DELHI HIGH COURT

Marwar Tent Factory

Vs.

Union of India (Delhi)

Civil Writ No. 357 of 1971.

(S. N. Andley, C.J. and S. N. Shankar, J.)

1.10.1973

JUDGMENT

S. N. Shankar, J.

1. This order will dispose of Civil Writ Nos. 357, 494 726, 942 of 1971 and 691 of 1972. The question involved in all these petitions is as to the scope and effect of clauses 18 and 18-A of the standing General Conditions of Contract entered into between the Union of India through its various officers and the contractors. They were all heard together. The controversy has arisen in different contexts. It will therefore, be appropriate to set out the facts of each case separately.

C.W. 357 of 1971.

2. The petitioner, M/s. Marwar Tent Factory in this petition claims to be a tent manufacturer on the approved list of contractors of the Directorate General of Supplies and Disposals, Government of India. In pursuance of the acceptance of tender dated March 13, 1968 the petitioner agreed to supply tents of a total cost of Rs. 62,03,650/- of the agreed specifications and quality to the Union of India. According to the terms and conditions of the contract, 95 per cent, of the agreed purchase price of the tents was to be paid after inspection and acceptance of the same by the Inspecting Officer and on proof of their dispatch. The balance 5 per cent was to be paid after their receipt in good condition by the consignee. The petitioner supplied the total contracted quantity in nine consignments, tendered for inspection during the months of June, July, August and Sept., 1968. All the

consignments were inspected by the Inspecting Officer and accepted. On proof of their dispatch 95 per cent, of the price was paid to the petitioner. The balance 5 per cent, was also paid to it after receipt of the consignments by the consignee on the basis of three certificates issued by the consignee in September, 1968, that they were received in good condition. After a lapse of over two years, thereafter, by letter dated March 9, 1971. the Director-General of Supplies and Disposals, New Delhi called on the petitioner to pay a sum of Rs. 92,363/- as compensation for breach of a warranty of the contract. Failing payment, the letter said, the Pay and Accounts Officer, New Delhi will be asked to deduct this amount from any of the petitioner's pending or future bills. The petitioner has prayed for the quashing of this letter. The demand for Rs. 92,363/- and the threat to deduct this amount from the pending or future bills, the petitioner maintains, is wholly illegal and without jurisdiction and amounts to deprivation of his property without the authority of law. The petitioner also contends that he was never heard before creating the liability against him and the threat to deduct this amount from the other monies due and payable to it "being penal in nature" is liable to be quashed.

3. Respondents to the petition are Union of India and the Director-General of Supplies and Disposals.

4. In the counter-affidavit, the respondents maintain that the writ petition is not maintainable as Article 226 of the Constitution cannot be invoked in the matter of determination of rights and Obligations of the parties arising out of contract. On merits it is urged that the tents when received by the consignee were not found to be of the specifications governing the supplies and the respondents were within their rights to set off their dues and adjust the same from the pending and future bills of the petitioner under Clauses 18 and 18-A of the agreed general Terms and Conditions which governed the contract. The demand for the payment of Rs. 92,363/- is maintained to be perfectly legal and in order.

5. The preliminary objection as to maintainability of the writ petition cannot be decided in the abstract. Before dealing with this question, we, therefore, advert to the contentions that need to be examined on merits.

6. It is admitted between the parties that General Terms and Conditions govern the contract in question. Clause 18 of these terms reads as under:

"18. Recovery of Sums Due.

Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realize securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary: if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due.

For the purpose of this clause where the contractor is a partnership firm, the purchaser shall be entitled to recover such amount by appropriating in whole or in part any sum due to any partner of the firm whether in his individual capacity or otherwise."

7. The letter dated March 9, 1971 (Annexure P-5) impugned by the petitioner states that the consignee had reported to the Office of the Director-General of Supplies and Disposals that on a thorough check on receipt of the stores at Kanpur, it was found that they contained various defects. After mentioning the defects it says:-

"Since the goods on receipt were not in terms of specification you have committed a breach of warranty and reasonable compensation has to be given by you. It has, therefore, now been decided to impose a price reduction of 5% on the contract price for 8210 Nos. Flies Outer to compensate the loss to the Government on account of the above defects.

You are hereby called upon to pay the sum of Rs. 92,363/- (Rupees ninetytwo thousand three hundred and sixtythree only) in favour of the Pay and Accounts Officer, Ministry of Supply. New Delhi by 31-03-1971 failing which the P. and A. O., NewDelhi, will be asked to deduct the same from any of your pending or future bills.

