

(1985) 05 KAR CK 0008
In the Karnataka High Court
Case No : W.A. No's. 2250 of 1983 etc.

Rajamallaiiah

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 13-05-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 229
Karnataka Excise Act, 1965 — Section 21

Citation : (1985) ILR (Kar) 1802 : (1985) 2 KarLJ 541

Hon'ble Judges : Puttaswamy, J;Hakeem, J

Bench : Division Bench

Advocate : R.N. Narasimhamurthy, M.R. Nayak, A. Jagannatha Shetty, S. Ramaswamy Lyengar, M.H. Sawkar and C.V. Guruvegowda, for the Appellant; M.R. Achar, Government Advocate, for the Respondent

Judgement

Puttaswamy, J.—As common questions of law arise for determination in all these appeals, we propose to dispose of them by this common Judgment.

2. For different excise years commencing on the 1st of July of every calendar year and ending on the 30th June of the succeeding calendar year, the appellants were the highest bidders of the right to vend country liquor like toddy or arrack for one or the other revenue District Taluka or part of them as is the case, in the excise tender-cum-auctions held for that purpose under the Karnataka Excise Act of 1965 (Karnataka Act 21 of 1966) ("the Act") and the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules 1969 ("1969 Rules") framed thereunder. On the final acceptance of their bids by Government, the appellants executed "Lease Deeds" or written contracts with Government inter alia agreeing to pay shop rentals or "kists" every month on or before the agreed dates and were thereafter vending liquor in the approved shops.

3. In exercise of the powers conferred on them by Section 21 of the Act, the District Magistrates (DMs) of the Districts directed the compulsory closure of all or certain shops of the appellants on certain dates, with which they complied.

Some time thereafter, the appellants sought before the authorities and Government for pro-rata refund, rebate or remission of the shop rentals paid or payable by them for the days of closures principally on the ground that they were not attributable to their fault and the same was just and reasonable. When the authorities and Government did not accede to their demands or requests, the appellants approached this Court under Article 226 of the Constitution for appropriate reliefs. On 15-12-1983 Doddakalegowda, J. has dismissed their Writ Petitions and those orders Anjanappa and Co. Vs. State of Karnataka, are assailed by them in these appeals before us.

4. But, in order to better appreciate the contentions urged before us, we consider it useful to highlight the facts in Writ Appeals Nos. 2250 of 1983 and 1166 of 1984 arising out of Writ Petitions Nos. 37771 of 1982 and 18155 of 1980 respectively in some detail.

5-1. W.A.No.2250 of 1983; In the excise auction held on 3-6-1982 by the excise authorities under the Act and the Rules, the appellant offered the highest bid of Rs. 12,00,000-00 to vend toddy in the entire District of Mandya for the excise year 1982-83; that is, from 1-7-1982 to 30-6-1983. On the acceptance of the said bid by Government, the appellant executed a lease deed on 30-6-1982 in the form prescribed thereto and was vending liquor in the District from 1-7-1982. The total number of shops approved for vending toddy in the District then were 193.

5-2. On 16-9-1982 (Annexure-A) the DM, Mandya, taking note of the deteriorating law and order situation in the District, apparently exercising the powers conferred on him by Section 21 of the Act, directed the closure of all arrack and toddy shops and bars in the entire District of Mandya from that date until further orders. Evidently on the improvement of the law and order situation in the several parts of the District, the DM, by his notification No. MAG II MSC. CR 71/82-83 dated 27-9-1982 (Annexure-B) confined the closure of shops and bars to the following areas/places of of the District only :

- 1) Mandya.City,
- 2) Hosaboodanur and Haleboodanur in Mandya Taluk,
- 3) Gejjalagere, Maddur Taluk,
- 4) Sadaholalu -do-
- 5) Kudaregundi -do-
- 6) Besagarahalli -do-
- 7) K.M. Doddi -do-
- 8) Maddur Town
- 9) Shivapura and D. Malligere -do-

10) Malavalli Town

11) Malavalli Taluk (entire)

12) Melapura in Srirangapatna Taluk.

On a further examination of the situation and in modification of the earlier notifications, the DM, Mandya by his Notification No. MAG. II. MSC. CR 71/82-83 dated 12-10-1982. (Annexure-C) confined the closure of shops to Malavalli and, Nagamangala Town Municipal limits until further orders. Evidently, with the improvement of the law and order situation in the aforesaid two town limits also, the DM by his Notification of even number dated 5-11-1982 revoked the earlier Notification dated 12-10-1982 in its entirety. On the issuance of these Notifications and the consequent compulsory closure of shops in the areas and the periods specified therein there cannot be any dispute at all.

6-1. W. A. No. 1166 of 1984 : In the excise auctions held on 15-5-1980 for the excise year 1980-81 (i.e. from 1-7-1980 to 30-6-1981) the appellant offered the highest bid of Rs. 14,31,000/- for vending toddy in the District of Mysore. On Government accepting the said bid, the appellant executed a lease deed on 9-6-1980 in the appropriate form and Was vending toddy from 1-7-1980. The number of shops approved for vending toddy then were 373.

