

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 12th February, 2010

Petition No. 263 of 2009

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Tata Teleservices Limited & Anr.

..... Petitioner

Vs.

Union of India

..... Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G.D. GAIHA, MEMBER

For Petitioner : Mr. Mansoor Ali, Advocate

For Respondent : None.

JUDGMENT

S.B. Sinha

1. The petitioners herein are holders of licenses for providing basic telecom services. First petitioner (TTSL) is holder of a license for the state of Andhra Pradesh commonly known as Andhra Pradesh Circle and the second petitioner(TTMS) is holder of similar license for the Maharashtra Circle.

2. The Respondent herein, who is the licensor within the meaning of the provisions of Indian Telegraph Act 1885 granted license to the first petitioner as basic telecommunication services providers on and from 30th September, 1997. The license fee payable thereunder was a fixed sum and the tenure of the license was 15 years. The license agreement contains a provision namely clause 18.8 in terms whereof in case of delayed payment, interest at the prime lending rate specified by the State Bank of India from time to time + 5% p.a (compounded monthly) was payable w.e.f. the date on which the payment became due. The said agreement did not contain any provision for imposition of any penalty @ 150% on the amount due.

3. The National Telecommunication Policy was declared by the Government of India in March 1999, pursuant whereunto, license fee was to be paid on revenue sharing basis. Multipoly instead of Duopoly was proposed. Pursuant thereto a migration package was offered to the petitioner on the following terms:
 - (a) The migration to the NTP-99 Regime be made effective from 01.08.1999.
The revenues under the license was to be shared with DoT.

 - (b) With effect from 01.08.1999, duopoly be abolished.

 - (c) The license term would be extended to 20 years from the original effective date.

The petitioner accepted the said offer. A fresh agreement was entered into.

4. On the question as to what should be the meaning of AGR (as allegedly the Respondents interpreted the provisions of migration package and licenses incorrectly) a petition was filed before this Tribunal by the petitioner which was marked as Petition No. 18 of 2002. In the said Petition it was contended that the petitioner was compelled to pay a huge amount to the Respondents.
5. The said petitions were allowed by an order dated 9.4.2002. In terms of the said order the Second Petitioner was to receive a sum of Rs. 76 crores, (according to the respondent and according to the Petitioner Rs.20 crores more.) and so far as the first petitioner is concerned a sum of Rs. 29 crores.
6. In the meanwhile the Respondents by a communication dated 26.7.2001 sought to make amendment to the license inter alia by way of insertion of conditions Nos. 4.5. and 4.8, which read as under:

“ 4.5 Any delay in payment of LICENCE Fee, or any other dues payable under the LICENSE beyond the stipulated period will attract interest at a rate which will be 5% above the Prime Lending Rate (PLR) of State Bank of India prevalent on the day the payment became due. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest.

- 4.8 In case, the total amount paid on the self-assessment of the LICENCEE as quarterly LICENCE Fee for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable LICENSE Fee, it shall attract a penalty of 150% of the entire amount of short payment. This amount of short payment along with the penalty shall be payable within 15 days of the date of signing of audit report on the annual accounts, failing which interest shall be further charged as per terms of Condition 4.5. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed.”

The respondent herein raised a demand for a sum of Rs.42,88,59,140 from the first petitioner (TTML) towards the license fee for the years 1999-2000, 2000-01 and 2001-02. Penalty @ 150% + interest thereon was also included in the said demand.

The break-ups of the said demand are as under :-

| | | | |
|---------------------|---|------------|---------------------|
| Principal | = | Rs. | 20,58,97,440 |
| Interest | = | Rs. | 3,30,61,366 |
| Penalty | = | Rs. | 17,02,46,735 |
| Interest on penalty | = | Rs. | 1,96,53,599 |
| Total | = | Rs. | 42,88,59,140 |

The amount of penalty and interest was imposed allegedly for shortfall of Rs.11 crores towards license fee payable for the year 2001-02.

