IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

118 **CWP-11111-2024**

RAMAN KUMAR VERMA AND OTHERS

... Petitioners

VERSUS

UNION OF INDIA AND OTHERS

... Respondents

A N D

127 **CWP-11247-2024**

Date of Decision: 14.05.2024

NIRANJAN KUMAR JANAGAL AND OTHERS

... Petitioners

VERSUS

UNION OF INDIA AND OTHERS

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

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Present: Mr. H.C. Arora and Ms. Sunaina,
Advocates for the petitioners.

Mr. Ashutosh Bhardwaj, Advocate for
Mr. Parvesh K. Saini, Advocate for
respondent No.1- U.O.I.

Mr. Akshay Jain and Ms. Kajal,
Advocates for respondents No.2 and 3
in both cases.

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VINOD S. BHARDWAJ, J. (ORAL)

The question which arises for consideration in the present cases is as to whether the Banks can seek an indemnity from valuers being empanelled to seek indemnification of any loss/damage/action suffered on account of acts/ omissions attributed to the empanelled valuer?

As both these writ petitions raise identical questions of law, hence, with the consent of the counsel for the parties, they are being decided by a common judgment. For the facility of reference, the facts are extracted from CWP-11111 of 2024 titled as 'Raman Kumar Verma and others Versus Union of India and others.'

Challenge in the said petition is to the action of the respondent-Bank in calling upon the petitioners (intended to be empanelled by the respondent-Bank) to furnish an indemnity bond or any other agreement/ document containing an indemnity clause, on the grounds that (i) the same is without any authority of law and is in violation of principles of equity and natural justice; (ii) for the reasons that while sanctioning a loan, the role of valuer is to ascertain the value of the property at the time of advancement of the loan which is merely a professional opinion, however, the loan is never sanctioned only upon the opinion of the valuer as various other factors and procedures are also undertaken prior thereto (iii) because the Indian Banks Association has already issued a handbook on policy, standards and procedures for real estate valuation by banks and HFIs in India. Paragraph No.1.9 of the said handbook prescribes that no security deposits or any other indemnity money should be taken from the Valuers as security for the professional services and (iv) the insistence by the respondent-Bank to execute the indemnity bond is in gross violation of the judgment passed by the Hon'ble Supreme Court of India in the matter of ***"Jacob Mathew Versus State of Punjab and another"*** reported as ***(2005) 6 SCC 1.***

Learned counsel for the petitioners contends that the petitioners are qualified Valuers and they have been empanelled with the respondent-Bank on 02.05.2024. The letter of empanelment prescribes certain documents to be executed/furnished by the petitioners, which are as under:

i. An Agreement Form; and

ii. Model Code of Conduct for Valuers; and

iii. An Indemnity Bond.

It is submitted that the petitioners are not inclined to execute the abovesaid documents as desired by the respondent-Bank, since the said conditions are not only unconscionable but also violative of Article 14 of the Constitution of India. The respondent-Bank is taking advantage of its dominant position and is using the same for dictating unconscionable terms to the Valuers viz. the petitioners, who are seeking empanelment with the bank, which are harsh and unreasonable. The Valuers have no choice but to accept the same. It is also submitted that as a result of the aforesaid indemnity bond, the Valuers become responsible for all the losses and damages that may be caused to the bank on account of any loss, damage, cost, charges or expenses arising out of any act, lapse, default on the part of the valuer and will have to pay on demand such sum of money which will be incurred on account of such loss or damage. Counsel further avers that the Valuer is not liable for any decision taken by the banks/HFIs as such decision is to be taken by the Competent Authority on various parameters. Liability of an erroneous decision by sanctioning authority, merely on the basis of a professional opinion rendered by a Valuer, cannot lay foundation for seeking recovery of such sum from an approved Valuer.

Reliance in this regard is placed on the judgment of ***Jacob Mathew (supra).*** The relevant extract of the same is reproduced hereinafter below:

> *"Negligence by professionals: In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence.*
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> *(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the*

person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence."

It is submitted that the contents of the indemnity bond, sought to be furnished by the petitioners, are objectionable as they are one-sided and deploy an arbitrary and discretionary power against the Valuers sought to be empanelled by the respondent-Bank, notwithstanding that a human error may always occur and that the same should not lay foundation for fastening the liability upon the Valuers on account of such human error(s).

Notice of motion.

Mr. Akshay Jain, Advocate alongwith Ms. Kajal, Advocate, on being served with the advance notice, have entered appearance on behalf of contesting respondents No.2 and 3-State Bank of India in both cases.

He contends that challenge to the terms and conditions, as in the present case, is misconceived and misplaced; and that all the said issues have already been dealt with by a Division Bench of the Bombay High Court in the matter of ***'Practicing Valuers Association (India) and others Versus State of Bank of India and another*** in ***OS-WP-LD-VC No.188 of 2020*** decided on ***18.08.2020.*** It is further contended that the aforesaid conditions have already been upheld and approved by the Division Bench of the Bombay High Court after considering the relevant judgments of the Hon'ble Supreme Court of India. The relevant extract of the same is reproduced hereinafter below:

> *3. The Petitioners have in the above Writ Petition challenged two aspects of SBI's policy relating to empanelment of valuers ("Impugned Conditions"), viz.:*
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> *i. The upper limit of 70 years of age for an empanelled valuer; and*
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> *ii. The communication/direction/policy of SBI to the extent that it requires prospective valuers seeking empanelment with SBI to execute an indemnity in favour of SBI as per a prescribed format.*
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> *XXX XXX XXX*
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> *10. The Impugned Condition which requires prospective valuers seeking empanelment to submit an*
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> *indemnity in favour of SBI reads as follows:*
>
> *"(Annex IX)*
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> *Terms And Conditions To Be Annexed To*
>
> *The Appointment Letter For Valuers*
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> *xii. The Valuer shall indemnify and keep fully and effectively indemnified the Bank against all costs, claims, damages, demands, expenses and liabilities of whatsoever nature which may be caused to or suffered by or made or taken against Bank (including, without limitation, any claims or proceedings by any customers against Bank) directly or indirectly arising out of any improper, incorrect or negligent performance, work, service, act or omission by the Valuer or by any of Valuer's Personnel or fraud or other wrongful act by the Valuer or by any of Valuer's Personnel*

or for any act of the Valuer which results in Bank obtaining incorrect or incomplete information from the Valuer or any of Valuer's Personnel. In this connection, a Letter of Indemnity as per Annexure-XV is to be executed by him.

xiii. The Valuer agrees to indemnify and keep indemnified the Bank against any loss or damage to any of Bank's information, documents, property, records, or other items while in the Valuer's use or possession.

11. The Letter of Indemnity as per Annexure-XV to Respondent No. 1's Policy for Empanelment of Practicing Valuers reads as follows:

"Dear Sir(s),

In consideration of State Bank of India (herein after called the "Bank" which expression shall include its successors and assignees) empanelling me/us on their panel of approved Engineers and Valuers for the purpose of assessing the market value of the properties proposed to be taken as securities for the credit limits granted or to be granted by the Bank to its various borrowers, I/We jointly and severally extend this letter of indemnity.

Whereas by the letter of empanelment dated___________ the bank has empanelled me/us on their panel of approved Engineers & Valuers for the purpose of assessing the market value of the properties proposed to be taken as securities for the credit granted/to be granted by the Bank. I/We jointly and severally agree as follows.-

<u>*I /We shall duly and faithfully perform and discharge all the duties in the works entrusted by the Bank and in relation to the purposes of empanelment, fairly without any favour and discrimination and 1/we hereby undertake and agree to*</u>

indemnify you, your successors and assigns at all times and from time to time from and against all loss, damage and all actions suits, proceedings, expenses, costs, charges and demands arising out of any act, lapses defaults, negligence, errors, mistakes committed by me/us in performance of my/our professional obligations and I/we also hereby undertake and agree to pay to you on demand sums of money, costs, charges and expenses incurred in respect thereof and also to pay you interest on all such moneys at your ruling rate.

I/We further specifically agree that this indemnity shall continue to remain in force and I/We shall continue to be liable there under for all losses, damages, costs, charges and expenses arising out of any act, lapses, defaults, negligence, errors, mistakes committed by me/us in performance of my/our professional obligations and shall be binding on me/us and our legal and personal representatives, successors and assigns".

III. Reliefs Sought By The Petitioners

12. The main reliefs sought by the Petitioners read as follows:

"a) This Hon'ble Court may be pleased to issue a suitable writ or order or direction under the special jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India ordering that the communication/direction /policy of the respondents at exhibit "C " hereto to the extent of demanding from and ordering to the Petitioner no.1 and its members to execute an indemnity in terms of the format at exhibit "D" and the policy of the respondents to fix the upper age limit of 70 years for continuing on the panel of

the respondents as valuers is illegal, ultra virus the Constitution and is null and void

b) That this Hon'ble court may be pleased to issue a suitable writ, order or direction prohibiting the Respondents from insisting upon the Petitioners and the members of the Petitioner No.1 to execute an Indemnity Bond in terms of draft at Ex. 'D ' and discontinuing them to act as valuers on the panel of the respondents on completion of 70 years of age, as being illegal ultra vires, unconstitutional and violative of the Petitioners' right, guaranteed under Article 14, 19(l)(g) of Constitution of India;

IV Petitioners submissions

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14. As regards the requirement of submitting an indemnity for valuers seeking empanelment, the Advocate for the Petitioners has submitted as follows:

(i) That empaneled valuers, lawyers and accountants are a class of professionals who render services to SBI. SBI is advised by such professionals and based on the opinion/advice given by such professionals, SBI takes an informed decision as to whether or not to advance a loan, and the terms on which such loan is to be advanced. An error, mistake or professional misconduct by any of these professionals may result in a loss to SBI. Bank employees who eventually take the decision to sanction loans may similarly commit errors, mistakes or acts of professional misconduct which result in a loss to SBI. However, SBI has only sought an indemnity from valuers and not from empaneled advocates or accountants whose advise equally

informs the SBI's decision to advance a loan on varied terms and conditions. There is no intelligible differentia between valuers on the one hand and lawyers, accountants or bank employees on the other hand.

(ii) That the prescribed indemnity letter does not specify as to what would be considered to be a mistake, error, lapse, default or negligence etc. on the part of the valuers. Such an open ended indemnity is unreasonable. Reliance is placed on the decision in the case of Shakti Kumar Prabhakar & Ors. v. Union of India & Ors. Order dated 31st January, 2020 passed by the Patana High Court in Civil Writ Jurisdiction Case No.2092 of 2020, where State Bank of India was respondent nos. 6, 7 and 8 and a similar indemnity was under challenge. The High Court of Judicature at Patna took a strong prima facie view that such an open ended indemnity was unreasonable and the argument that valuers may choose not to get empaneled under such a policy is not available to a state instrumentality.

