

## CONSTITUTIONAL WRIT

**Present : The Hon'ble Justice Dipankar Datta**

Judgment on : 23.6.2010

W.P. No. 1823 (W) of 2010

Ideal Industrial Explosives Limited &amp; anr.

...Petitioners

Versus

Coal India Limited &amp; ors.

...Respondents

## POINTS

PRICE FALL CLAUSE - Petitioners were put on notice and explanations were sought for as to why the running contract ('Price Fall Clause') would not be enforced- Decision to invoke the PFC and to effect deductions - Breach of a contract by public officers operating within the contractual field- Whether amounts to violation of the principals of natural Justice – Constitution Of India, Article 226

**FACTS**

Coal India Limited (hereafter CIL) invited tenders for supply of cartridge, explosives and accessories. The company expressed interest to supply Detonating Its bid was accepted resulting in a running contract executed by and between CIL and the company valid for three years.

The running contract contains a clause titled 'Price Fall Clause' (hereafter the PFC). It reads as follows:

***"08 Price Fall Clause***

*During the currency of the Contract, the Prices at which the supplier will supply the stores shall not exceed the lowest Price charged by them to any other Agency including DGS&D.*

*In the event of Price going down, it will be their sole responsibility to promptly pass on such information to enable CIL to reduce the ordered Rate accordingly.*

*In the event of supplier's accepting Lower Price and other incidental Charges for supplies to any other Companies (other than CIL or its subsidiary cos.), the Lower Price and Charges will also be applicable to them for CIL contracts. Supplier must intimate CIL as soon as supplier submit/accept Lower Price/Charges to other Govt. Reputed Organization including PSUs. In the event of Non-intimation by them to this effect, suitable penal action will be taken against them.*

*Further to above, following provision shall also apply to the above supplies,*

*01. In case any manufacturer sells/offers to sell similar product/product in different Trade name at lower price and offers quantity discount to any buyer outside CIL, the same shall be intimated to CIL for amending the Contract price accordingly.*

*02. In case it is found that the firm has sold explosives in the above fashion to any buyer outside CIL at lower price and the same has not been intimated to CIL, the matter shall attract the following action,*

*i. Recovery of differential amount from such supplier.*

*ii. In such cases, CIL reserves its right to disqualify such supplier for future business dealings with CIL.*

*However this Price Fall clause shall not be applicable for supply of 'Non-permitted Large Dia Explosives' against this tender. "*

It is noted that the petitioners solemnly accepted the terms and conditions of the contract without demur and have been performing their part of the contract by supplying the said materials.

In due course of time, by a notice dated 8.4.2009 issued by the Chief General Manager (MM), CIL, the company was informed of a contract that it had entered into with Singareni Coal Company Limited (hereafter SCCL). The company was accused of failure to notify CIL about the lower price at which it had entered into a contract for supply of the same materials to SCCL. Accordingly, the company was asked to show cause why suitable action for recovering excess amount paid to it or to be paid to it for supply of same materials at a higher price to CIL starting from the date of the running contract would not be taken and why the prices should not be suitably amended to match the lower price for supply of materials to SCCL for future supply against the running contract.



The final contention that the PFC ('Price Fall Clause') not having contemplated opportunity to the petitioners prior to invocation thereof is opposed to public policy, thereby offending Section 23 of the Contract Act, has appeared to be an off-the-cuff. The plea is not reflected in the petition. Without any pleading in support of the point raised there is no ground to hold that the PFC ('Price Fall Clause') is opposed to public policy. Even if such a plea had been raised in the pleadings, it would have been difficult to uphold the contention having regard to the state of affairs as presented.

Para 28

Having regard to the facts that the petitioners were put on notice by CIL before invocation of the PFC ('Price Fall Clause') and that their objection/representation was given consideration, it is unable to hold that the impugned actions suffer from unfairness or arbitrary and discriminatory treatment.

