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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 7th May, 2010

Pronounced on: 17th May, 2010

W.P.(C) No.9178/2009

TRACK INNOVATIONS INDIA PVT. LTD.

..... Petitioner

Through: Mr. Jayant Bhushan, Senior Advocate
with Mr. M.P. Jha, Advocate, Mr.
Atul Batra, Advocate and Mr. Arijit
Mazumdar, Advocate.

VERSUS

UNION OF INDIA & ORS.

....Respondents

Through: Ms. Geetanjali Mohan, Advocate for
the respondents.

**ALONG WITH 6 OTHER CONNECTED MATTERS; BEING W.P.(C) NO.
44/2009, W.P.(C) NO. 9674/2009, W.P.(C) NO. 9675/2009, W.P.(C)
NO.9676/2009, W.P.(C) NO. 9677/2009 & W.P.(C) NO. 10329/2009**

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J

1. This judgment will dispose of a batch of writ petitions. The parties have agreed that the civil writ petition No.9178/2009 be treated as the lead case and accordingly, the said case was argued. The issues as raised in the other cases are identical and facts are more or less similar.

2. The following issues have been raised by the petitioner:

“A. Price Variation Clause

1. Whether the Price Variation Clause (PVC) as adopted in CS 156 of 2005 was faulty?

2. Whether the Petitioners are entitled to the new PVC as recommended by the Committee on 19.09.2007

B +/-30 Option Clause

Whether the Respondent Authorities could have invoked the +/-30 Option Clause at the end of contract period?”

The aforesaid issues arise on the basis of the following facts:

The petitioner was awarded the contract by the respondent No.3/Indian Railways, being CS 156/05, in the year 2005 for the supply of concrete sleepers by the petitioner to the respondent No.3. The petitioner has stated that for manufacture of the sleepers, respondent No.3 had leased out its land on which the petitioner set up a unit for production of concrete sleepers. Admittedly, the petitioner failed to adhere to the time of performance as required for the supply

of concrete sleepers and after giving one extension without imposition of liquidated damages, subsequent extension was granted subject to imposition of liquidated damages. Petitioner however failed to supply the contracted number of sleepers and hence was in breach. The respondent No.3, Northern Railway, who is the purchaser of the goods, also exercised an option, within the contractually permissible period for purchasing additional 30% sleepers more than the originally contracted for. The petitioner contends that the Price Variation Clause as found in the contract was defective from the beginning and it is alleged to be in the knowledge of the respondents and in spite of the same, the respondent No.3 failed to address the grievance of the petitioner as a result of which the petitioner was caused a loss as the price variation formula provided in the contract failed to compensate the petitioner for increased cost. It is further contended by the petitioner that the option of 30% additional sleepers was arbitrarily and unfairly exercised by the respondent No.3, though the same was exercised within the contractually permissible period, inasmuch as the respondent No.3 ought to have taken notice of the short/limited period remaining for the performance of the balance supply under the contract and also that further considering the production capacity of the petitioner, the option for purchase of additional sleepers ought not to have been exercised.

3. The respondents have vehemently opposed the petition. In the counter affidavit filed by the respondents, it has been contended that the writ petition is not the appropriate remedy with respect to issues pertaining to a contract which has been partly performed after being entered into and with respect to which the petitioner is in breach. It is further contended that issues of arbitrariness and unfairness would not arise with respect to contractual relations, although one of the parties is the 'State', for the reason that the petitioner entered into the contract with open eyes in a level playing field and the petitioner need not have entered into the contract with the respondent No.3. It is further contended that there were due negotiations with respect to the Price Variation Clause itself and it is only thereafter that the subject contract was entered into under which the petitioner had to supply 4,98,744 sleepers as per the order placed by the respondent No.3. It is contended that the petitioner had in fact offered the quantity of 6,00,000 sleepers to be supplied by January, 2008, however, the order was placed by the respondent No.3 only for 4,98,744 sleepers and subsequently an additional order for 1,49,623 number of sleepers was placed exercising the option clause in the contract which allowed placement of an order for additional quantity of 30% sleepers than as originally ordered. The contractual period was extended upto 10th September, 2008 and then upto to December, 2008. It is stated that the petitioner however only supplied 3.68 lacs sleepers i.e. 74% of the original order and 57% of the total

