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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment Pronounced on: 16.05.2024+ **FAO(OS) (COMM) 287/2019 and CM APPL. 31842/2018****SANGAM (INDIA) LTD**

..... Appellant

versus

**THE NATIONAL HIGHWAY AUTHORITY OF
INDIA & ANR**

..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr. Gaurav Pachnanda, Senior Advocate
with Ms. Ruchira Gupta and Ms.
Akanksha Sisodia, Advocates.

For the Respondents : Mr. Ankur Chhibber, Mr. Anshuman
Mehrotra and Mr. Nikunj Mehrotra,
Advocates.

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****JUDGMENT****TARA VITASTA GANJU, J.:****TABLE OF CONTENTS**

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PREFACE

1. This Appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the “Arbitration Act”] impugning a judgment passed by the learned Single Judge of this Court dated 03.07.2018 [hereinafter referred to as “Impugned Order”] by Sangam (India) Ltd. [hereinafter referred to as “Sangam”]. Sangam is aggrieved by the Impugned Order which set aside the Arbitral Award dated 03.05.2015 [hereinafter referred to as “Arbitral Award”] holding that the Arbitral Award has erroneously concluded that the contract is voidable at the option of Sangam and has misinterpreted the National Highways Fee (Determination of Rates and Collection) Rules, 2008 [hereinafter referred to as the “NHAI Rules”].

BRIEF FACTS

2. Briefly, the Respondent No.1/NHAI [hereinafter referred to as “NHAI”] invited bids for the work of collection of toll fees at Chamari Toll Plaza for the Bara – Orai section in the State of Uttar Pradesh, of the National Highway-2 [NH-2] for two sections from KM 220.000 to KM 260.713 on NH-25 and KM 421.200 -KM 449.000 on NH-2, on annuity basis for two years. The notice inviting tender was issued on 18.10.2012 and had set forth Annual Potential Collection at Rs.47.09 crores per annum. This Annual Potential Collection [hereinafter referred to as “APC”] was determined based on the survey and research carried out by NHAI.



- 2.1 NHAI vide their Letter of Acceptance [hereinafter referred to as “LOA”] dated 22.01.2013 accepted the bid of Sangam in the sum of Rs.62.10 crores, for the appointment of as toll fees collection contractor for a stretch of 68.513 Kms. Subsequently, an agreement dated 07.03.2013 [hereinafter referred to as “Agreement”] was executed between NHAI and Sangam in terms of which, Sangam was required to remit a total sum of Rs.62.10 crores per annum in instalments of Rs.1,19,09,589/- to NHAI every week. The term of the Agreement was for a period of two years beginning from 09.03.2013 [08:00 hrs.] to 09.03.2015 [07:59:59 hrs.].
- 2.2 Sangam furnished a bank guarantee dated 07.02.2013 in the sum of Rs.5,17,50,000/- and deposited cash performance security on 13.02.2013 for sum of Rs.5,17,50,000/- towards performance of the Agreement. The Agreement also provided that Sangam would collect user fees at such rates and from such vehicles as would be notified by the Central Government for the use of the said section of the National Highway/the said bridge.
- 2.3 In the meantime, the Government published a notification being notification no. SO.465(E) dated 26.02.2013 [hereinafter referred to as “Notification”] whereby levy and collection of toll fees for parts of the NH-25 and NH-2 were entrusted to NHAI. As per this Notification, NHAI was authorized to collect toll fees at NH-2, before completion of stretch at Kalpi, for the length of 66.813 Kms at the rate as specified therein, and, after completion of a stretch at Kalpi, for the length of 68.513 Kms at an enhanced rate. The



Notification also allowed NHAI to reduce the remittance amount to be deposited by it on a pro-rata basis for 66.813 Kms due to incomplete stretch of 1.7 km at Kalpi on NH-2 [hereinafter referred to as “Kalpi Stretch”]. The Notification further specifically provided the net road length for which NHAI was authorised to collect toll fees as per the table below:

<i>Location of Toll Plaza(s) (chainage)</i>	<i>Length (in km) for which fee is payable</i>
<i>Before completion of stretch at Kalpi</i>	
<i>Km/Ch. 229.913 (near village Usaka in Jaluam District)</i>	<i>66.813</i>
<i>After completion of stretch at Kalpi</i>	
<i>Km/Ch. 229.913 (near village Usaka in Jaluam District)</i>	<i>68.513</i>

2.4 It is the case of Sangam that the fact that the Kalpi Stretch was not available to it for the purposes of toll fees collection only came to its knowledge after the execution of the Agreement. Pursuant thereto, Sangam by its letter dated 16.04.2013 requested the NHAI to complete the incomplete stretch and that the period for such completion be excluded from the terms of the Agreement, failing which Sangam would be constrained to terminate the Agreement. By its letter dated 20.05.2013, NHAI directed Sangam to calculate the remittance for 66.813 Kms on a pro-rata basis.

