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The Commissioner of Income-tax, Bombay City II v. Shakuntala and two others, etc.

consideration. The result, therefore, is that all these three appeals fail and must be dismissed with costs; one hearing fee.

Appeals dismissed.

S. K. Das J.

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July, 24.

SETH BIKHRAJ JAIPURIA

v.

UNION OF INDIA

(J. L. KAPUR, K. SUBBA RAO, M. HIDAYATULLAH, J. C. SHAH and RAGHUBAR DAYAL, JJ.)

Contract—Divisional Superintendent of Railway placing orders—Contract not expressed to be in name of Governor-General and not executed on behalf of Governor-General—Whether binding on Government—Government of India Act, 1935 (26 Geo. 6 Ch. 2) s. 175 (3).

In the year 1913 the Divisional Superintendent, East Indian Railway placed certain purchase orders with the appellant for the supply of foodgrains for the employees of the East Indian Railway. The orders were not expressed to be made in the name of the Governor-General and were not executed on behalf of the Governor-General as required by s. 175 (3) of the Government of India Act, 1935. They were signed by the Divisional Superintendent either in his own hand or in the hand of his Personal Assistant. Some deliveries of foodgrains were made under these orders and were accepted and paid for by the Railway Administration. But the Railway Administration declined to accept further deliveries of foodgrains. The appellant sold the balance of foodgrains under the purchase orders and filed a suit to recover the difference between the price realised by sale and the contract price. The respondent resisted the suit *inter alia* on the ground that the contracts were not binding on it.

Held, that the contracts were not binding on the respondent and it was not liable for damages for breach of the contracts. Under s.175(3) of the Government of India Act, 1935, as it stood at the relevant time, the contracts had: (a) to be expressed to be made by the Governor-General, (b) to be executed on behalf of the Governor-General and (c) to be executed by officers duly appointed in that behalf and in such manner as the Governor-General directed or authorised. The

authority to a person to execute contracts may be conferred not only by rules expressly framed and by formal notifications issued in this behalf but may also be specially conferred. The evidence in the case showed that such authority was specially conferred upon the Divisional Superintendent. But the contracts were not expressed to be made by the Governor-General and were not executed on his behalf. The provisions of s. 175(3) were mandatory. The object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts and hence it was provided that the contracts must show on their face that they were made by the Governor-General and executed on his behalf in the manner prescribed by the person authorised.

State of Bihar v. *M/s. Karam Chand Thapar and Bros., Ltd.* (1962) 1 S. C. R. 827, followed.

Liverpool Borough Bank v. *Turner*, (1861) 30 L. J. Ch. 379, *Municipal Corporation of Bombay* v. *Secretary of State*, I. L. R. (1905) 29 Bom. 580, *Kessoram Poddar and Co.*, v. *Secretary of State for India*, I. L. R. (1927) 54 Cal. 969, *S. C. Mitra and Co.*, v. *Governor-General of India in Council*, I.L.R. (1950) 2 Cal. 431, *Secretary of State* v. *Yadavgir Dharamgir*, I. L. R. (1936) 60 Bom. 42, *Secretary of State* v. *G.T. Sarin and Co.*, I. L. R. (1930) 11 Lah. 375, *U. P. Government* v. *Lal Nanhoo Mal Gupta*, A. I. R. (1960) All. 420, and *Devi Prasad Sri Krishna Prasad Ltd.* v. *Secretary of State*, I. L. R. (1941) All. 741, referred to.

S. K. Sen v. *Provincial P. W. D., State of Bihar*, A. I. R. (1960) Pat., *Chatturbhuj Vithaldas Jasani* v. *Morashwar Prashram*, (1954) S. C. R. 817, *J. K. Gas Plant Mfg., Co. (Rampur) Ltd.* v. *King Emperor*, (1947) F. C. R. 141, *Moreshwar Pangarkar* v. *State of Bombay*, (1952) S. C. R. 612, *State of Bombay* v. *Purshottam Jog Naik* (1952) S. C. R. 674 and *State of U.P.* v. *Manbodhan Lal Srivastava*, (1958) S. C. R. 533, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 86 of 1959.

Appeal by special leave from the judgment and order dated March 27, 1957, of the Patna High Court in Appeal from Original Decree No. 359 of 1948.

A. V. Viswanatha Sastri and *S. P. Varma*, for the appellant.

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H. N. Sanyal, Additional Solicitor-General of India, R. Ganapathy Iyer and *T. M. Sen,* for the respondent.