ordered quantity. The petitioner was hence argued to be clearly in breach. It was further argued that there were a total of 70 suppliers who have supplied 195.75 lacs sleepers and out of the 70 suppliers, 44 suppliers have already completed the original order, 21 suppliers have completed the +30% additional quantity and 15 suppliers have requested for additional quantities after completing the original and +30% order. It is, therefore, contended that if the price variation formula was defective, performance of this type would not have materialized. It is, therefore, contended that if the reliefs as prayed for by the petitioner are granted, then, it would amount to discriminating against those suppliers who have duly performed their contractual obligations without any breach and as per the contracted price variation formula. It is denied that the price variation formula is in any manner defective and it is further the case of the respondents that loss, if any, has been caused to the petitioner only on account of its own faults including the delays in supply. During the course of arguments, it was also contended by the counsel for the respondents that the cost of manufacture depends upon various aspects and if the costing of the petitioner has lead to any disadvantage, it is only on account of the petitioner itself because other suppliers have not complained to the respondents. Costing, after all, it is contended is a result of innumerable inter-related factors and it cannot be said that the loss has been caused to the petitioner only because of the price variation formula. It is contended that there was no

guarantee by the respondents that the petitioner will make a profit under the contract. It was argued that in a normal commercial venture either a profit or a loss, is but a necessary incident.

4. The counsel for the petitioner has vehemently argued that the price variation formula was defective was admitted by the officials of the respondent No.3 themselves in a report which was prepared before awarding the next contract being CS 160. It is said that in the next contract awarded, the price variation formula was changed and therefore the benefit of the price variation formula should also be given to the existing contract, and more particularly with respect to the +30% variation. The committee report of the respondents which is relied upon by the petitioner is dated 19.9.2007. The respondents have, however, countered that the price variation formula depends upon the extant scenario and it is not necessary that one price variation formula adopted for one contract, should necessarily be adopted for other contracts entered into in different scenarios and the same depends upon the price of raw materials as then prevalent. It has been argued that there was no bar on the petitioner to supply to other private parties after taking due permission of the respondents, meaning thereby, if the petitioner was efficient, it could have after supplying the contracted quantity to the railways, raised its production for supply to other private persons. It is argued that the subject matter of the committee report was not with respect to the existing subject

contract CS 156 of 2005 and in fact it was for another contract and therefore observations in a committee report cannot be taken as a gospel truth which is binding on the railways. It was contended that the issue of costing will be a subject matter in civil proceedings, and in fact in arbitration, as the contract admittedly contains an arbitration clause. It has been argued that since there are disputed questions of facts as to whether or not the petitioner in fact suffered a loss, and which is denied, a writ petition is not an adequate remedy and all the issues will be ultimately decided in the arbitration proceedings.

5. In rejoinder, it was however contended on behalf of the petitioner that merely because there are disputed questions of facts, will not prevent this Court from exercising jurisdiction under Article 226 of Constitution of India once arbitrariness is shown.

6. Mr. Jayant Bhushan, learned senior counsel for the petitioner, has very strenuously, in support of the contentions and the arguments on behalf of the petitioner, relied upon various judgments of the Supreme Court. The first two judgments which are relied upon are the judgments of *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another* 1986 (3) SCC 156 and *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others* 1991 (1) SCC 212. The aforesaid judgments were referred to for the proposition that Article 14 of the Constitution can also be

invoked in contractual matters. The decision in the case of *Sanjana M. Wig (Ms) Vs. Hindustan Petroleum Corpn. Ltd. 2005 (8) SCC 242* was then relied upon in support of the proposition that once Article 14 is invoked, there is no bar to the exercise of jurisdiction by the Court under Article 226, even if the contract contains an arbitration clause. Finally, reliance was placed upon *ABL International Ltd. Vs. Export Credit Guarantee Corpn. of India 2004 (3) SCC 553* to contend that disputed questions of facts can be decided in a writ petition. The following paragraphs of the judgment in the case of *Kumari Shrilekha Vidyarthi(supra)* have been relied upon:

“21. The Preamble of the Constitution of India resolves to secure to all its citizens *Justice*, social, economic and political; and *Equality* of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains ‘Directives Principles of State Policy’ which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 — non-arbitrariness which is basic to rule of law — from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this

character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

So far as the case of *Central Inland Water Transport Corporation Limited(supra)* is concerned, the paragraphs which have been relied upon are as under:

“**83.** Yet another theory which has made its emergence in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denning, MR, appears to have been the propounder, and perhaps the originator—at least in England, of this theory. In *Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd.*⁰³⁰ where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnifier from liability arising to the indemnified from his own negligence, Lord Denning said: (at p. 415-16)

“The time may come when this process of ‘construing’ the contract can be pursued no further. The words are too clear to permit of it. *Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable?* When it gets to this point, I would say, as I said many years ago:

‘there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused’: *John Lee & Son (Grantham) Ltd. v. Railway Executive*¹³¹

It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.” (emphasis supplied)

In the above case the Court of Appeal negated the defence of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in *Lloyds Bank Ltd. v. Bundy*²³² that Lord Denning first clearly enunciated his theory of “inequality of bargaining power”. He began his discussion on this part of the case by stating: (at p. 763)

“There are cases in our books in which *the courts will set aside a contract*, or a transfer of property, *when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.* Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court.”

(emphasis supplied)

He then referred to various categories of cases and ultimately deduced therefrom a general principle in these words: (at p. 765)

“Gathering all together, I would suggest that *through all these instances there runs a single thread.* They rest on ‘inequality of bargaining power’. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word ‘undue’ I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being ‘dominated’ or ‘overcome’ by the other. *One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.* Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.” (emphasis supplied)

88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognised, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a

clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, Section 138(2) of the German Civil Code provides that a transaction is void “when a person” exploits “the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages ... which are obviously disproportionate to the performance given in return”. The position according to the French law is very much the same.

89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to “uphold the Constitution and the laws”. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today’s complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.”

7. The counsel for the respondents, on the other hand, sought to distinguish the judgments relied upon on behalf of the petitioner and in turn relied upon *M/s. New Bihari Biri Leaves Co. and Others Vs. State of Bihar and Others (1981) 1 SCC 537* and *Puravankara Projects Ltd. Vs. Hotel Venus International and Others (2007) 10 SCC 33* to contend that in commercial contracts, where the petitioner was not bound to enter into the contract, which however it did, with open eyes, then, Article 14 cannot be invoked and nor can the reasonableness of the contractual terms in such commercial contracts be examined by the Courts.

8. We are of the opinion that the writ petitions must fail and none of the contentions as advanced on behalf of the petitioner can succeed, more so in the facts of the present case.

9. Firstly, we are of the opinion that in commercial contracts, such as the present, where the private contractors enter into these contracts having huge financial stakes, there is no scope for seeking variation of the terms of the contract which have been acted upon on the ground of alleged unreasonableness by invoking Article 14 of the Constitution. Instead of giving our logic and language, it would be more fruitful to refer to the categorical language of the Supreme Court in its different judgments while dealing with such commercial contracts.

(i) The first judgment, in this behalf, is the judgment of Supreme Court in the case of *M/s. New Bihari Biri Leaves Co. and Others Vs. State of*

Bihar and Others (1981) 1 SCC 537. The Supreme Court has observed and held as under:

“47. xxx By means of his offer in the Tender Form or by bidding at the auction, the purchaser binds himself to pay this minimum royalty even if by the end of the year, the number of bags collected is less than the notified estimated yield. The purchasers form their own estimates of the expected yield from a particular unit for a particular year and then make their offers of rates in the prescribed Tender Form, or when the disposal is by public auction, the purchasers make their bids subject to the terms published in the Tender or Auction Notices. If, according to the estimate of an intending purchaser, the unit concerned is not likely to yield the quantity notified, it is open to him either not to submit any tender or offer or rates at all, or not to offer a bid or an amount higher than that which, according to his own estimate or calculation, would be a reasonable price of the bargain. In other words, if a person with his eyes open tenders the highest rates per standard bag or offers the highest bid at public auction, as the case may be, of his own accord, it will be assumed that he did so because in his own estimation the acceptance of the contract at those rates and subject to the notified terms and condition would afford him a reasonable scope for making profit.

