

(2007) 09 DEL CK 0014

In the Delhi High Court

Case No : Writ Petition (C) 18014 of 2005 and CM No. 11633/05

C.P. Mittal

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 03-09-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 32
Contract Act, 1872 — Section 23

Citation : (2007) 09 DEL CK 0014

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Radhika Chandrashekhar, for the Appellant; R.C. Nangia, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—In all these writ proceedings, under Article 226 of the Constitution of India, common questions of fact and law arise for consideration. They were, with consent of parties heard together. All the petitioners are licensees of the respondents. They are operating public call offices (PCOs) in one or the other railway platforms/spaces under the control of the second respondent Northern Railways. They are aggrieved by revision of terms of the licenses to the extent that the second respondent has demanded enhancement of commission to up to 102% and more, in comparison with the existing commission. They seek suitable directions that such demands should not be enforced.

2. All the petitioners were allotted/awarded licenses to operate PCOs in premises under the control of the second respondent specifically in railway platforms etc. The conditions of license, among others, stipulated payment of license fee on annual basis with reference to the area occupied. That was made subject to revision/enhancement from time to time. The petitioners were chosen as licensees as a measure of rehabilitation; in many cases these were on compassionate basis. In some cases the allotments were based on the

applicants" physical disability; and in others on account of unemployment.

3. On 20.05.02, the Ministry of Railways issued a Policy circular namely, No. 32/2002 and applied it to existing STD/ISD/PCOs booth holders/licensees. The said circular reads as follows:

Government of India

Ministry of Railways

(Railway Board)

No.2000/TG.IV/10/P/STD/PCO/Review

New Delhi dt.20.5.2002

The General Manager (Commercial)

All Zonal Railways

Policy Circular No.36 of 2002-Commercial Directorate

Sub:Policy for existing STD/ISD/PCO Booth holders.

The policy for allotment of STD/ISD/PCO/FAX/Internet Booths issued vide Board's letter No.2000/TG.IV/10/PCO/TATA dt. 28.4.2000 was stayed vide Board's letter of even dated 12/13.6.2001. The matter regarding review of STD/ISD/PCO booth policy issued vide above quoted letter of even number dt. 28.4.2000 has been under consideration of the Board for quite some time.

Ministry of Railways has, Therefore reviewed the matter and has decided that the revised policy for renewal of the existing contract of STD/ISD/PCO/FAX/Internet Booth holders will be as under:

1. In case of existing STD/ISD/PCO/FAX/Internet booths, the licensee may be allowed to operate the booth up to the unexpired period of existing contract. The contract can be further extended once if considered desirable w.e.f. the date of expiry of the earlier contract and up to 27.4.2005 subject to the following conditions.

(a) The party agrees to pay land license fee @ 20% of the notified cost of the land price prevailing at a particular station and 10% increase every year as notified by the Railway and a minimum of 10% of the commission earned by them from MTNL, BSNL or any other authorised service provider, etc. till a new contract at the same station as per New Policy for fresh allotment (2002) is finalised. After a new contract is finalised, the rate of commission would be 10% or the rate accepted in the said new contract whichever is higher.

(b) As per the agreement with STD/ISD/PCO booth holders, the licensee shall pay in addition to license fee other charges such as electric current, water consumption, municipal taxes, etc. as fixed by the administration from time to time regularly.

2. Zonal Railway should expedite the process of inviting open bids so that the benefit of higher rate (over and above the minimum of 10%) accrues to the railways as early as possible.

2.1 A clause may be introduced in their agreement that change/amendment/modification made in policy from time to time will automatically be applicable to the existing license holders without any further action on the part of the railway.

This issues with the concurrence of Finance and Legal Directorates of the Ministry of Railways.

Please acknowledge receipt of the letter.

