HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

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SWP no.502/2016
MP no.01/2016

Date of order: 26 .06.2018

Dr Syed Javid Farooq Qadri

v.

State of J&K and another

Coram:

Hon'ble Mr. Justice M. K. Hanjura, Judge

Appearing Counsel:
For Petitioner(s): Mr. Salih Pirzada, Advocate
For Respondent(s): Mr. M. I. Dar, AAG

Whether approved for reporting? ***Yes***

1. The fascicule of the facts, necessitous and apropos to fathom the background of the present writ petition, based whereupon a case has been set in motion and the present controversy built, has its genesis and origin to the envisioning of the claim of the petitioner since treating him not with similarly situated persons and co-petitioner in SWP no.373/2012, namely Dr Mohammad Younis, has put him in uncertainty and melancholy. It is the inertia of the respondents in treating the petitioner dissimilar and not vouchsafing him the akin benefits bestowed upon co-petitioner in SWP no.373/2012, that has forced him to knock at the portals of this Court with the writ petition on hand.
2. The petitioner pleads that he is working as a Consultant Surgeon and is posted in the JLNM Hospital as Super Specialist (DNB) Urology. In the year 2012, he was selected

for the super-specialty training course at the Institute of Kidney Diseases and Research Centre, Ahmedabad. For undergoing the said course, he implored for grant of study leave. Dillydallying in consideration thereof, forced the petitioner and another similarly situated person, namely, Dr Mohammad Younis, to move the writ petition, bearing SWP no.373/2012 titled *Dr Mohammad Younis and another v. State and others*. By the order dated 9th March 2012, a Coordinate Bench of this Court directed the respondents to relieve the writ petitioners so as to enable them to undergo DNB Course. It is maintained by the petitioner that the training course was undergone and successfully completed within the stipulated period. For resumption of the duties, the petitioner submitted the joining report on 26th June 2015. However, he was not permitted resumption of the duties until formal approval of administrative department which was granted on 15th October 2015 and as a sequel of which, the petitioner joined the duties on 17th October 2015 at JLNM Hospital, Srinagar. It is groused by the petitioner that while granting approval for resumption of duties vide letter no.HME/HRM/56/2015 dated 15th October 2015 (*Annexure B to writ petition*), the respondent no.1 has assumed the intervening period undergone training as unauthorised for being subjected to a separate decision regardless the direction of this Court in SWP no.9th March 2012, by which the petitioner was relieved to join the training course. The petitioner claims that he has been requesting the

respondents to treat the period as on deputation as has been done in the similar cases where the training period has been treated as on deputation, but no action is being taken to decide the intervening period of more than three years, from 10th March 2012 to 16th October 2015.

3. Reply has been filed by the respondent no.2, in which he insists that the petitioner was appointed as Assistant Surgeon in the respondent Health Department vide Government Order no.212-HME of 2007 dated 28th March 2007. He was selected for undergoing Registrarship. While doing his Registrarship at Government Medical College, Srinagar, he was appointed and posted as B-Grade Surgeon (Consultant) at Sub District Hospital, Pattan, Baramulla. It is contended by the respondents that while posted at SDH Pattan, the petitioner approached the respondent no.2 with an application, duly endorsed by the Chief Medical Officer, Baramulla, in which the petitioner stated that he had been selected for undergoing DNB (Super-Specialty Course) outside the State by the National Board of Examination, Government of India, and accordingly, he requested for sanction to the study leave in his favour. The respondent no.2 avers that that the Chief Medical Officer, Baramulla, reported that the petitioner was not attending to his duties with effect from 10th March 2012. The case of the petitioner was forwarded to the Health and Medical Education Department, being Administrative Department, vide letter no.Est-3-133/1507 dated 30th July 2013 for

necessary instructions and orders. Meanwhile, after completing the DNB Course in Urology Discipline, the petitioner approached the respondent no.2 with an application on 20th June 2015, for allowing him to re-join the department. The case was again referred to the Administrative Department, which in turn conveyed its approval vide letter no.HME/HRM/56/2015 dated 15th October 2015 and the petitioner was allowed to re-join, pending settlement of the intervening period spent on undergoing DNB Course as the same was ordered to be decided separately by the Health and Medical Education Department. Insofar as the order dated 15th March 2015, in terms whereof the respondents are under directions to decide the period undergone by the petitioner for undergoing the DNB Course on the analogy of Dr Mohammad Younis Bhat, regulated in terms of the Government Order no.812-HME of 2015 dated 18th December 2015 is concerned, the respondents maintain that the petitioner seeks same treatment as given to Dr Mohammad Younis Bhat in pursuance to the aforesaid Government Order, in terms whereof the period of the DNB Course spent by Dr Mohammad Younis Bhat in SKIMS, Soura, has been regulated in terms of Government Order no.812-HME of 2015 dated 18th December 2015. It is also averred that while bringing the factual background of the case to the notice of the Administrative Department vide communication no.DHSK/Legal/Sgr-895/1421-22 dated 4th

