

(1990) 08 MAD CK 0013
In the Madras High Court
Case No : O.S.A. No. 96 of 1981

Indian Oil Corporation Pvt. Ltd.

APPELLANT

Vs

M/s. Poppat Jamal and Sons

RESPONDENT

Date of Decision : 28-08-1990

Acts Referred:

Arbitration Act, 1940 — Section 20(4), 32, 33, 34
Constitution of India, 1950 — Article 12, 14, 226, 32
Contract Act, 1872 — Section 23

Citation : (1990) 08 MAD CK 0013

Hon'ble Judges : Mishra, J;Bakthavatsalam, J

Bench : Division Bench

Advocate : C. Ramakrishna for M/s. T.N. Vallinayagam, G. Rammohan and G. Veerabadran, for the Appellant; M.R. Narayanaswami, for M/s. P. Seshadri and N. Vijayakumar, for the Respondent

Judgement

1. Defendant Corporation have appealed against the judgment holding that they are not entitled to an order of stay of the suit u/s 34 of the

Arbitration Act. The plaintiff, a Partnership Firm, who has been carrying on business among others as Distributors of Liquid Petroleum Gas, has

instituted the suit in this Court, alleging that it was a Distributor of "Burshane" gas under the Burma Shell and Oil Storage and Distribution Company

Limited since October 1962 under an agreement for distribution of Burshane gas in the City of Madras. It had been carrying on business in the

distribution of Burshane Gas throughout the city of Madras and was being paid a commission of Rs. 3.68 per cylinder. By September 1969, it had

enrolled a large number of customers and it had 6960 connections and a business of 10,000 cylinders per month. The appellant took over the

business of Burshane gas in the Madras City in September 1969 and introduced

Indane Gas in the place of Burshane Gas. Plaintiff says:

As per the taking over agreement, the defendant had to honour all the commitments and liabilities of Burmah Shell in respect of the said business,

who were the principals of the Plaintiff. It was further made clear that the defendant had to honour all the contracts and rights created in favour of

third parties entered into by the Principals with its distributors. On the abovesaid undertaking the business was taken over from Burmah Shell by

the defendant.

On 28.6.1969, according to the plaintiff, the defendant acknowledged the rights of the plaintiff and accordingly there was a formal agreement

communicated by them dated 28.6.1989 confirming the plaintiff would continue to enjoy all the rights and privileges which it had with Burmah

Shell. On 1.9.1969 they entered into a standard agreement with the plaintiff (as referred to in the agreement dated 28.6.1969) under which it was

agreed under clause 1(b):

The distributor will, during the continuance of this agreement, confine himself to selling in the area or territory specified in sub clause (a) above and

such other places or areas as may from time to time be authorised by the Corporation in writing, provided always that the Corporation may from

time to time and at any time at its sole discretion, on giving 30 days notice, increase, reduce, restrict or otherwise alter the said area or territory and

nothing herein contained will be deemed to restrict the right of the Corporation to appoint another distributor instead of the existing Distributor, if

any, for the whole or part of the said area or territory

and 1 (C):

In the interest of furthering the sale of Indane the Distributor is allowed to appoint sub-distributors or open his own branch for clearly demarcated

zones in the area allotted to him. Corporation's prior approval for such appointments and terminations on terms thereof shall be obtained in writing.

There shall be no privity of contract between the Corporation and the sub distributors and they shall be directly responsible to the Distributor for all matters.

Plaintiff further says that pursuant to the said standard agreement, it enrolled new customers and took up the business. The defendant permitted the

plaintiff to enroll by-letter dated 7.1.1970, 30 domestic customers per month from the month of January 1975 onwards until further notice and also

permitted the plaintiff to convert the competitors customers without any restrictions, ""as at that time Calgas also was doing its business in gas in the

Madras City to its customers"". The defendant also wrote to the plaintiff on 13.3.1972 permitting it to enroll new commercial customers during the

period from March to June 1972 and asking it to use the said opportunity and enroll as many commercial customers as possible. Pursuant to the

same, apart from the commercial customers enjoyed by the plaintiff in the distribution of Bursnane Gas, it also enrolled new commercial customers

and as on 1.6.1971 the number of connections under the plaintiff were 8,619. In the middle of 1973, however, a new Regional Manager was

appointed for the defendant Corporation at Madras, who was not well disposed towards the plaintiff and he began to harass it in all possible ways,

manners and methods. As a first step, he curtailed the rights of the plaintiff by upgrading the sub-distributors as main distributors thus curtailing the

number of customers contrary to the terms and conditions of the agreement dated 1.9.1969. On one occasion when the defendant wrote to the

plaintiff on 9.8.1974 to the effect that the defendant had proposed to upgrade the two sub distributors, the plaintiff made a detailed representation

by its letters dated 21.6.1974 and 30.8.1974 pointing out to the defendant that as per the agreement, there being no privity of contract between

the defendant and the plaintiff's sub-distributions, they should not upgrade them as Distributors causing detriment to the plaintiff and even if the

defendant could do so by virtue of the power conferred under Clause 1(b) of the agreement, that could be done without any hindrance being

caused to the number of connections and customers enjoyed by the plaintiff. It is stated:

. . .In fact, the plaintiff by its letter requested that the matter may be arbitrated. The defendant, however, by its letter dated 10-9-1974 without any

reference to the Plaintiffs letters dated 21.8.1974 and 30.8.1974, informed the Plaintiff that the upgrading of the sub-distributors as main

distributors is an All India Policy and that it was not possible to extend the time limit and hence the two sub distributors Religious Agency and

Associate Traders aforesaid have been upgraded as main distributors with effect from 16.9.1974. The Plaintiff wrote a letter to the defendant on

12.9.1974 objecting to the said action of the defendant and that the same was unilateral and informing the defendant that the plaintiff must be re-

couped to the original level in the matter of the connections enjoyed by it. On 16.9.1974 the defendant wrote to the plaintiff to the effect that

certain areas of the plaintiff have been curtailed. In this context, it has to be noted that though the defendant had a right to curtail the area, it had no

power to curtail the number of connections and cylinder sales.

According to the plaintiff, the defendant sent a circular dated 30.10.1974 to the effect that the dealers were permitted to enroll new customers as

against Termination Vouchers in any part of the country. But soon after, by another letter dated 11.6.1975 to the plaintiff, they informed that the

enrolment of new connections against Termination Vouchers in future had to be suspended until further communication from the defendant. The

plaintiff wrote to the defendant on 10.7.1975 asking them to inform whether the instructions mentioned in letter dated 11.6.1975 were issued to all

the distributors or to the the plaintiff only which however was not replied to. The plaintiff then received a communication from the defendant on

16.1.1975 to the effect that there was dissatisfaction among the customers and that the plaintiff should remedy the same. The plaintiff sent a

detailed reply to the said letter on 28.1.1975 explaining their stand. The defendant again wrote to the plaintiff on 26.3.1975 inter alia:

With an object or limiting the size of the big distributors:- we request you to furnish the following details within 20 days after the receipt of this

letter:

1. Indicate the areas which you propose to shed in order to effect reduction in sale of 2000 cylinders a month. Please indicate the areas which you

feel difficult to feed so that you can concentrate more to the sales around your godown and supply point.

2. give a list of customers in those areas with their average consumption and also other details like name and address, S.V. NO. Equipment loan

deposit collected etc.

Although the said letter, it appears, was not replied, the plaintiff says:

. . .the plaintiff discussed the matter with the defendant and apprised that as per the agreement the same could not be done. The defendant having

felt satisfied with the same, dropped the idea of reduction of 2000 cylinders a

month.