A set of Treasury challan in triplicate is enclosed."

The impugned letter thus creates a demand for Rs. 92,363/- against the

petitioner (also called "the contractor" for purposes of discussion on clauses 18 and 18-A) on account of compensation/damages alleged to have been suffered by the respondents (also called "the purchaser" for discussion relating to the said clauses) and further seeks to enforce recovery of this amount either by cash payment, or by deduction from the pending or future bills of the petitioner. The question for decision is whether Clauses 18 or 18-A as they stand confers such a right and power on the purchaser.

8. Before dealing with scope and effect of these clauses let us examine the nature of the claim raised by the purchaser. The claim is for compensation for an alleged breach of a warranty of the contract. To succeed in this claim, if the petitioner-contractor disputes it, the respondent-purchaser has to prove (i) that there was in law a breach of contract on the part of the contractor and (ii) that as a result of that breach, the particular amount claimed was suffered by the purchaser by way of damages. Until these two conditions are fulfilled the claim for damages remains only a right to sue for damages and not a claim in the sense of being a debt recoverable from the contractor. Such a right is an indeterminate claim and not a chose in action assignable in law. In *Iron and Hardware (India) Co. v. Sham Lal and Bros.* [1] of the report, on this aspect, Chagla. C. J. (as he then was) said:-

"It is well settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to any debt and therefore it has been held that a right to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned."

9. A claim for payment of a sum of money as compensation or damages, therefore, is a mere right to sue for a certain amount and is not a debt due from the contractor. "Debt", according to page 4 of Corpus Juris Secundum Vol. 26, is a liquidated demand, the payment of which is not dependent on the happening of any contingency or the performance of any condition. It is opposed to what is commonly called a "liability" as used in the sense of inchoate or contingent debt.

10. The claim of the purchaser, therefore, if disputed, needs to be adjudicated before it can be a debt binding on the contractor. There are no words in clause 18 conferring a right on the purchaser to adjudicate its claim for damages to convert the amount claimed into a binding debt recoverable from the contractor. To read the power to adjudicate to be implicit in the clause, because the clause gives a power to the purchaser to appropriate, would be to constitute the purchaser a Judge in its own cause. This obviously cannot be done on the clause as it stands. It would be against all canons of interpretation and contrary to the basic principles of natural justice.

11. In *General Manager, North East Frontier Railway v. Dinabandhu Chakraborty,* [2] the respondent was a Station Master. On his retirement he was entitled to receive provident fund standing to his credit. While serving as Station Master, it was alleged that in the remittances made by him on a certain date there was a shortage of Rs. 3,000/-. An enquiry was instituted and the Enquiry Committee held that he was responsible for the loss of this amount. While paying the sum of the provident fund, the railway authorities deducted the sum of Rs. 3,000/- from this amount. The respondent contested the deduction. Rule 1341 of the Provident Fund Rules which authorized deduction by the Controlling Officer of any amount due under a liability incurred by the subscriber to the provident fund was pleaded in defense. The Supreme Court said:-

"Under that rule the controlling Officer is empowered to deduct any amount due under a liability incurred by the subscriber to the Government. Therefore before any deduction can be made, it must be established that under a liability incurred by the subscriber the amount in question, is due to the Government. In the instant case, the respondent has disputed his liability. His contention is that he was not responsible for the loss in question. Under the Provident Fund Rules, no authority is constituted for deciding any dispute that might arise between the subscriber and the Government as regards any alleged . Incurring of the liability, nor as regards its quantum. Therefore the only forum in which these disputes can be decided is the Civil Court. The Government cannot be a judge in its own cause in the absence of any statutory provision empowering it to act as such. Hence the High Court was right in its conclusion that action taken by the Government is an arbitrary one."