1961. July, 24. The Judgment of the Court was delivered by

Shah J.

SHAH, J. Bikhraj Jaipuria—hereinafter called the appellant—is the sole proprietor of a grocery business conducted in the name and style of "Rajaram Vijai Kumar" in the town of Arrah in the State of Bihar. In the months of July and August, 1943, the Divisional Superintendent, East Indian Railway under three "purchase orders" agreed to buy and the appellant agreed to sell certain quantities of food grains for the employees of the East Indian Railway.

The following table sets out the purchase prices, the commodities, the dates of purchase orders, the quantities and the rates and the method of supply.

Purchase Order No.	Date of purchase orders.	Kinds of commodity.	Quantity of commodities.	Rates.
(1)	(2)	(3)	(4)	(5)
69.	20-7-1943.	Gram 1st quality.	1000 mds.	@ Rs. 15/- per md. (plus cost of new bags not exceeding Rs. 75/- per 100 bags) F.O.R. any E.I.Rly. station in Bihar.
76.	24-7-1943.	Rice Dhenki Medium quality.	1000 mds.	@ Rs. 22-8-0 (plus cost of bags not exceeding Rs.75

(1)	(2)	(3)	(4)	(5)
				per cent) per md. F.O.R. any station on the division.
		ii. Wheat white as per sample.	5000 mds.	@ Rs. 20-8-0 per md. with bags F.O.R. any station on E.I.R. on the Division.
106.	24-8-1943.	Rice medium quality.	15000 mds.	@ Rs. 24/- per md. without bags F.O.R. E.I. Rly. station in Bihar.

Purchase orders Nos. 69 and 76 were signed by S.C. Ribbins, Personal Assistant to the Divisional Superintendent and purchase order No. 106 was signed by the Divisional Superintendent. Under the purchase orders delivery of grains was to commence within seven days of acceptance and was to be completed within one month. The appellant delivered diverse quantities of foodgrains from time to time but was unable fully to perform the contracts within the period stipulated. Between July 20, 1943 and August 24, 1943, he supplied 3465 maunds of rice and between September 1, 1943 and September 19, 1943 he supplied 1152 maunds 35 seers of wheat. In exercise of the powers conferred by cl.(b) of Sub-r. (2) of r.81 of the Defence of India Rules, the Government of Bihar by notification No. 12691-P.C. dated September 16, 1943 directed that commodities named in column 1 of the schedule shall not, from and including September 20, 1943 and until further notice, be sold at any primary source of supply or by the proprietor, manager or employee of any mill in the Province of Bihar at prices exceeding those

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specified in the second column of the schedule. The controlled rate of rice (medium) was Rs. 18/- per standard maund, of wheat (red) Rs. 17/-, of wheat (white) Rs. 18/- and of gram Rs. 12-8-0. The Sub-Divisional Magistrate, District Arrah issued on September 21, 1943, a price-list of controlled articles fixing the same prices as were fixed for wheat, rice and gram by the notification issued by the Government of Bihar. By cl.(2) of the notification, a warning was issued that in the event of the dealers selling controlled articles at rates exceeding those fixed or with-holding stocks of such articles from sale, "they will be liable to prosecution under r.81(1) of the Defence of India Rules."

By a telegraphic communication dated September 28, 1943, the Divisional Superintendent informed the appellant that under the purchase orders, foodgrains tendered for delivery will not, unless despatched before October 1, 1943, be accepted, and barring a consignment of 637 maunds 20 seers accepted on October 7, 1943, the Railway Administration declined to accept delivery of food grains offered to be supplied by the appellant after October 1, 1943. The appellant served a notice upon the Divisional Superintendent complaining of breach of contract and sold between February 18 and February 23, 1944 the balance of foodgrains under the purchase orders which were lying either at the various railway stations or in his own godowns. The appellant then called upon the Railway Administration to pay the difference between the price realised by sale and the contract price and failing to obtain satisfaction, commenced an action (Suit No. 359/48A) in the court of the First Additional Subordinate Judge, Patna for a decree for Rs. 2,89,995-15-3 against the Dominion of India. The appellant claimed Rs. 2,32,665-12-0 being the difference between the contract price and the price realised, Rs.42,709-10-3 as interest and Rs. 14,620-9-0 as freight, wharf-