May 2016 (*Annexure R-1 to the Reply*) the respondent no.2 has forwarded the case of the petitioner for issuance of necessary orders in pursuance of the order dated 15th March 2016 passed by this Court.

4. I have heard the learned counsel for the parties and considered the matter.

5. Learned counsel for the petitioner, to bolster the case set up by the petitioner, sturdily states that it is not in dispute that the petitioner joined the respondent department as Assistant Surgeon 1st April 2007 and was promoted to the post of Consultant on 17th August 2011 and given the length of service and nature of training undergone, after due process of selection, the petitioner does not incur any disability for seeking study leave. He also states that sanction of study leave was retained unreasonably and had this Court not intervened there was probability of missing the training as a result of adamancy of respondents at a crucial stage and it is only in lieu of the advanced and specialised training that the petitioner is reckoned as a Super-Specialist and proficiency is utilised for the greatest advantage of the patient care. His further submission is that the petitioner has been discriminated as being denied the benefit of deputation granted to Dr Mohammad Younis, who had also been relieved to join DNB Course in terms of the directions passed in the joint writ petition inasmuch as prior to joining the course, the leave was applied for before the competent authority. Since no decision was taken qua

the leave application, the petitioner invoked the jurisdiction of this Court to avert the impediment placed by the respondents in the pursuit of advanced training for achievement of specialised proficiency. Even the respondents did not satisfy their statutory obligation as demarcated under the J&K Civil Service (Leave) Rules, 1979, which unequivocally envision that where there is reason to believe that the obtaining of admissibility report will be unduly delayed, the authority competent to grant leave may calculate, on the basis of available information, the amount of leave admissible to the government servant and issue provisional sanction of leave. He also contends that in order to capitalise overmuch coveted opportunity, the petitioner undertook the training course and after its completion, he joined the services on 26th June 2015. As a result of the training, the petitioner has gained proficiency in the discipline of Urology to be garnered in the relevant sphere of activity and therefore, there is no question of unauthorised absence as the period is utilised to train and equip in Urology which is the related sphere of professional activity and comprehensive with study leave rules. After earning such training, the services of the petitioner are being harnessed for specialised treatment of patients as a Specialised Urologist inasmuch as the petitioner as on date has been posted in Super-Speciality Hospital, GMC, Srinagar. The learned counsel for the petitioner, to buttress his arguments, has placed reliance on ***Central Inland***

Water Transport Corporation Ltd and another v. Brojo Nath and another AIR 1986 SC 1571.

6. The petitioner way back in the year 2007, came to be appointed as the Assistant Surgeon vide Government Order no.212-GNE if 2997 dated 28th March 2007. While doing his Registrarship in GMC Srinagar, the petitioner was appointed as B-Grade Surgeon (Consultant) vide Government Order no.290-HME of 2011 dated 27th June 2011 and was posted at SDH Pattan vide Government order no. 333-HME of 2011 dated 6th July 2011. The petitioner, while posted at SDH Pattan, approached and sought permission from the respondent department to undergo DNB Course. He, along with one Dr Mohammad Younis, was forced to approach this Court with a writ petition, being SWP no.373/2012, in which by the order dated 2nd March 2012, this Court directed the respondent department to relieve the writ petitioners so as to enable them to undergo the DNB Course. The said direction, dated 2nd March 2012, was vouchsafed in favour of both the writ petitioners, viz. Dr Mohammad Younis and Dr Syed Javid Qadri (present petitioner) by this Court and benefits and liabilities percolating therefrom affect and impact both the writ petitioners and simultaneously oblige the respondent department to treat them on the same lines. The respondents by Government Order no.812-HME of 2015 dated 18th December 2015 (*Annexure C to writ petition*) have treated the period of DNB Course spent by Dr Mohammad