Xxxxx

48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., *Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.*⁸; see *Douglas Menzies v. Umphelby*⁹; see also *stroud's judicial dictionary*, Vol. I, p. 169, 3rd Edn.).

49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution. In this connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.” **(underlining added)**

The Supreme Court, therefore, rejected challenge to the reasonableness of the terms and conditions of the contract by holding that Article

14 cannot be invoked and the arguments based on the same were held to be unsustainable and liable to be rejected.

(ii) The next judgment is the judgment of Supreme Court in the case of *Assistant Excise Commissioner and Others Vs. Issac Peter and Others (1994) 4 SCC 104* and in which it has been held as under:

“Where, as in the present case, the contract between the parties is governed by statutory provisions, i.e., provisions of the Act, the Rules, the conditions of licence and the counterpart agreement, they constitute the terms and conditions of the contract. They are binding both upon the Government and the licensee. Neither of them can depart from them. It is not open to any officer of the Government to either modify, amend or alter the said terms and conditions, not even to the Minister for Excise. It is, therefore, not really necessary for the present purpose to examine what precisely was the statement made by the Minister for Excise or by the auctioning authorities at the time of auction. Even according to the licensee, the Minister merely stated that steps will be taken in the coming days to supply requisite quantities. They were not competent to hold out any such promise nor any such promise can clothe the licensees with any legally enforceable rights. (Para 14)

According to Rule 8(1) of the Rules supply of monthly quota is obligatory upon the Government while the supply of additional quantity/quota is discretionary. The expressions ‘the monthly quota..... shall be allowed’ and ‘may’, however, permit the issue of arrack in excess of the announced monthly quota’ make this position clear. It is therefore, not possible to accept the contention that the State is under an obligation to supply all that quantity that is asked for by the licensee, or quantities equal to the previous years’ supply or for that matter, equal to the average of previous three years’ supplies. Reliance upon Rule 8(3) is of no help. Rule 8(3) is an independent power. Even where ample supplies are available, the Board of Revenue can yet restrict the supply of additional quota to a shop having regard to the local requirements. But Rule 8(3) cannot be relied upon to say that unless the Board of Revenue places a restriction, the Assistant Commissioner of Excise is bound to supply all that is demanded, irrespective of the availability of arrack and the requirements of other licensees. No such absolute right can be recognized. Rule 2(26), which says that no remission or abatement in the licence fee shall be “claimable” by the licensee “on any account whatsoever”, should be read along with Rule 8(1), which sets out the only situation in which the duty and commission payable will be adjusted. [Of course, where the Government fails to perform its statutory obligation e.g., if it fails to supply the monthly quota referred to in Rule 8(1) it may not be open to the Government to invoke Rule 6(26).] In such a situation, it is not possible to say that in addition to the situation contemplated by Rule 8(1), there are other situations also wherein such rebate/remission or adjustment is permissible. Not only the conditions are statutory in this case but they are formally drawn in the shape of statutory rules. In such a situation, it would not be permissible to say that there was some other condition or term agreed upon or implied between the parties which is not found therein. Moreover any implied term should be

consistent with the express terms of the contract and not otherwise.

(Paras 15 and 16)

When Government cannot force and compel the licensees to lift additional quantities to clear its own stocks, there is no right in the licensees to compel the Government to supply what all they demand nor has the State the right to compel the licensees to purchase all that it proposes to sell to them. In the absence of a statutory right in the licensees to get additional supplies demanded by him, there is no basis in law for the claim of remission or rebate. The onerous nature of the terms is no ground for the licensees to resile from the express obligations undertaken by them.