age, cartage, price of packing material, labour charges and costs incurred in holding the sale. The appellant submitted that under the terms of the purchase orders, supply was to commence within seven days of the date of receipt of the orders and was to be completed within one month, but it was not intended that time should be of the essence of the contract, and in the alternative that the Railway Administration had waived the stipulation as to time in the performance of the contracts and therefore he was entitled, the Railway Administration having committed breach of the contracts, to recover as compensation the difference between the contract price and the price for which the grains were sold. The suit was resisted by the Dominion of India contending *inter alia* that the appellant had no cause of action for the claim in the suit, that the contracts between the appellant and the Divisional Superintendent, Dinapur were not valid and binding upon the Government of India and that the contracts were liable to be avoided by the Government, that time was of the essence of the contracts, that stipulations as to time were not waived, and that no breach of contract was committed by the East Indian Railway Administration and in any event, the appellant had not suffered any loss as a result of such breach. By the written statement, it was admitted that the East Indian Railway through the Divisional Superintendent, Dinapur had by three orders set out in the plaint agreed to buy and the appellant had agreed to sell the commodities specified therein, but it was denied that the Divisional Superintendent had been "given complete authority to enter into contracts for the supply of foodgrains."

The trial court held that time was not of the essence of the contracts and even if it was, breach of the stipulation in that behalf was waived. It further held that the plea that the contracts were void because they were not in accordance with the

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provisions of s. 175 (3) of the Government of India Act, 1935, could not be permitted to be urged, no such plea having been raised by the written statement. Holding that the Divisional Superintendent was authorised to enter into the contracts for purchase of foodgrains, and that he had committed breach of contract, the trial Judge awarded to the appellant Rs. 1,29,460-7-0 with interest thereon at the rate of 6% per annum from October 1, 1943, to the date of the institution of the suit and further interest at 6% on judgment. Against that decree, an appeal was preferred by the Union of India to the High Court of Judicature at Patna and the appellant filed cross-objections to the decree appealed from. The High Court held that time was of the essence of the contracts, but the Railway Administration having accepted the goods tendered after the expiration of the period prescribed thereby, the stipulation as to time was waived. The High Court further held that by the notification under r. 81 of the Defence of India Rules, performance of the contracts had not been rendered illegal but the Divisional Superintendent had no authority to enter into contracts to purchase food grains on behalf of the Railway Administration and that in any event, the contracts not having been expressed to be made by the Governor-General and not having been executed on behalf of the Governor-General by an officer duly appointed in that behalf and in manner prescribed, the contracts were unenforceable. The High Court also held that the appellant was not entitled to a decree for compensation because he had failed to prove the ruling market rate on the date of breach viz, October 1, 1943. The High Court also observed that the trial court erred in awarding interest prior to the date of the suit and in so holding, relied upon the judgment of the Privy Council in *Bengal Nagpur Railway Co., Ltd.* v. *Ruttanji Ramji and others* (1).

(1) L. R. (1938) 65 I. A. 66.

In this appeal by the appellant, two questions fall to be determined, (1) whether relying upon the purchase orders signed by the Divisional Superintendent which were not made and executed in the manner prescribed by s.175 (3) of the Government of India Act 1935, the appellant could sue the Dominion of India for compensation for breach of contract, and (2) whether the appellant has proved the ruling market rate on October 1, 1943 for the commodities in question.

The finding that the Railway Administration had waived the stipulation as to the performance of the contracts within the time prescribed though time was under the agreement of the essence, is not challenged before us on behalf of the Union of India. If the finding as to waiver is correct, manifestly by his telegraphic intimation dated September 28, 1943, that the foodgrains not despatched before October 1, 1943, will not be accepted the Divisional Superintendent committed a breach of the contract.

Section 175 (3) of the Government of India Act as in force at the material time provided :

"Subject to the provisions of this Act, with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

The Federal Railway Authority had not come into being in the year 1943: it was in fact never set up. The contracts for the supply of foodgrains were undoubtedly made in the exercise of executive