The plaintiff had also referred to letters and correspondence on the subject of restriction and withholding of customers and alleged that in reply to

its letter dated 15.9.1975, the defendant said that the upper limit of 10,000 customers for a distributor was not enforced in all cases and in the case

of a distributor whose sub distributors have been upgraded, he was allowed to have only a maximum of 10,000 customers and after upgradation of

sub distributor, the balance left with the main distributor was much less than 10,000 and as in the case of the plaintiff, the policy was not to release

further connections to such main distributors. The plaintiff had as on 19.7.1971, 8,619 connections. According to the plaintiff, in spite of the policy

evolved by the defendant in their communication dated 23.9.1975 it could not have been subjected to any restriction, but yet the defendant

corporation enforced upon it restriction on enrolment of new customers. Even after the defendant had taken over the distribution of Cal Gas in July

1975 from West Coast Gas Company of Visakapatnam all the rights and interests of the agent of the Cal Gas with Caltex were transferred to the

defendant by virtue of such taking over. As a consequence the defendant converted the Cal gas distributors as Indane distributors under the

defendant and although, to the knowledge of the plaintiff 1. Cooking Gas Agency 2. Madras Cylinder Gas Company and 3. South Madras Gas

Agency, who had bifurcated from the Original Madras Cylinder Gas Company Private Limited and who were distributors under the Eastcoast

Company, they had 5,000, 11,000 and 12,000 connections and the T.U.C.S. had about 20,000 connections and the Park Town Co-operative

Society had about 12,000 connections, no restrictions were imposed upon them and they were permitted to have connections of more than

10,000. The plaintiff has also stated that the defendant have discriminated citywise as well inasmuch as (the cities of Bombay, Madras and Calcutta

are "A" class cities) the defendant authorised a dealer in Bombay to have 6,000 cylinders per month, whereas in Madras they restricted to 3,500

cylinders per month. The plaintiff submitted a memorandum on 30.3.1976 to the Ministry of Petroleum, Government of India in which they set out

the inequality and discrimination meted out to them as against other distributors in the country. It also wrote a letter on 22.6.1976 to the defendant

reiterating its grievance. After narrating several subsequent instances, the plaintiff states:

From the facts narrated above it is clear that the plaintiff has been harassed and hostilely discriminated against at every stage since 1974 to suit the

whims and fancies of the defendant. The defendant had discriminated the Plaintiff against persons who are similarly situated by permitting the said

persons to have connections more than those covered under the so called policy as in the case of Cooking Gas Agency, Madras Cylinder Gas

Company and South Madras Gas Agency

and added

. . .The plaintiff was a distributor of Indane Gas to the Dasaprakash Group of Hotels from the date of introduction of Burshane Gas in Madras City

in the year 1962. All the connections and service had been done by the Plaintiff to the said Group of Hotels. When the plaintiff was thus supplying

Indane gas to the said group of Hotels, the defendant in order to harass the Plaintiff, directed some other distributor to supply Indane Gas to the

said Group. The plaintiff objected to the said treatment by the defendant by letter dated 10.1.1979 to which the defendant sent a letter on

11.1.1979 in which it is stated among other things:

It is needless for us to explain to you the reasons why a particular customer is attached by us to a particular Distributor.

The plaintiff again wrote to the defendant on 27.2.1979 to the effect that certain supplies had been made to certain distributors more than the

prescribed quota during the period, while the plaintiff had been made to suffer due to quota restriction and that the defendant had not taken any

step to return 4,036 customers taken away from the plaintiff except to recoup only 482 customers. The defendant replied on 5.3.1979 stating that

the customers list was brought upto the correct level, but no reply was given to the allegation to the plaintiff that it had been subjected to

discrimination.

2. As against all that had happened, the defendant called upon the plaintiff to sign an agreement dated 18.4.1980. The plaintiff has alleged,

. . .The Plaintiff was compelled to sign the said agreement wherein it is stated that the agreement shall have retrospective effect from 18.6.1969. To

this the defendant informed the Plaintiff that the said clause is only in form and

not in substance and that the plaintiff would be recouped with the curtailment done to it as the curtailment was during interregnum of 28.6.1969 and 18.4.1980. The plaintiff believing the said representation of the defendant signed the agreement and forwarded the same to the defendant. . .

No sooner the defendant signed the agreement on 5.5.1980, on the very same day, the defendant wrote to the plaintiff a letter informing that as per clause 1(b) (iii) of the agreement, all other areas operated by the plaintiff except Mount Road, Madras-2; Greams Road, Madras-6; Egmore, Madras-8; Chintadripet, Madras-2 and Thousand Lights, Madras-6 should be surrendered.

3. The plaintiff has stated that clause 33 (A) in the agreement dated 18.4.1980 is opposed to public policy and the same is unconscionable and

also void as per Section 23 of the Contract Act and that the plaintiff is entitled to hold 10,000 gas connections as per the policy of the defendant as

evidenced from the letter dated 23.9.1975 which includes 6,960 connections brought by the plaintiff from Burmah Shell before the defendant took

over the business of Burshane Gas in Madras City in 1969 as evidenced from the letter dated 28.6.1969 and for a permanent injunction restraining

the defendant from restricting or curtailing the said number of connections which were enjoyed by the plaintiff and for a mandatory injunction

directing the defendant to restore to the plaintiff the balance of the connections which were unlawfully and arbitrarily taken away by the defendant

from the plaintiff and for other reliefs.

4. After presenting the suit in the Court, the plaintiff filed a petition for grant of temporary injunction, which came up for orders on 2.12.1980. At

that time, the defendant appeared through a Counsel and took notice and gave an undertaking which is on the record.

5. The defendant thereafter filed an application under Order XIV , Rule 8 of the Original Side Rules of this Court and S.34 of the Arbitration Act

for staying the suit. In the supporting affidavit, the defendant stated that the reliefs claimed in the suit were wholly covered by an agreement dated

5.5.1980 entered into between the plaintiff and the defendant and under Cl. 37 thereof, the plaintiff ought to have referred the dispute to the

arbitration of the Managing Director or to any official of the Corporation, who may be nominated as such Arbitrator by the Managing Director and

the court for the said reasons should dismiss the suit as not maintainable.

6. The plaintiff filed a counter-affidavit stating that the application was not maintainable since the defendant had already taken steps in the

proceeding, that the defendant had acted with mala fides designedly and with an intention to harass the plaintiff, that the agreement dated

18.4.1980 was opposed to public policy by reason of the introduction of cl. 33 (A) giving retrospective effect to the agreement and that there had

been no agreement executed on 5.5.1980 and the only agreement that had been signed was the agreement dated 18.4.1980 and thus the

application filed u/s 34 of the Arbitration Act was fit to be dismissed.

7. The foremost point taken before the learned trial Judge was that the defendant had already participated in the proceeding with an intention to

defend the suit by filing a caveat, which constituted a step in the proceeding as contemplated under S.34 of the Arbitration Act and inasmuch as

when the injunction petition was taken up, the defendant gave an undertaking to the Court and clearly participated with an intention to defend the

suit. The learned trial judge has, however, held that filing a caveat can under no circumstance be held as a step in the proceeding and that

appearance of the defendant at the first hearing of the injunction application was also not a step in the proceeding, which would disentitle them from

Filing an application under S.34 of the Arbitration Act. Learned trial judge has, however, said that since the suit involved consideration of various

questions of law on certain constitutional aspects and when allegations of mala fide intention on the part of the Regional Manager had been made

and fraud pleaded in the plaint, in the words of the learned trial judge:

. . .As held in the decisions above referred to, if there are materials averred in the plaint alleging fraud, it would be a fitting matter to refuse stay of

the suit. The plaint also deals with discrimination under Article 14 of the Constitution and that the Corporation being a "state" is answerable when

discrimination is practised. Such points cannot be decided by the personnel in the defendant Corporation. In view of what has been stated above,

if these are aspects, which the plaintiff is going to canvass in the suit, certainly the Managing Director of the defendant Corporation is unfit, to give

proper decision on these points. When serious questions of law are coming up for consideration it would be negation of justice to leave it in the

hands of a layman-to decide the legal points i.e. whether there has been a hostile discrimination practised as pleaded and whether the defendant is

bound by promissory estoppel or not. Undoubtedly in this suit, plaintiff intends to canvass those points and they can be considered only by a Court

and not by the Managing Director of the defendant Corporation. In the nature of the pleadings raised, the defendant is not entitled to an order of

stay.