So far as TTSL is concerned, a demand of Rs. 200 crores was raised, the details whereof are as under: (Page 142)

| | | | |
|------------------------------------------|---|------------|-----------------|
| Principal | = | Rs. | 198,46,78,456 |
| Interest | = | Rs. | 1,46,82,931 |
| Penalty & Interest on penalty | = | Rs. | 8,48,080 |
| Total | = | Rs. | 200,02,09,467 |

7. The Petitioners contend that admittedly the Respondents had with it an amount of Rs. 76 crores approximately in excess. By reason of a letter dated 7.5.2003 it sought to make adjustments purported to be in terms of the judgment of Supreme Court of India dated 4.3.2003 in Appeal No. 5050 of 2002 (in the AGR matter) and sought to give an impression that it had made adjustments in terms of judgment of the

Tribunal and provided deduction to the extent of excess amount of Rs. 49,75,20,111 in case of TTML and Rs, 17,20,00,042 in the case of TTSL in stead and place of February, 2000.

8. The respondents thereafter raised a demand of Rs. 15,89,125 from TTSL due for the year 2004-05 on or about 03.07.06 and a sum of Rs, 25,88,25,488 upon TTSL by a letter dated 6.7.2006 respectively.
9. According to the petitioners as the Respondents had not given proper effect to the judgment of this Tribunal, they were constrained to file an Execution Application before this Tribunal being Execution Application No 7/2004 and 6/2004. The Respondents admitted on or about 05.10.2004 that they had been holding a sum of Rs.76 crores in excess for TTML and a sum of Rs.24 crores in the case of TTSL.
10. By an order dated 27.4.2005 this Tribunal passed the following order in the aforesaid Execution Applications:

“ 13. Relief sought by the applicants in Prayer (a) stands already covered in our judgment in M.A. No. 22 of 2004 (COAI & Others Vs. Union of India and Anr.) which is equally applicable in this case.

14. In view of the above Prayer (b), (c) & (d) have no grounds and no relief can be granted to the appellant. **The question of penalty of 150% has been delinked and will be dealt with separately along with the cases of Cellular Operators.**”

Applications were filed by the Petitioners in the said Execution Application praying that with the matter relating to validity of imposition of 150% penalty be heard along with other petitions pending before it, inter alia being Petition No. 8 of 2003.

4. The matters were heard in details and the judgment was reserved. However, it was found that no substantive averments had been made in the said application.

This Tribunal by an Order dated 18.11.2009, while granting liberty to the petitioners to file formal substantive petitions, directed that the said application of the petitioner be delinked from the other.

12. In furtherance of the said leave granted to the petitioners, this Petition has been filed praying inter alia for the following reliefs:

- (a) “quash the communications dated 07.03.2003, 07.05.2003, 03,07.2006 and 06.07.2006 or any other communication issued by DoT to TTSL and TTML levying penalty as being without authority of law and/or without any binding contract/license agreement between the parties for the relevant periods;
- (b) declare Clause No. 20.8 of License Agreement dated 01.06.2004 stipulating any penalty which initially was 150% and later on was reduced to 50% is/are null and void;
- (c) direct the DoT to give effect/adjust the excess amount available with it in the year it arose and give credit to it after giving interest at the same rate i.e. the prime lending rate specified by State Bank of India plus 5% per annum, on the said illegally held amounts.”

Despite service of notice and opportunity granted to the Respondents to file written submissions, nobody has appeared nor filed any written submissions was filed on behalf of the respondent.

13. The Ld. Counsel for the Petitioners made the following submissions:

- (i) Clause 25.8 of the license agreement dated 01.06.2004 is ultra vires Art. 14 of the Constitution of India as well as Sections 23 and 74 of the Indian Contract Act, 1872.

- (ii) The Indian Telegraph Act, 1885 having provided for imposition of penalty and specified the maximum amount in respect thereof, no agreement could have been entered into for payment of any sum in excess thereof.
- (iii) The demand made by the respondent is wholly illegal and without jurisdiction as a huge amount had been lying outstanding from the DoT and in any event the same could not have been given retrospective effect.
- (iv) The Petitioners in any event having never been in shortfall of more than 10% of the license fee, no penalty could have been imposed.
- (v) As the agreement contained clause for payment of interest which was to the extent of 5% above the Prime Lending Rate fixed by the State Bank of India from time to time on a monthly compoundable basis, no further amount is payable by way of penalty.
- (vi) The Petitioners having also furnished bank guarantees which could have been invoked at any point of time by the respondents for realization of its dues, if any, the impugned levy of penalty must be held to be initiated in law.
- (vii) Adjustments were made by the respondent only in terms of a letter dated 5.10.2004 as a result whereof credit for a sum of Rs.26,79,73,767 was granted to TTML and a sum of Rs. 7,05,93,704 in the case of TTSL being indisputably at the hands of the respondent, adjustment thereof, if any, should have been made in March,2000 and not in 2003.