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authority of the Federation. The contracts had therefore under s. 175(3), (a) to be expressed to be made by the Governor-General, (b) to be executed on behalf of the Governor-General, and (c) to be executed by officers duly appointed in that behalf and in such manner as the Governor-General may direct or authorise. But no formal contracts were executed for the supply of foodgrains by the appellant : he had merely offered to supply foodgrains by letters addressed to the Divisional Superintendent and that officer had by what are called "purchase orders" accepted those offers. These purchase orders were not expressed to be made in the name of the Governor-General and were not executed on behalf of the Governor-General. The purchase orders were signed by the Divisional Superintendent either in his own hand or in the hand of his Personal Assistant. In the first instance, it has to be considered whether the Divisional Superintendent had authority to contract on behalf of the Railway Administration for buying foodgrains required by the Railway Administration. By Ex.M-2 which was in operation at the material time, all instruments relating to purchase or hire, supply and conveyance of materials, stores, machinery, plant, telephone lines and connections, coal etc. could be executed amongst others by the Divisional Superintendent; but contracts relating to purchase of foodgrains are not covered by that authority. Under item 34 which is the residuary item, all deeds and instruments relating to railway matters other than those specified in items 1 to 33 may be executed by the Secretary of the Railway Board. It is common ground that there is no other item which specifically authorises the making and execution of contracts relating to purchase of foodgrains; deeds and instruments relating to purchase of foodgrains therefore fall within item 34. The Secretary to the Railway Board had not executed these purchase orders : but the trial Court held

that the Divisional Superintendent was authorised to enter into contracts with the appellant for the supply of foodgrains. In so holding, the trial judge relied upon the evidence of Ribbins, Grain Supply Officer and Personal Assistant to the Divisional Superintendent, Dinapur. The High Court disagreed with that view. The High Court observed that the authority of the officer acting on behalf of the Governor-General "must be deduced from the express words of the Governor-General himself expressed by rules framed or by notification issued, under s. 175(3). No notification has been produced in this case showing that the Divisional Superintendent had been authorised by the Governor-General to execute such contracts on his behalf, nor has any rule been produced which conferred authority upon the Divisional Superintendent to make such contracts."

After referring to paragraph 10 of the notification, Ex. M-2 items 1 to 34, the High Court observed:

"Therefore this notification rather shows that the Divisional Superintendent had no authority to execute the contracts for the purchase of food grains."

In our view, the High Court was in error in holding that the authority under s. 175(3) of the Government of India Act, 1935 to execute the contract could only be granted by the Governor-General by rules expressly promulgated in that behalf or by formal notifications. This court has recently held that special authority may validly be given in respect of a particular contract or contracts by the Governor to an officer other than the officer notified under the rules made under s. 175(3). In *The State of Bihar* v. *M/s. Karam Chand Thapar and Brothers Ltd.*(1), Venkatarama Aiyar J. speaking for the court observed:

(1) (1962) 1 S.C.R. 827.

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"It was further argued for the appellant that there being a Government notification of a formal character, we should not travel outside it and find authority in a person who is not authorised thereunder. But s. 175 (3) does not prescribe any particular mode in which authority must be conferred. Normally, no doubt, such conferment will be by notification in the Official Gazette, but there is nothing in the section itself to preclude authorisation being conferred *ad hoc* on any person, and when that is established, the requirements of the section must be held to be satisfied."

In that case, an agreement to refer to arbitration on behalf of the Government of Bihar was executed by the Executive Engineer whereas by the notification issued by the Government of Bihar under s.175 (3) all instruments in that behalf had to be executed by the Secretary or the Joint Secretary to the Government. This Court on a consideration of the correspondence produced in the case agreed with the High Court that the Executive Engineer had been specially authorised by the Governor acting through his Secretary to execute the agreement for reference to arbitration. Section 175 (3) in terms does not provide that the direction or authority given by the Governor-General or the Governor to a person to execute contracts shall be given only by rules or by notifications, and the High Court was in our judgment in error in assuming that such authority can be given only by rules expressly framed or by formal notifications issued in that behalf.

In para 5 of the plaint, the appellant pleaded:

"That for the purposes and under the authority conferred as noted in the para 3 above in July and August, 1943 the said E. I. Rly. through its then Divisional Superintendent, Dinapur, by three diverse orders agreed to buy and the plaintiff agreed to sell the following commodities at the rates mentioned against them.