Para 32

### **CASES CITED**

1. (1989) 3 SCC 293. Dwarkadas Marfatia and sons vs. Board of Trustees of the Port of Bombay and (2009) 1 SCC 150, Karnataka State Forest Industries Corporation vs. Indian Rocks.
2. (1996) 6 SCC 22, State of U.P. & ors. vs. Bridge & Roof Company (India) Ltd.
3. AIR 1977 SC 1496, M/s. Radhakrishna Agarwal v. State of Bihar
4. AIR 1976 SC 1207, Additional District Magistrate, Jabalpur vs. Shiv Kant Shukla
5. AIR 1975 SC 1121, Har Shankar vs. The Deputy Excise and Taxation Commissioner & ors.

For the petitioners : Mr. Saptangsu Basu  
Mr. Aniruddha Roy  
Mr. Ayan Kumar Boral  
Mr. Aiswarjya Gupta

For the respondents : Mr. Sakti Nath Mukherjee  
Mr. Kalimuddin Mondal  
Mr. Partha Basu  
Mr. N.K. Roy

**THE COURT :-**

1.The first petitioner is a company registered under the Companies Act, 1956 (hereafter the company). The second petitioner is the Managing Director of the company.

2.Coal India Limited (hereafter CIL) invited tenders for supply of cartridge, explosives and accessories. The company expressed interest to supply Detonating Fuse 10 gm. (Power Cord-10) (hereafter the said materials). Its bid was accepted resulting in a running contract executed by and between CIL and the company on 28.11.2008, valid for three years.

3.The running contract contains a clause titled ‘Price Fall Clause’ (hereafter the PFC). It reads as follows:

***“08 Price Fall Clause***

*During the currency of the Contract, the Prices at which the supplier will supply the stores shall not exceed the lowest Price charged by them to any other Agency including DGS&D. In the event of Price going down, it will be their sole responsibility to promptly pass on such information to enable CIL to reduce the ordered Rate accordingly.*

*In the event of supplier’s accepting Lower Price and other incidental Charges for supplies to any other Companies (other than CIL or it’s subsidiary cos.), the Lower Price and*

*Charges will also be applicable to them for CIL contracts. Supplier must intimate CIL as soon as supplier submit/accept Lower Price/Charges to other Govt. Reputed Organization including PSUs. In the event of Non-intimation by them to this effect, suitable penal action will be taken against them.*

*Further to above, following provision shall also apply to the above supplies,*

*01. In case any manufacturer sells/offers to sell similar product/product in different Trade name at lower price and offers quantity discount to any buyer outside CIL, the same shall be intimated to CIL for amending the Contract price accordingly.*

*02. In case it is found that the firm has sold explosives in the above fashion to any buyer outside CIL at lower price and the same has not been intimated to CIL, the matter shall attract the following action,*

*i. Recovery of differential amount from such supplier.*

*ii. In such cases, CIL reserves its right to disqualify such supplier for future business dealings with CIL.*

*However this Price Fall clause shall not be applicable for supply of 'Non-permitted Large Dia Explosives' against this tender. "*

4.It is noted that the petitioners solemnly accepted the terms and conditions of the contract without demur and have been performing their part of the contract by supplying the said materials.

5.In due course of time, by a notice dated 8.4.2009 issued by the Chief General Manager (MM), CIL, the company was informed of a contract that it had entered into with Singareni Coal Company Limited (hereafter SCCL) for supply of LD explosives and Det Fuse-10G at prices mentioned therein. The company was accused of failure to notify CIL about the lower price at which it had entered into a contract for supply of the same materials to SCCL. Accordingly, the company was asked to show cause why suitable action for recovering excess amount paid to it or to be paid to it for supply of same materials at a higher price to CIL starting from the date of the running contract would not be taken and why the prices should not be suitably amended to match the lower price for supply of materials to SCCL for future supply against the running contract.

6.A reply dated 16.4.2009 had been sent by the petitioners. However, the same has not been annexed to the writ petition. Hence, its contents could not be ascertained.

