

(1963) 01 KL CK 0012

In the High Court Of Kerala

Case No : A.S. No's. 655, 657, 664 to 669, 732, 733, 760 and 895 of 1959

A.K.T.K.M. Sankaran Namboodiripad and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-01-1963

Acts Referred:

Constitution of India, 1950 — Article 299(1)
Contract Act, 1872 — Section 65
Government of India Act, 1935 — Section 175(3)

Citation : AIR 1963 Ker 278

Hon'ble Judges : M.S. Menon, C.J;T.K. Joseph, J;P. Govindan Nair, J

Bench : Full Bench

Advocate : K. Kuttikrishna Menon, in A.S. Nos. 655 and 657 of 1959, K.V. Suryanarayana Iyer, T.S. Venkiteswara Iyer, C.M. Devan and S.K. Subramoniam, in A.S. No. 664 of 1959, K.V. Suryanarayana Iyer, C.M. Devan and S.K. Subramoniam, in A.S. No. 665 of 1959, K.V. Suryanarayana Iyer, C.M. Devan, S.K. Subramoniam and N.N. Venkitachalam, in A.S. No. 666 of 1959, K.V. Suryanarayana Iyer, S.K. Subramoniam and C.M. Devan, in A.S. No. 667 of 1959, T.S. Venkiteswara Iyer, C.V. Venkiteswara Iyer and C.M. Devan, in A.S. No. 668 of 1959, K.V. Suryanarayana Iyer, T.S. Venkiteswara Iyer, S.K. Subramoniam and C.M. Devan, in A.S. No. 669 of 1959, K.V. Suryanarayana Iyer, C.M. Devan and T.L. Viswanatha Iyer, in A.S. No. 732 of 1959, K.V. Suryanarayana Iyer, C.M. Devan and S.K. Subramoniam, in A.S. No. 733 of 1959, C.M. Devan and T.L. Viswanatha Iyer, in A.S. No. 760 of 1959, K.V. Suryanarayana Iyer and T.L. Viswanatha Iyer, in A.S. No. 895 of 1959, for the Appellant; Adv.-General, for the Respondent

Final Decision : Partly Allowed

Judgement

Govindan Nair, J.—These twelve appeals are by the defendants in O. S. Nos. 66, 62, 124, 58, 59, 125, 61, 121, 126, 122, 123 and 60 of 1955 on the file of the Principal Subordinate Judge of Kozhikode. The respondent in all these appeals is the State of Kerala. The suits were instituted by the State against the several defendants in the suits for the amounts specified in the complaints. The suits have been decreed.

2. The respondent in these appeals, the State of Kerala, alleged that the defendants in the various suits were appointed as their agents for the purchase of paddy, determined to be surplus to the requirements of producers in the delta area of West Godavari and Kistna Districts. In proof they relied on a notification dated 10-3-1948 issued by the Collector, West Godavari District, Ex. A-16. The schedule to Ext. A-16 mentioned the names of 22 such agents and the defendants in the suits mentioned above are 8, 9, 11, 13 to 18 and 20 to 22 mentioned in that schedule. A similar notification was issued by the Collector of Kistna District on 28-6-1948, and 8, 9, 11, 13 to 18, 20 and 21 mentioned in that notification are 11 of the twelve defendants in the various suits out of which these appeals arise. Ext. B-2 is a memorandum sent with Ext. A-16 to the District supply Officer, Revenue Divisional Officers, Tahsildars. Deputy Tahsildars, Grain purchase Tahsildars and Taluk supply Officers for information that the persons mentioned in the notification, Ext. A-16, have been appointed as procuring agents for the purchase of paddy in the West Godavari District.