14. We have noticed heretobefore that the respondents in terms of its letter dated 5.10.2004 accepted that a sum of Rs.29 crores was lying in excess in the case of TTSL from January, 2000 and an amount of Rs.24 crores in the case of TTML. The petitioner has given the following calculation to show that there was no shortfall whereas according to the respondent, the dues of the petitioner had fallen short by more than 10% of the license fee.

The relevant entries in respect of Petitioners (TTSL and TTMS) are as under:

2nd year – Revised migration dues demand as per Supreme Court Judgment

31.3.1999 to 31.7.1999 1339587945 (Rs. 397.52 Crores*123
Days)

-295040000 (after K'taka recovery
of Rs. 50 crs.)
(21.3.1999)

License fee due on 31.7.1999 1044547945

Interest due upto 31.7.1999 61144572

Migration dues as on 31.7.1999 1105692518

Interest and Penalties on Migration Dues:

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Migration Dues as on 31.7.1999 1105692518

Interest from 1.8.1999 to 31.3.2000 98204832

Migration Dues as on 31.1.2000 1203897350

Penalty from 1.2.2000 to 13.2.2000 15436273 3% for 13 days

Migration Dues as on 13.2.2000 1219333623

Paid on 14.2.2000 -1250000000

Securitisation penalty Nil

Excess paid on 14.2.2000 -30666377

Paid on 29.2.2000 -22017385

Paid on 15.3.2000 - 914721812

Total excess paid on 15.3.2000 -967405574

Acknowledged by DoT vide letter
Of 7th May 03 and 5th Oct. 04 765493878

Balance amount still to be recognized
By DoT -201911696

PLUS INTEREST FROM 14.2.2000
ON EXCESS AMOUNTS TO BE CALCULATED

(b) 2nd year – Revised migration dues demand as per Supreme Court Judgment

31.3.1999 to 31.7.1999 406405479 (Rs. 120.60 crores *123
days)
-241200000 (16.3.1999)
-21741234 (23.12.97)

Licence Fee due on 31.7.1999 143464245

Interest due upto 31.7.1999 8397949

Migration Dues as on 31.7.1999 151862194

Interest and Penalties on Migration Dues

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Migration dues as on 31.7.1999 151862194

Interest from 1.8.1999 to 31.1.2000 13488019

Migration Dues as on 31.1.2000 165350213

Paid on 31.01.2000 267145452

| | |
|------------------------------------------------------------------------------------|-------------------|
| Excess paid on 31.01.2000 | -101795239 |
| Penalty from 1.2.2000 to 29.2.2000 | 0 |
| Migration Dues as on 29.2.2000 | -101795239 |
| Paid on 29.2.2000 | -193569049 |
| Securitisation penalty | Nil |
| Excess Paid on 29.2.2000 | -295364288 |
| Acknowledged by DoT vide ltr of 7 th May'03 & 5 th Oct'04 | 240615746 |
| Balance amount still to be Recognized by DoT | -54748542 |
| Total Excess Paid on 29.2.2000 | -295364288 |
| PLUS INTEREST FROM 31.1.2000 ON EXCESS AMOUNTS – TO BE CALCULATED | |

If the said amount in an excess was available with the respondents, we fail to see any reason as to why adjustments had been given effect to only in May 2003 in-stead and place of March 2000.

From the judgment of this Tribunal and as also of the Supreme Court of India, it is evident that the petitioners had to pay a huge amount in excess because of mis-interpretation of the term “Adjusted Gross Revenue (AGR)” by the respondent by refusing to exclude income which do not arise from the conditions of license.

The respondent added revenues income for many items which were besides the provisions of the Telecommunication Licenses and, thus, there was no shortfall for the relevant year.

15. In any event in the year 2000 clause 20.8 was not inserted in the License Agreement having been so done only on 01.06.2004, when the amended agreement after migration to Unified Excess Service License was entered into. The amendment took effect from 14.11.2003.
16. The impugned penalty was levied for the financial year 2001-02 being a sum of Rs. 17,02,46,735 besides interest on TTML and a sum of Rs. 15.17.86,243 besides interest so far as TTSL is concerned. The penalty clause, even if valid could be given effect to only from 14.11.2003.