4. (Hindi version will follow)

4. On application of the above policy dated 20.05.02, the railways started collecting the minimum commission according to the rates specified in the circular, i.e minimum 10%. The commission had co-relationship the commission payable to the licensee, by the service provider, namely, MTNL/BSNL. The commission admissible to the petitioners was defined by franchise agreements which contained stipulations as to call charges that could be recovered and also the rates of commission, expressed in percentage to the total revenue earned through calls, payable to them. By way of an illustration, the relevant conditions from one of the agreement, namely, Clauses 5 and 17 are extracted below:

Terms and conditions which are part of agreement between Franchise and MTNL

5. The franchisee will charge Rs. 1.25 per unit call on all attended type STD/ISD Public Telephone and Rs.1/- per unit call for the calls made from the payphones will local call facility only from the public. The allocation of revenue shall be as follows:

For one month commission

a) First Rs. 20000 @ 16% per cent Next Rs. 30000 @ 15% per cent Over & above @ 12% per cent b) Pay Phones with Local Call Facility only 60 Paise Per Unit call recorded in Exchange. 40 Paise

However it is made clear that the commission of the franchisee as well as the aforesaid charges per call unit for STD/ISD payphone with local facility and that of per call unit for local Payphone only are subject to variation from time to time by the Government. The aforesaid rate/commission : changed by the DOT/Govt. The same shall be applicable to the franchisee from such date as notified by the DOT without any further notice in this regard.

Xxx xxx xxx 17. The franchisees of STD/ISD PCO may change up to a maximum of Rs.2/- as service charge in respect of each STD/ISD call from and STD/ISD/PCO. This service charge is not livable in case of a local call.

5. On 14.05.04, the Ministry of Railways issued a circular which, inter alia, concerned formulation of a new policy for fresh allotment of STD/ISD/FAX/

Internet Booth in Railway stations. According to the circular, a number of railway stations located in each division had to be segregated in different categories such as A, B, C, D, E and F. Allotment of booths was to be made on tender basis. Para 5.4 of the circular stated that after the existing contracts were completed or in case of termination, the booths were to be allotted to persons belonging to earmarked categories and that the tenders were entertainable for specific booths. Other relevant conditions of the said circular are extracted below:

GOVERNMENT OF INDIA

MINISTRY OF RAILWAYS

(RAILWAY BOARD)

No.01/TGIV/10/PCO/Review New Delhi, Dated 14.05.2004 The General Managers(C)

All Zonal Railways

(Commercial circular No.8 of 2634)

Sub; Policy for fresh allotment of STD/PCO/ISD/Fax/Internet booths at Railway stations.

Ref.: Board's letters No.01/TGIV/10/PCO/Policy dtd. 22.4.02

and No.01/TGIV/10/PCO/Review dt. 29.10.02.

A committee was constituted in the Ministry of Railways to review the existing policy for allotment of STD/PCO/ISD/Fax/Internet booths. Based on the recommendations made by the Committee and with the approval of the competent authority the Ministry of Railways have decided to rationalise certain provisions in the existing guidelines referred to in policy letter dated 22.4.2002 above. The modifications/additions/deletions made in the existing policy are as under:

Xxx xxx xxx Para 6.1.3 has been modified and may be read as under:

6.1.3 Packet "B" which is the financial offer shall be opened after short listing on the basis of Packet "A" and shall contain the financial bids only and no other document. The financial bid shall have two components. The first one comprise an undertaking for paying the land license fee as notified by the Railway Administration from time to time. The second component shall be an offer in terms of percentage of the commission payable to him by the telephone service provider i.e. BSNL, MTNL or any other authorised service provider which shall in no case be less than 10% of the commission payable to him. The maximum will also not be quoted more than 100% of the tender. If any tenderer quotes more than 100% commission, the tender will be treated as invalid. This should be specifically mentioned in the tender papers.

7. Para 6.1.4 has been modified and may be read as under:

6.1.4 After the bids have been received, a Tender Committee comprising three officers of appropriate level including one from Commercial, Civil and Finance Department respectively will scrutinise the Packet "A" and short list those who qualify in technical offer and reject summarily all those applications which are not accompanied by any of the documents stated for Packet "A". Thereafter, Packet "B" of only those bidders who qualify for opening of their financial bids in Packet "A" will be opened. The highest offer received should be considered for acceptance by the approving authority i.e. Divisional Railway Manager. However, as the highest bid has been restricted to 100% of the commission, there will be a draw of lots to be done by any child if there are more than one candidate offering same highest bid; Candidates should be advised the date, time and venue of the draw by Courier/Regd. AD to enable them to attend it if they so desire.