(iii) That the valuation reports submitted by empaneled valuers does not contain the usual disclaimer at the foot of the report. Therefore, SBI is free to take action if there is any fraud on the part of the valuer and there is no need for an indemnity to be submitted. By giving an indemnity, empaneled valuers will have to incur substantial costs to defend proceedings to establish that the valuation conducted at the time of loan disbursal was bona fide and accurate.

(iv) That no specific data has been submitted which shows that SBI has suffered losses due to mistaken or deliberately inflated valuations. The policy is influenced by irrelevant or extraneous considerations without taking into account

relevant considerations such as the versatile process of valuation.

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VI. Submissions By The Amicus Curiae

17. Mr. Sharan Jagtiani, Senior Advocate, who by our Order dated 24th July 2020 was appointed as Amicus Curiae to assist the Court, has circulated detailed Written Submissions. In addition to the factual and legal submissions set out therein, Mr. Jagtiani submitted as follows:

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Indemnity

(i) That the challenge to the Impugned Condition relating to furnishing a letter of indemnity must be viewed from the perspective of a challenge to a condition that the SBI wants to include in its contractual dealing with persons it wants to engage as valuers through the process of empanelment. Absent a policy or process of empanelment, the Respondent would for each assignment engage a valuer and would be able to insist, as part of the negotiated contract of service, that such an indemnity be given. Instead of an ad-hoc approach, the policy formulated by SBI is a comprehensive policy that provides for the conditions of eligibility for valuers seeking empanelment with the SBI. These conditions for empanelment then, to the extent applicable, become the pre-determined terms of the contract by which valuers are assigned certain work of valuation by the Respondent.

(ii) That the policy provides for a graded system of evaluation of the merit of a valuer, based inter alia on his or her educational qualifications and registration as a valuer

under extant laws such as the Wealth Tax Act, 1957 and the Companies Act, 2013. A valuer is eligible for empanelment and further eligible for certain types of assignments and mandates based on their evaluated score i.e. a valuer with a higher score will be given assignments pertaining to valuation of collateral security offered in high value transactions etc.

(iii) That therefore, SBI is acting within the sphere of contract in asserting the terms that it wants as part of that contract such as the requirement of submitting an indemnity.

(iv) That the question which therefore arises in this Petition, as regards the indemnity sought by SBI, is: Whether the inclusion of such an indemnity clause as a term of contract to engage the services of a valuer, the starting point of which is the empanelment itself, is so arbitrary that the term itself violates Article 14 of the Constitution ?

(v) That it is now well settled that the protection of Article 14 of the Constitution applies to State action even in matters where the State acts within the realm of contract- both as to its formation and its implementation. Some of the judgments that have applied principles of Article 14 to the realm of contract, are as follows:

a) Dwarkadas Marfatia & Sons v. Board of Trustees of The Port of Bombay ;(1990) 3 SCC 752

b) Shrilekha Vidyarthi (Kumari) v. State of U.P. ;(1991) 1 SCC 212.

c) Vijay Kumar Gupta v. State of Maharashtra. 2008 (4) MhLJ 370.

d) K SL & Industries Ltd. v. National Textiles Corporation Ltd. 2012 SCC On-Line Del 4189.

(vi) That it has also been laid down that the scope for judicial review in matters of contracts to which the State is a party is limited. The Courts have clearly recognized the need for flexibility and play in the joints. There is undoubtedly a margin of deference especially when formulating the terms of a contract that may themselves have their roots in a policy based need of the State underlying that specific aspect of the State's business. Some of the judgments that reinforce this principle are:

a) Directorate of Education & Ors. v. Educomp Datamatics Ltd. ;(2004) 4 SCC 19.

b) Michigan Rubber (India) Limited v. State of Karnataka & Ors. .(2012) 8 SCC 216.

(vii) That notwithstanding the fact that the indemnity is widely worded, it still may not make it so unreasonable or manifestly arbitrary an exercise of SBI's power in matters of contract especially in light of SBI's submission in its Affidavit in Reply that such a measure is necessitated by its long years of collective experience in suffering on account of erroneous or deliberately inflated valuation reports.

(viii) That the standard that might generally govern a civil action against a professional has been discussed by the Hon'ble Supreme Court in the case of Central Bank of India v. K. Narayana Rao (2012) 9 SCC 512.The intent of the indemnity, therefore, appears to be to entitle SBI to rely on an express contractual provision for holding valuers accountable.

(ix) That SBI, as a party intending to avail a service from a valuer, has the prerogative to define the scope of liability of that service provider by way of a contract, which is what the indemnity intends to do.

(x) That given the vitality of valuation as a process to the business of banking and lending, SBI consciously wants to hold valuers uniformly and without exception to a higher and more exacting standard of care. Since SBI accepts deposits from the general public, such a policy may be warranted in public interest.

(xi) That it is not as if SBI is seeking a bank guarantee from valuers which may be encashed on a unilateral assessment of loss made by SBI which would have an immediate financial impact on a valuer. SBI cannot make any instant recovery based on an indemnity clause of this nature. SBI would, by relying on the indemnity, have to prove its case in a civil court to make any recovery including by having to prove in accordance with law breach of the indemnity and the quantum of loss suffered. The only advantage it may have by such a clause is that it defines and widens the liability of the valuer.

(xii) That any valuer has a choice not to be empaneled with SBI if it does not agree to be bound by the indemnity in question. There is no fundamental right to do business with the State as has been held by the Supreme Court in Michigan Rubber (India) Limited (supra).