8. After stating the facts of the case, learned trial Judge has summarised the allegations in these words:

The main allegations made in the plaint are: The New Regional Manager, who assumed office in 1975 was motivated to harass the plaintiff in all

possible ways and manners. Actions taken by him resulted in service connections being taken away from the plaintiff. On 2.12.1980, it was stated

on behalf of the defendant that apart from whatever disconnections that had taken place, no further connections would be taken away from the

plaintiff. There being a further averment in the plaint in paragraph 18 that it was done with the intention of helping the partners of Madras Cylinder

Gas Co., it is for the plaintiff to establish in the suit about the mala fide intentions of the Regional Manager.

This is not a case where, in the plaint, a bad averment of discriminatory act committed by defendant, had been made. Reference is made to certain

letters and also the so called policy relied on in letter dt. 23.8.1975 having not been followed in the case of named distributors mentioned in

paragraph 15 of the plaint.

When the plaint contains not only the names of distributors, who have been allowed more number of connections than that of the plaintiff but it,

also further says that it is the new Regional Manager, who assumed office in 1973, had a deliberate intention to cause loss to the plaintiff, it has to

be taken that the plaint contains averments for framing an issue on plea of fraud and discrimination. . .

9. On the allegations that have been noticed above, the plaintiff has asked for the following reliefs:

a) for a declaration that the plaintiff is entitled to have 6960 connections in the supply of Indane Gas in Madras City which the plaintiff had got from

Burmah Shell before the defendant took over the business of Burmah Gas in

Madras City from Burmah Shell in 1969:

- b) for a permanent injunction restraining the defendant, its agents, servants etc., from curtailing or restricting the connections which were enjoyed by the plaintiff from 1969;
- c) for a mandatory injunction directing the defendant to restore the balance of connections viz., the 2,537 connections which were unlawfully and illegally taken away by the defendant from the plaintiff;
- d) for cost of the suit to be paid by the defendant to the plaintiff; and
- e) for such further or other reliefs as this Hon"ble Court may deem firm and proper in the circumstances of the best.

10. It is not in dispute that the defendant/appellant applied to stay the suit and to refer the dispute to arbitration under S. 34 of the Indian

Arbitration Act before filing a written statement, but they had already entered appearance through a caveat and as noticed above, learned counsel

appearing for the defendant/appellant had given an undertaking at the first hearing of the petition for grant of temporary injunction. There is some

controversy, however, whether there was any agreement dated 5.5.1980 between the plaintiff and the defendant or not, which agreement

according to the defendant contained an arbitration clause. The plaintiff had disclosed that there was an agreement dated 1.9.1969 and stated that

by its letters dated 21.8.1974 and 30.8.1974, it had pointed out to the defendant that as per the agreement, there would be no privity of contract

between the defendant and the plaintiffs sub-distributors, that they (defendant) could not upgrade them causing detriment to the plaintiff and that

even if the defendant could do so by virtue of the power conferred under cl. 1(b) of the agreement, that could be done only without hindrance

being caused to the number of connections and customers enjoyed by the plaintiff and ""in fact the plaintiff by its letter requested that the matter may

be arbitrated"". It is also stated that the defendant called upon the plaintiff to sign an agreement dated 18.4.1980 and that,

The plaintiff was compelled to sign the said agreement wherein it is stated that the agreement shall have retrospective effect from 28.6.1969. To

this the defendant informed the plaintiff that the said clause is only in form and not in substance and that the plaintiff would be recouped with the

curtailment done to it as the curtailment was during interregnum of 28.6.1969

and 18.4.1980. The plaintiff believing the said representations of the defendant signed the agreement and forwarded the same to the defendant. Further it is to be noticed that the plaintiff had no other option except to sign the agreement and accept the explanation offered by the defendant, as otherwise the plaintiff will be faced with termination of the contract on 30 days' notice without assigning any reasons. In view of the above position and the assurance given by the defendant the plaintiff had no other option except to sign the agreement believing the good faith and assurance of the defendant and to forward the same to the defendant. The plaintiff/defendant signed the agreement on 5.5.1980. On the very same date viz., 5.5.1980 the defendant wrote to the plaintiff a letter informing the plaintiff that as per cl. 1(b) (iii) of the agreement all other areas operated by the plaintiff except Mount Road, Madras-2; Greaves Road, Madras-6; Egmore, Madras-8; Chintadripet, Madras-2 and Thousand Lights, Madras-6 should be surrendered. . .

Besides it has also been noticed that it is alleged that Cl. 33(A) of the agreement is opposed to public policy and that the same is unconscionable and void as per S.23 of the Contract Act. The said cl. 33-A of the agreement is as follows:

This agreement shall be deemed to have been entered into between the parties on 18.4.80 and shall have retrospective effect from 23.6.69.

It seems therefore that it is the agreement dated 18.4.1980 which agreement the plaintiff, according to him, was compelled to sign and accordingly signed on 5.5.1980. The same agreement has been described by the defendant as the agreement dated 5.5.1980. It is not disputed that the said agreement dated 18.4.1980 which was signed by the plaintiff in 5.5.1980 contains as arbitration clause in Cl. 37 thereof which runs thus:

Any dispute or difference of any nature whatsoever or regarding any rights, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Managing Director of the Corporation or of some Officer of the Corporation who may be nominated by the Managing Director. The distributor will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the

course of his duties as an officer of the Corporation he had expressed views on all or any other matters in dispute or difference. In the event of the

arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reasons, the Managing

Director as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as arbitrator in

accordance with the terms of the agreement. Such persons shall be entitled to proceed with the reference from the point at which it was left by his

predecessor. It is also a task of this contract that no person other than the Managing Director or a person nominated by such Managing Director of

the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final-conclusive and binding on all

parties to the agreement, subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules

made thereunder for the time being in force shall apply to the arbitration proceedings under the Clause.

The award shall be made in writing within six months after entering upon the reference or within such extended time not exceeding further four

months as the sole arbitrator shall by a writing under his own hands appoint.

The arbitrator shall have power to order and direct either of the parties to abide by observe and perform all such directions as the arbitrator may

think fit having regard to the matter in difference i.e., dispute before him. The arbitrator shall have all necessary powers and may take such

evidence, oral and documentary, as the arbitrator in his absolute discretion thinks fit and shall be entitled to exercise all powers under the Indian

Arbitration Act, 1940 including admission of any affidavit as evidence concerning the matter in difference i.e., dispute before him.

The arbitrator shall be at liberty to appoint, if necessary any accountant or engineering or other technical person to assist him, and to act by

concurring the opinion so taken.

The arbitrator shall have power to make one or more awards whether interim or otherwise in respect of the dispute and difference and in particular

will be entitled to make separate awards in respect of claims or Cross claims of the parties.

The arbitrator shall be entitled to direct any one of the parties to pay the costs of

the other party in such manner and to such extent as the Arbitrator may in his discretion determine.