Xxx xxx xxx

6. In this background of circumstances, the present petitioner's grievance is that by letter dated 01.09.05,/ 06.09.05, the second respondent enhanced the highest commission on an assumed application of the new policy. One of the letters impugned in these proceedings issued to the petitioner, namely, writ petition No. 17800/2007 (Ms. Sunita Kumari) reads as follows:

Sub. :Payment of commission for PCO/STD/ISD/FAX/Internet booth at NDLS station on platform No.10/11 allotted to late Vipin Kalia.

Ref.: This office letter No.1146/C-4/NDLS/1664 dated 24.12.2002

In terms of Railway Board's policy circulated vide their letter No. 2000/TG-IV/10/P/STD/PCO/Review, dated 20.5.002, the license agreement of above booth will be extended further subject to the condition of payment of the commission equal to the highest commission being paid at NDLS station on tender basis is 150% w.e.f. 11.10.2003. As per consent dated 31.1.2003 of late Vipin Kalia, he had agreed to pay to the railway administration the revised rate of commission as per the rate of commission of new contract when allotted at the station. Accordingly the rate of commission of above booth is revised from 10% to 150% w.e.f. 11.10.2003. Please arrange payment of the commission of above PCO/STD/ISD/FAX/Internet booth at the above rate within 30 days failing which it will be assumed that you are not interested to operate the above booth and as such the license for the above PCO/STD/ISD/FAX/Internet booth will be terminated.

Please acknowledge receipt.

7. The above letter and enhancement of minimum commission from 10 per cent in all these cases, ranging between 102% to 150% has been challenged in these cases. The details of the petitioners such as writ petition numbers, date of allotment of the licenses, site of operation basis on which allotment of license was made; the basis on which commission has been enhanced (i.e. tender, allotment etc.) are hereby disclosed in the following tabular form:

Name

Date of license

Commission

Enhancement

Called upon to make payment of

Challenges Letter dated

New booth holder through

Place

C.P. Mittal

W.P. no 18014/05 Compassionate Ground: Physically Handicapped 29.1.96

10%

150%

102%

1.9.05

Tender

Nizamuddin railway station

Vineet Kumar

17790/05 Compassionate Ground, Physically Handicapped -

10%

150%

150%

1.9.05

Tender

New Delhi Station

T.S. Bhatia

17802/05 Compassionate Ground, Physically Handicapped 18.6.99

10%

150%

150%

1.9.05

Tender

New Delhi Railway station

Diwakar Kalia

17806/05 Compassionate Ground, Physically Handicapped -

10%

150%

150%

6.9.05

Tender

New Delhi Railway Station

Lt. Col. SC Manocha

17799/05 Compassionate Ground, Physically Handicapped 14-6-95

10%

150%

150%

1-9-05

Tender

New Delhi Railway Station

Ms. Parveen Johra

17923/05 Compassionate Ground, Physically Handicapped 28.12.95

10%

125%

125%

1.9.05

Tender

Panipat Railway Station

Suriner Kumar

W.P. No. 20297/05 Compassionate ground Self Employed 30.9.98

00%

125%

125%

1.9.05

tender

Panipat Railway Station

Kuldeep Singh

W.P. No. 17789/05 Compassionate Ground; Physically Handicapped -

10%

150%

102%

1.9.05

tender

New Delhi Railway Station

Pradeep Kumar Jain

17803/06 Compassionate Ground; Physically Handicapped -

10%

150%

150%

1.9.05

Tender

Delhi Junction Railway Station

Madan Lal

W.P. No. 17797/05 Compassionate Ground; Physically Handicapped -

10%

150%

150%

1.9.05

Tender

New Delhi Railway Station

Smt. Sunita Kumari

17800/05 Compassionate Ground; Physically Handicapped -

10%

102%

102%

1.9.05

tender

Nizamuddin Railway station

Smt. Anjana

W.P. No. 17823/05 Compassionate Ground; Unemployed, Widow -

10%

102%

102%

1.9.05

tender

Nizamuddin Railway Station

Suresh Kumar

W.P. No. 2024/05 Compassionate Ground, Physically Handicapped 30.03.2000

10%

125%

125%

1.9.05

Tender

Panipat Railway Station

8. Ms. Radhika Chandrashekhar, learned Counsel contended that the enhancement of commission by the second respondent abruptly from 10-15% to between 102% and 150% in almost all these cases on the basis of the highest tender rate, in the same place, by someone else, is arbitrary. It was contended that all the petitioners were allotted the booths or issued licenses by way of rehabilitation, since, according to the Central Government's policy, it was a social welfare measure. The revenue earned by them from these booths is also regulated by terms and conditions stipulated by the concerned telecom agency i.e. MTNL. For instance, if on an average the commission admissible for a total call turn over of Rs. 50,000/- is Rs. 8,000/-, the pre-existing commission of 10% (payable by Circular of 20.5.2002) worked out to Rs. 800/-. With the present

revision, the petitioners would be unable to function as substantial if not their entire source of livelihood, namely, commission would be payable to the second respondent. Thus, the basis of allotment i.e. rehabilitation and provision of source of livelihood for the unemployed and those deserving compassionate or special treatment, stands entirely discarded.

9. Counsel submitted that the condition of licenses when the petitioners were originally allotted booths stipulated payment of only license fee. Therefore, insistence that they should pay commission, on the basis of the circular of 2002, was questionable. However, since the petitioners' licenses were renewable annually they did not object to the condition, having regard to the quantum. But, now, by stipulating that commission equivalent to what would have to be paid by the higher standard in the current round of bidding, on the basis of a latter policy, the entire basis of the welfare measure has been undermined; even destroyed. It was submitted that with the insistence of recovery of amounts as high as 150 per cent of the commission on this basis, the respondents have acted in a discriminatory and arbitrary manner. The basis on which subsequent allottees were given booths, is entirely different; they bid or tendered for those. The petitioners are unaware as to their resources or their service providers; whether their franchise agreements or commission payable to them are more favorable, and other conditions and advantages enjoyed by them.

10. The petitioners, it is contended, are subjected to restrictions and conditions contained in the agreement with MTNL, which puts a cap on the quantum of commission they can claim. By seeking to compare these two separate and wholly different classes of allottees and stipulate a common basis for commission, the second respondent acted in an arbitrary manner.

11. Learned Counsel submitted that even otherwise as a whole the steep increase from 10% (i.e. existing rate of commission) up to 150% is oppressive and unconscionable. Learned Counsel submitted that although this is a condition of license and part of the contractual sphere nevertheless the Court should intervene as arbitrariness and unfairness is visible without any further proof. Counsel contended that having regard to the weak position of the petitioners i.e. their belonging to economically weaker sections of the community and undeniable entitlement to favorable treatment, the imposition of a condition of having to pay excessive commission over and above license fee solely on the basis of some others' willingness to pay such an amount or amounts for entirely different reasons is unsustainable under Article 14. It also has to effect of obliterating their right to meaningful life and livelihood.

12. Sh. R.C. Nangia, learned Counsel for the respondent contended that the petitioners had no doubt been allotted the booths on license basis; yet the conditions of their license were renewed from time to time annually. Pursuant to a uniform and non-discriminatory policy, made known to all, it was stipulated that commission at a minimum rate of 10% of what was being paid by the service provider i.e. MTNL would also charged as a condition of license. The

petitioners did not find anything objectionable in that arrangement. The very same circular also stated that the commission of 10% would be a minimum and would be subject to variation by new contracts.

13. Learned Counsel contended that the publication of the policy on 14th May, 2004 was a clear indication that the Railways wanted to adopt a uniform approach for allocation and allotment of all such ISD/PCO Booths. For this purpose, a categorization was made, of all railway stations. In order to issue such licenses for SC/ST applicants, physically handicapped and others entitled to such favorable treatment, all available booths in each category were clubbed together to work out the quota(s). The allocations were to be made on the basis of tenders. Thereafter, having regard to the license fee/commission paid, the existing license holders were to pay equivalent of the commission amount, agreed to be paid by the highest bidder in the same railway station.