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VIII. Findings And Reasons

19. The Petitioners' submission that the Impugned Conditions are discriminatory is premised on the ground that dissimilar treatment is meted out to valuers on the one hand and lawyers and accountants of SBI on the other. We find no merit in this comparison and are of the view that the nature of services provided by a valuer are distinct and unique. The process of *valuation requires physical investigation and adherence to a process which is not an exact science, but is based on scientific enquiry. This requires taking searches with local registrars, inspecting plant and machinery, making inquiries as regards de facto possession etc. The exercise of valuation of an asset that is offered as collateral has a more direct connection to the decision of grant of loan and banking facility than any other professional service rendered to a bank. It is a function that is entirely outsourced, unlike legal and accounting services, where a bank would most likely have in- house employees that can guide it in these matters as well as take assistance of outside professionals. The very fact that the RBI directed banks to frame policies in respect of valuation is in itself an indication that the relationship between banks and the valuers it engages is important to the commercial functioning of a bank and that valuers as a class of persons providing services to banks and financial institutions cannot claim parity with other professionals that banks may need to engage like lawyers and accountants.*

20. As correctly submitted by the learned Amicus Curiae, it may well be that in future the SBI or other banks feel the need to lay down more well-defined policies in relation to their dealings with other professionals also. The determination of policies that form the basis as to how the SBI wants to contract with persons/professionals it engages for availing their services need not come into existence all at the same time.

21. For the above reasons, we are of the view that there is an intelligible differentia between valuers on the one hand and the other classes of professionals such as lawyers and accountants, on the other hand. We therefore find that there is no discrimination simply because the Impugned Conditions apply only to the SBI's *dealings with valuers and not to advocates and accountants who are engaged by SBI.*

Indemnity

29. As has been submitted, the question that arises for consideration in respect of this part of the challenge may be stated as follows :

> *"Whether the inclusion of such an indemnity clause as a term of contract to engage the services of a valuer, the starting point of which is the empanelment itself, is so arbitrary that the term itself violates Article 14 of the Constitution?"*

30. In our view, in determining the criteria for empanelment of valuers and in stipulating the contractual terms and conditions that will govern the relationship between SBI and the empaneled valuers to whom an assignment or mandate is given, SBI is acting within the realm of a contract to carry out its commercial and business activities.

31. In considering the challenge under Article 14 to the indemnity clause and indemnity letter, it must be reiterated that it is nothing but a contractual term between SBI and a service provider that it wants to empanel viz. a valuation professional. Instead of negotiating this stipulation on a case to case basis, SBI is prescribing this condition in its policy of empanelment. In order to determine whether such a contractual stipulation is liable to be struck down, this Court must arrive at a finding that the inclusion of such an indemnity clause as a term of contract to engage the services of a valuer, is so arbitrary that the term itself violates Article 14 of the Constitution.

32. It is well settled that even in contractual matters, an instrumentality of the State or an entity such as SBI cannot act *arbitrarily or capriciously, unfettered by the requirements of Article 14. It cannot claim to be governed purely by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. In contractual matters, an instrumentality of the State does not enjoy the same freedom to contract as a private person. These principles are clearly stated in the Judgments of the Hon'ble Supreme Court in the cases of Dwarkadas Marfatia & Sons (supra); Shrilekha Vidyarthi (Kumari) (supra); Vijay Kumar Gupta (supra); and KSL & Industries Ltd. (supra).*

33. However, it is equally well settled that in commercial matters, there is a certain amount of deference or play in the joints to be given to executive discretion in negotiating a commercial contract or when acting in the sphere of contracts.

34. To appreciate the scope of judicial review in such matters it would be relevant to refer to the decision of the Hon'ble Supreme Court in Directorate of Education & Ors. (supra). In that case the Directorate of Education, Government of National Capital Territory of Delhi, took a decision to establish computer labs in the National Capital Territory area in all government schools by the year 2003 in collaboration with the private sector. Initially, for 2000-2001, tenders were issued which specified that interested firms must have a turnover of Rs. 2 Crores. Since the lowest tenderer was not in a position to carry out the project in 115 schools, the contract was divided amongst four parties. In the year 2001-02 the turnover clause was amended, instead of Rs.2 crores a turnover of Rs.5 crores was prescribed. Because of the several representations filed, the tender was cancelled, and fresh tenders were invited from the firms having a turnover of Rs.2 crores or above. The lowest tenderer was again not in a position to take up the entire project. Thus, the contract had to be distributed amongst *eight parties. For the final phase of 2002-03 the tenders were called for all the 748 schools. The cost of project was approximately Rs.100 crores. Because of the difficulty faced in the earlier years that the lowest tenderers were not able to implement the entire project, the Government took a policy decision to deal with one company having financial capacity to take up such a project instead of dealing with a number of small companies which were unable to take up the entire project individually. Accordingly, the Government took a decision to invite tenders from firms having a turnover of Rs. 20 crores or more. This condition was challenged. A Division Bench of the Delhi High Court allowed the Petition.*

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39. In view of the importance of valuation qua the business of banking and lending, we are of the opinion that it cannot be said that the objective of including an indemnity clause in its terms of empanelment is arbitrary or unreasonable and without any purpose whatsoever. Looking to the nature and purpose of this contractual stipulation, it would be within the discretion of SBI in matters of contract to insist on its inclusion as it wants to uniformly hold valuers to a higher and more exacting standard. SBI is entitled to seek inclusion of the indemnity clause in its terms of empanelment and terms of contract with valuers. We also find that SBI is entitled to add such terms to its Agreements with valuers in the larger public interest given the nature of decisions that SBI will make based on such valuations given by the valuers.