The District Supply Officer was required by Ext. B-2 to collect the necessary deposits immediately from the dealers and he was requested to get the necessary agreements executed and was directed to issue authorisations to them to commence their business. Five of these dealers executed agreements, which are Exts. A-17 to A-20 and A-27. These dealers agreed to abide by all the provisions prescribed from time to time by or under the said schemes and any directions issued thereunder. They also undertook to sell the stocks of paddy, rice or millets, to the persons to whom they were directed to sell and that at such rates as may be prescribed from time to time. There was also the provision to deposit certain sums of money as security for the fulfilment of the undertaking. The agreements further provided for the forfeiture of the deposits on any breach to comply with the provisions of the agreement and regulations and duties prescribed from time to time under the intensive procurement and/or informal rationing scheme. Ext. A-26 is a request by ten of those dealers addressed to the Collector, Malabar, for orders for the release of the paddy which they said they had procured pursuant to Exts. A-17 to A-20 and A-27 and furnished certain information for fixing the selling price. Agreements similar to Exts. A-17 to A-20 and A-27 have not been produced in the case for dealers other than those who executed those agreements, i. e., the appellants in A. S. Nos. 655, 664 to 667, 669 and 732. It is, however, agreed. The wholesale issue price of paddy was fixed by Ext. A-29 and this was communicated to the dealers.

3. The Government by G. O. (MS) 1048 (Food Department) dated 19-11-1948, fixed the fair price of food-grains for the new Khariff year 1948-49 and addressed Ext. A-66 communication to the Board of Revenue. It is stated therein that Government have decided to fix increased prices as indicated in Annexure I to Ext. A-66 and that "the difference between the existing prices and revised prices now fixed" should be collected on the stocks of the wholesalers and retailers as on the evening of the 20th of November 1948, as also a surcharge of twelve annas per maund of rice. The procedure suggested for the collection of

the above dues was,

"The stocks with all stockholders (whether millers, wholesalers or retailers) on the evening of the 20th November, 1948, should first be assessed with reference to the stock register. These stocks should be formally requisitioned at the old price. It is not necessary that the requisition notices should be issued on the 21st November itself. They may be issued as early as possible after that date but only in respect of the quantity which was held on the 20th evening. If the stockholders agree in writing to pay the difference in prices due to the increase in price sanctioned by the Government, the stocks in question should be released from the requisition; otherwise the stocks in question should be seized and sold to other merchants including quota holders at the revised prices, the difference between the old and the new prices being credited to the Government,"

4. On 20-11-1948, Ext. A-32 telegram was sent by the Board to the Collector, Malabar, and gave the direction to the latter that difference between existing and revised prices should be collected on stocks with all procuring agents, wholesalers and retailers on the evening of 20th of November, 1948, and that the surcharge of twelve annas per maund should also be collected in addition. On the 22nd of November, 1948, the Collector of Malabar in supersession of paragraphs 1 and 2 of Ext. A-29, fixed the wholesale issue price for paddy imported by the merchants from the Sirkars and issued Ext. A-34. Ext. A-34 further mentioned :

"The collection of excess profit that has accrued will be considered separately." And, on the 27th of November, 1948, the Collector addressed a communication to the dealers, Ext. A-33, paragraph 3 of which is in these terms: "The wholesale dealers and the P. C. C. S. are informed that they will have to pay to the Government an amount calculated at the rate equal to the difference between the prices now fixed and those fixed in this office proceedings first or second cited as the case may be, on the entire stock with them as on 20-11-48, less the amount collected from the ration shops on stocks already sold to them. They are requested to give a statement in writing at once agreeing to this. They should submit immediately a statement showing the stocks already sold by them to the ration shops with the quantities sold to each."

Some of the dealers agreed to remit to Government the difference in price between the price-fixed by Exts. A-29 and A-34 and this is evidenced by Exts. A-35 to A-37 and A-68. These undertakings were given by the appellants in A. S. Nos. 655, 666, 733 and 667. The other appellants did not give any such undertaking: The appellants in A. S. Nos. 664 and 668 sent communications, Exts. A-41 and A-51 respectively, requesting for amendment of certain mistakes which they alleged regarding the quantum of the weight in one case and the aggregate weight in the other.

5. It is agreed" that sales were effected in accordance with the price fixed by Ext. A-34 by all the dealers including; all the appellants. Because difference in prices claimed by Ext. A-34 was not paid by the dealers, requisition orders were

issued to the defendants on the 22nd of December, 1948. These are Exts. B-9 to B-17, They are similarly worded and it would be sufficient to extract what is stated in Ext. b-9.