6-2. In exercise of the powers conferred on him by Section 21 of the Act, the DM, Mysore by his Notification No. MAG.MLO 100/1980-81 dated 8-7-1980 (Annexure-B) to control or prevent communal clashes, directed the closure of all liquor shops within the limits of Ashokapurara, Vidya ranyapuram and Chamundipuram in Mysore City from 0800 hours on 8-7-1980 to 0800 hours on 15-7-1980. In Notification of even number dated 15-7-1980 (Annexure-C) the DM, Mysore besides extending the closure in the earlier three places directed the closure of shops within the limits of Old Agrahara, Nanjumalige, Bandikeri, Krishnamurthipuram, Laxmipuram, Jayanagara including K.G. Coppal and Sewage Farm Road area in Mysore City from 0800 Hours on 15-7-1980 to 0800 hours on 22-7-1980 which he again extended till 29-7-1980 for all the aforesaid areas (Annexure-D).

7. In all other cases, the closures are not for the entire area or for such long periods as in Writ Appeals Nos. 2250 of 1983 and 1166 of 1984. But, in all of them there were closures for certain small periods of certain specified places or towns or shops only for purposes of Section 21 of the Act.

8. Sri R. N. Narasimhamurthy, Learned Advocate who appeared for the appellants in Writ Appeals Nos. 2250 to 2306 of 1983 along with Sri M. R. Nayak, addressed the trading arguments. Sriyuths A. Jagannatha Shetty, S. Ramaswamy Iyengar, M. H. Sawkar and C. V. Guruvegowda, Learned Advocates who appeared for the other appellants adopted the arguments of Sri Murthy and supplemented them. Sri M. R. Achar, Learned Government Advocate appeared for the Respondents in all the appeals.

9. Both sides have relied, on a large number of rulings in support of their respective cases. We will refer to them at the appropriate stages.

10. On the contentions urged before us, two points arise for determination and they are :

(1) Whether the contracts entered into between the appellants and Government were one and indivisible as held by the learned Judge, was correct or not?

(2) Whether the term of the contracts providing for payment of shop rentals or "kists" for periods of compulsory closures and the refusal of Government to allow pro-rata or proportionate refunds, rebates or commissions of shop rentals or "kists" for such closures was arbitrary, unconscionable, unfair and unreasonable and was violative of Article 14 of the Constitution to justify the grant of relief to the appellants under Article 226 of the Constitution?

We will deal with them in their order.

RE : POINT NO. 1 :

9. Sri Murthy has urged that the finding recorded by the Learned Judge that the contracts entered into between the appellants and Government were one and indivisible was not correct and sound.

10. Sri Achar has sought to support the finding of the Learned Judge.

11. The Indian Contract Act of 1872 (Central Act No. 9 of 1872) (Contract Act) that generally incorporates the English principles of Contract and is said to be one of the best drafted codes, does not contain any express statutory provision defining the terms "divisible" and "indivisible" contracts or the principles that should govern in determining them. But, the Courts in India and elsewhere in deciding cases for enforcement of contracts, have evolved certain principles to decide whether a contract is "divisible" or "indivisible", one of them being whether there is only one contract to be performed as one unit or a contract divided into divisions or parts. The distinction and difference, if any between these terms, the principles that should be applied have been set out by Pollock and Mulla on the Indian Contract and Specific Relief Acts (9th Edition at pages 250-252 and 837-838) and the American Jurisprudence (Vol. 17 paras 324 to 328 - pages 757 to 763). Bearing the principles set out in these treatises, we propose to examine the question.

12. On an exhaustive and critical analysis of the nature of the trade or business which is only a privilege granted by Government, the Act and the Rules and several rulings of the Supreme Court, the Learned Judge has concluded thus :

"The petitioners liability to pay the rental cannot be apportioned depending upon hours of sale, number of days on which liquor was permitted to be sold and/or quantity of liquor sold. Contract is indivisible and for the entire area specified. It cannot be split into areawise/periodwise."

But, in order to appreciate the contentions of Sri Murthy on this and the other point also, it is useful, to refer; to the material parts of the auction sale notifications and the terms of the lease deeds executed by the appellants on the, two points only.

13. There is no dispute that the disposal of the right to vend liquors to the appellants has been completed in accordance with the provisions of the Act and the 1969 Rules and the contracts entered into are not ordinary contracts but are statutory contracts.

14. On Government making an order under Rule 3 of the 1969 Rules, the Excise Commissioner in Karnataka, Bangalore ("Commissioner"), the Competent Authority, issued auction sale notifications proposing to dispose of the right to vend liquor in public auction inter alia stating thus :

"Sub : Disposal of the, lease of the right of retail vend of Liquors (Toddy and Arrack shops) for 1982-84.

No.....in pursuance of the Notification No ...of the Government of Karnataka issued under Rule-3 of the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 notice is hereby given under Rule 4 of the said Rules that the lease of the right of retail vend of today and arrack shops for the year commencing from 1st July ...ending on 30th June (both days inclusive) will be disposed off in public auction by the Deputy Commissioner (Excise) Mandya District as specified in the. schedule appended to the Notification on the date and at at the time and place specified in the Schedule-V.

The lease shall be subject to the provisions of the Karnataka Excise Act, 1965 and Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969, Karnataka Excise Licences (General Conditions Rules, 1967 and all other relevant rules under the Karnataka Excise Act, 1965 as amended from time to time.

The General conditions governing the auctions are detailed below for the information of the intending bidders.

Excise Commissioner.

PROCEDURE OF AUCTION AND THE TERMS AND CONDITIONS OF THE LEASE OF THE RIGHT OF RETAIL VEND OF TODDY AND ARRACK.