12. In *M. C. Joseph v. State of Kerala.* [3] the petitioner was a Godown Keeper in

the Food grains Depot under the Civil Supplies Depart-ment. During the period of his service there was shortage in the stock of rice in that depot. By orders of the State of Kerala and the Board of Revenue, the liability of the petitioner for this shortage was fixed at Rs. 8,034.22 which was later reduced to Rs. 2,708.26 and this amount was sought to be recovered after adjusting the security deposit. The petitioner moved the Court for quashing this recovery. Reliance was placed in defense on a term in the petitioner's contract of service which provided that in the event of any loss or damage being caused to the Government by any act, or omission etc. etc., of the petitioner, he "shall make good to the Government such loss or damage in full, immediately on receipt of notice in writing from the Government as to the amount of such loss or damage and that on his failure to so pay up the amount, it shall be lawful and competent to the Government to recover same from him as arrears of Public Revenue under the provisions of the Revenue Recovery Act for the time being in force or in any other manner that may commend itself to the Government". The Court held that this condition undoubtedly provided for the recovery of the loss or damage from the petitioner but observed:

> "............ there is no indication anywhere in the contract as to how the Government would fix the extent of the liability. In the contract the Government has not been made an arbitrator and no power is conferred on the Government to fix the liability. The liability for damages and the power to fix the extent of the damage are entirely different things. Consequently on the strength of the provisions of the contract alone it is incompetent for the Government to take a one-sided decision and fix the liability of the petitioner.

That no man can be a Judge in his own cause is a rule of natural equity which has to be held sacred. In a dispute about a contract a person cannot be both a party and a Judge. If he is a party he cannot sit or act as a Judge and if he does so the decision is vitiated." Observations of Lord Atkinson in *Frome United Breweries Co. Ltd. v. Keepers of the Peace and Justices for County Borough of Bath,* [3] were cited in support of these observations.

13. Similar view was taken by a Division Bench of Mysore High Court in *N. R. Somesekhara Aradhya v. The State of Mysore,* [4] The petitioner in that case agreed with the State Government to supply rice. Clause 12 of the agreement provided that in the event of breach of the conditions of agreement by the

petitioner, the petitioner shall pay damages to the Government such as may be assessed by the Government. The Court held that in spite of this clause the question whether there was a breach of the agreement was one for decision by a Court of law and, therefore, the assessment of damages also would be for the Court to make.

14. We are, therefore, of the view that a mere claim for damages raised by the purchaser is not a debt or sum legally recoverable or due as such from the contractor and Clause 18 does not carry, by implication, a right or power for the purchaser to authorize it to quantify the damages if the contractor disputes the claim raised against it.

15. The question then arises what is the scope and effect of Clause 18 ? In our opinion, it authorizes the purchaser to appropriate any sum admitted or adjudicated to be due from the contractor against any amount due and payable to the latter. Normally, according to Section 59 of the Contract Act where a debtor owes some amounts to the creditor he has the right and option to allocate his payment to any particular debt and the payment, if accepted, by the creditor must be applied accordingly, but Clause 18 makes an exception to this general rule to confer a right on the purchaser to appropriate the amount due to and recoverable by it against any sum payable to the contractor or becoming due to it under the same contract or even any other contract including even the security deposited by the contractor in the account of and towards a wholly different contract.

16. We now come to Clause 18-A It reads as under:-

"18-A. Set off;

Any sum of money due and payable to the contractor (including security deposit returnable to him) under the contract may be appropriated by the Purchaser or Government or any other person or persons contracting through the Secretary and set-off against any claim of the purchaser or Government or such other person or persons for the payment of a sum of money arising out of or under any other contract made by the contractor with the Purchaser or Government or such other person or persons."

This clause also does not confer a right of adjudication on the purchaser. There can be no "set-off" of an unascertained amount. The claim of the purchaser even

though assessed by it at a particular amount, if disputed by the contractor, still remains, for reasons aforesaid, a disputed right to claim and not an ascertained debt. The appropriation of such a claim against any sum of money due and payable to the contractor would be without the authority of law and in that sense without jurisdiction.

17. For reasons aforesaid, we are of the view that the respondents in this case could not create a demand for Rs. 92,363/- against the petitioner in the sense of being a legally recoverable debt due from it and the threat to appropriate the amount of this demand from any pending or future bills of the petitioner is illegal.