(Para 16)

May be that the monthly quota fixed in these cases is unrealistic in the sense that with that quantity it is not possible for the licensees to do the business and pay the amount agreed to be paid by them. Further, the discretion vested in the Assistant Excise Commissioner by Rule 8(1) has to be exercised in a fair and reasonable manner. But all that only means that the available supplies will be distributed equitably among the licensees. The said sub-rule can in no event be read as creating an obligation upon the State to supply the quantities demanded by the licensee even if no such supplies are available. In this case the State has not contended itself by supplying the monthly quota alone; it supplied whatever additional quantities it could. There is no grievance on this score. It is not the case of any licensee that the State did not supply arrack to them even though it was available with it nor is there any complaint of inequitable distribution in any of these cases. If so, there is no question of the licensees not being able to observe the requirement of Rule 6(14). In the absence of a legal right to claim additional supplies, the arguments based on Sections 55 and 56 of Contract Act cannot be countenanced.

(Para 17)

As experienced businessman, the respondent-licensees must have anticipated that there would be problems in supply since things cannot be rectified overnight. In any event, the only assurance was that the authorities would take steps to ensure additional supplies as in the previous year. It cannot be understood as a firm promise- assuming for the sake of argument that they were competent to hold out such promise. Whatever they could supply, they did supply. It is not a case where any essential term of contract was kept back or kept undisclosed. The Government had placed all their cards on the table. If the licensees offered their bids with their eyes open in the above circumstances they cannot blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that licence fee should be reduced proportionate to the actual supplies made.

(Para 21)

Maybe these are cases where the licensees took a calculated risk. Maybe they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contract, profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licenses.

(Para 23)

It is also not possible to read the doctrine of fairness and reasonableness into the contracts to which State is a party on the ground that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. When the contract says that supply of additional quota is discretionary, it cannot be read as obligatory by applying the said doctrine. This doctrine cannot also be invoked in support of the plea that if the State is not able to so supply, it would be duty to act fairly cannot be 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. The licensees 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 State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of the duty to act fairly, is not acceptable. (Para 26)

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 where the action is administrative in nature. Just as principle 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. 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, contracts (which may be statutory in some cases) are the laws relating to contracts. When as in the present case, the contracts are entered into pursuant to public auction, floating of tenders or by negotiations, 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. 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. However, no opinion need be expressed on the question as to what would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation.

(Para 26)”

(iii) Very recently, the Supreme Court in the case of *Puravankara Projects Ltd. Vs. Hotel Venus International and Others (2007) 10 SCC 33* has held as under:

“There is a vital distinction between administrative and contractual law decisions. The concept of administrative law and fairness should not be mixed up with fair or unfair terms of contract. Duty to act fairly which is sought to be imported into a contract to modify

and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of natural justice ensure fair decision where function is quasi judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties.

(Paras 23, 32 and 33)

Tender terms are contractual and it is the privilege of the Government which invites its tenders and courts do not have jurisdiction to judge as to how the tender terms should be framed. By observing that there was an implied term which was not there in the tender, and postponing the time by which the bank guarantee had to be furnished, in essence the High Court directed modification of a vital term of the contract.

(Paras 29 and 30)” (**underlining added**)

The portions of the above judgments, underlined by us, clearly show that in commercial contracts entered into with open eyes, there cannot be variation to the terms of a concluded contract which has been acted upon. Commercial men take commercial decisions which sometimes results either in profit or sometimes in loss, however, the Government is not bound to ensure profit in every commercial contract, more so as regards the contracts which are entered into either by public auction or by floating tenders or negotiations. It has been clarified that there is no issue of fairness or arbitrariness with respect to terms of the contract in such commercial contracts.