By para 3 of the written statement, the Dominion of India accepted the allegations made in para 5 of the plaint. It is true that by paragraph 1, the authority of the Divisional Superintendent to enter into contract with trading firms dealing in foodgrains for the supply of foodgrains was denied and it was further denied that the Divisional Superintendent "was invested with complete authority to enter into contracts for the purchase of food supplies and to do all that was necessary in that connection." There was some inconsistency between the averments made in paragraphs 1 and 3 of the written statement, but there is no dispute that the purchase orders were issued by the Divisional Superintendent for and on behalf of the East Indian Railway Administration. Pursuant to these purchase orders, a large quantity of foodgrains was tendered by the appellant: these were accepted by the Railway Administration and payments were made to the appellant for the grains supplied. Employees of the Railway Administration wrote letters to the appellant calling upon him to intimate the names of the railway stations where grains will be delivered and about the date when the supply will commence. They fixed programmes for inspection of the goods, kept wagons ready for accepting delivery, held meetings on diverse occasions for settling programmes for the supply of grains, rejected grains which were not according to the contract, entered into correspondence with the appellant about the return of empty bags accepted bills and railway receipts and made payments, returned certain bills in respect of the grains tendered beyond the period of contract and did diverse other acts in respect of the goods which could only be consistent with the contracts having been made with the authority of the Railway Administration granted to the Divisional Superintendent. There is also the evidence of Ribbins which clearly supports the view that the agreements to purchase foodgrains by the Divisional

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Superintendent were part of a scheme devised by the Railway Administration at the time of the serious famine in 1943 in Bengal. In cross-examination, Ribbins stated:

"When the Bengal famine arose in April-May 1943, the (necessity for a scheme of) arrangement of supplying foodgrains to E. I. Railway employees arose...A scheme was drawn up for carrying out this work in writing. In other words orders were received from Head Office Calcutta about it. The Deputy General Manager, Grains, Calcutta issued the necessary orders...The agent or General Manager as he is called appropriated the above functionary. He must have done so presumably under orders...The entire scheme did subsequently get the assent of the Railway Board. From time to time order came with instruction from Head Office. All such directions should be in the office of D. Supdt., Dinapur. Some posts had to be created for carrying out this scheme. Originally one post of Asstt. Grain Supply Officer was created. Subsequently, two posts were created one on a senior scale and the other as Asstt. in Dinapur Dv. staff had to be appointed to be in charge of the grain shops. They were exclusively appointed to work the grain shop organisation. The Railway made some arrangement in some places for accommodation and additional storage...Grain shops were located at these places when accommodation was made for additional storage."

Ribbins was for some time a Grain Supply Officer under the East Indian Railway and he admitted that orders similar to the purchase orders in question in this litigation were drawn up in cyclostyled forms "as per orders from the Head Office." The witness stated that the instructions of the Head Office were "in the office file". None of these documents were, however, produced or tendered in evidence by the Railway Administration.

The evidence on the whole establishes that with a view to effectuate the scheme devised by the Railway Board for distributing foodgrains to their employees at concessional rates, arrangements were made for procuring foodgrains. This scheme received the approval of the Railway Board and Railway Officers were authorised to purchase, transport and distribute foodgrains. If, in the implementation of the scheme, the foodgrains were received by the Railway Administration, special wagons were provided and goods were carried to different places and distributed and payments were made for the foodgrains received by the Railway Administration after testing the supplies, the inference is inevitable that the Divisional Superintendent who issued the purchase orders acted with authority specially granted to him. The evidence of Ribbins supported by abundant documentary evidence establishes beyond doubt that the Divisional Superintendent though not expressly authorised by the notification Ex. M-2 to contract for the purchase of foodgrains, was specially authorised to enter into these contracts for the purchase of foodgrains.

The question still remains whether the purchase orders executed by the Divisional Superintendent but which were not expressed to be made by the Governor-General and were not executed on behalf of the Governor-General, were binding on the Government of India. Section 175(3) plainly requires that contracts on behalf of the Government of India shall be executed in the form prescribed thereby ; the section however does not set out the consequences of non-compliance. Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the

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object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity : if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed in Maxwell on Interpretation of Statutes 10th Edition p. 376 :

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequences in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded."

Lord Campbell in *Liverpool Borough Bank* v. *Turner*(1) observed :

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullfication for disobedience. It is the duty of Court of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

It is clear that the Parliament intended in enacting the provision contained in s. 175(3) that

(1) (1861) 30 L. J. Ch. 379.

the State should not be saddled with liability for unauthorised contracts and with that object provided that the contracts must show on their face that they are made on behalf of the State, i. e., by the Head of the State and executed on his behalf and in the manner prescribed by the person authorised. The provision, it appears, is enacted in the public interest, and invests public servants with authority to bind the State by contractual obligations incurred for the purposes of the State.