2.5 Subsequently, a notice invoking Arbitration was sent by Sangam on 30.05.2013. It was contended therein that as per the NHAI Rules and the Agreement documents executed with NHAI, the condition precedent for any contract for execution of toll fees is that the



road/stretch of road should be complete in all respects before signing of such contract.

- 2.6 Sangam also filed a Petition under Section 9 of the Arbitration Act, seeking directions that the Agreement be suspended till the matter is resolved and that NHAI be restrained from taking coercive measures like encashment of bank guarantee or forfeiture of security deposit, in the meantime.
- 2.7 Since, NHAI had already appointed a Sole Arbitrator on 03.07.2013, the Application under Section 9 of the Arbitration Act was disposed of by a learned Single Judge of this Court directing that it be treated as an Application under Section 17 of the Arbitration Act to be decided by the Sole Arbitrator.
- 2.8 The Application under Section 17 of the Arbitration Act was rejected by the Sole Arbitrator by order dated 13.08.2013. This rejection was challenged by Sangam in a Petition under Section 34 of the Arbitration Act, which was also dismissed on 26.08.2013.
- 2.9 NHAI had, in the meantime, sent a show cause notice on 09.07.2013, to Sangam as to why the Agreement be not terminated. Since no response was received, NHAI by its letter dated 24.10.2013, terminated the Agreement and forfeited the performance security of Rs. 10.35 crores and required that the Toll Plaza be handed back to NHAI on 27.10.2013. By another communication dated 30.10.2013, NHAI debarred Sangam for two years from participating or bidding in any future projects of NHAI.



- 2.10 Since arbitral proceedings had commenced, Sangam filed its statement of claim submitting that NHAI had breached the Agreement since the entire stretch of 68.513 Kms road in motorable condition was not provided. Sangam claimed that the Agreement was void/voidable at the instance of Sangam for the reasons that there were misrepresentations and conscious omissions on the part of NHAI with respect to the Kalpi Stretch. Sangam also claimed monies on account of losses under the Agreement along with the claim of loss of profits as well, as for refund of the performance security and bank guarantee along with interest thereon. A declaration was also sought by Sangam that the communication dated 30.10.2013, which debars Sangam and its Directors from participating in bidding in future projects, be set aside and quashed.
- 2.11 NHAI filed its statement of defence setting forth that NHAI had kept a clean slate with Sangam since the beginning and at all times Sangam was informed about the incomplete Kalpi Stretch. Additionally, it was contended that Sangam was required to see whether the aforesaid stretch could fetch the toll as mentioned in the bid document in terms of the Agreement. In its counter-claim, NHAI set forth that in view of the incomplete 1.7 Kms at Kalpi, the weekly annuity payment was reduced to Rs.1,16,14,079/- instead of Rs.1,19,09,589/-. However, only a part payment ranging from Rs. 58 lakhs to 87 lakhs per week, was made by Sangam. Thus, a counter claim for compensation for non-deposit/delay in deposit of toll fees collection in the sum of Rs. 58.2 crores and for losses



incurred under the Agreement and compensation for breach was filed by NHAI.

2.12 Both parties led evidence and examined witnesses. The finding of the Sole Arbitrator was that entire Kalpi Stretch remained incomplete even on the date of the Agreement and due to its dangerous and bad condition, huge traffic jams up to 16 to 18 hours a day, were routine affairs. At the instance of the parties, the Sole Arbitrator made a spot visit on 21.07.2014 along with other representatives of both the parties and found upon inquiries made on the spot that the contentions of Sangam were true that there were serious disputes pending with regard to payment of compensation to the land owners at Kalpi Village and that there was congestion of traffic due to the closure of the Yamuna Bridge and bad conditions of the road.

2.13 The Sole Arbitrator further held as follows:

“The fact that there is a long pending dispute regarding land acquisition and compensation in respect of 1.7 Kms of stretch was also not disclosed to the Claimant. Then there is a further non-disclosure of the fact that old Yamuna Bridge was closed from 18/01/2013. These important facts should have been disclosed in the Tender documents to enable the bidders to take considered decision before bidding. Even on 27.06.2014 during the cross-examination of Mr. Naveen Mishra, an opportunity was available to the Respondents to explain the reasons for not incorporating the relevant facts in the Contract Agreement but the Project Director of Respondents failed to take the benefit of the said opportunity. These misrepresentations and conscious omissions on the part of Respondent before entering into a Contract dated 07.03.2013 makes the Contract voidable at the option of Claimant. Even otherwise as per rule-3 the



collection of toll was impermissible in view of the fact that the 1.7 Km portion of road was incomplete.”

The Sole Arbitrator also relied upon the file notings as obtained by Sangam under the RTI Act, which made it clear that 1.7 Kms Kalip Stretch was under hindrance and the same continued to be under hindrance even after the execution of the Agreement.

