IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

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W.P.No.7729 of 2019

Between:

M/s. Century Pharmalabs India Pvt. Litd.,
Rep. by its Director, Mr. V.v.S. Suresh,
S/o. V. Rama Rao, R/o. 704, Turguoise Block,
My Home Jewel, Miyapur, Madinaguda, Hyderabad.

... **Petitioner**

AND

$ 1. The State of Andhra Pradesh, rep. by its Principal Secretary,
Health, Medical and Family Welfare Department, Secretariat,
Velagapudi, Amaravathi.

2. A.P. Medical Services Infrastructure and Development Corporation, 2nd Floor, Sy.No.9, Plot No.49, IT Park, Mangalagiri, Guntur District.
Rep. by its Managing Director.

... **Respondents**

Date of Judgment pronounced on : 02-11-2021

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether the Lordship wishes to see the fair copy Of the Judgment? : Yes/No

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*** HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO**

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... Respondents

! Counsel for petitioner : Sri P. Roy Reddy

^Counsel for Respondent No.1 : G.P. for Medical Health & Family Welfare

Addl. Advocate General

<GIST :

>HEAD NOTE:

? Cases referred:

1. 1986 (3) SCC 156
2. (2020) 4 SCC 621
3. 1997 (4) ALD 489
4. AIR 1962 SC 145
5. AIR 1963 SC 1405
6. (2003) 5 SCC 705

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

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ORDER:

The petitioner is a small scale industry and MSME Unit, engaged in manufacturing, export and supply of pharmaceutical products. The Petitioner was one of the successful tenderers in the tender issued by the 2nd Respondent, as the implementing agency of the 1st Respondent, vide 'E' tender notification vide tender notice No.2/APMSIDC/Medicines/2015-17, dated 12.10.2015 for supply of general medicines to its 13 central Medicines Stores. Consequently, an agreement dated 16.04.2016 was executed between the petitioner and the 2nd Respondent. The provisions of the Tender and the consequent agreement, relevant to the present case, are clause 21 of the tender and Clause 3 of the agreement which read as under:

Clause 21 of the Tender

"The supply should be started within 45 days and should be completed within 75 days from the date of receipt of purchase order in phased manner. If no supply is received even after 75 days of receipt of the purchase orders from the supplier, the MD, APMSIDC is authorised to impose a penalty at the rate of 0.5% of the value of goods not supplied will be levied for each day delayed up to a maximum period of 15 days."

Clause 3 of the Agreement

Penalty charges for delayed supply of drugs:

1. 75 days from the date of issue of PO. – No penalty.
2. For the next 15 days i.e. 76th day to 90th day – 0.5% per day of the value of drugs received during this period.
3. The Managing Director, APMSIDC at his discretion may extend the time period 90 days on the request of the firm in writing at a penalty of 1% of the value of the drugs supplied beyond 90 days for each day of delay or part there of up to 120 days."

2. The Petitioner used to supply the pharmaceutical products as per the indent and demand of the second respondent. But, according to the petitioner, due to the placement of orders by the 2nd respondent over and above the quantities mentioned in the tender notification to the tune of 200% to 400%, there were delays in the supply of medicines. For the delayed supplies, the 2nd respondent imposed penalty at the rate of 0.5% of the value of the goods not supplied, for each delay up to a maximum period of 15 days, and 1% per day thereafter and deducted the penalties from the running bills of the petitioner. Being a small scale industry and MSME Unit, the petitioner submitted its representation on 02.08.2017 to the 2nd respondent for waiver of all the penalties and refund of the forfeited amounts.

3. In a related development, various pulverising barytes units had sought waiver of certain liquidated damages from M/s. A.P. Mineral Development Corporation Limited. This request had been forwarded to the Government, which had issued G.O.Ms.No.169 dated 02.12.2016. In this G.O. the Government had accorded approval to the proposal of M/s. A.P. Mineral Development Corporation Limited, to cap levy of liquidated damages to 5% of the shortfall of quantity supplied to the Corporation. Subsequently, two companies, which are similarly situated to the petitioner, had submitted representations to the 2nd respondent, who forwarded the said representations to the Government along with the recommendation made by the Managing Committee of the 2nd respondent in its 77th meeting held on 11.04.2018 resolving to restrict the total deduction towards liquidated damages to 5% of the contract value, of the delayed supplies, in line with the concessions given under G.O.Ms.No.169 dated 02.12.2016, to support SSI Units, which are facing difficulties. This

recommendation was accepted by the Government which issued Memo No.42/H2/2018-1, dated 04.05.2018 according permission to the Managing Director of the 2nd respondent to restrict the total deduction of liquidated damages to 5% of the contract value. In view of this Memo, units such as the petitioner were entitled to seek refund of all those amounts which had been deducted in excess of 5% of the contract value. On that basis, the petitioner has approached this Court claiming that its representation dated 02.08.2017 should be considered by the respondents in the light of G.O.Ms.No.169, dated 02.12.2016 and Memo No.42/H2/2018-1, dated 04.05.2018.