10. The reliance placed upon by the learned senior counsel for the petitioner on the cases of *Central Inland Water Transport Corporation (supra)* and *Kumari Shrilekha Vidyarthi (supra)* is misconceived because the observations of the Supreme Court in these cases have to be confined to the facts where the contract is of employment or of a nature similar to employment of

unequal bargaining power. In fact, in the case of *Central Inland Water Transport Corporation (supra)* the Supreme Court has noticed that the issue of fairness or unfairness comes in when there is inequality of bargaining power and where one person is so strong in bargaining power and the other is so weak that the doctrine of fairness can come in. In the present case, the contractors are financially powerful and they deal in huge stakes. Such persons are not similar to weak employees. In para 89 of that judgment reproduced above clearly holds that the principle of unreasonableness of contractual terms will not apply where bargaining power of parties are equal and parties are businessmen. In fact, the Supreme Court was careful in para 101 to distinguish these contracts of employment from other contracts and observed as under:

“101. It was, however, submitted on behalf of the appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the course of its trading activities and the court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee.”

(underlining added)

11. We may also at this stage, with benefit refer to the Constitutional Bench decision of the Supreme Court in the case *Padma Sundara Rao Vs. State of Tamil Nadu (2002) 3 SCC 533* in which the Supreme Court has said that the ratio of a judgment has to be read in the context of the facts of the case and even a

single fact can make a difference. In para 9 of the said judgment, the Supreme Court has held as under:

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *British Railways Board v. Herrington* 9. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

(underlining added)

Thus the observations in paras 21, 22 and 24 of the judgment in the case of ***Kumari Shrilekha Vidyarthi*** have to be read in the context of the facts of that case and when issues similar to a contract of employment are in issue. Also those observations cannot apply where commercial contracts are entered into having huge financial stakes by the process of auction, tender or negotiations. Also, it cannot be said that private contractors are weak persons as was in the cases relied upon on behalf of the petitioner.

12. We, therefore, hold that it is not permissible to vary the terms of the contract between the parties, more so after the same has been acted upon, and in these cases where the contracts are purely commercial contracts entered into through the process of auction, tender or negotiations and in which there is no compulsion for any contractor to participate. We, therefore, reject the contention raised on behalf of the petitioner that the respondents were bound to alter the Price

Variation Clause on the ground that the same was unreasonable and did not adequately compensate the petitioner.

13. We would also, at this stage, note that whereas the decision in the case of *Kumari Shrilekha Vidyarthi (supra)* is by a Division Bench of two Judges, the decision in the case of *Issac Peter and Others (supra)* is of a Division Bench of three Judges and the decision of a Division Bench of three Judges will prevail over the decision of a Division Bench of two judges as per the Constitutional Bench Judgment of the Supreme Court reported as *Union of India Vs. Raghubir Singh (1989) 2 SCC 754*.

14. Let us now assume for the sake of arguments that the principle of reasonableness can be invoked to alter the terms of a binding contract by invoking Article 14. A further question then arises is whether in the facts of the present case, it can be contended that there is any unreasonableness in the Price Variation Clause. For the following reasons we feel that the Price Variation Clause is not unreasonable.

The reason that the Price Variation Clause is not unreasonable becomes clear from the fact that 70 suppliers have supplied 195.75 lacs sleepers and out of the 70 suppliers, 44 suppliers have completed the original order. In fact, 21 suppliers completed the +30% additional quantity and in fact 15 suppliers have further requested for additional quantities after completing the original and +30%

order. All this would not have been so if those other suppliers were finding the Price Variation Clause to be unreasonable. Obviously, how a person manages his costing of the total product decides as to whether he earns a profit or loss under a contract. Surely, those other suppliers would have managed their costing in terms of various factors including the Price Variation Clause in the subject contracts. After so working out, those suppliers have in fact not complained because they would have not suffered any loss. In fact, as stated above, 15 suppliers have requested for additional quantities after completing the original order and also the additional order of +30% variation. All this goes to show that the Price Variation Clause is not unreasonable as is being canvassed by the petitioner. There is another reason why we would not seek to interfere exercising our jurisdiction under Article 226 because if we grant the relief as prayed for to the petitioner, we would, in fact, be discriminating against those other suppliers who have duly performed their contracts on the basis of the existing Price Variation Clause. Possibly also this would amount to put a premium on the inefficiency in the costing of the petitioner who has approached this Court alleging insufficient compensation by the price variation formula. For the aforesaid reasons, therefore, we are additionally of the opinion that in the facts of the present case, it cannot be contended that the price variation formula is unreasonable and liable to be interfered with by invoking Article 14.