XX XX XX 12. The persons whose bid is confirmed shall within fifteen days from the date of commencement of the order of confirmation or before 30th day of June, whichever is earlier shall enter into an agreement of lease with the State Government incorporating, the terms and conditions under which the right of retail vend of toddy/arrack is leased in his favour.

xx xx xx 23(A). All shops shall remain closed on Gandhi Jayanthi Day;

All shops shall remain closed throughout the second day of October.

Explanation:- For the purpose of this conditions "throughout the second day of

October" means the period of twenty four hours commencing from twelve mid-night between the first day and the second day of October.

XX XX XX On the final acceptance of the bids offered by the appellants by Government under Rule 15 of the 1969 Rules, each of them have executed separate lease deeds in a printed form, the material terms of which read thus :

LEASE DEED

Under Rule 16 of the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969.

This indenture is made this the..... day of 198 between the Government of the Karnataka hereinafter called the State Government) of the one part and Sri/Sriyuths :(hereinafter called the Lessees/ which expression shall unless the context otherwise requires include his/ their heirs, executors, administrators, legal representatives partners, Successors, permitted assigns of the other part).

WHEREAS the highest tender/bid/offer of the Lessees in the disposal of the lease of the right of retail vend of liquor shops in (here mention the No. of shops) - Taluk/Taluks..... District/Districts has been accepted the confirmed by the State Government and the lessee/s has/have furnished security in the sum of Rs.

Now, this Deed witnesseth that in consideration of the Lessee/s paying the monthly rent of a sum of Rs..... for toddy/arrack shops/beer in beer taverns situated in the....Taluk/Taluks..... District/ Districts,..... the State Government hereby grants and demises unto the Lessee/s by way of lease the right of retail vend of toddy/arrack/wine or wine taverns in the shops or beer taverns or wine taverns specified in Schedule I hereunder, situated in the Taluk/ Taluks, District/Districts noted against them for a one year commencing on the day of

. It is hereby agreed :

(1) This lease shall be subject to the provisions of the Karnataka Excise Act, 1965, the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969, all other rules made under the said Act, and also in particular the terms and conditions detailed in Schedule 11 hereunder.

(2) The Lessee/s shall pay the monthly rent to the State Government on dates and conditions specified in Schedule III hereunder.

XX XX XX SCHEDULE II

(Conditions of the Lease)

(1) The Lessee shall commence the business on the 1st July 198 - or on such date as may be specified by the Excise Commissioner.

(2) Excepting on the days on which the shops are closed in accordance with Section 21 of the Karnataka Excise Act, 1965, the Lessee shall keep the shops open every day during such hours as the Excise Commissioner may fix.

XX XX XX 47. All shops shall remain closed on Gandhi Jayanthi Day, all shops shall remain closed throughout the second day of October.

Explanation : For the purpose of this condition "throughout the second day of October " means the period of twenty four hours commencing from twelve mid-night between the first day and the second day of October."

The obligation to close the shops besides being a requirement of the Act and the notifications issued thereunder is also an obligation under the Contracts entered into between the parties. Under the very contracts, the appellants have agreed to pay shop rentals for the entire period which necessarily includes the periods of compulsory closures also.

14. Section 17(I)(A) and Rule 16-A empower Government to transfer leases or licences from one person to another with its prior approval. Section 30 of the Act empowers Government to withdraw licences with the requisite notice, in which event, that Section also provides for proportionate refunds. But, in all these cases, no action had been taken under those provisions relied on by Sri Murthy. We cannot therefore, rely on the provisions to disturb the finding recorded by the Learned Judge. Even otherwise, we are of the view that these provisions of the Act and the Rules by themselves on which reliance was placed by Sri Murthy do not justify us to dissent from the finding recorded by the Learned Judge.

16. We will also assume that the provisions of the Act and the Rules and the fact situations bear on the contention and examine on that basis also.

17. Whenever transfers are effected with prior approval of Government, then it will be substitution, novation or modification of the original contract entered into between the parties that attracts Section 62 of the Contract Act or the principles underlying the same. But, that situation also will not affect the correctness of the finding recorded by the Learned Judge. What is true of transfers is also true of terminations u/s 30 of the Act. In any event, the termination of licence would be a case of termination of the contract itself and does not render the original contract into a divisible contract at all.

18. On any view of the matter, the finding of the Learned Judge that the contract was one and indivisible examined in the light of the principles noticed by us is correct and does not suffer from any error to justify us to disturb the same. We, therefore, reject the contention of Sri Murthy.

RE : POINT NO. 2

19. Sri Murthy has urged that the term of the contracts and the statutory provisions thereto providing for payment of shop rentals for periods of compulsory closures over which the appellants had no control, and were not at

fault at all, and the refusal of the authorities to allow pro rata remissions for such closures was arbitrary, unconscionable, unfair, un-reasonable and was liable to be remedied or prevented under the new doctrine of Article 14 of the Constitution evolved by the Supreme Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, , elaborated and reaffirmed in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, , *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , *Ajay Hasia etc. v. Khalid Mujib Sehravardi and Others*, AIR 1981 SC 487 and *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, .