The parties hereby agree that the courts in the city of Madras alone shall have jurisdiction to entertain any application or other proceedings in respect of anything arising under this agreement and any award or awards made by the sole arbitrator hereunder shall be filed in the concerned courts in the city of Madras only.

The earlier agreement dated 1.9.69, it is not in dispute, also contained an arbitration agreement in Clause 28 thereof, which is as follows:

If any question of differences arise between the parties hereto touching these presents or the constructions thereof or the rights, duties or the obligations of any person hereunder, or as to any other matter in any wise arising out of or connected with subject of these presents, the same shall be referred to Managing Director of the Marketing Division of the Corporation for arbitration and the Arbitrator shall have the option of getting the arbitration proceedings held at Bombay. The Arbitrator acting under those presents shall have all the powers conferred by the Arbitration Act, 1940 or any statutory modification thereof for the time being in force and these presents shall be deemed to be a submission to Arbitration with the provisions of the said Act.

In the suit therefore besides the issue of facts and law relevant for the reliefs above narrated, it shall be necessary, to go into the question whether

Cl. 33-A in the agreement dated 18.4.1980 is valid or not and if so, whether the plaintiff had signed the said agreement without any undue

influence etc. The Court shall also be required to examine the effect of the standard agreement executed on 1.3.1969 or any other agreement

which had existed between the parties prior to 1.9.1969 because there is some reference in the plaint of the agreement dated 28.6.1969 also. Two

pertinent questions that appear to arise in the suit are whether there has been any mala fide, deception or fraud practised by the defendant by their

Regional Manager, who assumed office in 1973 or not and whether the defendants by their alleged act of discriminations violated Art. 14 of the

Constitution or not. Learned trial Judge said that the defendant being a State, if they have discriminated as alleged, may be found to have violated

Art. 14 of the Constitution of India. He has also said that it is not a case in which

a bald averment of discriminatory act committed by the defendant

has been made in the plaint and that the plaint contains averments for framing an issue on plea of fraud and discrimination.

11. He has accordingly concluded,

. . .Such points cannot be decided by the personnel in the defendant corporation. . .If these are aspects, which the plaintiff is going to canvass in

the suit, certainly the Managing Director of the defendant Corporation is unfit to give proper decision on these points. When serious questions of

law are coming up for consideration, it would be negation of justice to leave it in the hands of a layman to decide the legal points i.e. whether there

has been a hostile discrimination practised as pleaded and whether the defendant is bound by promissory estoppel or not. . .

12. Learned counsel for the parties have taken us through the contents of the plaint, the affidavit filed in support of the petition under S.34 of the

Act and other materials on the record including documents produced at the hearing of the petition by the learned trial judge and cited a number of

decisions of the Supreme Court and several High Courts to support their respective contentions. Mr. Ramakrishna learned counsel for the

defendant/appellant has contended that there is no issue in the suit, which can be said to be beyond the realm of arbitration as the arbitration clause

in the agreement is wide enough to include even the issue as to the validity or otherwise of one of the clauses of the agreement, whether it is the

agreement dated 18.4.1980/5.5.1980 or the agreement dated 1.9.1969 is binding on the parties. He has submitted that once the plaintiff submitted

to the arbitration clause, the plaintiff should have invoked arbitrator's jurisdiction with respect to any dispute or difference of any nature

whatsoever or regarding any right, liability, act omission or on account of any of the parties. According to him, the words ""arising out of or in

relation to this agreement"" in the arbitration clause are wide enough to embrace even the issues as to the alleged discrimination or violation of

Article 14 of the Constitution of India by the defendant/Corporation as well as the question as to the validity of the clause 33-A of the agreement.

He has also contended that there is no allegation of any mala fide, want of good faith or fraud on the part of the defendant Corporation. All that has

been alleged is confined to the acts of the Regional Manager, who acted as a

servant of the Corporation. The rule that the principal shall be liable or responsible for the conduct of its agent or that the master in certain circumstances may be answerable for the acts of its servant should not be applied in the case of the statutory authority/State, which is capable of punishing the erring servant and compensate anyone suffering on account of the wrong done by its servant. It is unfair according to the learned counsel for the appellant, that the plaintiff has chosen to suggest that such acts of Regional Manager which according to it, have been prejudicial to its interests are acts of mala fides of the defendant/appellant.

13. Mr. M.R. Narayanaswami, learned counsel appearing for the plaintiff respondent has however submitted that the Court's discretion to stay any legal proceeding under S.34 of the Act has to be exercised keeping in view that a claim based on allegations of fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause of the agreement dated 18.4.1980/5.5.1980 particularly when the existence or otherwise of the contract itself is an issue. Apart from anything that may be said with respect to the contract, it is obvious that in the instant case, much will depend upon the adjudication of that issue as its invalidity will make it obvious that the alleged actions of the defendant are not covered by the arbitration clause of the agreement dated 18.4.1980/5.5.1980 and if there has been any arbitration clause in the standard agreement dated 1.9.1969, it was the defendant, who repudiated it by not acceding to the request to refer the dispute to the arbitrator when the plaintiff asked them to do so in 1974.

He has also contended that with respect to such acts which are referable to the Regional Manager concerned, allegations constitute mala fide in fact, but whether the policy as such, which the defendant purported to impose upon the plaintiff to take away its business which it had enjoyed as Burshane Gas Agent and with respect to which it had the assurance that it would continue its business without any hindrance or interference by the defendant/is hit by Article 14 of the Constitution of India or not, is a question touching the conduct of the defendant Corporation and in that, there are several incidents which are referable as mala fide in law. In short, his contention is that even on the issue of mala fide in law and fraud in the legal sense as to the validity of the so called policy and in its garb to interfere

with the business of the plaintiff, there are sufficient allegations in the
plaint. In any case, Mr. Narayanaswami has submitted, when the learned trial
Judge has exercised his discretion which cannot be said to be
unreasonable, the Appellate Court should refrain, even though it may have its
own opinion different from the opinion of the learned trial Judge, from
interfering with the judgment under appeal.

14. In *Narsinghprasad v. Dhanraj Mills* (21 Patna 544) , it was held:

Where an agreement is impeached on the ground of fraud and the dispute is as
to the factum or validity of contract, such a dispute does not fall
under the arbitration clause and should be decided by the court.

15. In *Pramada Prasad Mukharjee Vs. Sagarmal Agarwala and Others*, a Division
Bench of the Patna High Court held:

From the language of the Section it is clear that a party can apply to stay a legal
proceeding only when the repudiation is of the right or obligation in
respect of any matter "agreed to be referred," and not when the very existence
of the agreement is repudiated. . .

In the said case, besides several other judgments, a reference has been made to
a judgment of the house of Lords in *Heyman v. Darwins* 1942 AC

356 in which the conflicting authorities hearing on the interpretation of S. 4 of
the English Arbitration Act, 1889, has come up for discussion. That

was a case in which the main question for consideration was the effect of a
repudiation of the contract by one of the parties and the acceptance of

such repudiation by the other. On a review of the authorities Viscount Simon,
L.C., stated the law thus:

If the dispute is whether the contract which contains the clause has ever been
entered into at all, that issue cannot go to arbitration under the clause,

for the party who denies that he has ever entered into the contract is thereby
denying that he had ever joined in the submission. Similarly, if one

party to the alleged contract is contending that it is void ab initio (because, for
example, the making of such a contract is illegal), the arbitration

clause cannot operate, for on this view the clause itself also is void. But, in a
situation where the parties are at one in asserting that they entered into

a binding contract, but a difference has arisen between them whether there has
been a breach by one side or the other, or whether circumstances

have arisen, which have discharged one or both parties from further performance,

such differences should be regarded as differences which have arisen "in respect of" or "with regard to", or "under" the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly.