14. Learned Counsel contended that since the petitioners had willingly entered into the arrangements i.e. operating the licenses, all these years and had also accepted the condition, consequent upon the circular dated 20th May, 2002, (which included stipulations about enhancement of the commission on par with the highest commission paid in the concerned area/platform), the impugned orders cannot be faulted. It was urged that the dispute between the parties if at all is purely contractual and there is no public interest or public law concern that would entitle this Court to entertain the present writ proceedings. Therefore, it was urged that the petitioners are disentitled to any relief.

15. Learned Counsel urged that the policy of the second respondent has not been challenged or questioned. Therefore, its uniform, and even handed application could not be termed arbitrary, or unreasonable. The court, Therefore, must desist from entertaining these petitions.

16. The above narrative shows that two questions arise for determination. One, whether in this case, the court would be justified in exercising writ jurisdiction and adjudicating upon what are largely contractual disputes, albeit to which one party, i.e the second respondent is a public or state agency. Two, if so, whether the impugned increase in commission rates is arbitrary, or in any manner unreasonable.

17. There was a time when the jurisdiction of courts, under Article 226 was confined to narrow bounds. With expanding functioning by the state and its agencies, the Supreme Court, in a series of decisions, held that even in the contractual sphere or field, no activity of the state, whether by itself, or through any of its forms or agencies, can be arbitrary, uninformed, unfair or unreasonable. Thus, in matters relating to award of contracts, stipulations in tendering, post tender negotiations and so on, the courts, as a measure of accountability of state institutions, scrutinized their functioning by applying the test of fairness, non-arbitrariness, reasonableness and non-discrimination.

18. The decisions of the Supreme Court right from *Ramana Dayaram Shetty Vs.*

International Airport Authority of India and Others, ; Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, ; Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, to Tata Cellular Vs. Union of India, have reiterated the pervasiveness of Article 14 in relation of every activity of the State in its myriad forms, acting through its manifold agencies and for varied purposes. In Life Insurance Corporation of India v. Consumer Education and Research Centre 1995 (4) SCC 482, the Supreme Court, after reviewing in detail several previous decisions held that actions of the State, its instrumentalities and public authorities or of persons whose actions bear insignia of public law element or public character are amenable to judicial review and that legality of such actions would be tested upon the anvil Article 14. The Court defined the contents of public law remedy as intervention in exercise of judicial review power where the actions of State or its agencies bearing the imprint of public interest element, can be examined. It is thus well settled that non-arbitrariness and fairness are considered as two un-alterable corner stones of the principle of equality, the immutable legal behavioral baseline. Every action, policy or even change of policy in the realm of State activity Therefore, has to be informed, fair and non-arbitrary. In one of the cases where public law jurisdiction was in a nascent stage of development, a larger, five judge Bench of the Supreme Court, in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, held that:

every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution....

Xxx xxx xxx ...If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field.

19. In Indian Railway Construction Co. Ltd. Vs. Ajay Kumar, the Supreme Court held:

While the discussion to change the policy in exercise of the executive power when not trampled by any statute or rule, is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the fields of activity of the State is a expected tenet. The basic requirement of Article 14 is fairness in action of the State and non-arbitrariness in essence and substance is the heartbeat of fair play.

20. The above decisions were rendered in the context of formulation of policies, particularly conditions upon which state or public agencies, governed by Part III of the Constitution of India, were entering into contractual relationships. While exercising judicial review, the courts scrutinize policy choices before contracts are entered into, or the decision making process which culminate in contracts. However, courts ordinarily have desisted from adjudicating upon disputes of contracting parties, after the finalization of terms. In such instances, the courts refrained from deciding what were essentially disputed questions of fact. Yet, this rule was subject to an important exception, i.e if the facts were not in dispute, and the policies or action, even post contract displayed overwhelming elements of public law disputes, the scrutiny under Article 226 or Article 32 cannot be barred. Therefore once the State or its instrumentality is party to a contract, it has an obligation in law to act fairly, justly and reasonably, as enjoined by Article 14 of the Constitution of India. Any infraction of this obligation can entitle the court, even under Article 226 to entertain the dispute, in exercise of its discretion. Thus, in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, the Supreme Court summarized the appropriate approach to be followed in such cases, in the following terms:

From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

The above formulation of law has not been dissented from; it has been affirmed in the recent decision of the Supreme Court, reported as *Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others*, .