"In exercise of the powers delegated to me in G. O. No. 1360 Food, D/- 23-12-1947, I Sri Rao-Sahib T. K. Sankaravadivelu Pillai, Collector of Malabar, hereby require you Sri A. Sankunni Menon, Calicut to sell your stock of paddy (6688 bags of two maunds each) imported from the Sirkars as it stood on 20-11-1948 to the Government at Rs. 203-11 per bag.

If you agree in writing to pay to the Government the difference in price due to the increase in price sustained by the Government with effect from 21st November, 1948, the stock will be released to you for sale to the ration shops."

A reminder that the undertaking called for in paragraph 2 of the requisition orders had not been received and requesting that such undertaking may be given was sent by the Collector on 28th January, 1949, and that is Ext. B-18. But there was no compliance. However, we find that the security amounts were returned to the Malabar merchants who were the procuring agents pursuant to Ext. A-52, dated 7th January, 1949.

6. It was on the basis of these facts that the contention was raised by the appellants in the Court below and again before us in these appeals that there were no contracts enforceable at law against the appellants. This contention "was sought to be supported on three grounds:

(1) The appellants had not accepted any proposal to give rise to a promise.

(2) Section 91 of the Evidence Act is a bar to plead and prove the terms of the contracts on which the suits are allegedly based.

(3) In view of the provisions of Section 175(3) of the Government of India Act, 1935, and Article 299(1) of the Constitution, the alleged contracts are unenforceable and void and no action can be sustained on the basis of such contracts.

7. The first of the above arguments is advanced on the basis that all the communications addressed by the Collector had insisted on the execution of written agreements and that the appellants in these appeals, except, those in A. S. Nos. 655, 666, 733 and 667, had not executed such agreements. It is urged that they, on the other hand, protested and refused. Even the agreements executed by the appellants in A. S. Nos. 655, 666, 733 and 667 were, it is pointed out, not accepted by the Government, and reference was made to Ext. B-18. On behalf of the State, it is contended that though the appellants had not agreed in writing, they had accepted the proposal contained in Ext. A-33 by selling at the enhanced prices fixed by Ext. A-34. They were allowed to sell at the enhanced prices, it is urged, subject to the condition which was clearly notified to them by Exts. A-34 and A-33, that the difference should be paid to Government, and having admittedly sold at the enhanced prices, it cannot be said that they

have not accepted the condition which is an integral part of the proposal.

The interpretation clause, Section 2(a), of the Indian Contract Act, 1872, interprets "proposal" as,

"When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

The use of the term "proposal" has given rise to difficulties. This is noticed by Pollock and Mulla in their Commentaries to that clause at page 13 of the (1957) Eighth Edition of their Book on "The Indian Contract and Specific Relief Acts" : :

"The word "proposal" is synonymous in English use with "offer". But the language of these definitions appears to confine "proposal" to an offer to be bound by a promise. Thus a man who offers to sell and deliver, then and there, existing portable goods in his immediate control, such as a book or a jewel, does not offer a promise but an act, and if the other party takes the goods on the spot and becomes liable to pay for them, he (the buyer) is the only promisor. (We assume for simplicity's sake that there is no question of warranty, as in fact there often is none): In such a case the seller would seem not to make proposal within the terms of the Contract Act. But in England no one would hesitate to say that he offers (or proposes, though this word is less usual) to sell his goods."

We are really not concerned in these cases by any promise by the State. The query is, is there or is there not a promise by the appellants enforceable at law. We think there is. Another passage from the same book at page 14, we think, clarifies the position :

"It is also difficult at first sight to say, without doing some violence to language, that in the common affairs of life a promise is always an accepted proposal. Take the case of a man offering to sell" and deliver goods on credit, then and there, to another who at first does not want the goods, but is finally persuaded to take them at a price named by the seller. Here the seller delivers the goods and receives in exchange the buyer's promise to pay for them. Now the buyer's promise has never been a proposal: the seller offered to sell, and the buyer accepted the offer by taking the goods and pledging his credit. It may be said, however, that the buyer must be deemed to adopt the seller's terms at the last moment before delivery of the goods. For, the seller will not deliver them unless he knows that he will get the buyer's promise to pay for them; and the only way in which he can be sure of this is the existence of a proposal from the buyer to become liable for the price, which proposal will become a promise on the goods being delivered."