In a separate judgment Lord Macmillan, in the same case observed:

If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate.

The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-

matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general

arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such

reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may

agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the

contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in

the abrogated contract, cannot be invoked for the determination of question under the new agreement.

Narsingh Prasad v. Dhanraj Mills (supra) and Pramada Prasad v. Sagar Mat (supra) are cases also for the principle that if the party resisting an

application to stay a civil suit is the party charged of fraud, different considerations arise as the person charged does not desire trial by a Civil

Court. In such a case, the Court will not stay the suit as if a prima facie case of fraud is made out; when the suit is independent of the contract, the

allegation of fraud in the plaint is enough to oust the jurisdiction of the arbitrators and stay should be refused; even if the contract be admitted and

the obligation arising on the breach of the contract be repudiated on the ground of fraud, stay should be refused if a prima facie case of fraud is

made out because "fraud is a serious charge and the investigation of fraud must be made by a court and not by a lay arbitrator." In Pramada

Prasad's case (supra), some observation in Narsingh Prasad's case (supra) has been quoted with approval which runs thus,

Even if this was not a case where the whole contract was impeached and, therefore, not within the principles laid down in *Kitts v. Moore*, 1895 1

Q B 253, and other cases already cited in this judgment, yet the proceedings should not be stayed because serious allegation of fraud were

involved in the dispute. He urged that where a prima facie case was made out a civil suit should not be stayed.

This argument was on the hypothesis that the whole contract was not impeached. Dealing with this argument, Harries, C.J. held (at page 570):

A prima facie case of fraud has been established and, that being so, the allegation of fraud, should, in my view be investigated by a Civil Court

which is a far more competent tribunal to decide such questions than a lay arbitrator.

While dealing with the questions of stay when there is repudiation of the contract itself and not of the obligations arising thereunder, the learned

Chief Justice observed (at page 533):

It is clear that if the contract containing the arbitration clause is impeached then the suit should not be stayed and the matter should be decided by a

Civil Court.

In *Johunmull Parashan (sic) v. Louis etc. Co.*, 52 Cal WN 137 at p. 139 Harries, C.J., held that if the Court comes to a conclusion that a suit as

pleaded is a suit on the contract or arising out of the contract, then the suit should be stayed. But on the other hand if the suit as pleaded is a suit

independent of the contract, then the court has no power to stay the suit though it is satisfied that the frame of the suit is merely a means of avoiding

the consequences of alleging the true nature of the claim. Regarding his own observation in *Narsingh Prasad Boobna's* cases, 21 pat. 544, the

learned Chief Justice said:

The case of *Har Singh Prasad v. Dhanraj Mills*, was a case in which a suit had been brought on the contract and the question arose whether or not

it was a fit case to be stayed under S.34 of the Arbitration Act. In the present case the point to be decided is entirely different. Here the suit is

based on cause of action wholly apart from the contract and therefore entirely different considerations apply. That being so, this Patna Bench

decision based upon english cases has no relevance at all in the recent dispute.

Therefore, Mr. Lal Narain Sinha is not right in his contention that a prima facie case of fraud must be made out before an application for stay can be refused.

16. The law stated above, has held the field and undergone no substantial change eventhough quite a few decades have elapsed and such

contentions have been raised ever and over again in different Courts. The Supreme Court in Anderson Wright Ltd. Vs. Moran and Company, held

that in order that a stay may be granted under S.34 of the Act, it is necessary that the following conditions must be fulfilled:

1. The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement:

2. The legal proceeding which is sought to be stayed must be in respect of matter agreed to be referred:

3. The applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance. It is also

necessary that he should satisfy the court not only that he is, but also was at the commencement of the proceedings, ready and willing to do

everything necessary for the proper conduct of the arbitration; and

4. The Court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the

arbitration agreement.

The Supreme Court has said:

It is incumbent upon the Court, when invited to stay a suit under S.34 of the Indian Arbitration Act, to decide first of all whether there is a binding

agreement for arbitration between the parties.

This judgment is an authority for the principle in a case where with respect to the facts in issue arbitrator would have jurisdiction or not, the court

should give a careful consideration and decide the point on the evidence before deciding to stay the proceeding in the court or not to do so. Since

in that case a dispute existed whether the respondent was a party to the contract, the Supreme Court observed,

. . .In fact that is the subject matter of controversy in the suit itself. But, as has been said already, the question having been raised in this application

under S. 34 of the Arbitration Act, the Court had undoubted jurisdiction to decide it for the purpose of finding as to whether or not there is a

binding arbitration agreement between the parties to the suit. . .

and after taking notice of the contentions based on pleadings, observed,

. . .In our opinion, the point is not free from doubt and requires careful consideration and as it was not decided by the learned Judges of the High

Court and we have not the advantage of having their views upon it, the proper course for us to follow would be to send the case back for a hearing

of and decision on this point. . .

17. In *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, the Supreme Court considered the various provisions of the Arbitration Act, of

course in a different context and reiterated the statement of law that questions as to the existence or validity of the agreement are saved from

decisions by arbitrators or Umpires however appointed since such a plea can only be raised in bar of an application by the persons seeking a

reference to arbitration.

18. In *Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak*, again considering a case under S.20(4) of the Arbitration Act, the Supreme

Court observed,

There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter

should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the

reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a

court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in *Russel's*

Case (1880) 14 Ch. D.471 In that case there were allegations of constructive and actual fraud by one brother against the other and it was in those

circumstances that the Court made the observations to which we have referred above. Even so the learned Master of the Rolls also observed in

the course of the judgment at p. 476 as follows:

Why should it be necessarily ;beyond the purview of this contract to refer to an arbitrator questions of account, even when those questions to

involve misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to

in the second branch of the case before the Court, the court may not, in the exercise of its discretion, refuse to interfere; but it does not appear me

to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral

misconduct to one or other of the parties.

We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated

and so on that is not enough to induce the Court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious

nature that the court will refuse as decided in Russell's Case (1880) 14. Ch. D. 471 to order an arbitration agreement to be filed and will not make

a reference . . .

20-A. In U.P. Co-op. Federation v. Sundar Bros. Delhi (1880) 14. Ch. D. 471, one of the issues noticed was that before entering into the

dispute, it had to be decided which of the rules made under the Co-operative Societies Act were consistent with the provisions of the Indian

Arbitration Act, the High Court refused to stay the proceeding of the suit saying that it was a fit case in which discretion of the Court u/s 34 of the

Indian Arbitration Act should be exercised in not staying the suit. The Supreme Court said:

In our opinion, the reasoning of the High Court has much substance.

This judgment of the Supreme Court is also an authority for the principle that where the discretion vested in the Court under S.34 has been

exercised by the lower Court, the appellate Court should be slow to interfere with the exercise of the lower Court's discretion, and in dealing with

the matter raised before it at the appellate stage the appellate Court would normally be not justified in interfering with the exercise of the discretion

under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. If the discretion

has been exercised by the trial court reasonably and in a judicial manner the fact that the appellants Court would have taken a different view may

not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercising its discretion, the trial

Court has acted unreasonably or capriciously or has ignored relevant facts, then it would be open to the appellate court to interfere with the trial

court's exercise of discretion.

19. I am tempted here to refer to the judgment of the Supreme Court in *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, .

After discussing a large number of authorities on questions *inter alia* as to whether the existence or otherwise of a contract, in other words, validity

or otherwise of a contract can be referred to the arbitrator for decision or not, the Supreme Court has said:

Four propositions emerge very clearly from the authorities discussed above:

1. Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily

depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.

