchaser to furnish additional cash security as may be fixed by them at the time of confirmation. The auction purchaser shall also execute a permanent agreement in Form No. 11 appended to these rules and take out necessary licence before installation of the shop or shops. On the failure of the auction purchaser to make such deposit referred to in sub-rule (10) or take out such licence or execute such agreement temporary or permanent or furnish such personal surety or additional cash security as aforesaid, the deposit already made by him towards earnest money and security shall be forfeited to Government and the shop resold or otherwise disposed of by the Assistant Excise Commissioner subject to confirmation by the Board of Revenue. Disposal otherwise includes closure or departmental management. In the case of death of an auction purchaser before the execution of the permanent agreement, the same shall be obtained from the heirs of the deceased unless the Assistant Excise Commissioner subject to the confirmation by the Board of Revenue cancels the contract. In the case of death of an auction purchaser after confirmation of the sale of the shop or shops, his heirs, if any, shall be required to produce the necessary legal evidence in support of their claim and on production of the same the shop shall be transferred to them

> and pending such transfer the shop shall be run on departmental management. It is open to the Assistant Excise Commissioner to call upon them to furnish additional security, if in his opinion it is necessary for the successful working of the contract. If the heirs fail to produce within a period of one month from the date of death of the auction purchaser the necessary evidence in support of their claim or to deposit the additional security required, the Assistant Excise Commissioner shall order the re-sale of the shop or shops or otherwise dispose of the shop or shops at the risk of the original purchaser subject to confirmation by the Board of Revenue.
>
> xxx xxx xxx"

(underlining ours)

From a plain reading of the aforesaid provision it is evident that on the failure of the auction purchaser to execute the agreement whether temporary or permanent, the deposit already made by auction purchaser towards earnest money and security money shall be forfeited. Undisputedly, the appellant was declared as auction purchaser and, in fact, she had deposited 30% of the bid amount, that is, 7,68,600/- in terms of Rule 5(10)

of the Rules. It is further an admitted position that the appellant did not execute a permanent agreement or for that matter, did not execute the privilege. Hence, in terms of sub-rule (15) of Rule 5, the money deposited by her is liable to be forfeited. However, as stated above, the appellant's plea is that it was due to the facts beyond her control that she could not derive benefit from the privilege granted to her and hence did not run the shop. Therefore, the security amount deposited by her is not fit to be forfeited. In view of the aforesaid, what falls for our determination is as to whether the appellant could invoke the doctrine of frustration or impossibility or whether she will be bound by the terms of the statutory contract. In other words, in case of a statutory contract, will it necessarily destroy all the incidents of an ordinary contract that are otherwise governed by the Contract Act?

It is not the case of the State that appellant has purposely, or for any oblique

motive, or as a device to avoid any loss, refused to execute the agreement. It appears to us that the State was helpless because of the public upsurge against the sale of arrack at Kaladi, the birth place of Adi Shankaracharya as, in their opinion, the same will render the soil unholy. Consequently, the State also found it impossible to re-sell or re-dispose of the arrack shops. In view of second paragraph of Section 56 of the Contract Act, a contract to do an act which after the contract is made, by reason of some event which the promissory could not prevent becomes impossible, is rendered void. Hence, the forfeiture of the security amount may be illegal. But what would be the position in a case in which the consequence for non-performance of contract is provided in the statutory contract itself? The case in hand is one of such cases. The doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible.

However, in our opinion, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act. Rule 5(15) in no uncertain terms provides that "on the failure of the auction purchaser to make such deposit referred to in sub-rule 10" or "execute such agreement temporary or permanent" "the deposit already made by him towards earnest money and security shall be forfeited to Government". When we apply the aforesaid principle we find that the appellant had not carried out several obligations as provided in sub-rule (10) of Rule 5 and consequently, by reason of sub-rule (15), the State was entitled to forfeit the security money.

Now reverting to the decisions of this Court in the cases of ***Sushila Devi (supra)*** *and* ***Har Prasad Choubey (supra),*** we are of the opinion that they are clearly distinguishable. In those cases the contract itself did not provide for the consequences for its non-performance. On the face of the same, relying on the doctrine of frustration, this Court came to the conclusion that the parties shall not be liable. As stated earlier, in the face of the specific consequences having been provided, the appellant shall be bound by it and could not take benefit of Section 56 of the Contract Act to resist forfeiture of the security money.