21. In view of the above analysis, any lingering doubt as to the jurisdiction of the court to entertain a contractual dispute between a state instrumentality and a citizen, if it contains substantial elements of public law, in writ proceedings stands dispelled. There is no dispute that the second respondent is a state instrumentality. The question involved here concerns not only the manner in which it operates contracts i.e the licenses awarded, but also the situs of such contracts, i.e. railway property. One cannot be unmindful of its status as a monopoly public utility service provider, wholly owned by the Central Government. Its impugned action is perceived to have caused immense injury to the licensees, who, in furtherance of the state's welfare policies, were allotted booths on compassionate grounds, or by reason of physical disability. These, according to me, constitute sufficient public law elements to entertain the

present petitions under Article 226 of the Constitution of India. As regards facts, there is no dispute; both the parties rely upon circulars and consequential licenses issued by the second respondent.

22. In an illuminating and perceptive judgment, in *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, , the Supreme Court read into Article 14 the concept of public policy spelt out in Section 23 of the Contract Act, to invalidate conditions in employment contracts, which enabled the public employer, without cause to terminate contracts of service. The court repelled the contention that such action could not be taken, since the parties had entered into bargain by free exercise of choice. It was held as follows:

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.

23. Some time later, in the decision reported as LIC of India and Another Vs. Consumer Education and Research center and Others, the Supreme Court had to decide whether a life term policy could be restricted only to employees of Government, quasi-Government or reputed commercial firms and whether such condition was just, fair and reasonable or based on reasonable classification, consistent with Articles 14 and 21 of the Constitution. The court drew extensively upon previous decisions, including the Central Inland Case (supra) and held that:

It is, Therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.

The court proceeded to set aside the impugned condition. It also rejected the argument of the Life Insurance Corporation that the condition was based on reasonable classification.

24. The rule as to unconscionableness of contractual or policy conditions being a ground of arbitrariness has been approved in subsequent decisions. In Hindustan Times and Others Vs. State of U.P. and Another, , the impugned measure was a direction issued to by the Uttar Pradesh Government, that at the time of payment of bills for publication of government advertisements in all newspapers having a circulation of more than 25,000 copies, 5% of the amount, forming part of a fund for the purpose of granting pension to the working journalists, would be deducted. The court found this to be an illegal extraction, and held as follows:

The respondents being a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of "take it or leave it". The bargaining power of the State and the newspapers in matters of release of advertisements is unequal. Any unjust condition thrust upon the petitioners by the State in such matters, in our considered opinion, would attract the wrath of Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act. See Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly and Delhi Transport Corporation v. D.T.C. Mazdoor Congress. It is trite that the State in all its activities must not act arbitrarily. Equity and good conscience should be at the core of all governmental functions. It is now well settled that every executive action which operates to the prejudice of any person must have the sanction of law. The executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any court of law. The impugned action of the State does not fulfill the aforementioned criteria.

25. The question which has to be determined is whether the insistence by the

second respondent that the petitioners have to pay the enhanced commission at rates ranging between 102% and 150% in these cases, is arbitrary, or unreasonable. The following important facts have to be noticed:

- (1) All the petitioners were pre-2002/2004 licensees;
- (2) They were allotted booths as a measure of rehabilitation, either on compassionate ground, or on account of their disability. Thus the second respondent acknowledged their vulnerability, and forming part of a special class deserving favorable (affirmative) treatment.
- (3) The petitioners were initially asked to pay only license fee; the requirement of having to pay commission, in a defined proportion (minimum 10%) of what was earned by them from MTNL, was provided for later, in 2002. No doubt, this was not protested.
- (4) The percentage of commission payable to the petitioners by MTNL is fixed, and based on a separate understanding. This commission is their source of livelihood, and profit, after deducting the charges payable to the second respondent.
- (5) The policy embodied in the 14-5-2004 circular introduced competitive bidding for the first time, in relation to telephone, i.e STD/ISD etc booths. Those tendering under these conditions were awarded licenses on commercial basis.
- (6) The terms of agreement between such bidders and their respective service providers (ie. MTNL or any other telecom company) are unknown; they could well be more favorable than what is extended to the petitioners, in terms of commission, or other concessions.

