REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8249 OF 2022
[Arising out of SLP (Civil) No. 25457 of 2019]

M/s Texco Marketing Pvt. Ltd. … Appellant

Versus

TATA AIG General Insurance Company Ltd. & Ors. ... Respondents

J U D G M E N T

M. M. SUNDRESH, J.

Leave granted.

Heard learned counsel for the parties at length.

ON FACTS

1. The appellant secured a Standard Fire & Special Perils policy from the respondent on 28.07.2012. The policy was effective from 28.07.2012 to 27.07.2013. It was meant to cover a shop situated in the basement of the building. However, the exclusion clause of the contract specifies that it does not cover the basement. Due inspection of the shop was made which was actually situated on the other side of the road from the office of respondent No. 1. Not only this shop of the appellant, but yet another shop similarly situated, was also

insured by respondent No. 1. The appellant continued to pay the premium promptly.

2. The appellant put up further construction, for which due notice was given and due inspection was also made. The shop met with a fire accident for which the appellant raised a claim. The surveyor of respondent No. 1 also made an inspection, on the basis of which the appellant was instructed to refurnish its shop for the purpose of due evaluation. While arriving at the sum payable, the surveyor did notice the fact that the earlier inspections were made and that the fact that the shop was in a basement was to the knowledge of the insurer. The claim made was repudiated by respondent No. 1, taking umbrage under the exclusion clause.

3. The State Consumer Disputes Redressal Commission (hereinafter referred to as 'the State Commission') rejected the contention of respondent No. 1 on the premise that there was no adequate disclosure, the mandatory provisions have not been followed, as such the insurer was deficient in service and indulged in unfair trade practice. The fact that a similarly placed shop was also covered, was not in dispute. The amount payable is only after due deduction of the goods meant for the third party.

4. The aforesaid decision was overturned by the National Consumer Disputes Redressal Commission (hereinafter referred to as 'the National Commission'),

despite a finding to the effect that respondent No. 1 was not in compliance of the mandate of the law and inspection was indeed done prior to the execution of the contract, and even thereafter. Having found a deficiency in service, it placed reliance upon the exclusion clause in setting aside the decision of the State Commission while granting a sum of Rs.7.5 lakhs. It is this decision of the National Commission which is under challenge before us.

SUBMISSION AT THE BAR

5. Shri. A.K. Ganguli, learned senior counsel appearing for the appellant submitted that the National Commission has not overturned the reasoning of the State Commission both on facts and law. When once there is a finding which is not in dispute, the consequence would follow.

6. On the contrary, it is submitted by Smt. Shantha Devi R., learned counsel appearing for the respondents that the existence of the exclusion clause is not in dispute. Admittedly, the shop was situated in the basement, as such, the mere fact that the decision of the National Commission was accepted would not disentitle the respondents to contend that the finding that there was knowledge even at the time of the execution of the contract, is not correct. In any case, it cannot be the basis for restoring the decision of the State Commission.

GRAVAMEN OF THE CASE

7. "Whether an exclusion clause destroying the very contract knowingly entered, can be permitted to be used by a party who introduced it, becomes a beneficiary and then to avoid its liability?"

PRINCIPLES

Adhesion Contract

8. Black's Law Dictionary defines "Adhesion Contract" as:

> "A standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms. Also termed Contract of adhesion; adhesory contract; adhesionary contract; take it or leave it contract; leonire contract."

9. Adhesion contracts are otherwise called Standard-Form Contracts. Contracts of Insurance are one such category of contracts. These contracts are prepared by the insurer having a standard format upon which a consumer is made to sign. He has very little option or choice to negotiate the terms of the contract, except to sign on the dotted lines. The insurer who, being the dominant party dictates its own terms, leaving it upon the consumer, either to take it or leave it. Such contracts are obviously one sided, grossly in favour of the insurer due to the weak bargaining power of the consumer.

10. The concept of freedom of contract loses some significance in a contract of insurance. Such contracts demand a very high degree of prudence, good faith, disclosure and notice on the part of the insurer, being different facets of the

doctrine of fairness. Though, a contract of insurance is a voluntary act on the part of the consumer, the obvious intendment is to cover any contingency that might happen in future. A premium is paid obviously for that purpose, as there is a legitimate expectation of reimbursement when an act of God happens. Therefore, an insurer is expected to keep that objective in mind, and that too from the point of view of the consumer, to cover the risk, as against a plausible repudiation.