2.14 The Sole Arbitrator thus found that NHAI was mandated to act in a transparent, reasonable and *bona fide* manner being an instrumentality of the State but failed to do so at the time of entering of the Agreement. The Sole Arbitrator then passed the Arbitral Award on 03.05.2015 in the following terms:

- (i) NHAI was directed to return/refund to Sangam/claimant a sum of Rs.10.35 Crores towards illegally forfeited performance security including bank guarantee along with simple interest @14.55% p.a. from the date of cancellation of the Agreement, i.e., 24.10.2013, till the date of refund;
- (ii) NHAI was directed to pay to Sangam/claimant a sum of Rs.332.05 Lacs towards excess payment received above the actual toll collection; along with simple interest @14.55% p.a. from the date of cancellation of the Agreement, i.e., 24.10.2013, till the date of payment;
- (iii) If the refund in clauses (i) & (ii) was not paid in six weeks, interest @18%p.a., on the aforesaid awarded amounts shall be paid, from the date of passing of this award until full payment thereof;



- (iv) The counter claim filed by NHAI was rejected; and
- (v) Both the parties were directed to bear their own costs.

2.15 Aggrieved with the Arbitral Award, a Petition under Section 34 of the Arbitration Act was filed by NHAI before the learned Single Judge of this Court. NHAI challenged the rejection of all its contentions and the claims of Sangam which were allowed by the Arbitral Tribunal. It also challenged the rejection of its counter claim by the Arbitral Tribunal. It was contended that Sangam was, from the very beginning of the Agreement, trying to wriggle out of its obligations after making an over ambitious bid and later finding the project to be financially unavoidable or less profitable. The Arbitral Award is against public policy and in contravention of the provisions of the Agreement. There was no misrepresentation by NHAI to Sangam as the 1.7 Kms Kalpi Stretch was not something that was hidden. The Notification establishes that the incomplete Kalpi Stretch was in existence and in the knowledge of Sangam, as a copy was attached to the Agreement and the Agreement was signed on 07.03.2013, after the Notification was enforced.

2.16 In addition, NHAI had, based on the Notification, reduced the weekly remittance to be deposited by Sangam pro rata from Rs.1,19,09,589/- to Rs.1,16,14,079/- on 20.05.2013. It was further contended that the findings of misrepresentation are incorrect since the Toll remittance was only for 66.813 Kms instead of 68.513 Kms which forms part of the Agreement. NHAI additionally contended that the objections to the Kalpi Stretch and the issue of



misrepresentation was only raised by Sangam after a show cause notice for termination was sent by NHAI on 09.07.2013.

2.17 The learned Single Judge held that Sangam was expected to conduct a thorough survey of the highway, bridge, and surrounding areas, assessing access, diversions, road conditions, and closures before submitting a bid for toll collection. Such diligence is standard practice to determine revenue potential and bid amount. The incomplete Kalpi Stretch and the closure of the old Yamuna Bridge, as highlighted in the Arbitral Award, are facts readily discoverable by any prudent person. A drive down the highway would have revealed these issues, including potential traffic jams and local resistance to toll fees payment. It was thus held that, in view of the Exception to Section 19 of the Indian Contract Act, 1872 [hereinafter referred to as “Contract Act”], Sangam had the means to discover the condition of the Kalpi Stretch with ordinary diligence, that the relief cannot be granted to Sangam.

2.18 It was further held by the learned Single Judge that the Sole Arbitrator’s oversight of the Exception to Section 19 of the Contract Act and Clause 9 of the Agreement led to an erroneous conclusion regarding the Agreement’s voidability. The learned Single Judge interpreting Rule 3 of the NHAI Rules, held that the interpretation made by the Sole Arbitrator, suggesting that toll fees can only be collected when a national highway is entirely complete, is flawed. The government has the authority to issue notifications for any section of the highway according to the NHAI Rules. Therefore,



even if a portion of the highway is not finished, it does not negate the government's power to levy fees for that completed segment. Such an interpretation contradicts the language and intent of the rule.

- 2.19 The learned Single Judge set aside the Arbitral Award on the grounds of patent illegality and its being contrary to public policy of India. However, the learned Single Judge did not in any manner deal with the findings of fact as recorded by the Sole Arbitrator and their consequences on the relief claimed by NHAI. Directions were also passed permitting NHAI to re-nominate a new Arbitrator (in terms of the Arbitration clause between the parties) to adjudicate the disputes between the parties in accordance with law.
3. Aggrieved by the Impugned Order, Sangam has filed the present Appeal under Section 37 of the Arbitration Act praying that the Impugned Order be set aside and the Arbitral Award be restored.

CONTENTIONS OF SANGAM

4. The learned Senior Counsel appearing on behalf of Sangam while assailing the Impugned Order submits that the fact that NHAI was aware that the Kalpi Stretch was incomplete even prior to the Request for Proposal dated 18.10.2012 [hereinafter referred to as “RFP”] was issued. Reliance has been placed on the internal file notings of NHAI which were obtained under a letter received pursuant to an RTI Application dated 10.06.2013 filed by Sangam. It was submitted that these file notings reveal that even prior to



execution of the Agreement, NHAI was aware that it was unlikely that the Kalpi Stretch would be completed “*in the near future*” and this was concealed by NHAI. Despite the foregoing, Sangam was made to believe that the entire stretch of 68.513 Kms would be available under the Agreement.