26. Two important facts emerge. One, the petitioners' vulnerability and their eligibility on economic or such like conditions were the guiding factors impelling the second respondent to grant them licenses. In the case of others, (on the basis of whose bids, the commission recoverable from the petitioners is sought to be enhanced) allotment is admittedly a result of competitive bidding, on commercial considerations. Two, the conditions of MTNL, in terms of commission payable to the petitioners remain unchanged. Conversely the railways has not disclosed the commission payable by MTNL or the other telecom companies to the said bidders, whose commission has now fuelled increase in the rates vis-a-vis the petitioners.

27. Nomenclature aside, what is essentially in issue is the contractual power of the second respondent to allow its spaces to be utilized by private individuals for extending facilities to commuters and others visiting railway platforms and properties. One of the essential characteristics of a valid contract is certainty. What is sought to be introduced by the impugned orders in existing contract is an extraneous and vague stipulation, i.e commission paid by some one else. When the petitioners were granted licenses, they were aware of what was required of them, i.e payment of 10% commission (out of the commission

payable by MTNL). Mid-way, as it were, they have been required, as a condition, to pay 102% to 150% of such commission. The subjective element, i.e. dependence and linkage with the bid of the fresh licensee (who tendered on the basis of his economics) in such case, cannot be overemphasized. The petitioners, i.e. existing licensees are not free agents, and have to virtually fall in line with the dictates of the fresh tenderer, who would have worked out his own profitability on a commercial basis, with the telecom company. The petitioners, on the other hand, have no benefit of upward revision of commission rates by the MTNL.

28. As held in more than one place in this judgment, the petitioners belong to vulnerable sections of the society and were granted licenses on the basis of their economic need, to earn a livelihood. Equating their condition with those willing to bid for the facilities, after working out commercial viability, is comparing chalk with cheese thus treating unequals equally. To add insult to injury, the second respondent has insisted that the enhanced commission would be a condition for continuing with the license. This, in the plainest terms is a "take it or leave" it imposition of unconscionable terms by someone who is in a position to dominate and dictate the choice of another, with little or no bargaining power, that was frowned upon in the *Hindustan Times* case (*supra*). In another previous decision, a "welfare measure" to relieve famine and scarcity conditions, by providing employment to the unemployed, by exempting the state from paying minimum notified wages, was held to be arbitrary, and exploitative, in *Sanjit Roy Vs. State of Rajasthan*, , in the following terms:

The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions.

29. No material was adduced before the court, nor was it even suggested that the petitioners had improved themselves to such an extent that their bargaining power approximated, if not equaled ,the second respondent. In the above circumstances, I have no manner of doubt that the condition by which they have been asked to part with 100% of the commission (even if a charitable view is taken, that too would result in increase of the existing commission, by 100%) is unconscionable and arbitrary. The plea of uniform application of a non-discriminatory principle, in my opinion, sounds hollow, as it affronts the equality clause; it treats those who are facially unequals with equals. The condition is best exemplified in the following quotation from Anatole France:

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

30. In view of the above conclusions, these petitions have to succeed. The respondents are directed not to enhance the commission payable by the petitioners on the basis of the policy dated 14-5-2004, by equating the rate of

commission with the highest paid by others in the vicinity. The impugned orders demanding enhanced commission, are Therefore, set aside. The second respondent is directed to continue with the existing licenses on the basis of the minimum 10% commission. This does not, however, preclude it from individually considering the facts of each petitioner, and, after negotiating with them arrive at mutually acceptable terms, based upon the levels of commission and concessions enjoyed from the MTNL/ telecom company.

31. The writ petitions and all accompanying applications are allowed in the above terms. The respondents are directed to pay costs quantified at Rs. 3000/- for each set; each petitioner shall be paid the same within six weeks.