20. As soon as Sri Murthy had completed his formulation on point No. 2, Sri Achar was quick on his feet and objected to the same being examined and decided on two grounds namely (i) that the same had not been urged by the appellants in their Writ Petitions or even at the hearing before the Learned Judge and (ii) that Section 21 of the Act, the relevant notifications issued thereto which were otherwise valid and the validity of the contract had not been challenged and without such a prayer with necessary pleadings thereto, it was not open for this Court to examine and pronounce on any of them.

21. In some of their Petitions, the concerned appellants had challenged the validity of Rule 23 of the 1969 Rules as violative of Article 14 of the Constitution, which was, how-ever, not rightly pressed at the hearing. In some of the Writ Petitions? the concerned appellants had vaguely invoked Article 14 of the Constitution to sustain their claim before this Court, But, in none of them or at the hearing of their cases before the Learned Judge, the appellants had specifically urged a contention as formulated and urged before us, for which reason, the Learned Judge did not examine and deal with the same. Sri Murthy did not rightly controvert these deficiencies. But, he urged that the contention urged by him did not involve any investigation of facts and was founded on the very admitted facts and was a pure question of law and the same be permitted to be urged and considered in these appeals.

22. After hearing Counsel on this aspect, we were satisfied that the plea urged by the appellants did not involve any investigation of facts and was a pure question of law that should be permitted to be urged in the appeals before us. We, therefore, overruled the preliminary objections of Sri Achar and permitted Sri Murthy to urge his contention, with reference to which Sri. Achar has made his elaborate submissions.

23. On the claim of the appellants for pro rata remissions the Learned Judge on an analysis of the nature of the trade and business, the provisions of the Act, the terms of the contract, and the law bearing on all of them as expounded by the Supreme Court in various rulings, has negatived the same. In negating the same, the Learned Judge has inter alia observed thus :

"Unforeseen events which prevented vend of liquor will not alter the character of price paid/agreed to be paid for purchase of privilege. The petitioners have stipulated to pay lumpsum amounts as the price for exclusive privilege for vend

of liquor. The amount agreed to be paid is considered as the value of that right and will not depend upon loss or profit. Licensee can enjoy the privilege so long as the conditions and restrictions imposed are complied with.

Terms of contract indicate that they were aware of such eventualities. Persons who entered into a contract with eyes wide open must accept the burden of the contract along with its benefits. The dictum of Lord Atkinson in *MATTHEY vs. CURLING* 1922 (2)AC 180 at p. 234 (M), which reads thus:

"a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the Act of God or King's enemies or "vis major...."

has been approved by the Supreme Court in *SATYABRAT vs. MUGNEERAM* reported in 1954 SC 44."

After holding that the contract was one and indivisible which we have set out earlier and in continuation of that very finding, the Learned Judge proceeded to observe thus ;

"They are not entitled to claim pro rata deduction. If accepted Court may have to embark upon to modify the term of the contract as well as provision providing for grant of privileges which is impermissible. Petitioners cannot be permitted to import into the contract a stipulation to the effect that their liability ceases if vend of liquor is prevented on account of unforeseen events. It is well settled that, where there is a positive contract to do a thing, the Contractor must perform it or pay damages although in consequence of unforeseen events, the performance of contract has become unexpectedly burdensome or even impossible."

Before the Learned Judge, the appellants' claim, as noticed earlier, was not projected on the touchstone of the new doctrine of Article 14 of the Constitution for which reason only as noticed by us earlier, His Lordship did not examine and deal with the same. With this regrettable but inevitable disadvantage, we now propose to examine this contention of the appellants. We must however at this stage itself notice that what follows from this is that the appellants, without challenging the correctness of the conclusions or the reasoning of the Learned Judge, solely pin their faith on the new dimension of Article 14 of the Constitution to aid them.

24. When a statutory provision or any action taken thereunder is found to be invalid, it necessarily follows that any term in a contract made thereunder will also be invalid. We must, therefore, examine whether Section 21 of the Act and the Notifications issued thereunder are valid or not, though the appellants had not specifically challenged them.

25. Section 21 of the Act empowers the authorities specified therein to direct compulsory closure of shops for the preservation of public peace and order in the area. The purposes set out in the provision which are conceived in the public

interest in compelling and unavoidable circumstances cannot be taken exception to by this Court on any constitutional or legal principle. Without any doubt Section 21 of the Act cannot be invalidated by this Court on any principle, even if there was a specific challenge to the same.

26. The circumstances and the satisfaction of the authority u/s 21 of the Act, except when vitiated by mala fides which is not even the case of the appellants, cannot be examined by this Court as if it is an appeal and a different conclusion reached on the necessity or otherwise of the orders made by the authorities. We are satisfied that every one of the notifications were for purposes of Section 21 of the Act and not suffer from any infirmity.

27. What follows from the above is that the compulsory closures were justified. Whether that entitles the appellants for pro-rata remissions of shop rentals or not is the only question that really survives for our consideration.

28. On the new dimension or doctrine that arbitrariness was the anti-thesis of Rule of Law enshrined in Article 14 of the Constitution, in Royappa's case Bhagwati, J. speaking for himself, Chandrachud, J. (as His Lordship then was) and Krishna Iyer, J for the very first time formulated the same in these words:

"We cannot countenance any attempt to truncate its all embracing scope and meaning, for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore violative of Article 14....."

In Maneka Gandhi's case, the same Learned Judge expressed thus :

"The principle of reasonableness, which legally as well as philosophically, is an essential element, of equality or non arbitrariness pervades Article 14 like a brooding omnipresence"

In Ramana Dayaram Shetty's and A Jay Hasia's cases the Court speaking through the same Learned Judge has elaborated and re-affirmed this principle which is now firmly set-tied, as the new dimension of Article 14 of the Constitution.