4. As no action was being taken on the said representation, the petitioner had filed the present writ petition seeking a direction to the respondents to extend the benefit of G.O.Ms.No.169 dated 02.12.2016 in accordance with Memo No.42/H2/2018-1, dated 04.05.2018. This Court by an interim order dated 21.06.2019 had directed the respondents to consider the representation of the petitioner dated 02.08.2017 taking into consideration G.O.Ms.No.169, dated 02.12.2016 and Memo dated 04.05.2018.

5. While the present writ petition was pending, the managing committee of the 2nd respondent had issued a letter dated 05.01.2021 stating that the 2nd respondent had initiated steps within four weeks from the date of receipt of interim direction of this Court, in accordance with the Government Memo dated 04.05.2018 and another Memo dated 06.11.2018.

6. Thereafter, it appears that the Managing Committee of the 2nd respondent, in its meeting held on 20.01.2021, had decided to restrict liquidated damages to 5% only for purchase orders, which were issued

from 05.04.2017 onwards and required the petitioner to give an undertaking accepting that the liquidated damages would be restricted to 5% only in relation to those purchase orders which were issued from 05.04.2017 onwards. The petitioner had accordingly submitted such an undertaking on 02.03.2021. Thereupon, the 2nd respondent had refunded the excess amount to the petitioner in relation to all supplies made against the purchase orders issued from 05.04.2017 onwards.

7. In the circumstances, the issue that remains before this Court is whether the petitioner would be entitled for refund of any amount deducted over and above 5% of the contract value in relation to the purchase orders, which had been issued even before 05.04.2017.

8. The petitioner had filed a reply affidavit in which it is stated that the Managing Director of the 2nd respondent had informed the Managing Director of the petitioner that no money would be paid out unless the petitioner gave an undertaking accepting the condition of the 2nd Respondent that the refund would relate only to those purchase orders which are from 05.4.2017 onwards. It was further stated that the Managing Director was also informed that unless the undertaking was given, the petitioner would not be given any further business by the 2nd Respondent. Sri P. Roy Reddy, learned counsel for the petitioner would submit that the petitioner, which was in a financial crisis, had no option except to accept the condition of the 2nd respondent, for waiver of refund of money due to the petitioner, in relation to purchase orders which had been placed before 05.04.2017.

9. Sri P. Roy Reddy, would submit that due to the economic duress and unequal bargaining power between the petitioner and the 2nd respondent, the petitioner was forced to accept the condition of the 2nd

respondent and give the said irrevocable undertaking dated 02.03.2021. He submits that such an undertaking is not binding on the petitioner and relies upon the judgments of the Hon'ble Supreme Court in **Central Inland Water Transport Corporation Limited and anr., v. Brojo Nath Ganguly and anr.,**[1]**; Oriental Insurance Company Limited and anr., v. Dicitex Furnishing Limited**[2] and also on a judgment of the erstwhile High Court of Andhra Pradesh in **Superintending Engineer, Irrigation Department, Nizamabad and Anr., v. Progressive Engineering Company, Hyderabad and ors.**,[3].

10. The learned Additional Advocate General appearing for the respondents would submit that the Memo dated 04.05.2018 had been obtained by certain other companies on the basis of political pressure exerted on the Government at that point of time and steps are being taken to recover the excess amounts which have been paid out. He submits that the said Memo cannot be the basis for any concession to be given to the petitioner. He also submits that this Memo is silent on the question whether it is prospective or retrospective and in the absence of any specifics in the Memo, it would have to be held to be prospective only. He submits that the memo was given effect from 05.04.2017 only on the basis of the resolution of the managing committee, dated 20.01.2021, and as such, the petitioner would not be entitled to refund of any amounts in relation to the purchase orders issued prior to 05.04.2017. He would further submit that the basis for the case of the petitioner is the resolution passed by the Managing Committee of the 2nd respondent in its

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[1] 1986 (3) SCC 156
[2] (2020) 4 SCC 621
[3] 1997 (4) ALD 489

77th meeting. Going by the same standard, the petitioner would also have to accept the resolution passed by the Managing Committee of the 2nd respondent in its meeting held on 20.01.2021 where the decision was taken to restrict the benefit to the purchase orders given from 05.04.2017 only.