It is now a well settled principle of law that a penal provision contained in an agreement cannot be given a retrospective effect and retrospective operation. The provisions contained in an agreement and date from which it would come into force must be considered only on the consensus of the parties and not otherwise. In this case, the effective date of coming into force of the said penal clause would be the date when the 'Addendum' was added to the original agreement. A unilateral action on the part of one of the parties to the contract is not complicated under the Contract Act. As the respondent has sought to give retrospective effect to the penalty clause, the same, in our opinion, is bad in law.

17. Clause 20.8 undoubtedly contain a penal provision. It is an 'in terrorem' clause. In Dr. A.R. Biswas's Encyclopedic Law Dictionary the term 'in terrorem' has been defined as under:

“A condition in a will or gift which is intended to frighten or intimidate the donee is said to be *In terrorem*. When a contract has been broken and the sum named in the contract becomes payable for the breach or some penalty, the plaintiff is entitled to reasonable compensation or the penalty stipulated for. The reason is that the sum or the penalty has been inserted *in terrorem*. Section 74 of the Indian Contract Act 1872.”

The meaning of the word 'penalty' is well known.

In D.P. Mittal's Taxmann's Law Dictionary the term has been defined as under:

“The word “penalty” is a word of wide significance. Sometimes it means recovery of an amount as a penal measure even in a civil proceeding. An exaction which is not of compensatory character is also termed as penalty though it is not being recovered pursuant to an order finding the person guilty of crime.”

A penalty may constitute a civil wrong. It is provided in a contract for securing compliance by introducing coercive process which may be by way of penalty and interest. Even in such a case the person on whom such penalty is imposed will have to face civil consequences. In the instant case the petitioners were to pay a huge interest for delayed payment, which is minimum 17% per annum. It was to be compounded monthly. The rate of interest is in addition to Prime Lending Rate by 5%. Levy of separate penalty of 150% shortfall as also interest thereon was, thus, unwarranted. The same is in the nature of an ‘interrorem’.

The Indian Contract Act does not contemplate imposition of double penalty. In terms of Section 74 of the Indian Contract Act, penalty leviable by way of pre estimated amount towards damages also does not contemplate any interest thereupon as interest by way of damages cannot be levied on damages. Damages have to be determined on a reasonable basis.

It is now well settled that provisions of Sections 73 and 74 of the Indian Contract Act must be read con-jointly. Section 73 does not envisage recovery of damages which is indirect or remote in nature. Such a penal provision either in the Contract or otherwise having regard to sufferance of civil consequences by a party deserves strict scrutiny. Before imposition of such penalty, it is also necessary to comply with the conditions precedent laid down therefor.

18. If a penal clause is possible to be interpreted differently, an interpretation which favours the licensee should be preferred. Illustration (d) appended to Section 74 of the Indian Contract Act, in this context deserves our attention which reads as under :

“(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.”

This illustration also shows the consequential damages suffered by any person by reason of delay in payment which is remote and indirect would not be payable. Section 74 of the Contract Act clearly stipulates that if any amount named in the contract is payable in case of breach of contract, the Courts in a given case may award an amount which would appear to be reasonable by way of compensation not exceeding the amount provided for in the contract. What would be the reasonable amount would, however, depend on facts and circumstances of each case.

19. The Supreme Court of India in *Maula Bux V/s Union of India* reported in AIR 1970 SC Page. 1955 stated the law as under:

“There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach : *Natesa Aiyar V Appavu Padayachi*, ILR[1913] Mad 178 *Singer Manufacturing Company. v. Raja Prosad* ILR (1909) Cal.960; *Manian Pattar v. The Madras Rly Co.* ILR (1906) Mad. 188. But this view is no longer good law in view of the judgment of this Court in *Fateh Chand’s case* (1964) 1 SCR 515 : (1964) 1 SCR 515 This Court observed at p. 526 (of SCR)= (at p.1411 of AIR):

Section 74 of the Indian Contract Act deals with the measures of damages in two classes for cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulations by way of penalty ***** The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for”

The Court also observed:

“It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgement the expression ”the contract contains any other stipulation by way of penalty comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money contract contains any other stipulation by way of penalty comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.”

It was further observed:-

“There is no ground for holding that the expression ‘contract contains any other stipulation by way of penalty’ is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract which by the terms of the contract expressly or by clear implication are liable to be forfeited.”