29. On the power of this Court to examine and invalidate a statutory provision or any power exercised thereunder which necessarily will result in the invalidation of that provision, if incorporated in the contract, there cannot be any doubt at all. But, whether this new dimension except in the case of a statutory provision is at all applicable to adjudge every term of a statutory or an ordinary contract is still a moot point that calls for a close examination.

30. The lease deeds expressly stipulate that shop rentals are the rentals or consideration payable by the lessees to Government for the exclusive privilege of selling liquor granted by the latter to the former under the Act and the Rules for the period stipulated therein. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and *State of Haryana and others v. Jage Ram and others* A.I.R 1980 SC 2018, the Supreme Court dealing with similar situation of shop rentals under the Punjab Excise Act of 1914 ("Punjab Act") has ruled that shop rentals agreed to be paid by the lessee was not a tax or, excise duty but was the price or consideration charged by Government to the lessees for parting with its privileges and granting them to the lessees.

31. An auction sale notification is only an invitation to offer. In the auction sale notifications, it is expressly stated that offers of the highest bids will be subject to compulsory closure of shops for such periods as circumstances so demand u/s 21 of the Act, which in the very nature of things, cannot be foreseen and stated with any certainty and for payment of shop rentals for such periods also. The appellants offered their highest bids undertaking to close their shops in compliance of an order that may be made by the Competent Authority u/s 21 of the Act and still pay shop rentals for such periods also. The acceptance of highest bids or offers made by the appellants were subject to the same condition. But, in order to allay any controversy or an argument over the same, the lease deeds or written contracts expressly provide for compulsory closure of shops for periods stipulated by Section 21 of the Act and for payment of shop rentals for the whole of the period which however is divided into 12 months subject to various other terms, with which we are not concerned. If the appellants choose to offer and agree for these absolute terms to borrow the inimitable language of Vivian Bose, J. in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, they have tied down to those terms and that was their affair".

32. We have earlier found that Section 21 of the Act and the notifications issued thereunder were valid.

33. When a contract entered into between two contracting parties in the performance of a privilege granted under the Act and the Rules or that the Contract was a statutory contract, does not necessarily destroy all the incidents of an ordinary contract that are otherwise governed by the Contract Act. In other words, such a contract also is governed by the Contract Act subject to any of its terms overridden by the Special statutes and on the mode of execution being other-wise than in conformity with the requirements of Article 299 of the Constitution (vide *State of Haryana and Others Vs. Lal Chand and Others*,

34. Section 2 of the Contract Act which defines certain terms that are frequently dealt in that Act, formation and performance of a contract, defines a "contract" as an agreement enforceable at law. Anson, Salmond and Halsbury define the same term as hereunder :

"A legally binding agreement made between two or more persons by which rights

are acquired by one or more to Acts of forbearances on the part of the other or others (Anson)."

"An agreement creating and defining obligations between the parties"
(Salmond).

"A contract is an agreement made between two or more persons which is intended to be enforceable at law and is constituted by the acceptance by one party of an offer made to him by the other party to do or abstain from doing some Act" (Halsbury).

35. On the legal and moral necessity of contracts in civilised societies Venkatesh Iyer's "the Law of Contracts" 4th Edition Vol. 1 with apt quotations from leading authorities, sums up the same in these words :

"Justification for enforcement of contracts is two fold. The first is the principle of moral justification. Prof. Goodhart observes "that the moral basis of contract is that the promisor has by his promise created a reasonable expectation that will be kept." According to Prof. Corbin, the law of Contracts "the realisation of reasonable expectations that have been induced by the making of a promise." He adds; "doubtless this is not the only purpose by which men have been motivated in creating the law of Contracts." The main justification, however, for legal enforcement of promises is an economic one. Trade and commerce cannot thrive if promises would be broken without even an obligation on the part of the promisor to make good the loss caused by his default. As pointed out by Sri George Paton "Credit depends essentially on ability to rely on the State of Haryana and Others Vs. Lal Chand and Others, promise of others and can flourish only when there is a fully developed law of contract." In modern times commercial convenience rather than the moral position of the parties tends to operate as the crucial factor.

The juristic concept of contract consists of two constituent elements viz., Obligation and Agreement.

Obligation is understood as a legal tic, which imposes upon a determinate person, or persons, the necessity of doing or abstaining from doing a definite act or acts."

With this brief back drop we pass on to first examine the Contract Act.

36. The Contract Act provides for invalidation of a contract on two grounds only and they are (i) being void under Sections 20, 23 to 30 or (ii) voidable under Sections 19, 19A and 21 of that Act. The contracts entered into between the appellants and Government do not fall within either of the two grounds. The Contract Act or any of the principles of law of Contract do not authorise Courts to invalidate them or any of their terms on what it considers to be arbitrary, and reasonable or otherwise. The concept of arbitrariness and reasonableness which must differ from Judge to Judge is a difficult principle incapable of a precise

formulation and application. When two contracting parties have solemnly and deliberately agreed to the terms incorporated in the Contract, with full faith in their performance by each other, we fail to see as to how the concept of reasonableness can at all be invoked. Any attempt by Courts to extend the principle of reasonableness that is incapable of a precise formulation and standard to solemn contracts can be so exercised as to set them at naught in full or in part. We shudder at the consequences of extending this principle to contracts on the trade, business and industry. If extended to contracts, the principle itself will become an unruly horse or a dangerous weapon in the hands of Courts. We are also of the view that the extension of reasonableness to contracts will unsettle many of the well settled Rules of interpretation and construction of contracts some of which have been admirably summarised in American Jurisprudence Vol. 17 and by Chitty on Contracts. In U.S.A. also the due process clause has not been pressed into service to examine the reasonableness of a contract.