7.The petitioners had received another notice from the Chief Materials Manager, CIL dated 9.9.2009. It was mentioned therein that the reply dated 16.4.2009 had been examined and found unsatisfactory. An advice was given to treat the notice as final before initiation of action for violation of the PFC. A reply was invited by 24.9.2009 failing which it was threatened that necessary action would be taken.

8.Reply dated 10.9.2009 followed from the side of the petitioner, addressed to the Chief Materials Manager. The petitioners reiterated that the contract with SCCL had been entered into at least six months prior to the running contract with CIL being executed. As a result price that had been agreed upon earlier should not be considered and, therefore, invocation of the PFC did not arise.

9.A representation dated 15.10.2009 was also addressed to the said Manager reiterating the stand that the petitioners had given the best prices to CIL.

10.Ultimately, the Deputy Chief Materials Manager of CIL by notice dated 10.12.2009 informed the company of invocation of the PFC (paragraph 8 of the running contract) in respect of the price of Detonating Fuse 10 gm. (Power Cord-10) to read as follows :

Existing Price	Amended Price
Rs. 3,490 per km.	Rs. 3190 per km.

11.It was observed that the reduced price shall apply for the period 1.12.2008 to 18.5.2009 and all other terms and conditions of the running contract shall remain unaltered.

12.Upon receipt of the same, the petitioners through their learned advocate issued a notice dated 26.12.2009 calling upon the said Deputy Chief Materials Manager to withdraw, recall and/or rescind the notice forthwith failing which appropriate legal action would be initiated on the ground that the same was illegal, bad and unreasonable.

13.CIL did not favourably respond resulting in this petition dated 20.1.2010 being presented before this Court praying for quashing notices dated 8.4.2009, 9.9.2009 and 10.12.2009 and for restraining the respondents from deducting any amount from the bills raised by the petitioners.

14.Before the writ petition could be admitted, the petitioners filed an application being CAN No.3515 of 2010 bringing on record a purported communication dated 8.3.2010 issued by the fifth respondent, the Western Coalfields Limited confirming that an amount of Rs.4,77,713/- inclusive of excise duty and sales tax had been deducted from the bills of the company invoking the PFC for the period 1.12.2008 to 18.5.2009. A prayer was made for orders on the respondents not to deduct any amount from the running/future bills of the petitioners in any manner whatsoever and to refund the said sum of Rs.4,77,713/-.

15.Appearing in support of the petition, Mr. Saptangshu Basu, learned senior advocate contended that no opportunity of hearing was given to the petitioners and, therefore, the decision taken to invoke the PFC and to deduct amounts from the bill(s) of the petitioners is unilateral. According to him, the impugned action of the respondents in invoking the PFC is absolutely arbitrary, illegal, unreasonable and in clear violation of principles of natural justice. He further contended that the impugned action in order to be fair and reasonable should have been preceded by opportunity of hearing to the petitioners and notwithstanding the fact that the PFC does not contemplate hearing, the said requirement has to be read into it in the absence of express exclusion of the requirement of hearing. Absence of provision for hearing in the running contract, it was contended, is opposed to public policy and, therefore, hit by Section 23 of the Contract Act. The impugned actions, according to him, cannot be sustained on the authority of the decisions of the Supreme Court reported in (1989) 3 SCC 293. Dwarkadas Marfatia and sons vs. Board of Trustees



of the Port of Bombay and (2009) 1 SCC 150, Karnataka State Forest Industries Corporation vs. Indian Rocks.

16.The contentions raised by Mr. Basu have left me unimpressed and I have no hesitation in holding that the writ petition is not maintainable.