In these cases, we think that the appellants have accepted the terms of the proposal at the last moment before they started selling the goods at the enhanced prices and that there was a proposal by them to become liable to pay the difference, which, of course, had been accepted by the State by permitting

them to sell at the enhanced prices. We, therefore, hold that there was an agreement.

8. The second of the above contentions raised on behalf of some of the appellants is based on Section 91 of the Evidence Act. Section 91 of the Evidence Act only precludes the proof of the terms of a contract when law requires that the terms of the contract should be reduced to writing. The terms of the agreement relied on by the State are seen from Ext. A-33 and the other documents produced in the case. In fact, no oral evidence has been adduced in these cases. The fact that the articles have been sold at the enhanced prices fixed by Ext. A-34, dated 22nd November, 1948, has not been disputed. We, therefore, hold that Section 91 of the Evidence Act is no bar to the sustainability of the suits.

9. The next question that has to be determined in these appeals, which incidentally is the most important question, is whether the suits are maintainable in view of the provisions of Section 175(3) of the Government of India Act, 1935, and/or Article 299(1) of the Constitution. We extract below the section and the Article:

"175 (3). 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."

"299 (i). All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise."

It is the case of the appellants that admittedly no contract having been entered into by the Governor of the State of Madras executed on his behalf by a person authorised, there can be no agreement which can be enforced by suit. Our attention was invited to a number of rulings, but mainly reliance has been placed by the appellants on two rulings of the Supreme Court in *State of Bihar v. Karam Chand Thapar and Brothers, Ltd.* AIR 1962 SC no and *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, .

10. It is now well settled that no suit against any State Government or the Central Government based on an alleged contract entered into with the State or Central Government can be enforced against such Government in a Court of law if the contract is not embodied in an agreement entered into by the President or the Governor, as the case may be, and executed on behalf of the President or the

Governor in the manner prescribed and by the authority empowered to do so. The decisions of the Supreme Court in AIR 1962 SC no and Seth Bikhraj Jaipuria Vs. Union of India (UOI), , relied on by the appellants, arose from suits instituted against the Government. In Seth Bikhraj Jaipuria Vs. Union of India (UOI), , the Supreme Court approved the decision in Kessoram Poddar and Co. Vs. Secretary of State, wherein 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. It is, therefore, clear that a suit against the Government is not maintainable if the contract relied on as the basis of the suit has not been entered into in strict conformity with the provisions laid down in the statute governing the matter. Whether the same would be the result when the action is instituted by the Government on the basis of an alleged agreement which has not been entered into in strict conformity with the provisions of Section 175(3) of the Government of India Act, 1935 and/or Article 299(1) of the Constitution, but which has been fully performed by the Government, will have to be examined.

11. The purpose of provisions similar to Article 299(1) seems to be the protection of the Government. Bose, J., in *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, :

"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."

Shah, J., in his judgment in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, said :

"It is clear that the Parliament intended in enacting the provision contained in Section 175(3) that 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 purpose of the State."

And, again in *State of West Bengal Vs. B.K. Mondal and Sons*, the Supreme Court said :

"There can be no doubt that in enacting the provisions of Section 175(3) the Parliament intended that the State should not be burdened with liability based on unauthorised contracts and the plain object of the provision, therefore, is to save the State from spurious claims made on the strength of such unauthorised contracts. Thus the provision is made in the public interest and so there can be no difficulty in holding that the word "shall" used in making the provision is intended to make the provision itself obligatory and not directory."