37. On the power and propriety of Courts, extending the principle of reasonableness to contracts in England, the classic treatise "Principles of the English Law of Contract" by Sir William R. Anson edited by A G. Guest, 22nd ELBS Edition, expressing agreement with the principles enunciated by the House of Lords 1952 AC 166 with which view our Supreme Court has also concurred, to which we will refer in some detail at a later stage, has expressed thus :

"(c) The just and reasonable solution.

A still more radical theory is that the Court exercises a qualifying power - a power to qualify the absolutely binding nature of the contract - in order to do what is just and reasonable in the new situation. "The truth is", said Lord Wright, "that the Court or jury as a judge of fact decides the question in accordance with what seems to be just and reasonable in its eyes". In a very general sense, this is undoubtedly correct, for the whole object of the judicial process is to reach a just and reasonable solution between litigating parties. But, then it becomes scarcely more than a truism. On the other hand, if it has any real content, this theory is fraught with danger. It suggests that the Court has an inherent jurisdiction to go behind the literal words of the contract and to make such changes as it consider desirable in the circumstances. Indeed, in *British Movietonews, Ltd. vs. London and District Cinemas, Ltd.*, Denning L.J. said :

"Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer, "It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself. We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers, We realize that they have their limitations and make allowances accordingly.

This view was promptly repudiated on appeal by the House of Lords. Their

lordships reiterated the statement of Lord Loreburn that "No Court has an absolving power." Viscount Simon pointed out that it is not possible to release parties from their contractual obligations merely because it is just and reasonable to do so, for this might well be the case when the only effect of the subsequent event had been to render the contract financially more onerous than the parties had anticipated. A situation must arise to which it can be said that the contract no longer applied.

In view of these pronouncements by the highest tribunal, it cannot be contended that this theory is legally tenable as a basis for the doctrine of discharge of frustration. It would be wrong in law for a judge to direct himself, without more, that his only consideration was what was a just and reasonable solution in the circumstances."

We are of the view that on this statement of law that is correct for the reasons stated herein and for the reasons stated by us, which completely governs the question, we can-not extend the principle of reasonableness to contracts or any of its terms.

38. A document or a contract has to be read as a whole. A contract has to be given effect to in all its parts. Every part of the contract is as important as the other part of the contract.

39. When a contract is void the question of the Court construing any of its terms will not arise. But, when a contract is voidable, it can be voidable in whole or in part also. In declaring a contract void or voidable in whole or in part on grounds or circumstances that are dealt in the Contract Act, a Court does not re-write or substitute a new contract for the parties. On the other hand, the extension of the principles of reasonableness to contracts, in a given case will compel a Court to split up a contract and re-write the same, which is plainly impermissible. We are in agreement with the view expressed by the learned Judge on this aspect. For these reasons also we will not be justified in extending the principle of reasonableness to contracts in contravention of the provisions of the Contract Act.

40. In Harshankar's case a Constitution Bench of the Supreme Court was examining a case of default in payment of shop rentals on some lame excuses, but contrary to the terms of contracts entered into under the Punjab Act which is similar to the Act. In upholding the objection of the State of Punjab to the effect that the appellants in those cases were trying to wriggle out of the solemn contracts, Chandrachud, J. (as His Lordship then was) speaking for an unanimous Constitution Bench expressed thus :

"15. Learned Counsel for the respondent raised a preliminary objection to the maintainability of Writ Petition filed by the appellants and to the grant of reliefs claimed by them. He contends that such of the appellants who offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and they cannot, by their Writ Petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. This

objection is well founded and must be accepted.

16. Those interested in running the country liquor vends offered their bids voluntarily in the auctions held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auction were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by the prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing, the terms of contract between them and the Government, under, which they became entitled to sell liquor. The licenses exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of Judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by Writ Petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

In all the later cases and even in the very latest case of Lalchand, the Supreme Court has reiterated these very principles. We are of the view that these principles that govern these cases also support our above conclusion.

41. In *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, the Supreme Court was examining the claim of a contractor against Government who had entered into a contract for supply of Ghee to Government before the outbreak of 11 World War, but had been modified thereafter for escalation in procurement costs of ghee contrary to the terms of the contract. In rejecting that claim, the Supreme Court speaking through Shah, J, (as His Lordship then was) expressed thus :

"...The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

The parties to an executory contract are often lack in the course of carrying it out, with a turn of events which they did not at all anticipate a wholly abnormal

rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made.

xx xx xx (22) There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an unanticipated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an unanticipated turn of events since the date of the contract. Mr. Chatterjee strenuously contended that in England, a rule has in recent years been evolved which did not attach to contracts the same sanctity which the earlier decisions had attached, and in support of his contention, he relied upon the observations made in *British Movietonews Ltd. vs. London and District Cinemas Limited* 1951 1 KB 190 at p.210. In that case, Denning L.J., is reported to have observed :

".....no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the Court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the Court will read the words of the contract in a qualified sense ; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the unanticipated turn of events, but will do there in what is just and reasonable."