The question was considered later by the Supreme Court of India in Oil and Natural Gas Corpn. Ltd. V/s. Saw Pipe Ltd. reported in AIR 2003 SC 2629 in the following terms:

“ Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss, which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other parties to lead evidence for proving that no loss is likely to occur by such breach.”

In this case the petitioners have discharged their burden keeping in view the fact that a huge amount was lying with the respondent in excess and even for delay in payment it was entitled to claim a huge amount by way of damages and, thus, no further penalty was leviable.

20. In *Fateh Chand V/s. Bal Kishan Dass* reported in AIR 1963 SC page 1405, it was held as under:

“The measure of damages in the case of breach of stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages, the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to maximum stipulated; but compensation has to be reasonable, and that imposes upon the court duty to award compensation according to settled principles. The Section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby, it merely dispenses with proof of “ actual loss or damage” ; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”

Yet again in Union of India V/s. Raman Iron Foundary (AIR 1974 SC 1265) the Supreme Court of India held :

“The claim is admittedly one for damages for breach of the contract between the parties. Now it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether whether it be so liquidated or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle even if there is a stipulation by way of liquidated damage, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for liquidated damages.”

In this matter, thus, the impugned demand cannot be sustained.

In any event the stipulation for payment of penal amount was prospective in nature. No penalty was leviable in relation to a period prior to incorporation of clause 20.8

21. In Principles of Statutory Interpretation by Justice G.P. Singh, page 497, in respect of the retrospective effect given to the statutory provisions, it was stated that--

“to apply an amending Act, which creates a new obligation to pay additional compensation, or which reduces the rate of compensation, to pending proceedings for determination of compensation for acquisitions already made, will be to construe it retrospective which cannot be done unless such a construction follows from express words or necessary implication.”

It has also been stated that the rule of construction against retroactivity of penal laws is not restricted to acts providing for criminal offences but applies also to laws which provide for other penal consequences of a severe nature e.g. termination of services. (page 519, 11th edition, 2008).

In the case of *Pyare Lal Sharma v. Managing Director, Jammu & Kashmir Industries Ltd.* (1989) 3 SCC 448, Regulation 16.14 of the Jammu & Kashmir Industries Employees Service Rules which was amended on April 20, 1983 came for consideration. The amendment added certain additional grounds for termination of service of an employee and one of the grounds so added was: “If the employee remains on unauthorized absence.” In construing the Regulation the Supreme Court held that the period of unauthorized absence prior to the date of amendment could not be taken into consideration for terminating the services of an employee. It held that “it is the basic principle of natural justice that no one can be penalized on the ground of a conduct which was not penal on the day it was committed.” (page. 518, 11th edition, 2008).

22. In a case of this nature the principles of natural justice (being implicit unless expressly or by necessary implication excluded) should also be held to have application. The petitioners were not given an opportunity of hearing. No show cause notice was issued. Had an opportunity of hearing been given, the petitioner could have shown that the fault lies on the part of the respondent.

The adjustment was required to be made from the amount it was holding in excess from the relevant date and not after a period of 3 years, i.e., March, 2003. The respondent could not have taken advantage of its own wrong. They could not, on the one hand, contend that it had suffered losses

by way of delay in payment of the quarterly license fee for which it would be entitled to huge interest, and on the other, deny the same benefits to the petitioners.

23. The Supreme Court did not pass any order of stay in favour of the respondent. It was, therefore, obligated to account for the money it held in trust for the petitioner in its right perspective.

It, in law, cannot refuse to give effect to the judgment of this Tribunal or the Supreme Court of India and still invoke the penal clause.

24. Respondent is a State, within the meaning of Art.12 of the Constitution of India. In its action including enforcement of a contract, it is, thus, required to be fair and reasonable.

25. Having regard to the factual matrix involved herein we are of the opinion that the stand taken by Respondent is neither fair nor reasonable. Such a penal provision could not have been invoked in facts and circumstances of the present case and in absence of any contract.

26. There was no application of mind on the part of the respondent before the levy of impugned demand.

27. The impugned demand, therefore, cannot be sustained. It is set aside accordingly.

28. The respondent shall pay and bear the cost of this petition.

29. Advocate's fee assessed at Rs. 1,00,000/-.

.....,J

(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member