18. We also find that the demand for Rs. 92,363/- in the sense of an enforceable and recoverable demand-could in no case be created by the impugned letter without hearing the petitioner. In para. 20 of the petition, the petitioner, has alleged that he was not given any opportunity whatsoever to put his case before the issuance of the impugned demand. The allegation that hearing was not given has not been denied in the counter-affidavit. The demand, if intended to be binding and operative against the petitioner, is volatile of the principles of natural justice and for this reason also is liable to be quashed. (See *State of Orissa v. Dr. (Miss) Binapani Dei.* [5] and *A. K. Kraipak v. Union of India,* [6]

19. Shri S. S. Chadha, appearing for the respondents, argued that for purposes of Clauses 18 and 18-A claim to recover any sum from the petitioner was not a property within the meaning of Article 19 (1) (f) of the Constitution and, therefore, no hearing was called for. The submission in the facts of this case is without merit. The threat of deduction in the impugned letter is a threat to deprive the petitioner of property to the extent of Rs. 92,363/- by deducting this sum from the other amounts due or becoming due to the petitioner. This affects the pecuniary interests of the petitioner involving "civil consequences" to him. The rule of audi alteram partem is clearly attracted. Hearing was, therefore, necessary.

20. During arguments, it was urged that Clauses 18 and 18-A by implication confer on the respondents as purchaser a right not only to claim damages but also to quantify them so as to convert the claim for damages into a recoverable debt due from the contractor. We have already dealt with this aspect of the matter. We find nothing in these clauses to empower the purchaser to adjudicate

and to be a Judge in its own cause to convert the mere claim into a recoverable debt or sum due from the contractor. We further find that the suggested interpretation of these clauses would be violative of Article 14 of the Constitution. Unlike any contract between two private individuals, the contract in question is a contract with the Union of India which is "State" within the meaning of Article 12 of the Constitution. Even in discharge of its executive functions the Union of India would be bound to observe the mandate of Article 14 of the Constitution. To read the right to adjudicate to be implicit in the clauses would be to single out the contractor by an executive action of the Union and deprive him of the General protection of law, available to all other citizens, not to be subject to or bound by any obligation not admitted by or adjudicated against him. Reference in this connection may be made to *Delhi Peasants Co-operative Multi-Purpose Society Ltd. v. The Collector,* [7] where H. R. Khanna, Chief Justice (as His Lordship then was) said:-

"Article 14 of the Constitution enshrines the doctrine of equality before the law and of equal protection of the laws within the territory of India. It is well established that the equality or equal protection of laws guaranteed by Article 14 is not confined to the law enacted by a legislature but covers also executive orders and notifications. This (is) as it should be; for otherwise the protection afforded would become illusory, if the law enacted by the Legislature could not violate Article 14, but the executive could. In modification of the words of Lord Atkin in *James v. Crown, 8* it may be said that the Constitution is not to be mocked by substituting executive for legislative interference with equality."

21. Shri S. S. Chadha then urged that by Clause 18 the contractor had agreed that when any claim for payment of the sum of money was raised by the purchaser he was entitled to recover "such sum" by appropriating in whole or in part, the security, if any, deposited by the contractor. "Such sum", he said, meant the claim as assessed by the purchaser so that under this clause the purchaser was entitled to recover the amount of the claim as unilaterally assessed by it. This interpretation of the clause is clearly not permissible. The expression "appropriate" according to the Shorter Oxford English Dictionary means "to make over to any one as his own", "to take for one's own, or to oneself". When used in relation to money in a commercial contract, in our view, it means the appropriation of the particular amount by one of the parties to the contract when it has become in law the property of the person appropriating it

and nothing futher remains to be done to make it so. A sum of money claimed as damages which is neither admitted nor adjudicated is not such property. It cannot, therefore, be appropriated. The appropriation envisaged in Clause 18 is only in regard to monies that could be taken over by the purchaser as its own i.e. the monies that were either admitted by the contractor or were adjudicated by a competent tribunal to be due from him. Clause 18 talks of appropriation. It is intended to be effective between the parties. Finality is attached to the appropriation of the sum of money in the sense that the contractor has no right to claim it back. Clause 18 would be a complete defense to such a claim by the contractor. The argument of the respondents that even if the government appropriates under this clause against its claim for damages which is merely a right to sue, the contractor can sue the government or invoke the arbitration clause in respect of the claim for damages has no validity. To say that the government's right to appropriate is subject to the contractor's right to sue appears to us to be a contradiction in terms. Such an argument - which has been advanced in these cases - does violence to Clause 18. Therefore, as a matter of construction. Clause 18 would apply only if the sum of money claimed is either admitted or adjudicated and is not a mere right to sue.

