(1955) 08 GAU CK 0007

In the Gauhati High Court

Case No : First Appeal No. 29 of 1951

Barada Kanta Das APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 09-08-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299
Contract Act, 1872 — Section 65
Essential Supplies (Temporary Powers) Act, 1946 — Section 16, 16(2), 3, 3(1), 4
Government of India Act, 1935 — Section 175, 175(3), 176
Limitation Act, 1963 — Article 2

Citation : (1955) 08 GAU CK 0007

Hon'ble Judges : Ram Labhaya, J;Deka, J

Bench : Division Bench

Advocate : S.K. Ghose and K.P. Bhattacharjee, for the Appellant; D.N. Medhi, Sr. Govt. Advocate, for the Respondent

Judgement

Ram Labhaya, J.—This is an appeal from the judgment and decree of the Additional Subordinate Judge, Upper Assam Districts dated 10-4-1951 by which plaintiff''s suit for the recovery of a sum of Rs. 28,137-6-3 was dismissed.

2. Plaintiff is the sole proprietor of a firm known as Sarada Charan Barada Kanta Roy. The firm is doing business at Silchar. The Secretary to the Government of Assam in the Supply Department offered to the firm by letter No. SD. 624/46 dated 30-7-1946 the appointment of a distributor of commodities on terms and conditions stated in that letter.

The plaintiff accepted the offer and was appointed distributor of controlled commodities namely, sugar, wheat and salt on the terms contained in the letter of 30-7-1946. According to the conditions of the appointment the plaintiff had to take prompt delivery of every consignment on cash payment. He had to lodge claims on carriers and insurances companies for losses in transit.

He was also responsible for demurrages etc. He further undertook responsibility for carriage of the commodities from the rail-head and steamer stations. He was to sell these commodities at prices fixed by the Government. He was assured that the prices would be so fixed that he would have a margin of Re. 1 per maund over the landed cost paid by him, though this term was liable to variation by the orders of the Government.

3. Paragraph 6 of the letter provided that plaintiff would be responsible for transit losses and would get an allowance of 2 1/2 per cent of the physical quantity on account of transit losses that he may suffer. He was also promised one per cent per month for godown shrinkage and shortage in respect of the physical quantity which would remain at the end of every month.

In regard to salt the distinguishing feature was that he had to keep in stock a quantity fixed by the Government. The stipulation contained in the letter of 30-7-1946 relating to transit losses was subsequently modified. The modification in respect of sugar took effect from 20th June and in regard to wheat from 1-10-1947. Plaintiff''s claim consists of items on account of losses in transit, and godown shortage and shrinkage both in respect of sugar and wheat.

So far as salt is concerned, his claim is on a different basis. He avers that the commodities were decontrolled and on the date of decontrol he had in his custody 4,695 maunds of salt. The price of salt dropped down by reason of decontrol and the loss he claims on that account is estimated at Rs. 9,976/-. In respect of transit losses the two items claimed are of Rs. 5,063/- (sugar) and Rs. 2,873/- (wheat).

The loss has been calculated at the rate of annas -/10/- per maund which was allowed to the plaintiff by modification of the terms of the original conditions which took effect from June, 1947. He has alleged that annas -/10/- works out to about 2 1/2 per cent that was permissible under the terms of the original arrangement.

4. The suit has been resisted by the State of Assam. Several pleas have been raised. It was pleaded that the plaintiff had no cause of action against the State of Assam. There was no enforceable agreement in existence. The suit was not maintainable as laid. It was also barred by Section 16(2) of the Essential Supplies (Temporary Powers) Act, 1946 (Act XXIV of 1946). There was also the bar of limitation and plaintiff was estopped from suing by reason of his waiver and acquiescence.

On facts the case set up was that the Government had not taken any financial responsibility either for losses in transit or for godown losses whatever their extent and reliance has been placed in support of this plea on the letter of 21-12-1946 (Ex. 4).