Exclusion Clause

11. An exclusion clause in a contract of insurance has to be interpreted differently. Not only the onus but also the burden lies with the insurer when reliance is made on such a clause. This is for the reason that insurance contracts are special contracts premised on the notion of good faith. It is not a leverage or a safeguard for the insurer, but is meant to be pressed into service on a contingency, being a contract of speculation. An insurance contract by its very nature mandates disclosure of all material facts by both parties.

12. An exclusion clause has to be understood on the touch-stone of the doctrine of reading down in the light of the underlining object and intendment of the contract. It can never be understood to mean to be in conflict with the main purpose for which the contract is entered. A party, who relies upon it, shall not be the one who committed an act of fraud, coercion or mis-representation,

particularly when the contract along with the exclusion clause is introduced by it. Such a clause has to be understood on the prism of the main contract. The main contract once signed would eclipse the offending exclusion clause when it would otherwise be impossible to execute it. A clause or a term is a limb, which has got no existence outside, as such, it exists and vanishes along with the contract, having no independent life of its own. It has got no ability to destroy its own creator, i.e. the main contract. When it is destructive to the main contract, right at its inception, it has to be severed, being a conscious exclusion, though brought either inadvertently or consciously by the party who introduced it. The doctrine of waiver, acquiescence, approbate and reprobate, and estoppel would certainly come into operation as considered by this court in **N. Murugesan v. Union of India** (2022) 2 SCC 25.

13. On the aforesaid principle of law, particularly with respect to the issues *qua* onus, burden and reading down, this Court in **Shivram Chandra Jagarnath Cold Storage v. New India Assurance Co. Ltd.** (2022) 4 SCC 539 has held as follows,

> "19. Another instance where exception clauses may be interpreted to the benefit of the insured is when the exception clauses are too wide and not consistent with the main purpose or object of the insurance policy. In *B.V. Nagaraju v. Oriental Insurance Co. Ltd.* (1996) 4 SCC 647, a two-Judge Bench of this Court read down an exception clause to serve the main purpose of the policy. However, this Court clarified that the breach of the exception clause was not so fundamental in nature that would have led to the repudiation of the insurance policy. In that case, the terms of the insurance policy allowed an insured vehicle to carry six workmen, excluding the driver. When the vehicle

met with an accident, it was carrying nine persons apart from the driver. The insured had moved a claim for repair of the vehicle, which was rejected by the insurer.

20. Allowing the claim, this Court held thus : (B.V. Nagaraju case (1996) 4 SCC 647] , SCC pp. 650-51, para 7)

> *"7. It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry 6 workmen, excluding the driver. If those 6 workmen when travelling in the vehicle, are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the poser, keeping apart the load it was carrying. Here, it is nobody's case that the driver of the insured vehicle was responsible for the accident. In fact, it was not disputed that the oncoming vehicle had collided head-on against the insured vehicle, which resulted in the damage. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident. In the instant case, however, we find no such contributory factor. In Skandia case [Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654] this Court paved the way towards reading down the contractual clause by observing as follows : (SCC pp. 665-66, para 14)*
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> > *'14. …* When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of "reading down" the exclusion clause in the light of the "main purpose" of the provision so that the "exclusion clause" does not cross swords with the "main purpose" highlighted earlier. The effort must be to harmonise the two instead of allowing the exclusion clause to snipe successfully at the main purpose. The theory which needs no support is supported by Carter's "Breach of Contract" vide para 251. To quote:

> "Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the "main purpose rule", which may limit the application of wide exclusion clauses defining a promisor's contractual obligations. For example, in Glynn v. Margetson & Co. [1893 AC 351 (HL)] , AC at p. 357, Lord Halsbury, L.C. stated : (AC p. 357)
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> > '… It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard … as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.'
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> Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House of Lords in Suisse Atlantique Societe d' Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) 1 AC 361 : (1966) 2 WLR 944 (HL)] . Accordingly, wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract."
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> *(emphasis in original and supplied)"*

Duty of Disclosure, Good Faith and Notice

14. The principles governing disclosure, good faith and notice are founded on the common law principle of fairness. These principles are meant to be applied with more rigour in standard form contracts such as insurance contracts. Such an application is warranted much more when we deal with an exclusion clause. A very high standard of good faith, disclosure and due compliance of notice is required on the part of the insurer, keeping in view the unique nature of an insurance contract.