17.In the decision reported in (1996) 6 SCC 22, State of U.P. & ors. vs. Bridge & Roof Company (India) Ltd., the Supreme Court was considering a dispute about certain payments which the respondent company claimed was due to it whereas the appellant State contended that it was entitled to retain. The Court noted that the contract between the parties was not a statutory contract but was one in the realm of private law, governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. It was ruled that the dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition; the dispute ought to be resolved by arbitration, if provided by the contract, or by the Civil Court, as the case may be. Whether any amount was due to the respondent company from the appellant State under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the appellant State is justified or not were matters which cannot be agitated in or adjudicated upon in a writ petition and that the prayer in the writ petition, viz. to restrain the appellant State from deducting a particular amount from the respondent company's bill was not a prayer which could be granted by the High Court under Article 226. Accordingly, it was held in paragraph 18 of the decision as follows:

*“18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. [See the decision of this Court in Asstt. Excise Commr. v. Issac Peter, (1994) 4 SCC 104, where the law on the subject has been discussed fully.] The writ petition ought to have been dismissed on this ground alone.”*

18. The facts in the present case are strikingly similar. There is no existence of statutory contract between the parties. The running contract that has been executed is in the realm of private law. The dispute raised in the writ petition concerns invocation of the PFC by CIL and deduction from the bills raised by the petitioner. The writ petition involves enforcement of contract qua contract. On the authority of the decision in *Bridge & Roof (supra)*, the prayer made in the writ petition to restrain CIL from deducting any amount from the bills raised by the petitioner cannot be granted.

19. Now I shall deal with the contention advanced by Mr. Basu in relation to alleged violation of principles of natural justice arising out of non-grant of opportunity of hearing prior to the decision taken by CIL to invoke the PFC. Admittedly, the terms of the running contract do not provide for any opportunity of hearing before deduction is effected upon invocation of the PFC. The contention urged is that “opportunity of hearing must be read into the clause to make it fair and reasonable and not opposed to public policy”.

20. The saying “as you sow, so shall you reap” is well-known. The company entered into the contract with CIL with its eyes wide open and abreast of the possibility of suffering deduction from its bills upon invocation of the PFC without hearing. Mr. Basu conceded that he had not come across any authority on the point urged by him, in respect of contractual disputes.

21. The answer to Mr. Basu’s contention would be found in the decision of the Supreme Court reported in AIR 1977 SC 1496, *M/s. Radhakrishna Agarwal v. State of Bihar*. There, writ petitions were filed before the Patna High Court questioning orders of the State Government passed in 1974 revising the rate of royalty payable by the petitioners-appellants under a lease of 1970 to collect and exploit sal seeds from the forest area, and, after that, cancellation of the lease by a letter of 15.3.1975. The petitioners’ case was that the revision of the rate of royalty payable by them

during the subsistence of the lease was illegal and, thereafter, cancellation of the lease itself was illegal for various reasons.

22. One of the contentions urged by the petitioners/appellants before the Supreme Court is recorded in paragraph 23 of the decision. The contention was repelled by the observations contained in the same paragraph. Paragraph 23 is quoted below :

*“23. A rather desperate argument which has been addressed to us on behalf of the appellants is that they were entitled to an opportunity to show cause against the cancellation of the leases. It was urged, on the strength of A.K. Kraipak v. Union of India (AIR 1970 SC 150), that the distinction made between administrative and quasi-judicial action is thin and a vanishing one. This argument appears to us to be wholly irrelevant inasmuch as a question of the distinction between an administrative and quasi-judicial decision can only arise in the exercise of powers under statutory provisions. Rules of natural justice are attached to the performance of certain functions regulated by statutes or rules made thereunder involving decisions affecting rights of parties. When a contract is sought to be terminated by the officers of the State, purporting to act under the terms of an agreement between parties, such action is not taken in purported exercise of a statutory power at all.”*

23. Thereafter, the Court noted the decision reported in AIR 1976 SC 1207, Additional District Magistrate, Jabalpur vs. Shiv Kant Shukla wherein it was held as follows :