- 4.1 It was further contended on behalf of Sangam that this disclosure was made by NHAI only after the legal notices dated 16.04.2013 and 20.05.2013 were served upon it by Sangam. Sangam thus, contended that the Agreement was executed as a result of fraudulent misrepresentation by NHAI in view of the fact that there were conscious omissions regarding the incomplete Kalpi Stretch.
- 4.2 Learned Senior Counsel further contended that the Impugned Order is based on the ‘Exception’ to Section 19 of the Contract Act. However, it is contended that this Exception is not applicable to cases of ‘*active concealment*’ and ‘*fraudulent misrepresentation*’. Reliance in this behalf is based on *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd*¹ and a judgment of Division Bench of Calcutta High Court in *John Minas Apcar v. Louis Caird Malchus*².
- 4.3 Lastly, relying on the judgments in the *Associate Builders v. DDA*³, *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*⁴, and *Delhi*

¹ (2021) 4 SCC 713

² 1938 SCC OnLine Cal 62

³ (2015) 3 SCC 49

⁴ (2019) 15 SCC 131



*Airport Metro Express (P) Ltd. v. DMRC*⁵, it is contended that the interference in an Arbitral Award is limited under the provisions of Section 34 of the Arbitration Act and an error in law which does not go to the root of the matter could not be made a ground of patent illegality.

CONTENTIONS OF NHAI

5. *Per contra*, learned Counsel appearing on behalf of NHAI has submitted that the consent of Sangam under the Agreement was not obtained by any misrepresentation or fraud. The Kalpi Stretch is a public road and non-completion of the 1.7 Kms was within the knowledge of Sangam. Clause 2.3 and 2.3.1 of the RFP provided that prior to submissions of bid, the bidders would ascertain for themselves the site conditions, traffic, location, surroundings and other relevant matters which form the subject matter of the bid and such an examination would have revealed the incomplete Kalpi Stretch. In any event, Sangam would have come to know of the incomplete Kalpi Stretch, as the Notification dated 26.02.2013, clearly provides for it, thus it cannot be said that there is misrepresentation or fraud by NHAI.
- 5.1 It was further submitted that prior to making of a bid, the assessment of actual quantum of user fee collection has to be made by a bidder in terms of Clause 1.1.1 of the RFP. The APC for this project was Rs.47.09 crores. Sangam submitted its bid on

⁵ (2022) 1 SCC 131



19.11.2012 for an APC at Rs.62.1 crores which is approximately 31.88% above the APC. At that time of submission of the bid, the Kalpi Stretch was incomplete and thus, the assessment made by Sangam would necessarily have been made by taking into account the incomplete Kalpi Stretch as Sangam would have conducted its due diligence prior to submitting its bid.

- 5.2 Learned Counsel for NHAI further contended that in any event, when the Notification clearly prescribes the Kalpi Stretch as being incomplete, it could not be said that Sangam was not aware of the same. Thus, by its conduct, Sangam had acquiesced to this fact and could not raise the argument of fraudulent misrepresentation.
- 5.3 Lastly it was submitted on behalf of NHAI, that it is a settled law that an argument on a question of law such as the Exception to Section 19 of the Contract Act being applicable, can be taken at any stage of the proceedings. Reliance was placed on judgment of the Supreme Court in the case of *State of Chhattisgarh v. SAL Udyog (P) Ltd*⁶. NHAI thus contended that the learned Single Judge, had correctly set aside the Arbitral Award.

ANALYSIS

6. The limited controversy that arises in the aforesaid facts is whether the conclusion of the learned Single Judge, that by virtue of the 'Exception' to Section 19 of the Contract Act, the Agreement would

⁶ (2022) 2 SCC 275



not be voidable, can be sustained.

6.1 Before proceeding further, we must note that NHAI has not challenged the factual findings returned by the Arbitral Tribunal before us. However, NHAI has in its written submissions filed, *inter alia* raised the following contentions:

- (i) There has been no misrepresentation or fraud played by NHAI. Clauses 2.3.1 and 2.3.2 (c) and (e) of the RFP sets out that a bidder is deemed to have visited the site and acquainted itself of all conditions prior to submitting its bid. It is based on these inspections and assumptions that a bid is submitted, Sangam submitted its LOA and thus, it is deemed to have been aware of the incomplete Kalpi Stretch.
- (ii) The plea of vitiation of consent by fraud could only be raised prior to executing the Agreement on 07.03.2013. At the time of making of the bid or submitting its response to the RFP, Sangam was not prevented from exercising its rights under Section 19 of the Contract Act. Since, this was not done at that time, the plea of misrepresentation raised subsequently by Sangam is barred by acquiescence and waiver.

6.2 As discussed above, the learned Single Judge had proceeded solely on the basis that notwithstanding the afore-mentioned findings, the Agreement would not be voidable by virtue of Exception to Section 19 of the Contract Act.