40. It is also important to note that SBI is not seeking a bond or bank guarantee which can immediately and unilaterally be encashed against its empaneled valuers. Even if SBI seeks to rely upon and invoke the indemnity against a valuer, it will have to initiate appropriate legal proceedings before a Court and SBI *would have to establish breach of the indemnity and consequent loss by following due process of law. At the same time, the indemnity clause does hold the valuer to a higher standard of care and secure SBI's interest by way of express contract rather than SBI having to base any action only on a tortious or civil action of professional negligence or fraud. As we have observed above, this exercise of discretion in important commercial or contractual matters cannot at all be termed an arbitrary exercise of power by SBI.*

41. Every valuer has a choice not to be empaneled with SBI if it does not agree to be bound by the indemnity clause in question. SBI does not have a monopoly in issuing valuation mandates even though it's business may account for a significant share of valuations carried out by valuation professionals.

42. As regards the submissions made in Rejoinder as noted above, we find that merely because the judgments of the Supreme Court noted above were in relation to tender matters, it can be no ground to disregard them or to ignore the principles laid down in those judgments. Although the empanelment of valuers is not strictly speaking a tender process, it is nevertheless a process by which valuers make application for empanelment to then be eligible to render services when appointed from the list of empaneled valuers. Their eligibility for empanelment is considered and based on their scores they are eligible for certain types of assignments. This process is the basis of a contract between SBI and the valuer and thus the principles laid down in the context of tender matters, that also result in a contract once a particular tenderer is selected, would certainly be relevant to the present situation. In any view of the matter, the principles laid down in those judgment also pertain to the scope of judicial review under Article 14 of the Constitution to administrative actions in the *sphere of contractual matters and those principles would clearly apply to the present case. Thus, there is no merit in the attempt to distinguish the judgments noted above.*

43. We also find that there is no merit in the submission that the policy, containing the impugned conditions, is not framed by experts and therefore liable to be quashed. The policy of SBI indicates that it is framed by the Stressed Assets Resolution Group. This group of persons may not be outside experts but by the very nature of the function that they discharge are experienced in the business operations of the bank in relation to grant of loans and putting policies in place in relation to Non Performing Assets and matters related thereto such as valuation of securities to facilitate recoveries in the event that a loan or facility becomes a Non Performing Assets. Further, even if a policy is not prepared by "experts", that by itself cannot be a ground to challenge the policy in question. Thus we find no merit in this submission either.

44. We have also noted that the SBI has, in its Affidavit in Reply at Paragraph 12, candidly stated that the indemnity will be invoked rarely and is intended for cases where it suffers huge losses on account of an erroneous or fraudulent valuation report. We expect SBI to abide by its own understanding of when it will seek to invoke the indemnity condition against valuers as it has explained in Paragraph 12 of the Affidavit in Reply. If the invocation of the indemnity in a given case is unreasonable or arbitrary, it is that action that may separately be assailed by the affected valuer, which is entirely distinct from assailing the Impugned Condition of indemnity as generally provided for. It is well settled that the possibility of abuse does not by itself render state action, or in this case the stipulation, as unconstitutional."

It is further submitted that the above mentioned judgment has also been ***followed by the Telangana High Court*** while deciding a batch of writ petitions including ***CWP-2648 of 2021*** titled as ***Bheemrao Jaligama and another Versus Punjab National Bank.*** The relevant extract of the same is reproduced hereinafter below:

> *"10. It was contended by the Petitioners that the inclusion of a clause mandating submission of a letter of indemnity is so unconscionable and draconian that it warrants interference of this Court.*
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> *11. It is relevant to note that the Supreme Court in **<u>Central Inland Water Transport Corpn. v. Brojo Nath Ganguly</u>** has held that an unconscionable contractual stipulation is a one which results due to unequal bargaining power between the parties. If the Court finds that the stipulation is unconscionable then it can strike down the stipulation as violative of Article 14 of Constitution of India. The relevant paragraphs are extracted below:*
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> > *76. Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a court in any other country been pointed out to us. <u>The word "unconscionable" is defined in the Shorter Oxford English Dictionary, 3rd Edn., Vol. II, p. 2288, when used with reference to actions etc. as "showing no regard for conscience; irreconcilable with what is right or reasonable". An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable.</u>*
> >
> > *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.*

From the decision in ***Brojo Nath Ganguly (supra),*** *it can be said that a contract can only be interfered on the ground of unconscionability, if the term(s) of the contract are substantially unfair, monstrous, tainted with illegality and which shock the conscience of the Court.*

12. ***Black's Law Dictionary (10th Edition, Thomson Reuters)*** *defines unconscionability as follows:*

> *Unconscionability. 1. Extreme unfairness. Unconscionability is normally assessed by an objective standard: (1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party.*

> *2. The principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp. terms that are unreasonably favorable to one party while precluding meaningful choice for the other party.*

An examination of English decisions at this juncture is apt to determine what constitutes an unconscionable bargain which may require courts to step in and strike down such unfair terms. In ***Alec Lobb (Garages) Ltd v Total Oil GB Ltd.****, it was held:-*

> *It is probably not possible to reconcile all the authorities, some of which are of great antiquity, on this head of equitable relief, which came into greater prominence with the repeal of the usury laws in the nineteenth century. But if the cases are examined, it will be seen that three elements have almost invariably been present before the court has interfered.* ***First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken: see, for example, Blomley v Ryan (1954) 99 CLR 362, where, to the knowledge of one party, the other was by reason of his intoxication in no condition to negotiate intelligently. Second, this weakness of the one party has been exploited by the other in some morally culpable manner: see, for example, Clark v Malpas (1862) 4 De GF & J 401, 45 ER 1238, where a poor and illiterate man was induced to enter into a transaction of an unusual nature, without proper independent advice, and in great haste. And third, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive. Where there has been a sale at an undervalue, the undervalue has***