15. An act of good faith on the part of the insurer starts from the time of its intention to execute the contract. A disclosure should be a norm and what constitutes a material fact requires a liberal interpretation. It is only when an insurer is not intending to act on an exclusion clause, the aforesaid principles may not require a strict compliance. The three elements which we have discussed are interconnected and overlapping. It is the foremost duty of the insurer to give effect to a due disclosure and notice in its true letter and spirit. When an exclusion clause is introduced making the contract unenforceable on the date on which it is executed, much to the knowledge of the insurer, non-disclosure and a failure to furnish a copy of the said contract by following the procedure required by statute, would make the said clause redundant and non-existent.

16. Lord Denning succinctly describes the fallacy in making an inadequate disclosure in **George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd**. (1983) Law Reports Q.B. 284),

> "None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract." But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When

the courts said to the big concern, "You must put it in clear words," the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

It was a bleak winter for our law of contract……"

17. In a recent judgment, this Court in **Manmohan Nanda v. United Insurance** (2022) 4 SCC 582, summarises the duty of an insurer and an insured to disclose any material facts,

"***Uberrimae fidei***

31. It is observed that insurance contracts are special contracts based on the general principles of full disclosure inasmuch as a person seeking insurance is bound to disclose all material facts relating to the risk involved. Law demands a higher standard of good faith in matters of insurance contracts which is expressed in the legal maxim uberrimae fidei.

32. *MacGillivray on insurance law* 13th Ed. has summarised the duty of an insured to disclose as under:

> "...the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms.

33 . Lord Mansfield in *Carter v. Boehm* (1766) 3 Burr 1905 has summarised the principles necessitating disclosure by the assured in the following words: (E.R. p.1164)

> "Insurance is a contract of speculation.
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> The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist,….

> The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the under-writer is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.
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> The policy would be equally void against the under-writer if he concealed;...
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> Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary".

The aforesaid principles would apply having regard to the nature of policy under consideration, as what is necessary to be disclosed are "material facts" which phrase is not definable as such, as the same would depend upon the nature and extent of coverage of risk under a particular type of policy. In simple terms, it could be understood that any fact which has a bearing on the very foundation of the contract of insurance and the risk to be covered under the policy would be a "material fact".

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35. Just as the insured has a duty to disclose all material facts, the insurer must also inform the insured about the terms and conditions of the policy that is going to be issued to him and must strictly conform to the statements in the proposal form or prospectus, or those made through his agents. Thus, the principle of utmost good faith imposes meaningful reciprocal duties owed by the insured to the insurer and vice versa. This inherent duty of disclosure was a common law duty of good faith originally founded in equity but has later been statutorily recognised as noted above. It is also open to the parties entering into a contract to extend the duty or restrict it by the terms of the contract."

18. On the principle of acting in good faith, it is held by this Court in **United India Insurance Co. Ltd. v. M.K.J. Corporation (**1996) 6 SCC 428, that it is the primary duty of the parties to a contract to do so,

> "(6) It is a fundamental principle of Insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. Just as the insured has a duty to disclose, "similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge, since obligation of good faith applies to them equally with the assured."
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> (7) The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded….."

19. A similar view is taken in **Modern Insulators Ltd. v. Oriental Insurance Co. Ltd**. (2000) 2 SCC 734,

> "(8) It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties and good faith forbids either party from non-disclosure of the facts which the parties know. The insured has a duty to disclose and similarly it is the duty of the insurance company and its agents to disclose all material facts in their knowledge since the obligation of good faith applies to both equally."

20. We have already quoted with profit the classical passage of Lord Denning in **George Mitchell (supra)** on the degree of notice. Such a degree of notice mandates a party relying upon the exclusion clause to bring it to the knowledge of the other side, any failure to do so would non-suit the said party from placing reliance upon it, as held in **Bharat Watch Company v. National Insurance Co. Ltd.** 2019 (6) SCC 212,

> "7. The basic issue which has been canvassed on behalf of the appellant before this Court is that the conditions of exclusion under the policy document were not handed over to the appellant by the insurer and in

the absence of the appellant being made aware of the terms of the exclusion, it is not open to the insurer to rely upon the exclusionary clauses. Hence, it was urged that the decision in United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, (2004) 8 SCC 644, will have no application since there was no dispute in that case that the policy document was issued to the insured.