7. An examination of the Arbitral Award shows that in terms of the notice inviting tender, RFP and the LOA as well as the bank guarantee and the performance security taken by NHAI, was for toll fees, to be collected for the entire stretch of 68.513 Kms. The Sole Arbitrator noted that there were serious disputes raised by Sangam in the collection of toll fees, including disputes with regard to payment of compensation to land owners which had been previously been acquired by the Government in and around the Kalpi Stretch, as well as the factum of congestion of traffic due to closure of old Yamuna Bridge.
- 7.1 The Sole Arbitrator further relied on Rule 3 of the NHAI Rules to submit that the collection of toll fees is contingent upon the highway being complete in all respects. Thus, it was held that the initiation of the tender process for appointing an agency to collect toll fees for the entire stretch including the Kalpi Stretch which was incomplete, showed a lack of *bona fides* on NHAI's part.
- 7.2 The Sole Arbitrator thus concluded that there were misrepresentations and omissions on the part of NHAI which made the Agreement voidable at the option of Sangam. The termination and black listing by NHAI and forfeiture of the bank guarantee and performance security in the sum of Rs.10.35 crores was held to be illegal and was set aside. Further, since the toll fees collection by Sangam from 09.03.2013 to 26.10.2013 was Rs.25,95,96,115/- and Sangam had already paid a sum of Rs.29,86,55,749 to NHAI, the Award permitted Sangam to retain the actual amount of toll



collected. The Sole Arbitrator awarded a sum of Rs.332.05 lakhs towards excess payment received above the actual toll fees collection to Sangam. Interest was also awarded on both the forfeited performance security as well as the excess payment payable from the date of cancellation of the Agreement i.e., 24.10.2013 till the date of payment. The counter-claim of NHAI was rejected. The aforesaid payments were directed to be refunded with interest.

8. The learned Single Judge while adjudicating the Section 34 Application referred to relevant portions of the Arbitral Award as well as to the provisions of Sections 17 to 19 of the Contract Act. The learned Single Judge relying on the 'Exception' to Section 19 of the Contract Act held that Sangam was expected to conduct a thorough survey of the highway, bridge, and surrounding areas, assessing access, diversions, road conditions, and closures before submitting a bid for toll collection. Such diligence is standard practice to determine revenue potential and bid amount. The incomplete Kalpi Stretch and the closure of the old Yamuna Bridge, as highlighted in the Award, were facts readily discoverable by any prudent person. The learned Single Judge held that if a party whose consent was caused by misrepresentation, had the means of discovering the truth with ordinary diligence, Section 19 of the Contract Act would have no application. A drive down the highway would have revealed these issues, including potential traffic jams and local resistance to toll fees payment. Therefore, relief could not



have been granted to Sangam. It was further held that the Sole Arbitrator's oversight of the 'Exception' to Section 19 of the Contract Act and Clause 9 of the Agreement, led to an erroneous conclusion regarding the Agreement being voidable at the option of Sangam.

9. Learned Senior Counsel appearing on behalf of Sangam during arguments, has laid emphasis on the internal file noting dated 21.01.2013 of NHAI obtained *via* RTI [hereinafter referred to as "RTI noting"], to submit that despite having the knowledge of the same and the fact that the Kalpi Stretch was not likely to be completed in the immediate near future, on the very next day, i.e., 22.01.2023, NHAI issued a letter of intent accepting the offer letter of Sangam without making any disclosure about the Kalpi Stretch.
 - 9.1 It was thus contended that, in view of the RTI noting, there has been an "*active concealment*" on the part of the NHAI in terms of the Judgments in the *Avitel Post* case and *John Minas* case, and, the 'Exception' to Section 19 of the Contract Act is not applicable in the facts of this case.
10. Section 19 of the Contract Act sets out that where a consent to an Agreement is obtained by coercion, fraud or misrepresentation, the Agreement is voidable at the option of the party whose consent was caused to be obtained by such coercion, fraud or misrepresentation as the case may be.



10.1 Section 17 of the Contract Act defines ‘*fraud*’ as an act committed by a party with an intent to deceive another party to induce him to enter into an Agreement and in sub-Section (2) includes, “*active concealment*” (as amongst the acts of fraud), of a fact by a party having the knowledge of the fact concealed. The Explanation to Section 17 of the Contract Act also provides that mere silence is not fraud unless the person had a duty to disclose except where such silence in itself is equivalent to speech.

10.2 Section 17 of the Contract Act is extracted below:

*“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 of 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 or 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.”

[Emphasis is ours]

10.3 Misrepresentation is defined under Section 18 of the Contract Act. Section 18 of the Contract Act defines “*misrepresentation*” to mean



and include a positive assertion which is not true but made in a manner that it is believed to be true and includes a breach of duty committed which, with an intent to deceive, giving the person committing it an advantage, to the prejudice of another. Section 18 of the Contract Act is extracted below:

“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.”