12. A distinction was drawn in England between cases where the requirement of a seal in contracts by corporations was the result of the common law rule and those where the said requirement was based on a statutory provision like the one in Section 174(i) of the Public Health Act, 1875. The non-observance of the statutory provision requiring that a contract of the specified type should be in writing and sealed with the common seal of the authority in question renders the contract void and as such exempts the corporation from any liability to pay compensation for the performance of the contract even where the corporation may have had the full benefit and enjoyment of the said contract. However, where the requirement as to writing and seal is based not on statutory provisions but on the principle of common law, failure to comply with the said requirement would not afford a valid defence to the corporation to resist a claim made by a contractor for compensation for work done by him if it is shown that the corporation had the benefit and enjoyment of the said work. So it was held in suits against corporations at common law by applying the rule of equity that suits are maintainable against corporations where there has been part performance of the contract. This is an exception to the rule that a suit on a contract which was not under seal is not enforceable against the corporation. This exception, however, was held not to be applicable when the requirement of a seal was based on a statutory provision like the one in Section 174 (i) of the Public Health Act 1875. (Vide *Young and Co. v. Royal Leamington Spa Corporation* (1883) 8 AC 517.

Another exception that has been applied is where there has been an executed consideration. It is said:

"Where a contract is executed on the part of the corporation, and the other parties to it have received the benefit of the consideration moving from the corporation, such other parties are bound by the contract, notwithstanding that the contract was not made under the corporate seal". (Hals-bury's *Laws of England*, Third Edition, Volume 9, P. 85, para 173.)

At page 197 of Sir William R. Anson's "*Principles of the English Law of Contract*", twenty-first Edition, there is a similar passage:

"It appears that where a corporation has done all that it was bound to do under a simple contract it may in like manner sue the other party for a non-performance of his part."

The case referred to in these two passages is *Fishmonger's Co. v. Robertson* (1843) 134 ER 510. The corporation concerned in that case was not a statutory corporation and it may be doubted whether the principle of the above decision can be applied to statutory corporations. Salmond and Williams on "*Principles of the law of Contracts*", appear to take the view that the principle can be applied in the case of statutory corporations as well. It is said at p. 145 of the Second Edition :

"Where the statutory provision is mandatory, however, it would seem that in

general the non-statutory exceptions will be excluded. Thus in (1883) 8 AC 517, the House of Lords held that a person who pursuant to an unsealed contract with a corporation, had rendered services to the corporation of a kind necessary for the purposes for which the corporation was created nevertheless could not recover anything from the corporation in respect of those services. It may perhaps be doubted whether, in the absence of express words in the statute, a similar rule would be applied against a corporation which had performed its side of the contract and sued the other party. In the absence of such express words the view which should be taken would appear to be that the requirement of sealing is for the protection of the corporation and the corporators, not for the protection of the other contracting party."

13. These two exceptions to the rule that a contract required under seal is not enforceable by or against the corporation are based on the principle of part performance, and the case in which the contract has been fully executed on the part of the corporation. The first of these is a principle of equity, and cannot override a statutory inhibition. But there is no reason why the second, where a contract is fully executed on the part of the corporation, should not apply to a statutory corporation as well.

14. It appears to us that the real reason why a corporation is not allowed to sue the other contracting party even when the requirement of the seal is for the protection of the corporation is that such a course would offend the rule of mutuality. The position would be then that the corporation would be able to sue, but not the other party contracting with the corporation. Equity, in the case of non-statutory corporations, supplied this want of mutuality by imposing an obligation on the corporation by applying the doctrine of part performance. However, in the case of statutory corporation, the Courts could not apply the doctrine of part performance as the effect of applying the doctrine would be to do away with an Act of Parliament. (1883) 8 AC 517.

We think that there is no violation of the doctrine of mutuality in cases where the corporation had fully executed its part of the contract and then sued for enforcing the promise of the other contracting party. As long as the obligations of a corporation remained in the form of a promise, a suit by the corporation would not lie because the promise of the corporation cannot be enforced and the doctrine of mutuality would be attracted. But where the obligations of the corporation passed the stage of a promise, and ended in a performance of that promise, there is nothing remaining to be enforced against the corporation and the doctrine of mutuality is, therefore, not attracted. If the real reason for not allowing the corporation to sue even when a contract is not under seal is the violation of the doctrine of mutuality, the reason cannot apply in the case where the corporation had fully executed its part of the contract. We think in such circumstances, a suit by the corporation for enforcing the promise of the other contracting party is sustainable.