11. The learned Additional Advocate General while addressing the question of economic duress would submit that there were about 10 suppliers, including the petitioner, who had given the said undertakings and except the petitioner none of the other suppliers had raised any objection to the restriction placed on the refund of excess deductions. He would further submit that the petitioner, before raising this issue in its reply filed by the petitioner in this writ petition, had not raised this issue of economic duress or compulsion before any authority at any stage. In the circumstances, he would submit that the petitioner, had executed the undertaking with the full knowledge of consequences and without being under any duress. He submits that the present contention, of economic duress and unequal bargaining power, is only for the purpose of avoiding the consequences of such an undertaking

Consideration of Court:

12. The contract between the 1st/2nd respondents and the petitioner was for supply of medicines to 13 central medicine stores in the State of Andhra Pradesh. The method of supply set out under the tender document and the agreement dated 16.04.2016 was that purchase orders would be issued to the petitioner from time to time and the petitioner was to supply the medicines/pharmaceutical products to all or any of the 13 central medicine stores, in accordance with the terms of the purchase order. The time given for making such supply was fixed at 75 days from

the date the purchase order is given to the petitioner. Clause-21 of the tender document, set out above, and Clause-3 of the agreement dated 16.04.2016 stipulated that if the supply of medicines/pharmaceutical products is not completed within 75 days from the date of receipt of the purchase order, the petitioner could still deliver the medicines on levy of liquidated damages to the extent of 0.5% per day of delay on the value of the drugs received between the 76th day to the 90th day. Thereafter, liquidated damages would be levied at the rate of 1% for every day of delay beyond the 90th day up to the 120th day.

13. Section 73 of the Indian Contract Act provides for levy of liquidated damages. It was commonly understood that the Hon'ble Supreme court in **State of Vindhya Pradesh (Now The State of Madhya Pradesh) v. Shri Moula Bux and ors**.,[4] and **Fateh Chand v. Balkishan Dass**[5] had interpreted Section 73 of the Indian Contract Act to mean that liquidated damages stipulated under the contract could be collected only upon actual loss being demonstrated by the affected party and the said loss/compensation being restricted to the upper limit fixed as liquidated damages in the contract. This notion was dispelled by the Hon'ble Supreme Court in **Oil and Natural Gas Corporation Limited v. Saw Pipes Limited**[6] which went on to hold that in cases where it is not possible to ascertain the quantum of loss, the liquidated damages fixed under the contract shall be treated as a genuine pre-estimate made by both parties to the contract and the same can be collected by the affected party without having to prove or demonstrate actual loss. In the present case, the same conditions prevail and as such fixation of liquidated

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[4] AIR 1962 SC 145
[5] AIR 1963 SC 1405
[6] (2003) 5 SCC 705

damages cannot be faulted. It may also be noted that while liquidated damages are levied on the length of the delay in execution of a contract, a cap is generally placed on the total amount of liquidated damages that can be levied under a contract. There is no cap in the present case and as such Liquidated damages up to 7.5% can be levied for the delay up to 15 days and another 30% if the delay was a further period of 30 days beyond the original period of delay of 15 days.

14. To sum up, the initial deduction of the liquidated damages was done in accordance with the terms of the tender and agreement. After deducting the said amounts, the 2nd respondent took a decision to cap the liquidated damages to 5%. This decision was sent for the approval of the 1st respondent as the 1st respondent is the primary party, who would be affected by any such decision and as the 2nd respondent was only acting as the implementing agency for the 1st respondent. The 1st respondent by the Memo dated 04.05.2018 had approved this decision. Subsequently, the 2nd respondent took a further decision in its meeting held on 20.01.2021 to extend the benefit of cap of 5% only to purchase orders which have been issued from 05.04.2017. The 2nd respondent instead of obtaining necessary approval from the 1st respondent had required the petitioner to give an undertaking that the petitioner would not insist for refund of amounts relating to purchase orders placed before 05.04.2017. The petitioner had given such an undertaking and repudiated the same now on the ground of financial duress and unequal bargaining power.