8. This submission is sought to be answered by the learned counsel appearing on behalf of the insurer by adverting to the fact that SCDRC construed the terms of the exclusion. SCDRC, however, did not notice the decision of this Court, and hence, NCDRC was (it was urged) justified in correcting the error having regard to the law laid down by this Court. The learned counsel urged that the appellant has been insuring its goods for nearly ten years and it is improbable that the appellant was not aware of the exclusion.

9. We find from the judgment of the District Forum that it was the specific contention of the appellant that the exclusionary conditions in the policy document had not been communicated by the insurer as a result of which the terms and conditions of the exclusion were never communicated. The fact that there was a contract of insurance is not in dispute and has never been in dispute. The only issue is whether the exclusionary conditions were communicated to the appellant. The District Forum came to a specific finding of fact that the insurer did not furnish the terms and conditions of the exclusion and special conditions to the appellant and hence, they were not binding. When the case travelled to SCDRC, there was a finding of fact again that the conditions of exclusion were not supplied to the complainant.

10. Having held this, SCDRC also came to the conclusion that the exclusion would in any event not be attracted. The finding of SCDRC in regard to the interpretation of such an exclusionary clause is evidently contrary to the law laid down by this Court in Harchand Rai (supra) However, the relevance of that interpretation would have arisen provided the conditions of exclusion were provided to the insured. NCDRC missed the concurrent findings of both the District Forum and SCDRC that the terms of exclusion were not made known to the insured. If those conditions were not made known to the insured, as is the concurrent finding, there was no occasion for NCDRC to render a decision on the effect of such an exclusion."

21. On a discussion of the aforesaid principle, we would conclude that there is an onerous responsibility on the part of the insurer while dealing with an exclusion

clause. We may only add that the insurer is statutorily mandated as per Clause 3(ii) of the Insurance Regulatory and Development Authority (Protection of Policy Holder's Interests, Regulation 2002) Act dated 16.10.2002 (hereinafter referred to as IRDA Regulation, 2002) to the effect that the insurer and his agent are duty bound to provide all material information in respect of a policy to the insured to enable him to decide on the best cover that would be in his interest. Further, sub-clause (iv) of Clause 3 mandates that if proposal form is not filled by the insured, a certificate has to be incorporated at the end of the said form that all the contents of the form and documents have been fully explained to the insured and made him to understand. Similarly, Clause 4 enjoins a duty upon the insurer to furnish a copy of the proposal form within thirty days of the acceptance, free of charge. Any non-compliance, obviously would lead to the irresistible conclusion that the offending clause, be it an exclusion clause, cannot be pressed into service by the insurer against the insured as he may not be in knowhow of the same.

Doctrine of Blue Pencil

22. In such a situation, the doctrine of "blue pencil" which strikes off the offending clause being *void ab initio*, has to be pressed into service. The said clause being repugnant to the main contract, and thus destroying it without even a need for adjudication, certainly has to be eschewed by the Court. The very existence of

such a clause having found to be totally illegal and detrimental to the execution of the main contract along with its objective, requires an effacement in the form of declaration of its non-existence, warranting a decision by the Court accordingly. The aforesaid principle evolved by the English and American Courts has been duly taken note of by this Court in ***Beed District Central Coop. Bank Ltd. v. State of Maharashtra,*** (2006) 8 SCC 514,

> **"10.** The "doctrine of blue pencil" was evolved by the English and American courts. In *Halsbury's Laws of England*, (4th Edn., Vol. 9), p. 297, para 430, it is stated:
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> "430. *Severance of illegal and void provisions.*—A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the *contract* enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general."
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> **11.** In P. Ramanatha Aiyar's *Advanced Law Lexicon*, 3rd Edn. 2005, Vol. 1, pp. 553-54, it is stated:
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> "*Blue pencil doctrine (test).*—A judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words. (*Black*, 7th Edn., 1999)
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> This doctrine holds that if courts can render an unreasonable restraint reasonable by scratching out the offensive portions of the covenant, they should do so and then enforce the remainder. Traditionally, the doctrine is applicable only if the covenant in question is applicable, so that the unreasonable portions may be separated. *E.P.I. of Cleveland, Inc.* v. *Basler* [12 Ohio App 2d 16 : 230 NE 2d 552, 556].
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> *Blue pencil rule/test.*—Legal theory that permits a judge to limit unreasonable aspects of a covenant not to compete.
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> Severance of contract; 'severance can be effected when the part severed can be removed by running a blue pencil through it without affording the remaining part'. Attwood v. *Lamont* [(1920) 3 KB 571 : 1920 All ER Rep 55 (CA)] . (*Banking*)