15. The only question then to be considered is whether the provisions in Section

175(3) and Article 299(1) are meant for the protection of the State. The passages from the Supreme Court decisions which we have extracted in paragraph 11 of this judgment clearly indicate that the provisions are meant for the protection of the State, whether the State Government or the Central Government, as the case may be. That being so, Section 175(3) of the Government of India Act, 1935, and Article 299(1) of the Constitution will not be a bar to the sustainability of a suit instituted by a Government when they had fully performed their part of the contract.

16. Counsel for the appellants, however, invited our attention to a number of rulings, and according to them, there is no distinction between the contract being executory or executed. These cases have to be examined. The first of these is a decision in the Ahmedabad Municipality v. Sulemanji Ismalji ILR 27 Bom 618. This decision can have no application. The suit there was brought by the Municipality for the breach of an executory contract. It was held :

".....it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff. It is not binding on the plaintiff because the formalities prescribed by Section 30 of the Bombay District Municipal Act Amendment Act 1884, have not been complied with."

The principle is in consonance with what we have stated above. The contract remained executory and since the promise of the Municipality could not be enforced, the suit by the Municipality was held to be not maintainable.

In Raman Chetti v. Municipal Council of Kumbakonam ILR 30 Mad 290, a suit by the Municipality for arrears of toll amounts due from the defendant and for damages, was held to be not maintainable. The defendant, a toll contractor, was the highest bidder at a public auction of the right of collection tolls for three years. The defendant entered into possession and collected tolls, but did not execute the written agreement which was required by the provisions of Section 45 of the Municipalities Act. After seventeen months of enjoyment by the defendant, he was put out of possession and a resale of the remainder of the term was effected. This resulted in loss to the plaintiff, the "Municipal Council, and the suit was for recovery of the loss so sustained and the arrears due for the period when the defendant was in possession. It was held :

"The fact that the agreement was partially acted upon cannot be held to render it an operative contract in spite of the provisions of the statute which have been violated."

The contract was not fully executed on the part of the Municipality and the principle we have stated above could not have been applied and the case can, therefore, be no authority for the proposition that even if the Municipality had performed fully their part of the contract, the action would not have been maintainable.

The question again arose on very similar facts before the Madras High Court in

Madura Municipal Council v. Veeranna Kone 16 Ind Cas 890 (Mad), and the High Court, following the decision in ILR Mad 290, dismissed the suit. This case too is not helpful.

In Mohamed Ebrahim Molla Vs. Commissioners for the Port of Chittagong, , the question was considered whether on the basis of an executed consideration an action would lie by the Port of Chittagong, the plaintiff in that case. The contract in question did not comply with Section 29 of the Chittagong Port Act, 1914. It was, therefore, contended, by the defendant that the contract is unenforceable, though it was fully executed by the plaintiff, the Chittagong Port. After an examination of some of the English decisions, the Court observed :

"In common law, therefore, in cases of executed consideration, the absence of a contract tender seal does not invalidate a contract and it is unnecessary to refer to the other cases cited. But where there is express statutory provision, that exception has been held not to apply even in cases of executed contract."

For the proposition that where there is express statutory provision, the exception would not apply, reliance was placed on (1883) 8 AC 517, British Insulated Wire Co., Ltd. v. Prescott Urban Council (1895) 2 QB 463, and Hoare v. Kings-bury Urban Council (1912) 2 Ch 452. These cases did not decide the question whether a suit by a corporation which had fully performed its part of the contract is maintainable or not.

A number of cases decided by the Indian High Courts were then referred to, two of which have already been noticed by us, viz. ILR Mad 290 and ILR 27 Bom 618. In none of the other cases, the question mooted above arose for decision. Reference was then made to (1843) 134 ER 510, and the following passage from that decision was quoted.

"It may possibly be the case, that up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a nudum pactum only. But, after the adoption of the contract by the corporation by performance on their part, upon general principles of reason the right to set up this defence appears altogether to fail."

and the decision was distinguished by the observation :

"In that case, however, there was no statutory provision which rendered the agreement invalid and the case therefore is distinguishable."

We are led to think that the real distinction-which seems to underlie suits by corporations which have fully performed their part of the contract, from attempts to enforce an executory contract, has not been dealt with in this case. In the case of executory contracts, the corporation, even in cases where the statutory provision is meant for the protection of the corporation and the corporators, is

not allowed to sue because to do so-would be against the doctrine of mutuality. This is clearly expressed by Sir L. H. Jenkins, Chief Justice, in these words:

"..... it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff." (ILR 27 Bom 618.)