15. We are also of the opinion that the issue with regard to costing is a question of fact, and a disputed question of fact, and it is only when it is proved in appropriate civil proceedings that in spite of the best costing methods of the petitioner still the price variation formula would have caused losses, only then can the petitioner be entitled to any change it is seeking in the price variation formula on the ground of unreasonableness. Of course, we may hasten to add that we have already held that there is no unreasonableness in the price variation formula. The present proceedings under Article 226, we do not wish to convert into regular civil proceedings, where evidence is led on disputed questions of facts. While saying so, we are conscious of the decision in the case of *ABL International Ltd.(supra)*. We however feel that contractors such as the petitioner are not those persons who should be entitled to invoke proceedings under Article 226 of the Constitution of India in purely commercial contracts where profit and loss is a natural incident, as already stated above. Entitlement of this Court to look into and decide disputed questions of facts is different than exercise of that jurisdiction and in the facts of the present case we decline to exercise our jurisdiction to hold an enquiry into disputed questions of facts, more so because there is an Arbitration Clause in the binding contract between the parties. The decision in the case of *Sanjana M. Wig(supra)* relied upon on behalf of the petitioner does not help the petitioner because that judgment would only apply if there are no disputed questions of facts.

In the present case, the respondents are vehemently disputing the allegation that price variation formula is not reasonable and are further disputing not only the costing of the petitioner but are also disputing the entitlement of the petitioner to rely upon certain observations in a committee report dated 19.9.2007. We agree with the contention raised on behalf of the counsel for the respondents that a third party to whom the report is not addressed and who is not communicated the contents of that report, cannot take advantage of the contents of such a report. Further, the stand of the respondents and the railways will come from an appropriate authority with regard to the issue as to whether the price variation formula is or is not reasonable and an officer or even a committee cannot by making a report lead to the binding conclusion in that the observations in the report automatically becomes the stand of the respondents in future litigations. Even at the very best, an observation in a report can be one piece of evidence and it cannot be the only and sole basis to tie down and confine the respondents so that it is not open for it to take up a positive stand that price variation formula was in fact not only reasonable but ought not to be interfered with once a binding contract is entered into and which has in fact been acted upon between the parties and further that the same price variation formula has compensated the other suppliers who have not raised any grievance about the same.

16. We, therefore, reject the contention raised on behalf of the petitioner that there is any unreasonableness in the price variation formula. We also refuse to exercise our jurisdiction to go into the disputed questions of facts in these proceedings under Article 226 of the Constitution of India.

17. The discussion, as made above, will cover the issue with regard to the price variation formula not only for the original contracted quantity but also for the +30% variation.

18. The final issue as urged by the learned senior counsel for the petitioner was that the option of additional quantity of +30% variation should not have been exercised by the respondent No.3 because there was very little balance time to complete the order and the respondent No.3 has therefore acted unreasonably. Admittedly, the option to exercise the +30% variation is in accordance with the terms of the contract, and once that is so, it is not open to the petitioner to import the concept of reasonableness to alter the binding terms of the contract, and with respect to which we have already dilated at length above. This contention raised on behalf of the petitioner is therefore rejected.

19. In view of the above, the writ petition is dismissed with costs of Rs.50,000/-. The connected writ petitions being Nos. 44/09, 9674/09, 9675/09, 9676/09, 9677/09 and 10329/09 are also dismissed with costs of Rs.50,000/- in each of the petitions. A copy of this order be placed in the file of the connected

writ petitions being writ petitions Nos. 44/09, 9674/09, 9675/09, 9676/09, 9677/09
and 10329/09.

VALMIKI J. MEHTA, J

SANJAY KISHAN KAUL, J

May 17 , 2010
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