2. Expressions such as ""arising"" out of or ""in respect of"" or ""in connection with"" or ""relation to"" or in consequence of ""or"" concerning ""relating to

the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration

agreement.

3. Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the Court to

decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a

collateral or separate agreement which will be effective and operative.

4. If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is

contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and or validity

of the agreement on the one hand and its effect (scope) on the other hand and have held that in the case of former those questions cannot be

decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or

illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement i.e. to decide the

issue of arbitrability of the claims preferred before him.

In *Renusagar Power Ltd v. General Electric Co.* (supra), the Supreme Court has referred to its earlier judgment in *Anderson Wright Ltd. Vs.*

Moran and Company, and extracted the passage wherein the Supreme Court noticed the subject matter of the controversy in the suit to hold that

the Court has undoubted jurisdiction to decide it for the purpose of finding as to whether or not there is a binding arbitration agreement between

the parties to the suit at the stage of considering the application under S.34 of the Act and added,

. . .What is of significance it that the decision of this Court does show that notwithstanding the fact that the finding on the issue that the respondent

was a party to the contracts would have operated as *res judicata* in the respondents' suit, the Court directed that issue to be decided in a S.34

petition for stay. In deciding the question under S.34 in this manner, the court expressed its entire agreement with the view enunciated by Mr.

Justice Khusiram Benarsi Lal Vs. Hanutmal Boid and Another , that where on an application made under S.34 of the Arbitration Act for stay of a

suit, as issue is raised as to the formation, existence or validity of the contract containing the arbitration clause the Court is not bound to refuse a

stay but may in its discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it

may involve incidentally a decision as to the validity or existence of the parent contract. . .

20. In one of the latest judgments of the Supreme Court in *I.T.C. Limited Vs. George Joseph Fernandes and Another*, wherein almost every

relevant case on the point has been taken notice of including the two Patna High Court's judgments and the judgments of the Supreme Court

referred to, it is stated,

. . .Thus, where in an application under S.34 of the Act an issue is raised as to the validity or existence of the contract containing the arbitration

clause, the Court has to decide first of all whether there is a binding arbitration agreement, even though it may involve incidentally a decision as to

the validity or existence of the parent contract. The court has to bear in mind that a contract is an agreement enforceable at law and that it is for the

parties to make their own contract and not for the court to make one for them. Court is only to interpret the contract. The stipulations in the

contract have, therefore, to be examined in the light of the dispute raised in the pleadings of the suit. If it is found that the dispute raised in the suit is outside or independent of the contract it follows that the arbitration clause will not encompass that dispute. However, as the parties were to make their own contract, they were also free to have agreed as to what matters would be referred to arbitration. If the arbitration clause is so wide as to have included the very validity or otherwise of the contract on the grounds of fraud, misrepresentations, mutual mistake or any valid reason the arbitrator will surely have jurisdiction to decide even that dispute. Two extreme cases have to be avoided, namely, if simply because there is an arbitration clause all suits including one questioning the validity or existence or binding nature of the parent contract is to be referred to arbitrator irrespective of whether the arbitration clause covered it or not, then in all cases of contracts containing arbitration clause the parties shall be deprived of the right of a civil suit. On the other hand if despite the arbitration clause having included or covered ex-facie even a dispute as to the existence, validity or binding nature of the parent contract to allow the suit to proceed and to deprive the arbitrator of his jurisdiction to decide the question will go contrary to the policy and objects of the Arbitration Act as embodied in Ss.32, 33 and 34 of the Act. Both the extremes have therefore, to be avoided. The proper approach would be to explain the issues raised in the suit and to ascertain whether it squarely falls within the compass of the arbitration clause and take a decision before granting the stay of the suit. If an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the court has to exercise discretion to decide or not to decide the issue or validity or otherwise of the arbitration agreement even though it may involve incidentally a decision as to validity or existence of the challenged contract. Should the court find the present contract to be void ab initio or illegal or non-existent, it will be without jurisdiction to grant stay. If the challenged contract is found to be valid and binding and the dispute raised in the suit covered by the arbitration clause, stay of the suit may be justified. . .

The Supreme Court at another place in the same Judgment said:

The next question is whether the disputes under the charter party raised in the suit are arbitrable. The division bench held that the learned single

Judge was right is so far as he held that the matters were arbitrable apart from the question of illegality, invalidity of the contract. We agree with this

view inasmuch as it is obvious that the question of invalidity of the contract due to the alleged mutual mistake would be de hors and independent of

the contract and as such would not be referable under the arbitration clause. In so far as the question of illegality of the charter party is concerned

as the appellant plaintiff has not established that the charter party was illegal or void ab initio the question whether the modification as alleged had

rendered the contract illegal would be covered by arbitration clause. . .

This judgment is also an authority for the principle that a contract which is not illegal from the beginning may be rendered illegal later by the method

of performance which did not comply with the statutory requirements and once it is shown that the contract was illegal, void or non-existent, it

would be unenforceable as *ex turpi causa non oritur actio* and also the principle that one who knowingly enters into a contract with improper

object cannot enforce his rights thereunder.

21. Before advertng to the case in hand, to record our opinion, we may at this stage express that a question as to the arbitrariness of the State's

action and violation of Article 14 of the Constitution of India is a matter pertaining to the public law field. An issue of arbitrariness or *mala fides* in

private law field may not give rise to a cause of action independent of the private law governing the parties such as the Arbitration Act or the

Contract Act. Courts no doubt have taken notice of both malice in fact and malice in law as constituting *mala fides* and attracting Art. 14 of the

Constitution of India. There are many authorities on the subject saying that a statutory authority under Article 12 of the Constitution of India cannot

act arbitrarily even in contractual matters and it must act only to further the public interest. In *Dwarkanadas Marfatia and Sons Vs. Board of Trustees*

of the Port of Bombay, the Supreme Court in its majority judgment has stated the law in the following words;

Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted ""State"" within Article 12 of the

Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only

upon lawful and relevant grounds of public interest. Reliance may be placed on

the observations of this Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, *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*, and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive Authority must be subject to rule of law and must be informed by reason. So, whatever to be the activity of the public authority, it should meet the test of Article 14. . .

22. This statement of law has been reiterated by the Supreme Court in *Mahabir Auto Stores v. Indian Oil Corporation* AIR 1990 S.C.C. 1031 in

these words:

It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In

appropriate cases, actions unformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution.

Reliance in this in this connection may be placed on the observations of this Court in *Radhakrishna Agarwal and Others Vs. State of Bihar and*

Others, It appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company is an organ of the State or an

instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 29-B of the

Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of

power. Therefore, the action of State organ under Article 14 can be checked. *M/s Radhakrishnan Agarwal v. State of Bihar* at p. 462 (at Sec.):

(at p. 1499-1500) of AIR (supra), but Article 14 of the Constitution cannot and has not been construed as a character for judicial review of State

action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such

actions. In a situation of this nature certain activities of the respondent company which constituted state under Article 12 of Constitution may be in

certain circumstances subject to Article 14 of the Constitution in entering or not

entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State Executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa Vs. State of Tamil Nadu and Another*, : *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, ; *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and also *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, . It appears to us that of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

In the same judgment, in another place, the Supreme Court has said:

. . .A plea of arbitrariness mala fides as being so gross cannot shift a matter falling in private law Held to public law field. According to Mr. Salve to permit the same would result in anomalous situation that whenever State is involved it would always be public law field, this would as an all redress against the state would fall in the writ jurisdiction and not in suits before

civil courts. We are of the opinion that in all such cases whether public law or private, law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case. Mr. Salve ought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a statute.

We are of the opinion that, that would depend upon the factual matrix.