When the contract has been fully executed by the corporation, the binding nature of the contract on the corporation cannot arise in an action by the other contracting party against the corporation. That being so, it appears to us that the plea that the contract is not binding on the plaintiff-corporation is not any more available to the defendant in an action by the corporation. And there can be no infringement of the doctrine of mutuality. This is the distinction that has been noticed and pointed out by Salmond and Williams in the passage which we have already referred to.

17. Our attention was invited to more decisions, four of the Madras High Court, one of the Peshwar Judicial Commissioner's Court and another of the Sind Judicial Commissioner's Court. In *The Municipal Council, Tiruvarur Vs. P.R. Kannuswami Pillai and Another*, reliance was placed on ILR Mad 290, 16 Ind Cas 890 (Mad) and *Mohamed Ebrahim Molla Vs. Commissioners for the Port of Chittagong*, already noticed by us, and it was observed that even if the corporation had fully executed a contract, a suit by the corporation would not lie and in *Madura Municipality v. Alagirisami Naidu* AIR 1939 Mad 957, with reference to Section 68 of the Madras District Municipalities Act, 5 of 1920, it is said that that section draws no distinction between executed and executory contracts and the word "contracts" used in that section must be held to cover both executed and executory contracts. The question did not arise in *K. Perumal Mudaliar Vs. Province of Madras*, which arose out of a suit for damages for breach of an executory contract. And in *K. Bhashyam Iyengar and Another Vs. The Superintendent of Police, Special Branch, C.I.D. and Others*, also the point considered and decided is different from the one discussed above. The point did not specifically arise in *Municipal Committee, Peshawar v. Haji Masiti* 141 Ind Cas 23 : (AIR 1933 Pesh 16). Reliance was placed on *Mohamed Ebrahim Molla Vs. Commissioners for the Port of Chittagong*, and *The Municipal Council, Tiruvarur Vs. P.R. Kannuswami Pillai and Another*, wherein it was held that the suit by a corporation even though it performed its part of the contract fully is not maintainable. The only other case remaining to be considered is the decision in *Ehumbho Metharam v. District Local Board, Hyderabad, Sind*, AIR 1940 Sind 199. Reliance was placed in this case also on the decision in *Mohamed Ebrahim Molla Vs. Commissioners for the Port of Chittagong*, for holding that even in the case of an executed contract, a suit would not lie. We have already discussed the decision in *Mohamed Ebrahim Molla Vs. Commissioners for the Port of Chittagong*, and it seems to us that the principle enunciated by Salmond and Williams in the passage extracted above has not been brought to their Lordships notice. The later decisions mainly followed the decision in *Mohamed Ebrahim Molla Vs. Commissioners for the Port of Chittagong*, and the Madras decision in

The Municipal Council, Tiruvarur Vs. P.R. Kannuswami Pillai and Another, .

18. Reliance was then placed on two passages from the Judgment of His Lordship the Chief Justice in Dr. H. S. Rikhy v. New Delhi Municipal Committee, AIR 1963 SC 554, and it was suggested that those passages would support the contention of the appellants that even suits instituted by the Government after having fully performed their part of the agreement are not maintainable because there has been no compliance with Section 175(3). It has to be noticed that the Supreme Court decision arose out of an application moved against the Municipality for fixation of fair rent and no question arose before the Supreme Court about an action by the Municipality on an executed consideration. The passages relied on have to be understood in the context in which they appear and the question that arose for decision. The first of these passages is in these terms:

"It is thus clear that neither of those cases, strongly relied upon by counsel for the appellant, is an authority for the proposition that where the statute makes it obligatory that there should be a contract under seal, the absence of such a contract could be cured by mere receipt of rent."

The second passage from the judgment of His Lordship the Chief Justice reads :

"In this connection, it was further argued that Sub-section (3) of Section 47 only says that a contract or transfer of property contemplated in the section executed otherwise than in accordance with the provisions of the section shall not be binding on the Committee. Therefore, the argument further is that the contract may not be binding on the Committee but it is not void. Now, what is the legal significance of the expression shall not be binding on the Committee" ? It simply means that it shall not be enforceable against the Committee, and it is clear beyond doubt that an agreement not enforceable in law is void."