It was also pleaded that by reason of the modification of the terms in the middle of 1947, plaintiff lost all right to claim transit and go-down losses even for the period preceding the modification of the terms of the agreement. The learned Subordinate Judge framed the following issues:

1. Is there any cause of action for the suit against the defendant?

2. Is the suit maintainable in law in its present form?

3. Is the suit barred by limitation?

4. Is the suit barred by estoppel, waiver and acquiescence?

5. Is the defendant liable to the plaintiff for any amount as claimed by him in the plaint?

6. Is the notice u/s 80, CPC valid in law?

7. To what relief, if any, the plaintiff is entitled.

Issue No. 6 relating to the validity'' of notice u/s 80, Civil P.C. is the only issue which has been decided in plaintiff''s favour and the finding in this respect has not been disputed. On all other issues decided by the learned Subordinate Judge he found against the plaintiff.

The learned Counsel for the appellant has assailed the correctness of all the findings arrived at against him. Before proceeding to examine the correctness of the findings which have been assailed on appeal it would be convenient to refer to the evidence that bears on the points which have been raised on appeal. The oral evidence in this case is negligible and has not even been referred to in the course of the argument. The documents referred to are as follows:

Ex. 1, the letter dated 30-7-1946 from Shri K. Datta, Secretary to the Government of Assam to the plaintiff offering to him the office of the distributor on terms stated in the letter. The important conditions may be reproduced. They are as follows:

5. For sugar and wheat products you are required to deposit the full value of the landed cost of these commodities of an amount equal to one month''s quota allotted to you into the Treasury which shall be held as a deposit by the Government, as Government will be advancing money for their procurement.

You shall also undertake to take prompt delivery of every consignment on cash payment, lodge claims on the Carriers and Insurance Companies, pay demurrage etc. and be responsible for carriage from the railhead or Steamer Station etc. storage and distribution as directed by the local authorities.

You shall sell at prices fixed by the Government which are expected to leave you a margin of Re. 1 per maund over the landed cost. The margin is provisional and liable to reduction in future.

6. You shall be responsible for the payment of freight, insurance, Government Agents'' commission etc. and the Government cess in respect of all these

commodities as per bills as well as losses in transit. You shall also maintain reserve stocks as prescribed by the local authorities.

You shall get an allowance of 2 1/2 per cent of the physical quantities for transit losses and 1 per cent per month for godown shrinkage and shortage in respect of the physical quantities which will remain at the end of the month in your hands.

7. As called upon you shall execute an agreement with the Government or their authorised representative embodying the above and other necessary conditions, the breach of any of the conditions of which will render you liable to immediate dismissal, forfeiture of your security in part or in whole, as the case may be, and the adjustment of deposits made by you.

5. By Ext. 3 dated 2-8-1946 the plaintiff conveyed his acceptance of the terms contained in Ext. 1.

6. Ex. 4 is a copy of a letter dated 21-12-1946 from Shri S.K. Datta, Secretary to the Government of Assam in the Supply Department to the Director of Supply and to all Deputy Commissioners and Sub-divisional Officers etc. He had received several references from Sub-divisional agents and district officers for clarifying the position and the responsibility of the Government and the sub-divisional agents regarding demurrage, transit losses etc. He informed them that

in regard to the distribution of sugar and wheat the arrangements are that Messrs. Shaw Wallace and Co. will send the S/R''s and R/R''s together with the invoice at fixed rates for these food stuffs to the Deputy Commissioners and Sub-divisional Officers. The latter then endorse the R/R or S/R to the Sub-divisional Agents to-take delivery of the foodstuffs from the rail or steamer heads on recovering the amount shown by Shaw Wallace and Co., in the relevant invoices.

The legal position therefore is that a bill of lading, R/R or S/R is assignable by common law and if such assignment is made and accepted, the property thereby covered, and all liabilities in connection therewith including dues payable to the carrier, pass on to the assignee, unless a contrary intention is specifically declared or is sufficiently obvious.

It follows from this legal ruling that if there-are any transit losses etc., it is for the Sub-divisional Agents to lodge complaints with the carriers for the shortage or if the carriers do not accept liability for the losses, they are to be borne by consignee in all such cases, that is by the Sub-divisional Agents.