But, the observations made by Denning, L.J., upon which reliance has been placed, proceeded substantially upon misapprehension of what was decided in *Parkinson and Co. Ltd. vs. Commissioners of Works* 1949 2 KB 632, on which the learned Lord Justice placed considerable reliance. The view taken by him was negated in appeal to the House of Lords in the *British Movietonews* case-(1952) AC 166 - already referred to. In India, the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into, will justify a Court, while holding the parties bound by the contract, in departing from the express terms thereof 1949 2 KB 632 was a case in which on the true interpretation of a contract, it was held, though it was not so expressly provided, that the profits of a private contractor, who had entered into a contract with the Commissioners of Works to make certain building constructions and such other additional constructions as may be demanded by the latter, were restricted to a fixed amount only, if the additional quantity of work did not substantially exceed in value a specified sum. The Court in that case held that a term must be implied in the contract that the Commissioners should not be entitled to require work materially in excess of the specified sum. In that case, the Court did not proceed upon any such general principle as was assumed by

Denning, L.J., in 1951 1 KB 190.

(23) We are, therefore, unable to agree with the contention of Mr.Chatterjee that the arbitrators were justified in ignoring the express terms of the contract prescribing remuneration payable to the agents stud to proceeding upon the basis of quantum meruit."

The circumstances of compulsory closures were within the contemplation of the parties and therefore, the principles enunciated in this case applies in greater force. We are of the view that in reality and substance the claim of the appellants in these cases is similar to the claim of the appellant in Alopi Parshad's case and is liable to be rejected for the very reasons found in that case. We are also of the view that the extension of the principles of reasonableness, would run counter to the principles enunciated in all these cases.

42. We are of the view that the principles enunciated by the Supreme Court in P.N. Kaushal and Others Vs. Union of India (UOI) and Others, in particular of the case under U.P. Excise Act are also to the same effect.

43. We will now examine whether the rulings relied on by Sri Murthy really support his contention.

44. In Royappa's and Maneka Gandhi's cases the Supreme Court was not dealing with cases of contracts but was dealing with cases of administrative actions either under a statute or otherwise. In Ajay Hasia's case the Court was dealing with college admissions. We are of the view that the principles enunciated in these cases do not bear on the point and assist the appellants.

45. In Ramana Dayaram Shetty's case the Supreme Court was dealing with the disposal of contracts and not with the performance of contracts or the reasonableness of the term entered into between two contracting parties. For the reasons stated earlier, the principles enunciated in this case, does not bear on the point.

46. In Lotus Hotel's case on which very strong reliance was placed by Sri Murthy, the facts, in brief, were these : On an application made by M/s. Lotus Hotels Private Limited, the Gujarat State Financial Corporation established under the State Financial Corporations Act of 1951 to provide credit facilities to industrial concerns, on 24-7-1978 sanctioned a loan of Rs. 29.93 lakhs to Lotus for establishing a 4 star hotel at Baroda on certain terms and conditions. On 13-2-1979 the Corporation, cancelled the earlier loan facility sanctioned by it and refused to disburse the loan amounts to Lotus. On a Writ Petition filed by Lotus a Learned Single Judge of the High Court of Gujarat issued a mandamus to the Corporation to disburse the loan amounts to Lotus which was also affirmed by that Court in a Writ Appeal, since reported in The Gujarat State Financial Corporation, Ahmedabad Vs. Lotus Hotels Pvt. Ltd., , which was challenged by the Corporation before the Supreme Court, which dismissed the same. In affirming the decision of the Gujarat High Court to a case of performance of a

statutory duty by a statutory authority under a statute, the Court first applied the principle of promissory estoppel with which aspect we are not concerned in these cases. Then distinguishing the ruling in Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, the Court expressed thus :

11. Viewing the matter from a slightly different angle altogether, it would appear that the appellant is acting in a very unreasonable manner. It is not in dispute that the appellant is an instrumentality of the Government and would be "other authority" under Article 12 of the Constitution. If it be so, as held by this Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the rule inhibiting arbitrary action by the Government would equally apply where such Corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

12. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the Respondent acted upon it, the statutory Corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the Respondent. In such a situation, the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A Petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12.

In para 11, the Court re-affirming the principles enunciated in Ramana Dayaram Shetty's case, held that the failure of the Gujarat Financial Corporation to disburse the loan amount as under taken by it was unreasonable. In the succeeding paragraph the Court expressed the view that the failure to disburse the loan amount that had been agreed to was a statutory duty and it was bound to perform the same. But, that is not the position in the present cases. In this case also the Court did not hold that the reasonableness of a contract or any of its terms de hors the statutory provisions and the Contract Act can be examined by a Court and a different view expressed on any of them. We are of the view that these principles do not really support the appellants and do not detract us to hold otherwise.

47-1. In Issaac Peter v. The Assistant Excise Commissioner, Calcutta and others, OP Nos. 2325 of 1981-1 dated 14-11-1983 (Kerala) of the Kerala High Court on which strong reliance was placed, the facts in brief were these. Under the Abkari Act and the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 framed thereunder, Government of Kerala which had undertaken to supply certain minimum and additional quantity of liquor to the contractors did not supply the same when demanded by the petitioner in that case. On that basis, the petitioner inter alia sought for pro-rata refund or remission in the shop rentals payable by him which was accepted to by the Court on a construction of Kerala Rules. We are of the view that the question that arises for determination in these cases did

not directly arise for determination in Isaac Peter's case and, therefore, the ratio in that case if correct also does not really bear on the point and assist the appellants.