It is in the interest of the public that the question whether a binding contract has been made between the State and a private individual should not be left open to dispute and litigation; and that is why the legislature appears to have made a provision that the contract must be in writing and must on its face show that it is executed for and on behalf of the head of the State and in the manner prescribed. The whole aim and object of the legislature in conferring powers upon the head of the State would be defeated if in the case of a contract which is in form ambiguous, disputes are permitted to be raised whether the contract was intended to be made for and on behalf of the State or on behalf of the person making the contract. This consideration by itself would be sufficient to imply a prohibition against a contract being effectively made otherwise than in the manner prescribed. It is true that in some cases, hardship may result to a person not conversant with the law who enters into a contract in a form other than the one prescribed by law. It also happens that the Government contracts are sometimes made in disregard of the forms prescribed; but that would not in our judgment be a ground for holding that departure from a provision which is mandatory and at the same time salutary may be permitted.

There is a large body of judicial opinion in the High Courts in India on the question whether

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contracts not in form prescribed by the Constitution Acts are binding upon the State. The view has been consistently expressed that the provisions under the successive Constitution Acts relating to the form of contract between the Government and the private individual are mandatory and not merely directory.

In *Municipal Corporation of Bombay* v. *Secretary of State* (1), the true effect of s. 1 of St. 22 and 23 Vic. c. 41 fell to be determined. The Governor-General of India in Council and the Governors in Council and officers for the time being entrusted with the Government were, subject to restrictions prescribed by the Secretary of State in Council, empowered to sell and dispose of real and personal estate vested in Her Majesty and to raise money on such estate and also to enter into contracts within the respective limits for the purposes of the Act. It was provided that the Secretary of State in Council may be named as a party to such deed, contract, or instrument and the same must be expressed to be made on behalf of the Secretary of State in Council by or by the order of the Governor-General in Council or Governor in Council, but may be executed in other respects in like manner as other instruments executed by or on behalf of him or them respectively in his or their official capacity, and may be enforced by or against the Secretary of State in Council for the time being. In a suit between the Government of Bombay and the Municipal Corporation of Bombay, the latter claimed that it was entitled to remain in occupation on payment of a nominal rent, of an extensive piece of land because of a resolution passed by the Government of Bombay sanctioning such user. Jenkins C. J. in delivering the judgement of the Court observed :

"I think that a disposition in 1865 of Crown

(1) I. L. R. (1905) 29 Bom. 580.

lands by the Governor in Council was dependent for its validity on an adherence to the forms prescribed, and that therefore the Resolution was not a valid disposition of the property for the interest claimed."

In *Kessoram Poddar and Co.* v. *Secretary of State for India* (1), it was held that in order that a contract may be binding on the Secretary of State in Council, it must be made in strict conformity with the provisions laid down in the statute governing the matter and if it is not so made, it is not valid as against him.

The same view was expressed in *S. C. Mitra and Co.* v. *Governor-General of India in Council* (2), *Secretary of State* v. *Yadavgir Dharamgir* (3), *Secretary of State and another* v. *G. T. Sarin and Company* (4), *U. P. Government* v. *Lala Nanhoo Mal Gupta* (5), *Devi Prasad Sri Krishna Prasad Ltd.* v. *Secretary of State* (6), and in *S. K. Sen* v. *Provincial P. W. D. State of Bihar* (7).

But Mr. Viswanatha Sastri on behalf of the appellant contended that this court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram* (8) has held that a contract for the supply of goods to the Government which is not in the form prescribed by Art. 299 (1) of the Constitution (which is substantially the same form as s. 175 (3) of the Government of India Act, 1935) is not void and unenforceable. In that case, the election of Chatturbhuj Jasani to the Parliament was challenged on the ground that he had a share or interest in a contract for the supply of goods to the Union Government. It was found that Jasani was partner of a firm which had entered into contracts with the Union Government for the supply of goods and these contracts subsisted on November 15, 1951 and

(1) I.L.R. (1927) 54 Cal. 969. (2) I.L R. (1950) 2 Cal. 431.
(3) I.L.R. (1936) 60 Bom. 42. (4) I.L.R. (1930) 11 Lah. 375.
(5) A.I.R. (1960) All. 420. (6) I.L.R. (1941) All. 741.
(7) A.I.R. (1960) Pat. 159. (8) (1954) S. C. R. 817.

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February 14, 1952 respectively the last date for filing nominations and the date of declaration of the results of the election. This court held that Jasani was disqualified from being elected by virtue of the disqualification set out in s. 7 (b) of the Representation of the People Act 43 of 1951. The contracts in that case were admittedly not in the form prescribed by Art. 299 (1) of the Constitution, and relying upon that circumstance, it was urged that the contracts were void and had in law no existence. In dealing with this plea, Bose J. speaking for the court observed :

"We feel that some reasonable meaning must be attached to article 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of the Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts, probably by far the greatest in numbers, which though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. If not, its interests are safeguarded as we think the Constitution intended that they should be."