10.4 It is apposite to extract Section 19 of the Contract Act here as well:

“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 a 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.**”

[Emphasis is ours]

11. The learned Single Judge has relied on the ‘*Exception*’ to Section 19 of the Contract Act to hold that the Agreement entered into between Sangam and NHAI was not voidable (as has been held by the Sole Arbitrator), in view of the Explanation to Section 19 of the Contract Act. It is, however, been argued by Sangam that the Exception is not applicable where there is “*active concealment*” or fraudulent misrepresentation.
- 11.1 The learned Senior Counsel appearing on behalf of Sangam has relied on the phrase “*active concealment*” as appearing in Section 17(2) of the Contract Act to aver, that this phrase acts as an Exception to Section 19 of the Contract Act.
12. The Exception to Section 19 of the Contract Act was considered by a Division Bench of the Calcutta Court in ***John Minas*** case. In the ***John Minas*** case, one of the parties was induced by a representation by the opposite party to purchase a share in a property. The representation was made by written communications by the defendants giving a fictitiously high value to the property. It was based on these representations that the sale was entered into for the property at a higher value. Later on, it was discovered that these representations were bogus. It was thus held that there was a deliberate “*active concealment*” perpetrated in that case and an ordinary person with ordinary diligence would not be



expected to discover such fraud and a conclusion that the Agreement between the parties had been procured by fraud was upheld. It was further held that where there is a case of deliberate “*active concealment*”, it would fall under Section 19 of the Contract Act and not under its “*Exception*”.

12.1 The Court construed the Exception to not apply in cases of deliberate active fraud as distinguished from misrepresentation that was not fraudulent. The relevant extracts from the *John Minas* case are set out below:

“The Plaintiff says that he *was induced* to enter into that *contract by the fraud of the Defendant and asks that the contract be rescinded.*”

xxx

xxx

xxx

We are only concerned with the representation that the defendant received offers of Rs. 9,20,000 and Rs. 8,20,000 through Mr. Philip Oddie of Messrs. Morgan & Co. It does not appear to be disputed that the other representations were true.

xxx

xxx

xxx

After reading the evidence and the letters I agree with the learned Judge and I have come to the conclusion that *the defendant did cause those letters to be written in which bogus offers for the property were made. I believe and I find that they were made for the purpose of giving a fictitiously high value to the property and I further find that the plaintiff was induced by the contents of those letters to enter into the agreement he now seeks to have rescinded.*

It appears to me that those letters were, *to use the words of s. 17(1) of the Indian Contract Act, 1872, "a suggestion, as to a fact, of that which is not "true by one who does not believe it to be true" They were false and fraudulent documents, brought into being for the purpose of deceiving persons to whom the defendant might later wish to sell shares in the property. I have no doubt that the making and the exhibition of those documents to the plaintiff were fraud*



within the meaning of s. 17 of the Indian Contract Act. Section 19 of the same Act provides:

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.

Then there follows an exception:

If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of s. 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.

It has been argued before us that the exception applies here. No such argument was raised in the court below. In my view, the exception does not apply in this case. It has been argued, accepting the plaintiff's story, that there has been misrepresentation fraudulent within the meaning of s. 17. In the case of Niaz Ahmad Khan v. Parshotam Chandra⁷ the application of this exception to a case of fraud was discussed. The Court (Sulaiman C. J. and Young J.) said:—

If the statute were clear it would be our bounden duty to give effect to its meaning quite irrespective of any consideration as to what the law is in England. But on the face of it the exception is ambiguously worded. The difficulty is caused mainly by the punctuation, viz., a comma after the word "silence," which seems to indicate that the words "fraudulent within the meaning of s. 17" apply both to "misrepresentation" and to "silence". But as observed by their Lordships of the Privy Council in the case of Maha-rani of Burdwan v. Krishna Kamini Dasi⁸ and Pugh v. Ashutosh Sen⁹ punctuation is no part of the statute, and a court of law is bound to interpret the section without the commas inserted in the print. If the comma after the word "silence" is to be ignored, the expression fraudulent within the meaning of s. 17" might well apply to "silence" exclusively and not to "misrepresentation". This interpretation is strengthened by the

⁷ (1931) I.L.R. 53 All. 374, 379-380

⁸ (1887) I.L.R. 14 Cal. 365 (371); L.R. 14 I.A. 30 (35)

⁹ (1928) I.L.R. 8. Pat. 516 (525); L.R. 56 I.A. 93 (100)



circumstances that the legislature has used the preposition "by" twice, i.e., both before "misrepresentation" and also before "silence". If the expression "fraudulent within the meaning of s. 17" qualifies "misrepresentation" the result would be that due diligence would be required in the case where misrepresentation became fraudulent, but would not be required when the misrepresentation fell within s. 18 and was just short of fraud, for the exception would be confined to the former kind only. This would be a scartling result.