47-2. In para 23 of its order, the Court dealing with a contention urged by the Counsel for the petitioner that the claim for shop rentals or kists for quantity of liquor that had not been supplied was arbitrary, referring to the cases bearing on the new dimension of Article 14 and the scope and ambit of Article 226 of the Constitution expressed thus :

"We find considerable force in his reasoning"

With great respect to their Lordships, we are of the view that this observation made by the Court without a critical examination of the legal position, dissented to by the learned Judge with reasons in support of the same, with which we are in respectful agreement, runs counter to the principles enunciated in Harshankar's and Lalchand's cases. With great respect to their Lordships, we find it difficult to subscribe to the views expressed in Issaac Peter's case.

48. On the above discussion, we have no hesitation in holding that the new dimension of Article 14 of the Constitution has no application to contracts and more so to the reasonableness of a term of a contract.

49. We will assume that the new dimension of Article 14 is also applicable to cases of contracts and the terms of contracts and examine whether the term of the contract providing for payment of shop rentals or kists for periods of compulsory closures was arbitrary, unfair, unconscionable and unreasonable.

50. In appreciating this aspect, it is necessary to bear in mind that every one of the appellants and Government had performed their parts of the contracts for the entire period of the contracts for which they were entered into, which we have also held to be one and indivisible. In others words, the whole period for which the contracts were entered into have been found to be beneficial to both the parties and their performance or non - performance for the remaining periods did not depend on the compulsory closures, in a few cases for longer period and in others for very short periods, that too in respect of some shops only.

51. After all the reasonableness of a contract or the term of a contract cannot be adjudged only with reference to an event that occurs for a day or for longer periods. Any such attempt will not give a clear, correct and fair picture of the reasonableness of a contract and one of its terms. As to how and in what manner, the compulsory closures affected their business for the entire period which should be taken as the proper unit for evaluation of that question has neither been pleaded nor established before us. When every one of the appellants did business for the entire period, we can only presume that the compulsory closures for some periods or on some days was not destructive of their business and did not completely cripple their business even to remotely attract Section 56 of the Contract Act. On this analysis also, we find it difficult to

hold that the term of the contract providing for payment of shop rentals for days of closure is arbitrary and unreasonable.

52. As noticed earlier, the appellants had been made known of the possibility of closing their shops and the obligation to pay shop rentals for those periods. With eyes wide open, the appellants who are undoubtedly shrewd businessmen have contracted for such a term. We have earlier found that the closure of shops were for purposes of Section 21 of the Act and were not done with any oblique motive. When the appellants have contracted for such a term, evidently with due regard to the risks in the business, we find it difficult to hold that the term for payment of shop rentals for compulsory closures can be characterised as arbitrary, unfair, unconscionable and unreasonable to attract Article 14 of the Constitution. We are, therefore, of the view that even if the periods of closures are treated as units by themselves, then also they are not entitled for pro - rata refunds, rebates and remissions as claimed by them.

53. On the foregoing discussion, we hold that there is no merit in this contention of the appellants and we, reject the same.

54. Apart from the two contentions noticed and dealt by us, no other contention was urged before us.

55. As both the contentions urged for the appellants fail, these appeals are liable to be dismissed. We, therefore, dismiss these Writ Appeals.

ORDER ON THE ORAL APPLICATIONS FOR CERTIFICATES OF FITNESS TO APPEAL UNDER ARTICLES 133(1) AND 134A OF THE CONSTITUTION OF INDIA

Puttaswamy, J.—After we pronounced our Judgment in these appeals, Learned Counsel for the appellants make oral applications for grant of certificates of fitness to appeal to the Supreme Court under Articles 133(1) AND 134A of the Constitution of India. Learned Counsel for the appellants contend that the cases decided by us involve substantial questions of general importance and they need to be decided by the Supreme Court of India. Elaborating the same, Learned Counsel for the appellants contend that the applicability or otherwise of the new dimension of Article 14 of the Constitution of India to contracts, involves a substantial question of law of general importance and the same needs to be decided by the Supreme Court.

2. Shri M.R. Achar, Learned Government Advocate appearing for the respondents, opposes the oral applications made by the appellants. Shri Achar contends that the questions raised and decided are concluded by the rulings of the Supreme Court and, therefore, the cases decided by us do not involve a substantial question of law of general importance that needs to be decided by Supreme Court.

3. So far as we are aware, this is the very first case in which the new dimension of Article 14 of the Constitution has been projected to contracts, in particular to statutory contracts on which we have expressed our view and on which question,

the Supreme Court so far has had no occasion to decide. The questions raised in these cases are likely to arise before this Court and other Courts also and an authoritative ruling of the Supreme Court is, therefore, called for. In these circumstances, we are of the opinion that the cases decided by us involve a substantial question of law of general importance. We are also of the view that the same needs to be decided by the Supreme Court.

4. In the result, we allow the oral applications made by the appellants in all these appeals and grant Certificates of fitness to Appeal to the appellants under Article 133(1) of the Constitution of India.