23. Since Radhakrishna Agarwal and Others Vs. State of Bihar and Others, is the case referred to in the later judgments of the Supreme Court affirmed the Patna High Court's Judgment and stated the law to be applied particularly when the dispute related to a contract to which a State was a party in the following words,

. . .It is true that the article 14 of the Constitution imports a limitation or imposed an obligation upon the state's executive power under Article 298

of the Constitution. All constitutional powers carry corresponding obligations with them. This is the rule of law which regulated the operation of

organs of Government functioning under a Constitution. And, this is exactly what was meant to be laid down by this Court in Eurasian Equipment

& Chemicals Ltd., v. State of West Bengal & Anr., 1975 2 S.C.C. 674 at 677 on which learned counsel for the appellants sought to rely strongly.

It is thus clear that the Eurasian Equipment & Chemicals Ltd case (supra) involved discrimination at the very threshold or at the time of entry into

the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State Acts purely in the executive

capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise

of its constitutional powers. But, after the state or its agents have entered into the Field of ordinary contract, the relations are no longer governed

by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of

violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field perform any act. In this

sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in

and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

24-25. It is a case clearly brought in the Court by a party to an arbitration agreement against the other Party to the agreement. Except appearing in

the suit at the initial stage and at the hearing of the injunction matter to give an undertaking of some sort and filing the petitions under S.34 of the

Act, the defendant/appellant took no step in the proceeding in the suit. By filing the said petition, they intended to satisfy the Court that they were at

the commencement of the proceeding, ready and willing to do everything necessary for the proper conduct of the arbitration and that their

willingness they were ready to establish. It is not possible to say that because the defendant/appellant appeared in the suit and at the hearing of the

injunction matter, gave an undertaking, they took such a step in the proceeding after appearance which would disentitle them from seeking stay of

the proceeding in the Court and a reference of the matter to the arbitrator. In fact, no contention with any seriousness was raised before the

learned trial Judge or before us. Authorities are clear and may include one in the case of I.T.C. Limited Vs. George Joseph Fernandes and

Another, in saying that appearance in the suit and contesting the prayer for injunction is not a step in the proceeding so as to disentitle the party to

an agreement from invoking S.34 of the Act. Learned Trial Judge has held that the question as to the discrimination under Art. 14 of the

Constitution and mala fides or fraud averred in the plaint are issues which would constitute a fitting matter to refuse stay of the proceedings in the

suit. According to the learned trial Judge, there were such serious questions of law coming up for consideration in the suit and that any stay of

proceeding in the Court would amount to negation of justice to leave it in the hands of the layman to decide the legal points that is to say whether

there has been a hostile discrimination practised as pleaded and whether the defendant is bound by promissory estoppel or not. Learned trial Judge

has also held that the contentions as to the validity of Cl. 33 (a) of the agreement dated 18-4-1990 that no agreement was signed on 5-5-1980 to

the knowledge of the plaintiff, etc. were such that they are beyond the jurisdiction of the arbitrator. He has however proceeded to come to the

above conclusion by stating that if the plaintiff avers in the plaint any allegation of fraud or refers to mala fides or if the suit involves determination of

any constitutional issue or various questions of law, the Court has to properly and judicially exercise the discretion and if on a perusal of the plaint,

a prima facie case can be made out on any of these issues, then the only proper course is to have these issues decided in open Court. He has

however failed to notice and follow accordingly whether a dispute inclusive of the Arbitrator's jurisdiction comes within the scope or purview of

Arbitration clause or not, primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what

language they employ and expressions such as "arising out of" or "in respect of" or "in connection with" "in relation to" or in "consequence of" or

relating to" the contract are of the widest amplitude and contend and include even questions as to the existence, validity and effect of the

arbitration agreement. It cannot be applied as a rule that even if the arbitration clause included within its scope questions of its existence, validity

and effect (scope), in no case where there is a challenge to the validity or scope of an agreement, stay can be granted. The decided cases which

have been referred to by us above, including the judgments of the Supreme Court, make a distinction between the question as to the existence

and/or validity of the agreement on the one hand and its effect on the other hand, and that in the case of former, those questions cannot be decided

by the Arbitrator as by sheer logic, the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal.

In the case of the latter, it will ordinarily be for the Arbitrator to decide the effect or scope of the arbitration agreement, i.e., to say to decide the

issue of arbitrability of the claims preferred before him. In every case however in a petition under S.34 of the Act the court must always decide

prima facie if need be, with reference to evidence on the preliminary question whether there is any issue in the suit, genuine and real as to the

existence or validity of the agreement or not, and whether there is a real question as to the fraud or mala fide of the contracting parties to be

decided in the suit which should not be referred to the Arbitrator or there is an issue of bias or prejudice of the Arbitrator, which would render the

arbitrator incompetent. It is clearly laid down by the Supreme Court of India and that stands as the law binding on all concerned that the Court is

not bound to refuse stay merely because an issue is raised to the formation, existence or validity of the contract containing an arbitration clause, but

it may however in its discretion decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a

decision as to the validity or existence of the parent contract. The proper approach in all such cases would be to examine the issues raised in the

suit and to ascertain whether it clearly falls within the ambit of the arbitration clause and take a decision before granting stay of the suit. A decision

as to the validity of existence of the challenged contract may have to be taken invariably in every case at the hearing of the application under S.34

of the Act as. ""Should the court find the present contract to be void ab initio or illegal or non-existent, it will be without jurisdiction to grant stay. If

the challenged contract is found to be valid and binding and the dispute raised in the suit covered by the arbitration clause, stay of the suit may be

justified."" I.T.C. Limited Vs. George Joseph Fernandes and Another, .

26. Defendant/appellant Corporation is a "State" within Art. 12 of the Constitution. It cannot act arbitrarily even in the matter of granting of a

contract or in execution thereof in the garb of public policy, which policy itself is against the public interest. That, however, will be applied so long

the challenge is confined to the public law field attracting Art. 14 of the Constitution of India. Any issue as to the arbitrariness or mala fides in

private law field cannot give rise to cause to action independent of the private law governing the parties that is to say the Contract Act, etc., That

the plain-tiff/respondent had entered into an agreement which intended an arbitration clause besides Clause 33(A) which intended to give

retrospective effect of the contract is not disputed. What is stated by the plaintiff/respondent is that it was compelled to sign the said agreement.

Whether there was any such compulsion or not is a question of fact. We say, however, observe that although the plaintiff has stated in the plaint

that the defendant informed the plaintiff that the said clause was only inform and not in substance and that the plaintiff would be recouped with the

curtailment done to it as the curtailment was during interregnum from 26.6.1969 and 13.4.1980 and the plaintiff believing the said representation of

the defendant signed the agreement and forwarded the same to the Defendant, nonetheless it signed the agreement on 5.5.1980 and subjected

itself to the contract including the arbitration clause therein and Clause 33 (A) that the agreement shall have retrospective effect from 28.6.1969.