15. A contention was raised by the Learned Additional Advocate General that the said Memo was silent as to the date from which it would be brought into effect. In the course of hearing, the learned Additional

Advocate General had passed on a communication of the 2nd Respondent dated 28.07.2021 sent to two suppliers seeking to recover the amounts paid on account of the Memo dated 04.05.2018. This communication clearly demonstrates that the memo was understood by all concerned that it would entitle the suppliers for recovery of the entire amount of liquidated damages beyond 5% from the inception of all supplies made under the tender dated 12.10.2015. This Memo would also indicate that the final decision as to whether there can be a cap on the levy of liquidated damages is to be taken by the 1st respondent-Government and not the 2nd respondent. The Memo dated 04.05.2018 continues to remain in force since this Memo has not been altered or recalled. The subsequent decision of the 2nd respondent, in the meeting of the Managing Committee of the 2nd respondent on 20.01.2021, cannot override the Memo of 04.05.2018, and cannot be given effect to as long as the Memo dated 04.05.2018 remains undisturbed. The contention of the learned Additional Advocate General that the subsequent decision of the 1st respondent to restrict the cap of 5% of liquidated damages only to purchase orders placed after 05.04.2017 cannot be accepted. The benefit of capping liquidated damages at 5% would continue to be available to the petitioner.

16. The effect of the undertaking given by the petitioner on 02.03.2021 remains to be considered. The said undertaking given by the Petitioner and its acceptance by the 2nd Respondent would result in a contract. The question that would arise is whether such a contract could be repudiated by the petitioner on the ground that it is vitiated by undue influence in the form of economic duress, unequal bargaining power and the asymmetry in the strength of the parties.

17. The Hon'ble Supreme Court in **Central Inland Water Transport Corpn. v. Brojo Nath Ganguly** case at (paragraph 89) had considered the issue of the effect of undue influence including economic duress and unequal bargaining power and after an extensive review had held as follows:

> 89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the

> result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

18. In **Oriental Insurance Company Limited and anr., v. Dicitex Furnishing Limited** case, the Hon'ble Supreme Court, while upholding the above principle, though there is no reference to the above case, had held, on the facts of the case that a case of economic duress was made out and disregarded the voucher of final settlement given by the private party therein.

19. Similarly, the erstwhile High Court of Andhra Pradesh in **Superintending Engineer, Irrigation Department, Nizamabad and Anr., v. Progressive Engineering Company, Hyderabad and ors.**, case on the facts of the case, had held that a letter accepting certain rates

of work was given under economic duress and cannot bind the contractor therein. These judgements reiterate the principle that if there is a case of economic duress made out against a contract or undertaking given by the weaker party, such an agreement or undertaking can be disregarded.

20. The counter affidavit filed by the 2nd Respondent states that the suppliers were called upon to give their consent to the decision taken by the managing committee of the 2nd respondent, dated 20.01.2021. The facts show that, the only way the petitioner would be given any refund is upon an irrevocable undertaking being given by the petitioner that it would be satisfied with whatever is given by the 2nd respondent. The petitioner, which is a small scale unit, cannot obviously take on the 2nd Respondent which is one of the primary sources of business and income to the Petitioner. The only option available to the petitioner is to sign on the dotted line failing which it was in danger of losing desperately needed funds and also all future business from one of it's main sources of business. This contract is obviously not a contract freely arrived at between two equal parties exercising free will. A case of economic duress is made out and the undertaking given by the Petitioner, on 02.03.2021, requires to be disregarded.

21. To sum up, the Petitioner is entitled to recover the excess liquidated damages levied on the Petitioner, as long as the Memo dated 04.05.2018 remains undisturbed and in view of the said memo, the 2nd Respondent cannot rely on the decision of the Managing committee of the 2nd Respondent held on 20.01.2021 to reject the claim of the Petitioner.

22. Accordingly, this writ petition is disposed of with a direction to the 2nd respondent to consider the request of the petitioner for refund of excess liquidated damages strictly in accordance with the approval

granted by the 1st Respondent in Memo No.42/H2/2018-1, dated 04.05.2018 as long as it remains. The said exercise of considering and passing orders on the request of the petitioner for refund of the excess liquidated damages shall be done, by the 2nd Respondent, within three weeks from the date of receipt of this order. There shall be no order as to costs.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

R. RAGHUNANDAN RAO, J

2nd November, 2021
Js

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

W.P.No.7729 of 2019

2nd November, 2021

Js