Younis – a similarly situated person as the present petitioner – as '*on deputation*'. Germane it would be to extract apropos portion of the aforesaid order infra:

> "And whereas, Director Health Services, Kashmir stated that the office received the orders of Hon'ble High Court passed on 02.03.2012 under SWP No.373/2012 CMP No.570/2012 titled Dr. Mohammad Younis and anr V/S State directing the respondents to relieve the petitioners enabling them to undergo DNB course, subject to outcome of writ petition, and the same was also communicated to Administrative Department, however, no instructions were received in the matter
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> And whereas, after completion of three years tenure of DNB in Surgical Gastroenterology from SKIMS, the doctor has submitted the joining report in the Directorate on 27.02.2015;
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> And whereas, Director Health Services, Kashmir has submitted the case with regard to period spent by the doctor in undergoing DNB course at SKIMS and in the meanwhile, doctor is being posted at DH, Pulwama pending settlement of the aforesaid period;
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> And whereas, the department vide letter No.DH/ Legal / Gaz. / 29 / MR0-845/2011-13/K dated 15.04.2014 conveyed approval to Director, SKIMS, Principal, Government Medical College, Jammu/Srinagar, Principal, Government Dental College, Jammu/Srinagar and Director, Health Services, Jammu / Kashmir to treat the period of PG/Super Specialist Medical Courses as 'on deputation' in favour of in-service doctors including some petitioners who have undergone / are undergoing such studies in SKIMS Srinagar, Government Medical College, Srinagar / Jammu and Government Dental College, Srinagar / Jammu, on the basis of their selection by the concerned selection agency prior to 29th of May 2013, whereafter the period of study of such doctors shall be governed by SRO-274 dated 30th of May, 2013 issued by the Finance Department.
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> And whereas, the case of Dr. Mohammad Younis was examined in the department and his case was found to be of similar nature as above doctors.
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> Now, therefore, it is hereby ordered that the period of DNB course in Surgical Gastroentrology spent by Dr. Mohammad Younis, Medical Officer in SKIMS, Soura, Srinagar w.e.f. 27.2.2012 to 26.02.2015 be treated as 'on deputation' as per letter No.HD/Legal/Gaz/29/MR-845/2011-13-K dated 15.04.2014."

7. What principally emerges from the above quoted passage extracted from the Government Order no.812-HME of 2015 dated 18th December 2015, is that a similarly situated person as the petitioner, namely, Dr Mohammad Younis, had on the auspices of the order dated 2nd March 2012 passed by this Court n SWP no.373/2012, underwent DNB Course. The present petitioner was also beneficiary of the aforesaid order dated 18th December 2015, so he also underwent the DNB Course. After completion of three years tenure of DNB Course, Dr Mohammad Younis resumed his duties on 27th February 2015, so was the present petitioner. The matter for settlement of the period spent for undergoing the DNB Course qua Dr Mohammad Younis was initiated and processed, which culminated in issuance of Government Order no.812-HME of 2015 dated 18th December 2015, treating the period spent for undergoing DNB Course as 'on deputation'. Worth to be seen is that the respondents in the Government Order no.812-HME of 2015 dated 18th December 2015, indubitably admit and accept that approval has been conveyed for treating the period of PG/Super Specialist Medical Courses as 'on deputation' in favour of inservice doctors including some petitioners who have undergone and/or are undergoing such studies in various colleges. It was in view of the said policy decision that the period spent by similarly situated person, namely, Dr Mohammad Younis, has been treated as 'on deputation'. Having said so,

the present petitioner, therefore, cannot be discriminated and denied the benefit vouchsafed to similarly situated person, Dr Mohammad Younis. In that view of matter, the stand of the respondents that the period spent by the petitioner for undergoing DNB Course is to be decided by them separately as according to the respondents for the said period the petitioner had been unauthorizedly absent, could not withstand the test of fairness and therefore is pregnant with arbitrariness.

8. Be that as it may, the petitioner has made out a case for grant of the relief(s) implored for by him in the writ petition on hand. However, the above discourse needs to be overstretched.