> ***almost always been substantial, so that it calls for an explanation, and is in itself indicative of the presence of some fraud, undue influence, or other such feature.*** *In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase 'shocks the conscience of the court', and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.*

13. In **Multiservice Bookbinding Ltd. v. Marden, Browne-Wilkinson J** *held as follows:*

> ***I therefore approach the second point on the basis that, in order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable: it is not enough to show that in the eyes of the court, it was unreasonable. In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience****.*
>
> *The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited: the court can and should intervene where a bargain has been procured by unfair means.*

14. Lord Denning M.R., in **Lloyds Bank Ltd. v. Bundy** *discussing what constitutes unconscionability and unfair contractual terms warranting interference of the courts held as follows:*

> ***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 upon 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.*

Unconscionability of a transaction shall be decided based on the circumstances of the parties which may include the weakness of one party and the dominant position enjoyed by another party, the financial needs of the parties, the alternatives or the choice available to the weaker party, etc. In other words, as *held by the Supreme Court in State of Karnataka v. State of Tamil Nadu, unconscionability of a contract depends on unconscientious use of superior power over another party who may be ignorant or be in a weak bargaining position.*

15. The Supreme Court in ***Phulchand Exports Ltd. v. O.O.O. Patriot*** *held that where business men are involved who are aware of the nature of bargain and are equally situated, the transaction cannot be termed as unconscionable. The relevant paragraphs are extracted below:*

> *37. The transactions covered by Section 23 are the transactions where the consideration or object of such transaction is forbidden by law or the transaction is of such a nature that, if permitted, would defeat the provisions of any law or the transaction is fraudulent or the transaction involves or implies injury to the person or property of another or where the court regards it immoral or opposed to public policy. Whether a particular transaction is contrary to a public policy would ordinarily depend upon the nature of transaction.* ***Where experienced businessmen are involved in a commercial contract and the parties are not of unequal bargaining power, the agreed terms must ordinarily be respected as the parties may be taken to have had regard to the matters known to them.***
>
> *38.* ***The sellers and the buyers in the present case are business persons having no unequal bargaining powers. They agreed on all terms of the contract being in conformity with the international trade and commerce. Having regard to the subject-matter of the contract, the clause for reimbursement or repayment in the circumstances provided therein is neither unreasonable***

> ***<u>nor unjust; far from being extravagant or unconscionable.</u>*** *It is the precise sum which the sellers are required to reimburse to the buyers, which they had received for the goods, in case of the non-arrival of the goods within the prescribed time. More so, the fact of the matter is that the goods never arrived at the port of discharge. The Arbitral Tribunal has only awarded reimbursement of half the price paid by the buyers to the sellers and, therefore, the award cannot be held to be unjust, unreasonable or unconscionable or contrary to the public policy of India.*

16. At this juncture, it is relevant to note that the concept of reasonableness cannot be invoked by one party to force the State to enter into a contract. The State or its instrumentality is free to decide the terms on which it will enter into a contract. Doctrine of reasonableness cannot be invoked to amend/alter/modify terms of contract to favour one party. In ***<u>Excise Commr. v. Issac Peter</u>****, the Supreme Court held 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 [(1989) 3 SCC 293]*** *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. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] 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***

> ***<u>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.</u>*** *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.*

17. It is to be noted that the scope of interference in commercial/ contractual matters under Article 226 of the Constitution of India is extremely narrow. The State or its instrumentality in the matters involving commercial transactions is justified in acting like a prudent business man who is driven by his own commercial interest.

18. In the context of award of tenders, the Supreme Court in ***<u>Michigan Rubber (India) Ltd. v. State of Karnataka</u>*** *has held that in contractual matters where State or its instrumentality is a party, the Courts can only interfere where public interest is involved and if the decision-making process is discriminatory, grossly unfair and arbitrary which no reasonable authority can come up with and is marred by mala fides. The relevant paragraphs are extracted below:*

> *23. From the above decisions, the following principles emerge:*
>
> ***<u>(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and</u>***

substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.

Therefore, a strict and higher threshold is contemplated by the Supreme Court to interfere in commercial/contractual matters under Article 226 of the Constitution of India.

19. Now coming to the facts of the case, this Court cannot accept the contention of the Petitioners that the clause requiring submission of a letter of indemnity for valuers seeking empanelment with the bank is unconscionable, irrational, unfair and violates Article 14 of the Constitution of India.

20. It is clear that the amount disbursed by banks as part of their lending activity depends on the valuation of the security that is deposited. This valuation is sine qua non for the bank to determine the amount which shall be disbursed and in case the borrower fails to return the loan amount, the bank is left with no other option but to enforce the security deposited. Therefore, it is justified on the part of the banks to ensure that the property deposited by the prospective borrower is properly valued.

21. To ensure such proper valuation, it is for the banks to determine the criteria that a valuer has to satisfy to seek *empanelment with them. The banks may come up with a condition that the valuer shall act reasonably, fairly and take reasonable care while valuing a property. The bank is justified in imposing a condition that if any loss occurs to the bank on account of improper/illegal valuation, the valuer will be called upon to indemnify the bank.*

22. This Court cannot accept the contention of the Petitioners that the valuers are professionals whose role is only to give opinion like doctors, lawyers or chartered accountants. As stated above, the amount of loan that is disbursed is based on the valuation determined by the valuer. A valuer is required to have the necessary qualifications as required under the Wealth Act, 1957 and rules thereunder. He has a duty to act fairly and value the property based on the prevailing market standards, failing which he shall be ready to face action. The Petitioners contention of the Petitioners appears to be that valuers shall be empaneled with the Respondent bank but shall have no liability in cases of wrongful valuation. The said contention is untenable.