*“The principles of natural justice which are so implied must always hang, if one may so put it, on pegs of statutory provisions or necessarily follow from them. They can also be said sometimes to be implied as necessary parts of the protection of equality and equal protection of laws conferred by Article 14 of the Constitution where one of the pillars of Dicey’s principles of the Rule of Law is found embodied. Sometimes, they may be implied and read into legislation dealing with rights protected by Article 19 of the Constitution. They could at times, be so implied because restrictions on rights conferred by Article 19 of the Constitution have to be reasonable.”*

and ultimately ruled in paragraph 25 as follows :

*“25. The limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only question which normally*

*arises in such cases is whether the action complained of is or is not in consonance with the terms of the agreement.\*\*\*”*

24.The principle of law laid down in several cases by the Supreme Court, while considering statutory provisions not providing for opportunity of hearing before an adverse decision is taken, to the effect that if natural justice is not expressly excluded the same would have to be read in the statutory provision to ensure fair play and justice would thus not apply to terms and conditions of a contract unless of course there is involvement of a public law element.

25.In a dispute of the present nature where the complaint is directed towards breach of a contract by public officers operating within the contractual field, it would be stretching the law too far to read the terms and conditions thereof as implying an obligation to hear, based on the principle that right of hearing has not been expressly excluded.

26.It is well-known that a writ petition is not intended to facilitate avoidance of obligations voluntarily incurred and in the words of the Supreme Court itself, the petitioners have “*displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations*” (see AIR 1975 SC 1121, Har Shankar vs. The Deputy Excise and Taxation Commissioner & ors.).

27.Even otherwise, the contention of Mr. Basu that natural justice has been violated cannot be upheld. Prior to invocation of the PFC, the petitioners were put on notice and explanations were sought for as to why it would not be enforced. It is, therefore, not a case where the petitioners did not have the opportunity to explain and were condemned unheard. The decision to invoke the PFC and to effect deductions may be questioned on valid grounds by instituting appropriate proceedings but writ remedy is not the appropriate remedy in view of the decision in Bridge & Roof (supra).

28.The final contention that the PFC not having contemplated opportunity to the petitioners prior to invocation thereof is opposed to public policy, thereby offending Section 23 of the Contract

Act, has appeared to me to be an off-the-cuff response of Mr. Basu finding himself cornered. The plea is not reflected in the petition. Without any pleading in support of the point raised, I find no ground to hold that the PFC is opposed to public policy. Even if such a plea had been raised in the pleadings, I would have found it difficult to uphold the contention having regard to the state of affairs as presented.

29. I shall now consider the decisions relied on by Mr. Basu.

30. The decision in *Dwarkadas Marfatia* (supra) did not involve any question of deduction that could be made in terms of the contract between the parties. The dispute related to eviction of a tenant by the Bombay Port Trust. It was in an absolutely different fact situation that the Court made observations, relied on by Mr. Basu. There can be no doubt in respect of the declaration of law made therein but it must be borne in mind that a decision is an authority for what it actually decides and not what can logically be deduced therefrom.

31. In *Indian Rocks* (supra) while reiterating that writ remedy is ordinarily not available to enforce a contract qua contract, the Court held that if the impugned action is arbitrary or discriminatory violating Article 14 a writ petition may be held to be maintainable. The Court considering the facts involved in the petition recorded a finding that the appellant Corporation had acted unfairly.

32. Having regard to the facts that the petitioners were put on notice by CIL before invocation of the PFC and that their objection/representation was given consideration, I am unable to hold that the impugned actions suffer from unfairness or arbitrary and discriminatory treatment.

33. On facts and in the circumstances of the present case, I do not find the said decisions to be of any assistance to Mr. Basu.

34. In the result, the writ petition stands dismissed. Parties shall bear their own costs.

35.Nothing herein shall preclude the petitioners to question legality and/or propriety of the impugned action(s) of the respondents by pursuing the channel of civil litigation.

36.Urgent photostat certified copy of this judgment and order, if applied for, shall be given to the applicant as early as possible.

(DIPANKAR DATTA, J.)