9. It may not be out of place to mention here that the men's concept of the State as a polity or a political unit or entity and what the functions of the State are or should be, have changed over the years and particularly in the course of this century. A man cannot tenaciously cling to the same ideas and concepts all his life. As Emerson said in his essay on "Self-Reliance", "*A foolish consistency is the hobgoblin of little minds*". Man is by nature ever restless, ever discontent, ever seeking something new, ever dissatisfied with what he has. This inherent trait in the nature of man is reflected in the society in which he lives for a society is a conglomerate of men who live in it. Just as man by nature is dissatisfied, so is society. Just as man seeks something new, ever hoping that a change will bring about something

better, so does society. Old values, old ideologies and old systems are thus replaced by new ideologies, a new set of values and a new system; they in their turn to be replaced by different ideologies, different values and a different system. The ideas that seem revolutionary become outmoded with the passage of time and the heresies of today become the dogmas of tomorrow. What proves to be adequate and suited to the needs of a society at a given time and in particular circumstances turns out to be wholly unsuited and inadequate in different times and under different circumstances.

10. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have flourished, reached their peak and passed away. In the year 1625, *Carew, C.J.*, while delivering the opinion of the House of Lords in ***Re the Earldom of Oxford, (1625) W. Jo. 96, 101 SC (1626) 82 E.R. 50, 53***, in a dispute relating to the descent of that *Earldom*, said:

> "….and yet time hath his revolution, there must be a period and an end of all temporal things, *finis rerum*, an end of names and dignities, and whatsoever is terrene…."

11. The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from "The Rock" said:

> "O Perpetual revolution of configured stars,
> O Perpetual recurrence of determined seasons,

O world of spring and autumn, birth and dying!
The endless cycle of idea and action, endless invention,
endless experiment".

12. The law exists to serve the needs of the society, which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, *Sydney Smith*, said, "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society.

13. I would like to quote the following passage, which has become a classic, from the opening paragraph of *Justice Oliver Wendell Holmes's* "*The Common Law*", which contains the lectures delivered by him while teaching law at *Harvard* and which book was published in 1881 just one year before he was appointed an *Associate Justice of the Massachusetts Supreme Judicial Court*:

> "It is something to show that the consistency of a system requires a particular result, but it is not all. me life of the law has not been logic : it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

14. I now turn to the plea of the learned counsel for the respondents that once the petitioner accepted and acted upon the terms and conditions of the communication no.HME/HRM/56/2015 dated 15th October, 2015, by which the unauthorized period has been ordered to be decided separately, he is estopped to challenge the same. To this, the learned counsel for the petitioner has strenuously argued, and rightly so, that by virtue of the superior

position of the respondents vis-à-vis the petitioner, he was made to comply the communication dated 15th October 2015, inasmuch as the petitioner had no option but to kneel down before the respondents. His further submission is that the parties did not stand on an equal footing and did not enjoy the same bargaining power, and that the power used and utilized by the respondents was arbitrary and uncanalized. The learned counsel for the petitioner, to buttress his submissions, has taken this Court through some paragraphs of the judgment of the Supreme Court in the case of ***Central Inland Water Transport*** (supra), wherein the Supreme Court has accepted the position that certain regulations made by employers need to be struck down, being a reflection of unequal bargaining powers. This position was reiterated by the Supreme Court in the case of ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others JT 1990 (3) 725***.

15. The general rule as stated by ***Willes, J.,*** in ***Pickering v. Ilfracombe Ry. Co., [1868] L.R. 3 C.P. 235*** *(at page 250)* is as follows:

> "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good".

16. Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to

public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a court in any other country been pointed out to us. The word "*unconscionable*" is defined in the *Shorter Oxford English Dictionary, Third Edition, Volume II, page 2288*, when used with reference to actions etc. as "*showing no regard for conscience; irreconcilable with what is right or reasonable*". An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable.

17. Although certain types of contracts were illegal or void, as the case may be, at Common Law, for instance, those contrary to public policy or to commit a legal wrong such as a crime or a tort, the general rule was of freedom of contract. This rule was given full play in the nineteenth century on the ground that the parties were the best judges of their own interests, and if they freely and voluntarily entered into a contract the only function of the court was to enforce it. It was considered immaterial that one party was economically in a stronger bargaining position than the other; and if such a party introduced qualifications and exceptions to his liability in clauses which are today known as "*exemption clauses*" and the other party accepted them, then full effect would be given to what the parties agreed. Equity, however, interfered in many cases of harsh or unconscionable bargains, such as, in the law relating to

penalties, forfeitures and mortgages. It also interfered to asset aside harsh or unconscionable contracts for salvage services rendered to a vessel in distress, or unconscionable contracts with expectant heirs in which a person, usually a money-lender, gave ready cash to the heir in return for the property which he expects to inherit and, thus, to get such property at a gross undervalue. It also interfered with harsh or unconscionable contracts entered into with poor and ignorant persons who had not received independent advice [See: *Chitty on Contracts, Twenty-Fifth Edition, Volume I, paragraphs 4 and 516*].

18. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.

19. In *Lingappa Pochanna Appelwar v. State of Maharashtra (1985) 1 SCC 479*, the Supreme Court said that the Legislators, Judges and administrators are now familiar with the concept of distributive justice. Our Constitution permits and even directs the State to administer what may be termed "distributive justice". The concept of distributive justice in the sphere of law-making connotes, *inter alia*, the removal of economic inequalities and rectifying the

injustice resulting from dealings or transactions between unequals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: 'From each according to his capacity, to each according to his needs'. Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct A regulation of contractual transactions by forbidding certain transactions and, perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society or there may be legislative control of unfair agreements.

20. When our Constitution states that it is being enacted in order to give to all the citizens of India "*Justice, social, economic and political*", when clause (1) of Article 38 of the Constitution directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which the social, economic and political justice shall inform all the institutions of the national life, when clause (2) of Article 38 directs the State, in particular, to minimize the

inequalities in income, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations, and when Article 39 enjoins upon the State that it shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and that there should be equal pay for equal work for both men and women, it is the doctrine of distributive justice which is speaking through these words of the Constitution.

21. Yet another theory which has made its emergence in recent years in the sphere of the administrative laws is the test of reasonableness or fairness of a clause in the administrative matters where there is inequality of bargaining power. ***Lord Denning***, ***M.R.***, appears to have been the propounder, and perhaps the originator – at least in England, of this theory. In ***Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd., [1973] 1 Q.B. 400***, Lord Denning said:

> "The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago :
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> 'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused' : *John Lee & Son (Grantham) Ltd. v. Railway Executive [1949] 2 All. E.R. 581, 584.* It will not allow a

party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."

22. It was in ***Lloyds Bank Ltd. v. Bundy, [1974] 3 All E.R. 757*** that ***Lord Denning*** first clearly enunciated his theory of "*inequality of bargaining power*". He began his discussion on this part of the case by stating:

> "There are cases in our books in which the courts will set aside a contract. Or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power such as to merit and intervention of the court."

23. He then referred to various categories of cases and ultimately deduced therefrom a general principle in these words:

> "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. **One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself**. Again, I do not mean to suggest that every transaction is saved by

> independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases." (Emphasis supplied)

24. From the above what is derivative is that should our Courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the Courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "*uphold the Constitution and the laws*". The Constitution was enacted to secure to all the citizens of this great Country social and economic justice. Article 14 of the Constitution guarantees to all the persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract or unfair and unreasonable act of the

employer upon the employees, who are not equal in bargaining power.

25. By a hair's breadth ever has the voice of the timorous spoken more clearly and loudly than in the words of *Lord Davey* in ***Janson v. Uriefontein Consolidated Mines Limited [1902] A.C. 484, 500*** "*Public policy is always an unsafe and treacherous ground for legal decision.*" That was in the year 1902. Seventy-eight years earlier, *Burrough, J.*, in ***Richardson v. Mellish, [1824] 2 Bing. 229, 252; s.c. 130 E.R. 294, 303 and [1824-34] All E.R. Reprint 258, 266***, described public policy as "*a very unruly horse, and when once you get astride it you never know where it will carry you.*" The Master of the Rolls, ***Lord Denning***, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young *Alexander the Great Taming Bucephalus*, he said in ***Enderyby Town Football Club Ltd. v. Football Association Ltd., [1971] Ch. 591, 606***, "*With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.*" Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. *Sir William Holdsworth* in his "*History of English Law*", *Volume III, page 55*, has said:

> "In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of

> public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

26. It is thus clear that the principles governing the public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of the public policy which covers a case, then the court must in consonance with the public conscience and in keeping with the public good and public interest declare such practice to be opposed to the public policy. Above all, in deciding any case which may not be covered by the authority, our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