23. Even lawyers, doctors and chartered accountants can be held liable before the consumer forums or their respective disciplinary bodies if they act negligently or against the interests of their clients. For example, Jacob Mathew (supra) relied upon by the Petitioner does not say that the doctors are not at all liable for their professional opinion. The said decision says that they have to take reasonable care and shall not act negligently. To prove that they are not liable, doctors have to show that they have followed the test in Bolam's case and have acted reasonably in light of the standard of care prescribed.

24. Similarly, there is no open-ended liability in the present case. The indemnity clause can be invoked by the Petitioners only if the bank is able to prove that the valuation was improper and loss was sustained by them owing to an act, lapse or error *committed by the valuer. If the valuers feel that their valuation report is justified and was based on existing market standards, they can raise the same grounds before a court of law against invocation of the indemnity clause.*

25. Further, the Petitioners have failed to establish that the condition mandating submission of letter of indemnity is unconscionable on account of unequal bargaining power. The Petitioners are not ignorant and are well aware of the duties that are to be performed by them and the importance of the valuation report given by them. Only when the duties are not performed and the same results in any loss to the Petitioner, can the indemnity clause be enforced. The said clause cannot be said to be unconscionable as it does not give any undue advantage to the Respondent. The said clause merely fixes liability on the valuers who fail to act as required and the said liability can only be decided by a court of law.

26. As per the decisions discussed above, the Petitioners have failed to show that the stipulation mandating submission of a letter of indemnity is extravagant, is grievously impaired by reason, is morally culpable & reprehensible and unreasonably favours only the Respondents.

27. Dealing with a similar clause mandating an indemnity clause for empanelment as a valuer with the State Bank of India, a Division Bench of the Bombay High Court in ***Practicing Valuers Association (India) v. State Bank of India*** *refused to interfere under Article 226 of Constitution of India and held that such a stipulation is valid and not violative of Article 14 of the Constitution of India. This Court agrees with a view expressed by the Bombay High Court. The relevant paragraphs of the said decision are extracted below:*

> ***38. Keeping these principles in mind, we have to consider the challenge to the Impugned Condition relating***

to the indemnity clause. SBI states that the rationale for seeking an indemnity is its experience of suffering because of incorrect and deliberately inflated valuation reports. SBI has given some examples in its Affidavit in Reply of instances where it claims to have suffered loss and prejudice because of certain valuations of property that ultimately proved to be grossly inaccurate. We are making it clear that we should not be understood as expressing any opinion on the specific grievance that SBI may have with the valuers named in the Affidavit in Reply. These are stated as examples to justify the inclusion of the Impugned Condition relating to the indemnity clause.

39. In view of the importance of valuation qua the business of banking and lending, we are of the opinion that it cannot be said that the objective of including an indemnity clause in its terms of empanelment is arbitrary or unreasonable and without any purpose whatsoever. ***Looking to the nature and purpose of this contractual stipulation, it would be within the discretion of SBI in matters of contract to insist on its inclusion as it wants to uniformly hold valuers to a higher and more exacting standard. SBI is entitled to seek inclusion of the indemnity clause in its terms of empanelment and terms of contract with valuers. We also find that SBI is entitled to add such terms to its Agreements with valuers in the larger public interest given the nature of decisions that SBI will make based on such valuations given by the valuers***.

40. It is also important to note that SBI is not seeking a bond or bank guarantee which can immediately and unilaterally be encashed against its empaneled valuers. Even if SBI seeks to rely upon and invoke the indemnity against a valuer, it will have to initiate appropriate legal proceedings *before a Court and SBI would have to establish breach of the indemnity and consequent loss by following due process of law.* ***At the same time, the indemnity clause does hold the valuer to a higher standard of care and secure SBI's interest by way of express contract rather than SBI having to base any action only on a tortious or civil action of professional negligence or fraud. As we have observed above, this exercise of discretion in important commercial or contractual matters cannot at all be termed an arbitrary exercise of power by SBI.***

41. ***Every valuer has a choice not to be empaneled with SBI if it does not agree to be bound by the indemnity clause in question. SBI does not have a monopoly in issuing valuation mandates even though it's business may account for a significant share of valuations carried out by valuation professionals.***

28. Therefore, in light of the aforesaid discussion, the present batch of writ petitions are liable to be dismissed."

He thus submits that the issue has already been considered extensively by the above mentioned High Courts and the above said Clauses have already been upheld.

Responding to the above, learned counsel for the petitioners submit that so far as the decision of the Bombay High Court dated 18.08.2020 is concerned, the same is subject matter of challenge in SLP Diary No.25411 of 2020 titled as 'Vijay Raghunath Swar and Another Versus state Bank of India and others' and that the notice in the said SLP has also been issued. They, however, fairly concede that there is no stay granted so far in the said SLP.

I have heard the learned counsel for the respective parties and have also gone through the documents appended alongwith the present petition as well as the judgments relied upon by both sides with their able assistance.