The learned Judge also observed :

"It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form."

The rationale of the case in our judgment does not support the contention that a contract on behalf of a State not in the form prescribed is enforceable against the State. Bose J. expressly stated that the "Government may not be bound by the contract, but that is a very different thing from saying that the contract was void and of no effect, and that it only meant the principal (Government) could not be sued ; but there will be nothing to prevent ratification if it was for the benefit of the Government."

The facts proved in that case clearly establish that even though the contract was not in the form prescribed, the Government had accepted performance of the contract by the firm of which Jasani was a partner, and that in fact there subsisted a relation between the Government and the firm under which the goods were being supplied and accepted by the Government. The agreement between the parties could not in the case of dispute have been enforced at law, but it was still being carried out according to its terms : and the Court held that for the purpose of the Representation of the People Act, the existence of such an agreement which was being carried out in which Jasani was interested disqulified him. It was clearly so stated when Bose J. observed :

"Now section 7(d) of the Representation of the People Act does not require that the contracts at which it strikes should be enforceable against the Government ; all it requires is that the contracts should be for the supply of goods to the Government. The contracts in question are just that and so are hit by the section".

Reliance was also placed by counsel for the appellant upon cases decided under s.40 of the Government of India Act, 1915, which was continued in operation even after the repeal of the Act, 1915, by the 9th schedule to the Government of India

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Act, 1935. Section 40 prescribed the manner in which the business of the Governor-General in Council was to be conducted. It provided that all orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council and shall be signed by a Secretary to the Government of India or otherwise as the Governor-General in Council may direct and shall not be called in question in any legal proceeding on the ground that they were not duly made by the Governor-General in Council.

In *J.K. Gas Plant Manufacturing Co., (Rampur) Ltd.*, v. *King Emperor* (1), certain persons were accused of offences committed by them in contravention of cls. (5) and (8) of the Iron and Steel (Control of Distribution) Order, 1941, which order was not expressed to be made by the Governor-General in Council as required by s. 40(1) of the 9th schedule to the Constitution Act. The Federal Court held that the scope and purpose of the Act did not demand a construction giving a mandatory rather than a directory effect to the words in s. 40: for, in the first instance, the provision that all orders of the Governor-General in Council shall be expressed to be made by the Governor-General in Council did not define how orders were to be made but only how they are to be expressed; it implied that the process of making an order preceded and was something different from the expression of it. Secondly, it was observed, the provision was not confined to orders only and included proceedings and in the case of proceedings, it was still clearly a method of recording proceedings which had already taken place in the manner prescribed rather than any form in which the proceedings, must take place if they are valid. Thirdly, it was observed, that the provision relating to the signature by a Secretary to the Government of India or other person indicated that it was a provision as

(1) (1947) F.C.R. 141.

to the manner in which a previously made order should be embodied in publishable form, and it indicated that if the previous directions as to the expression of the order and proceedings and as to the signature were complied with, the order and proceedings shall not be called in question in a court of law on one ground only.

The rule contained in s. 40 (1) was in the view of the court one of evidence which dispensed with proof of the authority granted by the Governor-General in respect of orders or proceedings which complied with the requirements prescribed: the making of the order or the proceedings was independent of the form of the order or proceedings expressing it. But it cannot be said that the making of the contract is independent of the form in which it is executed. The document evidencing the contract is the sole repository of its terms and it is by the execution of the contract that the liability *ex contractu* of either party arises.

The principle of J. K. Gas Plant Manufacturing Co.'s case has therefore no application in the interpretation of s. 175 (3) of the Government of India Act, 1935.

Reliance was also placed upon *Dattatreya Moreshwar Pangarkar* v. *The State of Bombay* (1) and *The State of Bombay* v. *Purshottam Jog Naik* (2). In both these cases, orders made by the Government of Bombay under the Preventive Detention Act were challenged on the ground that the orders did not comply with the requirements of Art. 166 of the Constitution. Article 166 substantially prescribes the same rules for authentication of the orders of the Governor of a State as s. 40 to the 9th schedule of the Government of India Act, 1935 prescribed for the authentication of the orders of the Governor-General and the Governors. In the former case, this court observed that

(1) (1952) S.C.R. 612. (2) (1952) S.C.R. 674.