Confronted with this, Ms. Aggarwal raises the issue of validity of Rule 5(15). The learned Single Judge had allowed the writ petition filed by the appellant but negatived her challenge to the validity of Rule 5(15) and 5(16) of the Rules. In an appeal preferred by the State, it does not seem that the appellant had raised the plea of

invalidity of the Rules but before us it is the contention of the appellant that Rule 5(15) does not meet the requirement of the doctrine of reasonableness or fairness and on this ground alone the rule is invalid. As a corollary, the forfeiture made is illegal. It is pointed out that in a contract of the present nature, the relative bargaining power of the contracting parties cannot be overlooked. Viewed from this angle, the rule is opposed to public policy, contends the learned counsel. Reference in this connection has been made to a decision of this Court in the case of **Central Inland Water Transport Corporation Limited and Another** v. **Brojo Nath Ganguly and Another etc. (1986) 3 SCC 156.** In this case, the terms in the contract of employment as also service rules provided for termination of service of permanent employees without assigning any reason on three months' notice or pay in lieu thereof on either side was under challenge. Taking into account unequal bargaining power between the employer and the employee, the term in contract and the rules

were held to be unconscionable, unfair, unreasonable and against the public policy. On these grounds, this Court struck down the termination as void. The relevant portion of the judgment reads as follows:

> "**100**……The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (*i*) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9(*i*) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a clause similar to Rule 9(*i*) in their contracts of employment. As appears

> from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several government companies apart from the Corporation (which is the first appellant before us) must be having it. There are 970 government companies with paid-up capital of Rs.16,414.9 crores as stated in the written arguments submitted on behalf of the Union of India. The government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(*i*) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under Section 23 of the Indian Contract Act."

Reference has also been made to a Constitution Bench judgment of this Court in the case of **Delhi Transport Corporation** v. **D.T.C.Mazdoor Congress and Another 1991 Supp (1) SCC 600.** In this case, **Brojo Nath Ganguly (supra)** has elaborately been discussed and while endorsing the view by majority this Court held as follows:

> "**338.** Accordingly I hold that the ratio in Brojo Nath Ganguly case, (1986) 3 SCC 156 was correctly laid and requires no reconsideration and the cases are to be decided in the light of the law laid above. From the light shed by the path I tread, I express my deep regrets for my inability to agree with my learned brother, the Hon'ble Chief Justice on the applicability of the doctrine of reading down to sustain the offending provisions. I agree with my brethren B.C.Ray and P.B.Sawant,JJ. with their reasoning and conclusions in addition to what I have laid earlier."

However, it has been contended by learned counsel representing the respondent-State that doctrine of fairness or reasonableness is not capable to be invoked in a statutory contract. Strong reliance has been placed on a decision of this Court in the case of **Assistant Excise Commissioner and Others** v. **Issac Peter and Others (1994) 4 SCC 104,** and our attention has been drawn to the following passage.

> "**26**……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."

We have given our most anxious consideration to the submission advanced and we do not find any substance in the submission of the learned counsel for the appellant and the decision relied on by her, in fact, carves out an exception in case of a commercial transaction. The duty to act fairly is sought to be imported into the statutory contract to avoid forfeiture of the bid amount. The doctrine of fairness is nothing but a duty to act fairly and reasonably. It is a doctrine developed in the administrative law field

to ensure rule of law and to prevent failure of justice where an action is administrative in nature. Where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action. But, in our opinion, it certainly cannot be invoked to amend, alter, or vary an express term of the contract between the parties. This is so even if the contract is governed by a statutory provision i.e. where it is a statutory contract. It is one thing to say that a statutory contract or for that matter, every contract must be construed reasonably, having regard to its language. But to strike down the terms of a statutory contract on the ground of unfairness is entirely different. Viewed from this angle, we are of the opinion that Rule 5(15) of the Rules cannot be struck down on the ground urged by the appellant and a statutory contract cannot be varied, added or altered by importing the doctrine of fairness. In a contract of the present nature, the licensee takes a calculated risk. Maybe the appellant was not wise enough but in law, she can

not be relieved of the obligations undertaken by her under the contract. **Issac Peter (supra)** supports this view and says so eloquently in the following words:

> "**26**……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…"

Now, referring to the decision of this Court in the case of **Brojo Nath Ganguly (supra)**, the same related to terms and conditions of service and the decision in the said case has been approved by this Court in the case of **D.T.C. Mazdoor Congress (supra)**. But while doing so, the Constitution Bench explicitly observed in unequivocal terms that doctrine of reasonableness or fairness cannot apply in a commercial transaction. It is not possible for us to equate a contract of employment with a contract to vend arrack. A contract of employment and a mercantile transaction stand on a different footing. It makes no difference when the contract to vend arrack is between an individual and the State. This would be evident from the following text from the judgment:

> "**286.** ……This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction."
>
> (underlining ours)

Accordingly, we are of the opinion that in a contract under the Abkari Act and the Rules made thereunder, the licensee undertakes to abide by the terms and conditions of the Act and the Rules made thereunder which are statutory and in such a situation, the licensee cannot invoke the doctrine of fairness or reasonableness. Hence, we negative the contention of the appellant.

In the result, we do not find any merit in the appeal and it is dismissed accordingly but without any order as to costs.

……J.
(CHANDRAMAULI KR. PRASAD)

……..……..J.
(V.GOPALA GOWDA)

NEW DELHI,
OCTOBER 22, 2013.