Specific questions were also raised to learned counsel for the petitioners as to whether the Indian Bank Association is an instrumentality or agency of the State within the meaning of Article 12 of the Constitution of India, to which learned counsel for the petitioners fairly answered in negation. A pointed query has also been raised with respect to the Guidelines/Handbook on Policy, Standards and Procedures framed by the Indian Bank Association and as to whether such Guidelines are justiciable and enforceable in accordance with law, to which, counsel for the petitioners fairly submit that the guidelines, which are circulated as a handbook for uniformity of decision by the banks as well as the Housing Financial Institutions, are not statutory in nature and are not justiciable or enforceable in any Code of Law. They, however, contend that the said guidelines have been prescribed to rule out any arbitrariness on the part of the respondents. They contend that the object of filing the present petition was to highlight the arbitrariness and discrimination in the actions taken by the respondent-State Bank of India, which is an agency and instrumentality of the State and the same having prescribed such condition of furnishing of an indemnity bond which is unconscionable.

Further, the Clause 1.9 of the handbook on Policy, Standards and Procedures for Real Estate Valuation by Banks and HFIs in India, relied upon by the counsel for the petitioners, reads thus:

"1.9 Obligation of the Banks/HFIs

This document casts the following obligations on the appointing agencies viz. the Banks/housing finance institutions:

XXX XXX XXX

- *No security deposits or any other indemnity money should be taken from the Valuers as security for the professional services that they provide.*

XXX XXX XXX

- *In case the valuation report submitted by the valuer is not in order, the banks/housing finance institutions shall bring the same to the notice of the valuer within 15 days of the submission for rectification and resubmission. In case no such communication is received, it shall be presumed that the valuation report has been accepted.*
- *All procedures as outlined in this document have to be followed by the banks and the housing finance institutions.*

XXX XXX XXX

- *Wherever the value of the property is more than Rs.10 crore, two valuers of Category A or B shall be appointed in order to get the valuation done. In case the difference in the valuation arrived at by both the valuers is not more than 15 percent, the average value is considered. In case the difference is more than 15 percent, then, a third valuer, who shall also be a senior valuer in the A or B category, shall be appointed and the bank/HFI shall take an appropriate considered decision on the value."*

They further make a reference to Clauses 13 and 14 of the Agreement, required to be executed between the parties, to contend that prescription of any such condition is in direct conflict with the provisions prescribed in the Handbook on Policy, Standards and Procedures. The relevant Clauses 13 and 14 are reproduced as under:

> *"13. That in pursuance of this agreement, the valuer hereby agrees and consents with the SBI that he/she/they will, at all times, indemnify and keep harmless the Bank against all losses, costs, damages, expenses and all actions, suits, proceedings, expenses, costs, charges and demands and other outgoings which the Bank may meet, incur, suffer or sustain by reason of the any act, lapses, defaults, negligence, errors or mistakes committed by him/her/ them or in relation to the submission of any wrong, inflated, obliging valuation report of the assets offered as security to the Bank, whether caused due to his/her/their voluntary/ involuntary act, omission, criminal breach of trust, neglect or default, which is found out/ noticed at any time, even at a later point of time. The valuer further undertakes and agree to pay the SBI on demand-sums of money, costs, charges and expenses incurred in respect thereof and also to-pay interest on all such moneys at the ruling rate.*
>
> *14. That the valuer agrees that if his/her/their/ its liability as referred to above cannot be quantified immediately the quantum arrived at and demanded by the Bank at a later point of time shall be final and conclusive, and the valuer further agrees that he/she/ they will not dispute the same."*

(Emphasis Supplied)

On a primary reading of the aforesaid Clauses, it is evident that there is a marked difference between the conditions prescribed in Clause 1.9 where the reference is to making a security deposit or any other indemnity money to be taken from the Valuer of offsetting the loss, if any, that may be suffered by the Bank/Housing Finance Institutions. The said Clause prohibits indemnity sssssmoney from valuers as security for professional service that they provide.

The condition prescribed in Clauses 13 and 14 of the proposed agreement are only with respect to execution of an agreement for holding the Bank/Housing Finance Institutions harmless on account of any act/omission committed by a Valuer. Such Clauses are common in industrial practice wherein an Agent is required to indemnify his principal for any liability which is so fastened on the principal for acts/omissions that are directly attributable to the acts/conduct/omission on the part of an agent. It is not in the nature of a security deposit or the indemnity money being called upon and to be submitted by a Valuer seeking empanelment with the respondent-Bank as a security for empanelment.

Further, insofar as the reasoning with respect to sustainability, conscionability and the validity of the Clauses is concerned, I find myself in agreement with the judgment of the Division Bench of the Bombay High Court for the reasons culled out thereunder and already extracted above, which has also been followed by the Single Bench of Telangana High Court. The reasons thus need not be reiterated to avoid repetition.

In addition, I find that the petitioners have failed to point out as to how a challenge to such Clauses *per se,* on the mere strength of the Handbook on Policy/Standards and Procedures issued by the Indian Banks Association would be maintainable. Further, merely because an SLP has been filed before the Hon'ble Supreme Court against the judgment dated 18.08.2020 passed by the Bombay High Court (supra) does not make out a case that the said judgment has no enforceability or persuasive value.

For the reasons stated thereunder and as referred to above, I find that there is no merit in the present petitions and the same are accordingly dismissed and there is no statutory prohibition or bar in seeking such indemnity or undertaking from the valuers to be empanelled. The counsel for the petitioners has failed to refer to any law to the contrary and merely relies on Article 19(1)(g) and Article 21. I fail to agree with the counsel as the clause does not infringe on the rights of the petitioners as prescribed and does not come to the aid of the petitioners.

A photocopy of this order be placed on the file of another connected case.

(VINOD S. BHARDWAJ)
JUDGE

MAY 14, 2024
rajender

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No