22. Shri Chadha cited *Yogendra Kumar Jalan v. Union of India*n [8] support of the proposition that the purchaser had the right to appropriate the security deposited by the contractor without the determination of the actual amount due. This case appears to have been decided on its own peculiar facts. The learned Single Judge has observed in the facts of that case that "there is no question of any determination involved here"; but if this decision is taken to lay down the broad proposition that the purchaser had the right to deduct or recover any sum of money which he merely claimed on account of an alleged breach of contract, the liability for which the contractor disputed, then, with respect, we disagree with the conclusion for reasons that have already been set out by us.

23. Shri Chadha also referred us to Annexure P-1, the schedule to the Acceptance of Tender, Clause 7 of which provides that conditions of the contract were to be those as contained in Form No. DGS and D (revised) as amended, excluding Clause 24, and specifically relied on Clause 8. sub-clause (7) of Clause 14, Clause 17 with particular emphasis on its sub-clause (8) and Clause 19 of the clauses contained therein. On the basis of these clauses, he argued that in spite of completion of delivery of the tents in this case and the

payment of the price of the stores supplied, it was still open to the purchaser to raise a claim for damages under Section 59 of the Sale of Goods Act, treating the breach by the contractor as a breach of warranty. Shri Singhania, appearing for the petitioner disputed this position and maintained that Section 59 was not at all attracted. Without going into this controversy and assuming that Section 59 applied and a claim for breach of warranty could be raised, we find that the claim for damages on the footing of a breach of warranty still remained a claim which, if disputed, had to be adjudicated and until adjudicated the claim could not be recovered as a debt for a specified amount due from the contractor enforceable either by way of cash payment, appropriation or set off. The argument, therefore, does not advance the case of the respondents.

24. We now come to the objection regarding maintainability of the writ petition. In support of the contention that contractual obligations cannot be decided in writ proceedings, Shri Chadha placed reliance on *Lekhraj Sathramdas Lalvani v. N. M. Shah.* [9] *Banchhanidhi Rath v. The State of Orissa,* [10] and Woodcrafts. Assam V. The Chief Conservator of Forests, Assam, Shillong, [11] Lalvani's case related to the appointment of manager under Section 10 (2) (b) of the Administration of Evacuee Property Act, 1950 which was held to be contractual in nature. His services were terminated. The order terminating the services was assailed in the writ court. In Banchhanidhi Rath's case the petitioner was an employee of the Education Department. After reaching the age of fifty-eight years he was asked to hand over charge. The order was challenged. The Court found that he had no right to remain in service after attaining the age of fifty-eight years and in this context observed that if a right is claimed in terms of a contract such a right cannot be enforced in a writ petition. Observations made in these two cases in the context of service contracts are of no assistance in the present case. The case of Woodcrafts decided by Assam and Nagaland High Court related to a contract entered into with the Government under Rule 21 of Assam Forest Regulation (7 of 1891). The Government purporting to act in terms of the contract raised the rate of royalty. Realization of royalty at the enhanced rate was challenged, but at the hearing the petitioner did "not dispute the jurisdiction of the Government to revise the rates under the agreement provided that is done in conformity with Clause 18 (a)". It was held that if the Government in the admitted exercise of that jurisdiction revised the rates which caused hardship to the contractor, remedy lay with the Government and not under Article 226 of the Constitution. This is not so here. The petitioner's case

all through is that the Government is acting to deprive him of his property otherwise than in accordance with law and without the jurisdiction - contractual or otherwise - to do so. It is true that to determine the contention raised by the petitioner, the contract between the petitioner and the Government has to be seen, but that is only to determine whether the action complained of is within the jurisdiction of the Government or is arbitrary or illegal. In *D. F. O, South Kheri v. Ram Sanehi Singh,* [12] in answer to a writ filed by the respondent to restrain the Divisional Forest Officer and Conservator of Forests from cancelling his "sleeper tally" the argument raised was that the grievance related to a contractual relationship and should not be allowed to be agitated in a writ court. On page 206 of the report. Shah J, (as his Lordship then was), speaking for the Court said:-

> "But in the present case the order is passed by a public authority modifying the order or proceeding of a subordinate forest authority. By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ................"

The present petition, therefore, in the facts of this case, is competent.