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the Preventive Detention Act contemplates and requires the taking of an executive decision for confirming a detention order under s. 11 (1) and omission to make and authenticate that decision in the form set out in Art. 166 will not make the decision itself illegal, for the provisions in that article are merely directory and not mandatory. In the latter case, an order which purported to have been made in the name of the Government of Bombay instead of the Governor of Bombay as required by Art. 166 was not regarded as defective and it was observed that in any event, it was open to the State Government to prove that such an order was validly made. The court in those cases therefore held that the provisions of Art. 166 are directory and not mandatory.

These cases proceed on substantially the same grounds on which the decision in *J. K. Gas Plant and Manufacturing Co.'s* case proceeded, and have no bearing on the interpretation of s. 175 (3) of the Government of India Act, 1935.

Reliance was also placed upon the *State of U.P.* v. *Manbodhan Lal Srivastava*(1) in which case this court held that the provisions of Art. 320 cl. (3) (c) of the Constitution relating to the consultation with the Public Service Commission before discharging a public servant are merely directory.

The fact that certain other provisions in the Constitution are regarded as merely directory and not mandatory, is no ground for holding that the provisions relating to the form of contracts are not mandatory. It may be said that the view that the provisions in the Constitution relating to the form of contracts on behalf of the Government are mandatory may involve hardship to the unwary. But a person who seeks to contract with the Government must be deemed to be fully aware of

(1) (1958) S.C.R. 533.

statutory requirements as to the form in which the contract is to be made. In any event, inadvertence of an officer of the State executing a contract in manner violative of the express statutory provision, the other contracting party acquiescing in such violation out of ignorance or negligence will not justify the court in not giving effect to the intention of the legislature, the provision having been made in the interest of the public. It must therefore be held that as the contract was not in the form required by the Government of India Act, 1935, it could not be enforced at the instance of the appellant and therefore the Dominion of India could not be sued by the appellant for compensation for breach of contracts.

We are also of the view that the High Court was right in holding that the appellant failed to prove that he was entitled to compensation assuming that there was a valid and enforceable contract. The appellant claimed that he was entitled to the difference between the contract price and the price realised by sale of the foodgrains offered after October 1,1943 but not accepted by the Railway Administration. The High Court rightly pointed out that the appellant was, if at all, entitled only to compensation for loss suffered by him by reason of the wrongful breach of contract committed by the State, such compensation being the difference between the contract price and the ruling market rate on October 1,1943, and that the appellant had failed to lead evidence about the ruling market rate on October 1,1943. The trial judge held that the "control price-list xxx was reliable for ascertaining the measure of damages in the case". This document was a notification relating to the controlled rates in operation in the district of Arrah, by which the sale of foodgrains at prices exceeding the rates prescribed was made an offence. The appellant had obviously the option of delivering foodgrains at any railway station F. O. R. in the Province of

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Bihar, and there is no evidence on the record whether orders similar to Ex.M-2 were issued by the authorities in other districts of the Bihar State. But if the grains were supplied in the district of Arrah, the appellant could evidently not seek to recover price for the goods supplied and accepted on and after October 1, 1943, at rates exceeding those fixed by the notification; for, by the issue of the control orders, on the contracts must be deemed to be super-imposed the condition that foodgrains shall be sold only at rates specified therein. If the grains were to be supplied outside the district of Arrah, the case of the appellant uffers from complete lack of evidence as to the ruling rates of the foodgrains in dispute on October 1, 1943. The High Court was therefore right in declining to award damages.

On the view taken by us, this appeal must stand dismissed with costs.

Appeal dismissed.

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July, 24;

THE STATE OF ANDHRA PRADESH

v.

THADI NARAYANA

(P. B. GAJENDRAGADKAR, K. N. WANCHOO and K. C. DAS GUPTA, JJ.)

Criminal Appeal--Acquittal of some charges and conviction others--Appeal by accused against conviction—Powers of appellate court--If can set aside acquittal also—Code of Criminal Procedure, 1898 (V of 1898), s. 423 (1) (b).

The accused was tried for offences under s. 302 and s. 392 Indian Penal Code. The Sessions Judge acquitted her under s. 302 and s. 392 but convicted her under s. 411 Indian Penal Code. The accused appealed to the High Court against her conviction under s. 411. The State did not appeal against the acquittal nor did the High Court issue any notice to the accused under s. 439 (2). The High Court set aside the order of conviction under s. 411 as well as the order of acquittal