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*For instance, in most cases advantage is taken of simple-minded people who are careless enough not to take the trouble to find out the-truth which an ordinary man with sense would do with ordinary diligence. **We are, therefore, inclined to hold that in the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence.***

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*I am inclined to agree with this view of the matter. A similar view was taken in the case of *Abdulla Khan v. Girdhari Lal*¹⁰ where the Court. said:-*

Currie v. Rennick (2) is a different case, as it was based on misrepresentation alone, and not fraud, which was held not to avoid the contract, as, under s. 19 of the Contract Act, the plaintiff had the means of discovering the truth with ordinary diligence. This is a case of active fraud, which none but an expert was capable of detecting.

The learned authors, Sir Frederick Pollock and Sir Dinshah Mulla, in their work on the Indian Contract Act, 6th Ed., at p. 130 say:-

¹⁰ [1904] P.R. (Jud. Civil) 149, 151



It will be observed that the exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent.

In my opinion, this is a case of deliberate active fraud which comes within s. 19 and not within the exception I have mentioned. Further, I am of the opinion that the circumstances under which fraud was perpetrated in this case were such that an ordinary person with ordinary diligence could not be expected to discover that fraud. In my opinion, the learned Judge was right, in coming to the conclusion that this agreement has been procured by fraud, and, in ordering that the plaintiff's contract should be rescinded.

This appeal is, therefore, dismissed with costs.”

[Emphasis is ours]

13. The Supreme Court in the *Avitel Post* case, relying upon the *John Minas* case held that where a party has acted on the basis of representations and/or warranties to enter into an Agreement, which representation and/or warranties have later been proved to be false, then such contract would clearly fall within fraudulent inducement under Section 17 of the Contract Act and be voidable at the instance of the party who induced the contract based on such representations and warranties. The facts in the *Avitel Post* case were that a share subscription Agreement was entered into between the parties for a consideration of USD 60 million paid by HSBC to acquire 7.8% of paid up capital of a company. It was the case of HSBC that the transaction was based on a representation, that the company was at an advance stage of finalising a contract with British Broadcasting Corporation (BBC) which was expected to generate a revenue of USD 300 million in the first phase and ultimately over USD 1 Billion. It was, thereafter, discovered by HSBC, pursuant to



Auditors being appointed, that the contract with BBC was non-existent and was only set up by the company to induce HSBC into investing the money into the company.

13.1 The disputes were referred to Arbitration, and amongst the issues decided was the arbitrability of fraud. It was held that there were representations and warranties made when the contract was in its advanced stage of negotiation to induce the claimant (HSBC) to invest in the company and that HSBC did rely on these representations, which were false or misleading to enter into the investment. The Arbitral Award, thus, held that the company was directly liable for fraudulent misrepresentation under the contract and found HSBC entitled to damages. This finding was upheld by the Supreme Court.

13.2 While discussing Sections 10, 14, 17 and 19 of the Contract Act, the Supreme Court in the *Avitel Post* case held that all Agreements made with free consent of parties competent to contract are lawful, however, if the consent is caused or obtained by fraud, which would have otherwise not been given but for such fraud, the contract is voidable at the option of the party whose consent was so caused. It was held as follows:

*“45. Section 10 of the Contract Act states that all agreements are contracts if they are made with 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. Section 14 states that consent is said to be free when it is not caused inter alia by fraud as defined in Section 17. **Importantly, the section goes on to say that consent is said to be so caused when it would not have been given but for the existence, inter alia, of such fraud. Where such fraud***



is proved, and consent to an agreement is caused by fraud, the contract is voidable at the option of the party whose consent was so caused. This is provided by Section 19 of the Contract Act which reads as follows:

“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 a 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 representation 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.⁴⁵

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party of whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.”

[Emphasis is ours]

13.3 The Supreme Court in the *Avitel Post* case further held that the words “*with intent to deceive another party*” as appearing in Section 17 of the Contract Act must be read with the words “*or to induce him to enter into a contract*”, must be in relation of the formation of the contract itself. It was also held that fraud in performance of the contract may be governed by the tort of deceit which would lead to damages but not to rescission of the contract itself:

*“46. It has been held by the Bombay High Court in *Fazal D. Allana v. Mangaldas M. Pakvasa* [*Fazal D. Allana v. Mangaldas M. Pakvasa*, 1921 SCC OnLine Bom 122 : AIR 1922 Bom 303] , that Section 17 of the Contract Act only applies if the contract itself is obtained by fraud or cheating. **However, a distinction is made***



between a contract being obtained by fraud and performance of a contract (which is perfectly valid) being vitiated by fraud or cheating. The latter would fall outside Section 17 of the Contract Act, in which the remedy for damages would be available, but not the remedy for treating the contract itself as being void (see pp. 311-12). This is for the reason that the words “with intent to deceive another party thereto or his agent” must be read with the words “or to induce him to enter into the contract”, both sets of expressions speaking in relation to the formation of the contract itself. This is further made clear by Sections 10, 14 and 19, which have already been referred to hereinabove, all of which deal with “fraud” at the stage of entering into the contract. Even Section 17(5) which speaks of “any such act or omission as the law specially deals to be fraudulent” must mean such act or omission under such law at the stage of entering into the contract. Thus, fraud that is practised outside of Section 17 of the Contract Act i.e. in the performance of the contract, may be governed by the tort of deceit, which would lead to damages, but not rescission of the contract itself....”