Fraud is no doubt always a serious charge and if prima facie case of fraud is made out it should be investigated by a Court and proceedings should not be stayed under S.34 of the Act. There is in this case however, no specific allegation of fraud anywhere made in the plaint. All that is stated, is in the name of mala fides and that too primarily with respect to the conduct of the Regional Manager. There is no difficulty to notice that such allegation of mala fides in fact are not made against the arbitrator, who has been named with reference to his office in the arbitration clause. It is important to notice here that all such acts alleged in the plaint fall to the period prior to 5-5-1980 on which date the plaintiff signed the agreement dated 18.4.1980. The act of the Defendant/appellant dated 5.5.1980 on which it is said, they wrote to the plaintiff that as per Clause 1(b) (3) of the agreement, all other areas operated by the plaintiff except Mount Road, Greams Road, Egmore, Chintadripet and Thousand Lights should be surrendered by it. The issue as to whether Clause 33 (a) in the agreement dated 18.4.1990 is opposed to public policy and the same is unconscionable and also void as per S.23 of the Contract Act, thus is an issue brought in the suit to undo the plaintiffs' signing the agreement dated 18.4.1980 on 5.5.1980. Anything opposed to public policy or anything unconscionable or otherwise inviting S.23 of the Contract Act was involved in giving retrospective effect to the agreement dated 18.4.1980 or not therefore is an issue which must be decided at the threshold so that one may find out whether the real issue is only the effect of the agreement or its scope or its non-existence in the period between 28.6.1969 and 18.4.1960. Another issue incidentally which we have noticed in the course of the arguments and to which is appears the attention of the learned trial judge was never drawn, is the existence of the standard agreement which held the field until the agreement dated 18.4.1990 was executed. Plaintiff, who is a party to the standard agreement which has not been challenged as invalid any ground, cannot but be bound by the arbitration clause therein. If it is held prima facie that Cl. 33 (A) of the agreement dated 16.4.1980 is invalid, its effect will be that the parent agreement would not operate from a date prior to 18.4.1980. Nevertheless the standard agreement would continue operating with effect from the date it was executed that is to say on 1.9.1969. It shall be necessary therefore for the plaintiff to show why in terms of arbitration clause of the standard

agreement, he be not asked to honour the covenant

27. We have taken notice of the law on the subject and some of the findings recorded by the learned trial Judge and some of the relevant facts

which according to us, have substantial bearing in the matter of existence or otherwise of such questions of law, fraud or mala fide, etc. With

respect to which facts, necessary findings have not been recorded by the learned trial Judge. The learned trial judge has not approached the matter

in the manner it should have been approached and in that, he has fallen in error of law.

28. On the question of bias, however, our attention has been drawn to a judgment of the learned single Judge of this Court. The two principles of

Natural Justice (1) audi alterum partem and (2) Nemo Judex in causa sua are well recognised in our system. The latter which means that no

person can be a judge in his own cause has been applied as much to the Arbitrators/Administrative Tribunals, etc. as well as courts of law. To

extend the principle, bias cannot be readily presumed and that there should be clear and positive evidence to show existence of some interest of

the court or the Arbitrator or the authority so as to give basis to think that there is a reasonable apprehension of bias, has held the field without any

exception. Mohan, J. as he then was in Indian Oil Corporation Ltd, v. S. Ravindran 99 L.W. 524 has taken notice of this law and stated in the

following words.

It is a generally accepted principle of law, that when parties enter into contracts, they will honour the commitments under the contracts. This is

because, a contract means consensus ad idem. In other words, the obligations under a contract spring from the terms that were agreed to between

the parties. Otherwise the very purpose of entering into a contract becomes negatory once it is settled that there is a binding, enforceable contract

between the parties, a contracting party cannot be released from the obligations thereafter. They must be required to complete the bargain under

the contract. . .

He has then stated,

It is well settled by now and I need not labour upon by reference to case law that two well accepted principles constitute the edifice of natural

justice. They are:- (1) audi alterum partem. The meaning is, hear the other side:

hear both sides. No man should be condemned unheard. (ii) The second is *nemo iudex non causa sua*. No person can be a Judge in his own cause. It is the latter of the principles that has been applied to this case holding that in as much as the Arbitrator to be nominated under clause 28 of the agreement is the Managing Director of the petitioner Corporation or his nominee, such a person cannot deal with the case in which one of the parties is the Corporation itself, fairly. In other words, the Corporation having terminated the contract, one of its officers, however high he may be placed, if he deals with that dispute and embarks on an adjudication whether the termination has been validly done or not, would be Judging his own causes. Therefore, the principle of *nemo iudex non causa sua* is said to be violated. For my part, such a principle founded upon the theory of natural justice cannot be made applicable to the contracts entered into between the parties, otherwise, it is impossible to carry on business. Unless such a power is reserved to one of the contract in parties, he may not enter into the contract at all. . .

A Division Bench of this Court however in *Union of India Vs. Coromandel Engineering Co., Madras*, of which Mohan, J. has also taken notice of, has stated.

But we find that this view of the law has been superseded by later developments, even in the United Kingdom and by an amendment of the English

Arbitration Act. Undoubtedly, principles of natural justice have subsequently received increased recognition in the cases, and, if there is a well

founded apprehension of bias on the part of a arbitrator, because of his knowledge of the special facts, or the role that he has played in any

negotiations pending the litigation, that would certainly constitute a legitimate justification for avoidance of the Clause. It will be a question of fact

whether such apprehension is well founded and such bias, or a reasonable possibility of it, may be inferred.

The two cases, however, do not stand in conflict, as one may accept that an arbitration clause referring a dispute to a particular person cannot be

disregarded on the ground that the person concerned is in substance a judge in his own cause, but it can be so disregarded if there is sufficient

reason to suspect that he will act unfairly. One may refer to an authority in *IVKS and Barker v. Williams* 1894 2 CD 471 wherein it has been

stated;

An arbitration clause referring dispute to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a Judge in

his own case unless there is sufficient reason to suspect that he will act unfairly." and another decision is *Scerslsy v. Mersey Docks and Harbour*

Board 1894 2 Q.B. 667 in which it has been stated,

. . . If it was not for the agreement of the parties if the rule applicable to judges were to be applied it is obvious that it would be impossible to say

that the engineer, under whose superintendence the work has to be done, could act as Arbitrator, because some persons would suspect him of

being biased in favour of the parties whose servant he was. But that cannot be the case here because both parties have agreed that the engineer,

though he might be so suspected, shall be the arbitrator. A stronger case then that must, therefore, be shown. It must, in my opinion, be shown if

not that he would be biased, that atleast there is a probability that he would be biased. That seems to us distinctly to have been decided in *Jackson*

v. Barry, Ry. Co. 1893 ch. 238.

29. We need not multiply the decisions. We must straightaway come to the facts and state that for the reason of certain bias that may be flowing

from the conduct of the Regional Manager, who according to the plaintiff/respondent, was ill disposed towards it, that would not be sufficient to

discredit the Arbitrator who may not be deemed to be biased only because another officer of the same Corporation acted somewhat prejudicially

against the interests of the plaintiff respondent.

30. We have made certain observations only for the purpose of showing that we have reasons to think that the learned trial Judge has not followed

the course shown by the law laid down by the Supreme Court of India as well as the consensus of authorities on the subject. Without intending to

affect the adjudication even for the purpose of prima facie determination of the questions aforesaid, we, however, find ourselves as a Court of

Appeal in a situation as noticed by the Supreme Court in *I.T.C. Ltd. v. F.G. Fernandes* (Supra) that the learned trial Judge has not given a careful

consideration to the matters relating to the determination whether the suit be stayed under S.34 of the Act or not and evidently has not decided

relevant questions on the evidence before him, we only observe that we do not

have the advantage of knowing the full facts and the view of the learned trial Judge on the matter in issue. Therefore, in our opinion, it is a fit case in which this Court should interfere with the trial Court's judgment and remit the case for a re-hearing and disposal in accordance with law.

31. We are conscious of the delay but law's delays have now become more or less a cause of concern almost in every case. While remitting the case therefore, we propose to fix a time limit for the disposal of the application under S.34 of the Act and accordingly direct the parties to submit to the jurisdiction of the trial court for the hearing of the application within a fortnight and co-operate in disposal of the matter, within a period of two months from today without seeking any adjournment unless for good reason. In the result, the appeal is accordingly allowed. No costs.