25. It was also urged on behalf of the respondents that the contractor, in case he disputed the claim raised by the purchaser, had the alternative remedy to have the matter settled either by arbitration, in cases where the contract contained an arbitration clause, or through court if there was no arbitration clause, and this alternative remedy being available, the writ was not competent. Apart from the fact that in case the claim is disputed by the contractor it would primarily be for the party raising the claim to avail of these remedies and these remedies cannot properly be said to be the legal remedies of the purchaser it is obvious that the basic grievance of the contractor in this case is that he is being deprived of his property without the other party resorting to these legal remedies and this wrongful act of the other party which, in this case, is the Union of India, affects his fundamental rights. To seek redress in such a situation the aggrieved party has a right to invoke Article 226 of the Constitution. Further, it is settled law that the existence of an alternative remedy is no bar to a writ in the case of infringement of fundamental rights - See *Himmatlal Hiralal Mehta v. The State*

of Madhya Pradesh, [13]

26. For the aforesaid reasons, we are of the view that the impugned demand deserves to be quashed. A writ is accordingly issued declaring that the demand for Rs. 92,363/- in the impugned letter dated March 9, 1971, by way of recoverable debt due from the petitioner and the direction to the Pay and Accounts Officer to deduct this amount from any pending or future bills of the petitioner is illegal and without jurisdiction, and on that account inoperative. This shall, however, not prevent the respondents from having their claim for damages, if any, referred to in this letter, duly assessed and quantified in accordance with law and then enforce recovery and payment of the amount adjudged to be due to them from the petitioner by resorting to clause 18 or 18-A.

C. W. 494 of 1971.

27. M/s. Bhagwandas Shri Krishna a partnership firm (hereinafter called "the contractor") in pursuance of the acceptance of tender dated April 28, 1969 agreed to supply 3000 k. g. of brass rivets of size of 5/8" and 3000 k. g. of brass rivets of the size of 3/4" to the respondents (hereinafter called 'the purchaser"). The letter containing terms of acceptance contained a clause that it shall make a deposit of Rs. 3,855/-. This was not acceptable to the contractor for reasons which it is not necessary to mention here. On July 9, 1969 Assistant Director (Supplies) of the Office of the Director General of Supplies and Disposals, New Delhi notified the contractor that as he had failed to furnish the security amounting to Rs. 3,855/- the contract was being cancelled at the risk and cost of the contractor and the extra cost recoverable on account of risk purchase because of this cancellation will be intimated to him in due course. On January 28, 1971 the Assistant Director (Supplies) by another letter required the contractor to deposit Rs. 30,900/- by January 31, 1971 towards extra expenditure incurred in risk purchase and informed it that failing deposit steps to recover this amount will be taken without any further reference to the contractor. The contractor has assailed this letter.

28. In the counter-affidavit, it is maintained that the contractor was bound to deposit the security and on its failure to do so the contract was rightfully cancelled. The demand for Rs. 30,900/-asainst the contractor in the impugned letter was said to have been rightfully issued in terms of clauses 18 and 18-A of

the General Conditions of Contract. In para. 10 of the counter-affidavit, amongst others, it was stated.

"............... The petitioners having agreed to the terms of the contract cannot challenge the said clauses and cannot contend that (until) Govt. establishes its claim, it has no right to recover the amount for which its claim arises........."

29. For reasons that have already been stated, clauses 18 and 18-A of the General Conditions of Contract do not confer any right on the purchaser to adjudicate or quantify its claim for damages, It has, therefore, no right to recover the amount which it claims by way of damages until and unless the same is either admitted or adjudicated by the Court. The claim for Rs. 30,900/- raised by the respondents, therefore, being not admitted by the contractor is not a recoverable debt and enforceable as such until and unless it is quantified by an appropriate tribunal.

30. The writ petition is therefore, accepted, the impugned letter dated January 28, 1971 and the demand contained therein is quashed. This shall, however, be without prejudice to any rights of the purchaser (respondents) to take appropriate proceedings for the adjudication and recovery of its claim.

C. W. 726 of 1971.

31. M/s. Data Ram Onkar Nath, a partnership firm, the petitioner in this writ (hereinafter called "the contractor"), in response to an invitation to tender for the supply of 'dal arhar', submitted its tender which was accepted by the respondents (hereinafter called "the purchaser") by means of a telegram received, according to the contractor, on May 5, 1970. The delivery of the stores, according to the contractor, had to commence on June 4, 1970. The telegraphic acceptance stated that formal acceptance of tender was to follow but according to the contractor, it was received as late as on June 6, 1970. The contractor neither made deliveries nor deposited the security as it was required to do under the contract. On June 22, 1970, on behalf of the President of India, the contractor was informed that as he had failed to supply 230 M. T. *'dal arhar'* against the acceptance of tender referred to above, the contract was being cancelled at his risk and cost subject to recovery of extra amount that may be incurred by the Government in re-purchase of the cancelled quantity. By letter dated June 9, 1971 the contractor was informed that the Government had suffered a total loss of Rs. 90,712,00 out of which, after adjusting a sum of Rs.