[Emphasis is ours]

13.4 While discussing Section 19 of the Contract Act and its Exception, the Supreme Court in the *Avitel Post* case cited the *John Minas* case, and held that the Exception does not apply to cases of active fraud as distinguished from misrepresentation, which is not fraudulent. It is this extract which forms part of footnote 45 to this judgment, that was relied upon by Sangam to support its argument that the Exception to Section 19 of the Contract Act was not applicable. The extract of footnote 45 in the *Avitel Post* case is below:

“It is important to note that the Exception in Section 19 does not apply to fraudulent misrepresentation as the words “by silence” alone go with the word “fraudulent”, thus not applying to cases of fraudulent misrepresentation. In John Minas Apcar v. Louis Caird Malchus, 1938 SCC OnLine Cal 62 : AIR 1939 Cal 473, the concurrent judgments of Derbyshire, C.J. and Lord Williams, J. referred to a passage from Sir Frederick Pollock and Sir Dinshaw



Mulla, in their work on the Contract Act, 6th Edn., which said:

“It will be *observed that the Exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent.*”

(emphasis in original)”

[Emphasis is ours]

13.5 The principle of active concealment has also been extended in relation to the Explanation to Section 19 of the Contract Act. While discussing “*active concealment*” and the “*Explanation to Section 19 of the Contract Act*”, the Supreme Court in the judgment of ***Mithoolal Nayak v. Life Insurance Corporation of India***¹¹ has held that the underlying principle to the “*Explanation to Section 19 of the Contract Act*” is that it is irrelevant whether the representation is fraudulent or not, if it has not induced a party to whom it was made, to act upon it by entering into a contract. It was held that the “*active concealment*” of the state of health of the insured in the proposal form/personal statement submitted at the time of entering into the policy had an important bearing in obtaining the insurance and that the party acting as such, cannot take advantage of the Explanation to Section 19 of the Contract Act as below:

“Learned counsel for the *appellant has referred us to the Explanation to Section 19 of the Indian Contract Act in support of his argument. We are unable to accept this argument as correct. It is indeed true that Mahajan Deolal was examined by as many as four doctors. It is also true that the respondent Company had before it the conflicting reports of Dr Desai and it specially asked Dr Kapadia to examine Mahajan Deolal in view of the reports submitted by Dr Desai. Yet, it must be pointed out that the respondent Company had no means of knowing that Mahajan Deolal had been treated for the serious ailment of secondary*

¹¹ AIR 1962 SC 814



anaemia followed by dilatation of heart, etc., in September-October 1943 by Dr Lakshmanan. Nor can it be said that if the respondent Company had knowledge of those facts, they would not have made any difference. The principle underlying the Explanation to Section 19 of the Contract Act is that a false representation, whether fraudulent or innocent, is irrelevant if it has not induced the party to whom it is made to act upon it by entering into a contract. We do not think that that principle applies in the present case. The terms of the policy make it clear that the averments made as to the state of health of the insured in the proposal form and the personal statement were the basis of the contract between the parties, and the circumstance that Mahajan Deolal had taken pains to falsify or conceal that he had been treated for a serious ailment by Dr Lakshmanan only a few months before the policy was taken shows that the falsification or concealment had an Important bearing in obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say: "It could have made no difference if you had known the truth". In our opinion, no question of waiver arises in the circumstances of this case, nor can the appellant take advantage of the Explanation to Section 19 of the Indian Contract Act."

[Emphasis is ours]

CONCLUSION

14. The ratio of the aforesaid decisions is that cases of deliberate fraud, do not come within the meaning of Exception to Section 19 of the Contract Act and where an Agreement has been procured by fraud, the contract is voidable at the instance of the party deceived, notwithstanding that the party whose consent was caused by fraudulent misrepresentation had means of discovering the truth by due diligence.
15. The question as to whether the findings of misrepresentation and active concealment are warranted in the facts of the present case is a contentious issue. To that extent, we do not agree with the conclusion of the learned Single Judge that in view of the Exception to Section 19



of the Contract Act, the findings are not required to be adjudicated upon. NHAI had in its Petition under Section 34 of the Arbitration Act, challenged all the findings which were against it and had also challenged the dismissal of its counter claim by the Sole Arbitrator. Thus, an adjudication on these findings of fact was also necessary to be carried out.

16. In these circumstances, this Court deems it expedient that the matter be remanded for a fresh adjudication of Section 34 Petition by the learned Single Judge.
17. It is clarified that all rights and contentions of the parties are left open in this regard.
18. The Appeal and pending application is disposed of in the aforesaid terms.

(TARA VITASTA GANJU)
JUDGE

(VIBHU BAKHRU)
JUDGE

MAY 16, 2024/r/SA