A rule in contracts a court may strike parts of a covenant not to compete in order to make the covenant reasonable. (*Merriam Webster*)

Phrase referring to severance (q.v.) of contract. 'Severance can be effected when the part severed can be removed by running a blue pencil through it' without affording the remaining part. *Attwood* v. *Lamont* [(1920) 3 KB 571 : 1920 All ER Rep 55 (CA)] . (*Banking*)"

12. The matter has recently been considered by a learned Judge of this Court while exercising his jurisdiction under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 in *Shin Satellite Public Co. Ltd.* v. *Jain Studios Ltd.* [(2006) 2 SCC 628]"

The Indian Contract Act, 1872

"**2.Interpretation-clause.-** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

xxx *xxx* *xxx*

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract*;*

xxx *xxx* *xxx*

10.What agreements are contracts.- All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

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17.'Fraud' defined.- 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
(2) the active concealment of a fact by one having knowledge belief of the fact:
(3) a promise made without any intention of performing it;
(4) any other act fitted to deceive;
(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.

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18.“Misrepresentation” defined.- “Misrepresentation” means and includes-

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true’
(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;
(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

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19.Voidability of agreements without free consent.- When consent to an agreement is caused by coercion, [***] fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.- If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

> Explanation.- A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.
>
> *Illustrations*
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> xxx xxx xxx
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> (c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to mortgage. B may either avoid the contract, or may insist on its being carried out and mortgage-debt redeemed,"

23. Section 2(i) of the Indian Contract Act, 1872 (hereinafter referred to as "the Contract Act") defines a voidable contract. This definition clause extends the option to one side of the parties to the contract to declare it as voidable.

24. Under Section 10 of the Contract Act, an agreement would partake the character of a contract when consideration is lawful and so also the objective. A void agreement cannot be enforced, not being a contract in the eyes of law. The words "fraud" and "mis-representation" are defined under Sections 17 and 18 of the Contract Act. These two provisions on a simple reading give a clear indication that they are of very wide import. No restrictive meaning can be given to them, as both the words "means" and "includes" are consciously mentioned. The categories given are merely illustrative in nature. What constitutes an act of "fraud" or "mis-representation" is a question of fact.

25. Once an act of fraud, coercion or misrepresentation is proved, the agreement being a contract becomes voidable at the option of the party against whom it was done. Option under Section 19 of the Contract Act not only facilitates such a

party, but also curtails the other who is responsible, from seeking to declare the contract as voidable. Thus, the door is shut for the said party who benefits from such an act in seeking to declare the contract as voidable.

26. The second part of Section 19 of the Contract Act extends a further benefit to the aggrieved party to seek the performance of the contract, notwithstanding, the fraud or misrepresentation against him. Therefore, an aggrieved party has the option to either declare the contract as voidable or insist upon its due performance. The provision has got a laudable objective behind it which is to provide adequate relief to the party, who is aggrieved at the hands of the one who committed fraud, coercion or misrepresentation. The aforesaid position is made clear from illustration (c) to Section 19 of the Contract Act, which provides for the B party either to avoid the contract or insist upon it being carried out. It also debars the violator from deriving benefit from his wrong doing.

27. When a court of law is satisfied that a fraud, or misrepresentation resulted in the execution of the contract through the suppression of the existence of a mutually destructive clause facilitating a window for the insurer to escape from the liability while drawing benefit from the consumer, the resultant relief will have to be granted.

Consumer Protection Act, 1986:

*"**2. Definitions.**- (1) In this Act, unless the context otherwise requires,-*

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(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

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(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely: —

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

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(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have.

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(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services."

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3. Act not in derogation of any other law.— The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

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14. Finding of the District Forum.—(1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:—

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(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:

Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit;

xxx xxx xxx

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

28. The consumer under the Consumer Protection Act, 1986 (hereinafter referred to as "the 1986 Act") is at an elevated place than the plaintiff in a suit. A dispute before the Consumer Commission is to be seen primarily from the point of view of the consumer as against the civil suit. It is only to avoid any possible bottleneck in granting the relief. The jurisdiction of the Commission has been clearly demarcated, being in addition to any other laws in force as stipulated under Section 3 of the 1986 Act. The Act being a self-contained one, requires to be strengthened by the procedural laws, as the intention now is to facilitate a relief and not to curtail it. The aforesaid view of ours is fortified by Regulation 26 of the Consumer Protection Regulations, 2005 which cautions the Commission to avoid the cumbersome procedure contemplated under the Code of Civil Procedure. Clearly, the object is to make the Commission as consumer friendly as possible.