14,733,00 already held by the Government in the form of standing security and cash, a balance of Rs. 75,979,00 was outstanding which he must remit to the Pay and Accounts Officer within 15 days. He was further informed that as a result of this adjustment his standing security of Rs. 10,000,00 had "fallen short to the extent of Rupees 5,370,00" and that he must recoup the same within 15 days. This letter has been challenged by the contractor.

32. In the counter-affidavit, it is maintained that after the communication of acceptance by telegram, the contract between the parties was complete and the contractor was bound to make the supplies. He having failed to do so, the contract was rightly cancelled and the purchaser was entitled to Rs. 90,712,00 by way of general damages on account of this breach. This amount, it is stated, was claimed "as per terms and conditions of the contract". It was maintained that the purchaser (respondents) was entitled to assess damages suffered by it and if the contractor was aggrieved from this assessment, it could invoke the arbitration clause. The particular clause of the contract on which this right to assess was claimed was not mentioned in the counter-affidavit but at the time of arguments clause 18 of the General Conditions of Contract which we have dealt with earlier was invoked for this purpose.

33. It is unnecessary to repeat what has already been said on the scope and effect of clause 18. This clause does not confer any right on the purchaser to quantify the damages so as to convert its claim for damages into a binding debt legally recoverable from the contractor or to give rise to a right to appropriate and apportion the disputed claim against any monies of the contractor held by it. The demand of the purchaser, therefore, in the impugned letter for payment of the sum of Rs. 75,979/- or the apportionment of the sum of Rs. 14,733/- towards the standing security of the contractor is without the authority of law and as such illegal, without jurisdiction and inoperative and is hereby quashed. This shall, however, be without prejudice to the other rights of the purchaser (respondents) in respect of their claim, if any, against the contractor (petitioner) being established by due process of law.

C. W. 942 of 1971.

34. M/s. Swastik Industrial Corporation (hereinafter called "the contractor") entered into an agreement with the Union of India through the Director General, Supplies and Disposals (hereinafter called "the purchaser") for the supply of

5,440 fire extinguishers valued at Rs. 3,19,600/- to be supplied to the Commandant, G. O. D., Kanpur. For some reason, the contract was not performed. On July 16, 1968, the purchaser notified the contractor that as he had failed to furnish the security the contract was being cancelled at his risk and cost. By a subsequent letter dated September 20, 1969, the contractor was called upon to pay a sum of Rs. 29,050/- towards extra expenditure incurred in risk purchase on account of failure of the contractor to supply the fire extinguishers. The letter further stated that the amount should be deposited by October 11, 1969 failing which the Pay and Accounts Officer, Bombay will be authorized to recover the same from any of its pending bills. The contractor has challenged this letter and the demand contained therein including the threat of recovery from other monies due and payable to the contractor under the pending bills.

35. In the counter-affidavit, it is claimed that the contract was justly cancelled as a result of which the purchaser suffered damages and "in lodging a claim for Rs. 29,050/- the respondent only enforced his legitimate right as per the agreed conditions of contract". Reliance was placed on clause 18 of the General Conditions of Contract in support of this right. For reasons already stated this clause does not confer any right on the purchaser to adjudicate or quantify the damages. It is open to the purchaser to have resort to proceedings in accordance with law to have its claim for damages adjudicated if the same is not admitted by the contractor but until the same is done, there is no legally enforceable demand against the contractor and any deduction or appropriation of the amount of Rs. 29,050/- by the Pay and Accounts Officer will be unauthorized and without the authority of law.

36. C. W. 942 of 1971 is therefore accepted in the above terms. The impugned letter dated September 20, 1969 and the demand contained therein is quashed but this is without prejudice to any other rights of the purchaser (respondents) to have the claim quantified or adjudicated in accordance with law and then enforce their rights, if any, under clause 18 or 18-A.