The contract was not enforceable by the Committee because the promise made by the Committee is invalidated by law (Section 47 of the Punjab Municipal Act). And, it is clear that the Court should not enforce such a promise because the Jaw had invalidated that promise.

"An agreement not enforceable by law is said to be void". (Section 2(g) of the Indian Contract Act.)

The question whether an invalid promise can be substituted by a performance so as to constitute an executed consideration which would sustain an action by the Municipality or the State did not arise for decision and had not been considered by the Supreme Court. We are unable to agree with counsel for the appellants that the passages quoted above support the appellants in their contention that an action by the Government or by a Municipality when they had performed fully their part of the contract is not maintainable. We, therefore, think that the conclusion reached by us in paragraph 15 above must stand,

19. We further think that the suits instituted by the State Government are sustainable even if the contracts are void. Section 65 of the Indian Contract Act

which is in these terms -

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it" must apply.

The appellants have definitely taken advantage by the enhanced prices fixed by Exts. A-34 and A-33. They are bound to restore it to the State Government.

20. The Supreme Court in *State of West Bengal Vs. B.K. Mondal and Sons*, applied the provisions of Section 70 of the Contract Act to give relief to the plaintiff in a suit against the State of West Bengal and observed that the provisions of the section, if satisfied, would entitle the plaintiff to compensation. We think the principle of that decision must apply in these cases as well, and we are further of the opinion that the terms of Section 65 have been satisfied.

21. There are two more points urged by the appellants and they are entitled to succeed on those points. The first of these related to the claims made in each of the plaints under the heading "Board's Overhead Charges". These claims are stated separately in each of the plaints. There is no basis for these claims. And there is not even a mention of such Overhead Charges in Exts. A-34 or A-33. The claims made under the heading Overhead Charges in each of the plaints are, therefore, not sustainable.

22. The State has also claimed in each of the plaints interest from 1st December, 1948, on to the date of the institution of the suits. This claim is also not sustainable. Vide *Mahabir Prashad Rungta Vs. Durga Datt*, . We, therefore, negative the claim for interest made by the State for the period from 1-12-1948 until the dates of the suits.

23. We allow the appeals to the extent of disallowing the claims made by the State for Boards Overhead Charges and for interest up to the dates of the suits.

24. It was next argued that the claims in the suits have been made with reference to the entire stocks imported by the appellants, the merchants. Reliance has been placed for this contention on the wording in the schedules to the plaints "Number of bags imported". It is urged that, if at all, the claim can be sustained only with reference to the stocks that were in existence on 27-11-1948, the date of Ext. A-33. There must have been, it is pointed out, sales between 20-11-1948, the date of Ext. A-29, and 27-11-1948," the date of Ext. A-33. Ext. A-33 in paragraph 3 which we have already extracted makes it clear that the difference has been claimed only with reference to the stocks on 20-11-1948 less what has already been sold to retailers. The State can, therefore, claim the difference in prices between Exts. A-29 and A-33 only on the stocks that were in existence on 27-11-1948, the date of Ext. A-33. This matter has not been investigated by the Court below. We, therefore, remit the case to the Court below to ascertain the question of the stocks that were in existence

with each of the appellants on 27-11-1948. The difference in the prices can be claimed by the State only on the stocks that existed on 27-11-1948 as ascertained by the Court below.

25. In the result, these appeals are allowed to the extent of disallowing the claim made by the State towards "Board"s Overhead Charges" and interest till dates of the suits. We set aside the decrees in the various cases and remit the cases to the trial Court for determining the stocks that were in existence with each of the appellants on 27-11-1948. The Court below will thereafter pass a decree for the difference in the prices on the stocks determined to be in existence on 27-11-1948.

26. The appellants have gained substantially the claims made by the State for "Board"s Over-head Charge" and interest up to the dates of suits having been negatived by us. We think that in these circumstances, the appropriate order relating to costs is to direct the parties to bear their respective costs throughout, and we order accordingly.