29. Having noted the provision governing unfair trade practice, it is rather crystal clear that it takes in its sweep all forms of unfair trade practice. One cannot give a restrictive or narrow interpretation to this provision which starts from an invitation, preceded by an offer, followed by an acceptance, conduct, and

execution of the contract. Court's finding against one of the parties *qua* the existence of unfair trade practice has to be transformed into an adequate relief in favour of the other, particularly in light of Section 14 of the 1986 Act. One has to keep in mind the legislative intendment behind the Act. Once again, we reiterate the definition clause which gives adequate ammunition to the Court to declare any form of unfair trade practice as illegal while granting the appropriate relief.

Consumer Protection Act, 2019:

"**2. Definitions**. – In this Act, unless the context otherwise requires,-

xxx xxx xxx
xxx xxx xxx

(46) "unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:--

(i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or
(ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or
(iii) refusing to accept early repayment of debts on payment of applicable penalty; or
(iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or
(v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or

(vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage;"

(47) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:--

(i) making any statement, whether orally or in writing or by visible representation including by means of electronic record, which--
(a) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
(b) falsely represents that the services are of a particular standard, quality or grade;
(c) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
(d) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
(e) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
(f) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
(g) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:"

30. The definition clause under sub-section (46) of Section 2 of the Consumer Protection Act, 2019 (hereinafter referred to as "the 2019 Act") gives a very broad meaning of unfair contract. As in the other provisions, it does not restrict itself to the few illustrative circumstances mentioned under sub-clause (i) to (vi).

Ultimately, it is for the State Commission or the National Commission to declare a contract as unfair contract.

31. Though, these two provisions are merely defining the terms, they actually empower the Commission to go into the issue *qua* the unfair nature of the terms of a contract and also the trade practice. Once, the State Commission or the National Commission, as the case may be, comes to the conclusion that the term of a contract is unfair, particularly by adopting an unfair trade practice, the aggrieved party has to be extended the resultant relief. The above said view is further strengthened by Sections 47 and 49 of the 2019 Act.

Section 47 and 49

> **"(47) Jurisdiction of State Commission.-** (1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction--
>
> (a) to entertain--
>
> (i) complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:
>
> Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;
>
> (ii) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;
>
> (iii) appeals against the orders of any District Commission within the State; and…
>
> xxx xxx xxx
>
> **49. Procedure applicable to State Commission**.- (1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be necessary, be applicable to the disposal of complaints by the State Commission.

(2) Without prejudice to the provisions of sub-section (1), the State Commission may also declare any terms of contract, which is unfair to any consumer, to be null and void.

xxx xxx xxx

58. Jurisdiction of National Commission

(1) Subject to the other provisions of this Act, the National Commission shall have jurisdiction—

(a) to entertain—

(i) complaints where the value of the goods or services paid as consideration exceeds rupees ten crore: Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;

(ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;

(iii) appeals against the orders of any State Commission;

(iv) appeals against the orders of the Central Authority; and……"

xxx xxx xxx

59. Procedure applicable to National Commission.- (1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be considered necessary, be applicable to the disposal of complaints by the National Commission.

(2) Without prejudice to sub-section (1), the National Commission may also declare any terms of contract, which is unfair to any consumer to be null and void."

32. Section 47 and 58 of the 2019 Act have been introduced to facilitate the State Commission and the National Commission to exercise jurisdiction over a contract which is unfair. As stated, the power is not only with respect to identifying a contract as unfair or not, but also to grant the consequential relief.

33. Under sub-section (2) of Section 49 and 59 of the 2019 Act, the State Commission and the National Commission, respectively, may declare any terms of the contract being unfair to any consumer to be null and void. The principle governing the doctrine of civil remedy of a contract is well enshrined in this provision.