C. W. 691 of 1972.

37. M/s. Hindustan Metal Works, a partnership firm (hereinafter called "the contractor") state that in response to an invitation to tender dated July 9, 1969 for the supply of 40 metric tones of anti-friction bearing metal, it submitted its

quotation on receipt of which the respondents (hereinafter called "the purchaser") called upon it to explain why the quoted rates were higher than the rates quoted by it in the earlier tenders. To this the contractor sent a reply but thereafter it received an advance acceptance of tender for a part of the quantity that had been offered by it, incorporating the clause :-

"This Office reserves the right to place order for balance 50% within one month from the date of issue of formal A/T on the rate accepted in the contract."

38. Correspondence between the parties thereafter followed which it is not necessary to set out for purposes of the controversy awaiting decision. On May 22, 1970 Assistant Director (Supplies) informed the contractor that as it had failed to supply the stores against the A/T the contract was being cancelled at his risk and cost. By letter dated May 26, 1971 Assistant Director (Supplies) informed the contractor that the purchaser was entitled to recover a sum of Rs. 41,000/- as extra expenditure incurred in risk purchase which should be deposited in any branch of the Reserve Bank or Government Treasury to the credit of the Pay and Accounts Officer, Ministry of Supply, New Delhi by June 20, 1971 failing which "the Pay and Accounts Officer will be authorized to recover the same from any of your pending bills without further reference to you". By a second letter dated July 13, 1971 the same Assistant Director (Supplies) wrote to the contractor that the amount of Rs. 41,000/-was to be recovered from the contractor as general damages and not as risk purchase loss. The contractor contends that this demand is wrong and illegal and the threat to deduct this amount is without the authority of law.

39. In the counter-affidavit, details as to how this amount became due have been set out. It is stated that the market rate prevailing on the date of the breach was ascertained at Rs. 18/- per k. g. in respect of anti-friction bearing metal and that the damages had been calculated on this basis. The demand was maintained to be perfectly legal according to the terms and conditions of the contract.

40. Shri R. L. Tandon, appearing for the purchaser (respondents) in this writ petition relied on clause 18 of the General Conditions of Contract. This clause, the learned counsel maintained, authorized the purchaser to make its claim against the contractor a recoverable demand and adopted the arguments which we have dealt with above. For reasons that we have already indicated, we do not think that clause 18 confers any such right on the purchaser. It is unnecessary to

repeat what has already been said.

41. Sri Tandon further urged that at the worst there was a case where the purchaser simply withheld the money due to the contractor and, therefore, there was no case for the issuance of a writ. If the dues are simply withheld for any reason, right or wrong, the learned counsel may be right and normally the writ Court may not grant a writ directing payment. But this is not a case of mere withholding. On the assumption that under clause 18 the sum claimed is also the sum due to it, the purchaser is also appropriating the sum from other amounts due to the contractor through the Pay and Accounts Officer without any further reference to the contractor. We have already dealt with the concept of 'appropriation' and have also pointed out that the mere claim for damages, unless admitted or adjudicated against the contractor, is not a sum due or money recoverable from it as a debt capable of recovery by the Pay and Accounts Officer from the monies due and payable to the contractor under other Pending bills. The impugned letter, therefore, creating a demand of Rs. 41,000/- against the contractor as the sum due from it and threatening to authorize the Pay and Accounts Officer to recover this amount from the pending bills of the contractor is clearly unauthorized and illegal. The said demand in the impugned letter in the sense of being a recoverable debt from the contractor - is therefore, quashed. The question of authorizing the Pay and Accounts Officer to recover Rs. 41,000/-from any other bills of the contractor does not arise and no recovery as threatened can be made. This is, however, without prejudice to the rights of the purchaser (respondents) to have their alleged claim established against the contractor (petitioner in accordance with law and also then to enforce its recovery under clause 18 or 18-A of the General Conditions of Contract.

42. In the result, the respective petitioners in C. Ws. 357, 494, 726, 942 of 1971 and 691 of 1972 succeed as stated above. Bach petitioner will be entitled to costs. Counsel's fee in each petition Rs. 100/-.

Order accordingly.

Cases Referred.

1. (AIR 1954 Bombay 423) on page 425

2. 1970 Serv LR 382 (SC)

3. 1926 AC 586

4. (1966) 2 Mys LJ 477.

5. AIR 1967 Supreme Court 1269

6. AIR 1970 Supreme Court 150).

7. 1971 Delhi LT 399

8. , AIR 1972 Delhi 234

9. AIR 1966 Supreme Court 334;

10. AIR 1972 Supreme Court 843

11. AIR 1971 Assam and Naga 92.

12. AIR 1973 Supreme Court 205

13. 1954 SCR 1122 .