27. So far as the original terms of the employment, in the present case vis-à-vis the services of the petitioner with the respondent department, are concerned, they are governed and regulated by the J&K Civil Service Regulations, 1956, and J&K Civil Services (Classification, Control and Appeal) Rules, 1956. If an employee disobeys the Service Rules or displays negligence, inefficiency or insubordination or does anything detrimental to the interests or prestige of the employee or acts in conflict with the official instructions or is guilty of misconduct, such employee is liable to

disciplinary action as contemplated under the Rules and Regulations in vogue. The respondents' submission that the petitioner was allowed to rejoin the respondent department subject to deciding the period of unauthorized absence, is specious inasmuch as the respondents have already decided an identical case vis-à-vis similarly situated person, namely, Dr Mohammad Younis, and the respondents cannot be heard saying that Dr Mohammad Younis belongs to a distinct and a superior class, creed, descent, place of birth or residence or any of them.

28. Qua accepting and acting upon the communication no.HME / HRM/56/2015 dated 15th October 2015, whereby it was ordered that the unauthorized period would be decided separately, undoubtedly, the petitioner accepted the terms and conditions contained in the said communication. He had, however, no real choice before him. Had he not accepted the conditions of the aforesaid communication dated 15th October 2015, he would have been the ultimate sufferer and the same would certainly have exposed him to the hazard of finding another job.

29. The learned counsel for the respondents has insisted that once petitioner has acted upon the communication no.HME/HRM/56/2015 dated 15th October 2015, by joining the services, he is estopped in law to turnaround and reagitate the matter and this Court, therefore, cannot interfere with it. It is not possible for me to equate employees with goods, which can be bought and sold. It is

equally not possible for me to equate a contract of employment with a mercantile transaction between two businessmen and muchless to do so when the contract of employment is between a powerful employer and a weak employee. The actions of the State and its functionaries must be inconformity with Article 14 of the Constitution. The progression of the judicial concept of Article 14 from a prohibition against discriminatory class legislation to an invalidating factor for any discriminatory or arbitrary State action has been traced in ***Union of India v. Tulsiram Patel (1985) SCC 398***. The principles of natural justice have now come to be recognized as being a part of the Constitutional guarantee contained in Article 14. In ***Tulsiram Patel's*** case the Supreme Court said:

> "The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that Article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the same as discrimination; where discrimination is the result of State action, it is violation of Article 14; therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of 'State' in Article 12, is charged with the duty of deciding a matter."

30. Nevertheless, in the context of the unequal bargaining power of the respondent department qua the petitioner, who was desperate for salary, the condition contained in the communication no.HME/HRM/56/2015 dated 15th

October 2015, qua deciding the unauthorized absence separately, through unequal bargaining power is nothing but an unconscionable covenant, forced by the respondent State on a person (petitioner) who hardly had any strength to resist the might of the respondent department. In fact, the petitioner had practically no choice in the matter and had to relinquish his claim for the period he underwent DNB Course. This type of covenant cannot be said to be right or reasonable and amounts to unconscionable contract, as has been held by the Supreme Court in the case of ***Central Inland Water Transport Corpn Ltd. V. Brojo Nath Ganguly*** (supra). The act of the respondents not granting and giving him the same benefit as has been bestowed to similarly situated person, namely, Dr Mohammad Younis, violates the Constitutional rights guaranteed to the petitioner. It is not only in cases to which Article 14 applies that the rules of natural justice come into play. As pointed out in ***Tulsiram Patel's*** case (supra), "*The principles of natural justice are not the creation of Article 14. Article 14 is not their begetter but their constitutional guardian.*" That case has traced in some detail the genesis and development of the concept of the principles of natural justice and of the *audi alteram partem* rule. They apply in diverse situations and not only to cases of State action. As pointed out by *O. Chinnappa Reddy, J.*, in ***Swadeshi Cotton Mills v. Union of India AIR 1981 SC 818***, they are implicit in every decision-making function, whether judicial or

quasi-judicial or administrative. Indubitably, in certain circumstances the principles of natural justice can be modified and, in exceptional cases, can even be excluded as pointed out in ***Tulsiram Patel's*** case (supra).

31. Taking the foregoing discussion, observations and reasons together, the writ petition is allowed. The respondents are directed to treat the period undergone in training as on deputation as has been done in case of Dr Mohammad Younis vide Government Order no.812-HME of 2015 dated 18th December 2015 and give the petitioner all the service benefits for the said period, to which he is entitled to.

32. **Disposed of.**

(M. K. Hanjura)
Judge

Srinagar
26.06.2018
Ajaz Ahmad