34. In these provisions, there exists ample power to declare any terms of the contract as unfair by the State Commission and the National Commission. The words "any terms of the contract" would empower the State Commission and the National Commission to exercise unrestricted jurisdiction over any particular term of a contract, if in its opinion, its introduction by the insurer has certain elements of unfairness. The consequence of the declaration of that term as unfair, would make the contract active and executable to the benefit of the consumer. Therefore, this provision takes care of a possible mischief by the insurer as against the consumer.

35. We are conscious of the fact that the aforesaid provisions have been introduced under the new 2019 Act. However, the intendment of these provisions could be seen as implied even under the prior Act, i.e. the Consumer Protection Act, 1986. This Court has traced the jurisdiction of the Commission under Section 14 of the Consumer Protection Act, 1986 Act in **IREO Grace Realtech (P) Ltd. v. Abhishek Khanna**, (2021) 3 SCC 241,

> "33. Section 14 of the 1986 Act empowers the Consumer Fora to redress the deficiency of service by issuing directions to the Builder, and compensate the consumer for the loss or injury caused by the opposite party, or discontinue the unfair or restrictive trade practices.
>
> 34. We are of the view that the incorporation of such one-sided and unreasonable clauses in the apartment buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act."

ANALYSIS

36. Both the forums have held concurrently that respondent No. 1 was conscious of the fact that the contract was entered into for insuring a shop situated in the basement. The aforesaid position is not only a factual one but also accepted by the respondents as no challenge has been laid against the impugned order. Similarly, there was no specific denial on the non-compliance of adequate notice. The National Commission has not given any finding on this aspect, though it was dealt with *in extenso* by the State Commission. On a reading of Section 21(A) of the Consumer Protection Act, 1986, it is clear that it is not akin to Section 96 of the Code of Civil Procedure, 1908. Even otherwise, the impugned order has not considered all the relevant materials which were duly taken note of by the State Commission.

37. Once it is proved that there is a deficiency in service and that respondent No. 1 knowingly entered into a contract, notwithstanding the exclusion clause, the consequence would flow out of it. We have already discussed the scope and ambit of the provisions under the Indian Contract Act, 1872. Even as per the common law principle of acquiescence and estoppel, respondent No. 1 cannot be allowed to take advantage of its own wrong, if any. It is a conscious waiver of the exclusion clause by respondent No. 1.

38. Under the impugned order, we have already taken note of and discussed, the findings of the State Commission, which are indeed approved by the National Commission. These findings are sufficient enough to come to the conclusion that the terms of the contract are unfair, particularly the exclusion clause, and that respondent No. 1 has indulged in unfair trade practice. In such view of the matter, the decision of the National Commission cannot be sustained as the appellant cannot be non-suited only on the ground of mere deficiency in service without taking note of the fact that it is the duty of the Forum to grant the consequential relief by exercising the power under Section 14(d) and 14(f) of the Consumer Protection Act, 1986 which mandates the payment of adequate compensation by way of an award. The said provision makes it consequential in granting adequate compensation once it finds deficiency, the existence of unfair

terms in the contract and unfair trade practice on the part of the other party. In other words, a party is entitled for the relief which the law provides.

39. Non-compliance of Clauses (3) and (4) of the IRDA Regulation, 2002 preceded by unilateral inclusion, and thereafter followed by the execution of the contract, receiving benefits, and repudiation after knowing that it was entered into for a basement, would certainly be an act of unfair trade practice. This view is fortified by the finding that the exclusion clause is an unfair term, going against the very object of the contract, making it otherwise un-executable from its inception.

40. Therefore, we have no hesitation in setting aside the order passed by the National Commission. However, we are in agreement with the submission made by the counsel appearing for the respondents that the State Commission without any basis granted a sum of Rs.2.5 lakhs towards harassment and mental agony. We are of the view that no case for awarding amount under that head has been made out as the respondents merely took a legal stand.

41. In light of the aforesaid, the order impugned passed by the National Commission in F.A. No. 275 of 2016 stands set aside except to the extent of declining a sum of Rs.2.5 lakhs towards harassment and mental agony. The appeal stands allowed in part.

42. Before we part with this case, we would like to extend a word of caution to all the insurance companies on the mandatory compliance of Clause (3) and (4) of the IRDA Regulation, 2002. Any non-compliance on the part of the insurance companies would take away their right to plead repudiation of contract by placing reliance upon any of the terms and conditions included thereunder.

……J.
(SURYA KANT)

……J.
(M.M. SUNDRESH)

New Delhi,
November 09, 2022