He then dealt with certain exceptions with-which we are not concerned. The plea that the State of Assam is not responsible for any losses in transit or godown shrinkage and shortage rests mainly on the legal position as elucidated in this letter.

7. By Ext. 6, a memorandum from the Director of Supply to all Deputy Commissioners, Sub-divisional Officers etc., the conditions of appointment as contained in Ext. 1 were modified partially. It was stated in this letter that in

partial modification of paragraph 5 of this department letter SD. 624/46 dated 30-7-1946 on the subject noted above

I am directed to say that the Government are pleased to raise with effect from 20th June, 1947 for all consignments received on or after 20th June, 1947 the margin of profit to Sub-divisional Agents in respect of sugar from Re. 1/-to Rs. 1/10/- per maund which include annas 10 per maund as allowance for transit losses.

On the basis of reports from various centres transit losses on an average do not exceed 2 1/2 per cent and the amount of annas ten per maund by which the Sub-divisional agents margin is raised represents the cost equivalent to the transit loss mentioned above. This rate of loss applies also to wheat products from a date which will be announced later.

In regard to wheat the altered arrangement took effect from 1st October, 1947. This modification has afforded another plea raised in defence so far as the claim is concerned.

8. Ext. 5 dated 3rd September is a memo from the Director of Supply, Assam to all Deputy Commissioners etc. This also relates to transit losses and godown shrinkage. It was stated that there was some misunderstanding till that time regarding financial liabilities about the transit losses and godown shrinkage in respect of sugar and wheat.

The letter of 21-12-1946 was referred to again to bring out that the transit loss was entirely a liability of the agents and the Government had nothing to do with the matter. It was repeated with considerable emphasis that ''the Government took no financial responsibility in respect of transit losses and godown shrinkage as mentioned in Government letter dated 30th July, 1946, but enjoined issue of permit on the Agents making that much of allowance only.'' Paragraph 3 of this letter is important. It is reproduced below:

I am further to inform you in order to give relief to the Agents, Government recently raised the profit margin of the Agents by -/10/- per maund of sugar and the case in respect of wheat products is under the examination of Government. This was intimated to you, vide this office letter No. DSC. 211/47/35, dated 28th June, 1947.

This is all the evidence bearing on all the issues which arise in this case.

9. Cause of action--Issue No. 1 in the case involves the question whether plaintiff has no cause of action for the suit. The learned Subordinate Judge came to the conclusion that he had no cause of action. He observed that the plaint does not disclose any cause of action. This statement is quite incomprehensible. The plaint does very clearly show a cause of action, whether the facts alleged as constituting the cause of action could be substantiated or not is another matter. But it is impossible to say that the plaint does not disclose any cause of action.

The learned Judge has not elaborated his statement ''on the point. He merely says that plaint does not disclose a cause of action. This statement is incorrect and Mr. Medhi has not been able to support it. The learned Judge observed that the terms embodied in Ext. 1 were subsequently modified and altered by Exts. 5 and 6 which the plaintiff accepted. This is true. He then concluded that by reason of his acceptance of the modification of the terms of the original agreement he lost all right or title to claim losses in transit and losses due to godown shrinkage and shortage.

The learned Judge did not notice that the modified terms became operative from'' specified dates both in respect of sugar and wheat. The modified terms applied to sugar from 20-G-1947 and to wheat from 1-10-1947. The original agreement remained in force in its entirety till 20-6-1947.

The modification was not given any retrospective effect. It was prospective and this fact was stated in a manner which leaves no room for controversy. Therefore the finding of the learned Judge that by reason of the modification the plaintiff lost any cause of action that he may have had under the original agreement cannot be sustained.

The defence set up by the Government so far as this part of the case is concerned wag double barrelled. By reason of the directions issued by Ext. 4, it was contended that the Government had no financial responsibility for losses, claimed in respect of sugar and wheat, The notification was pleaded as depriving the plaintiff of any right to claim anything on account of transit and godown losses even for the period that elapsed before the modification.

It would appear that this plea was not sound. In paragraph 5 of Ext. 1 it was brought out clearly that plaintiff was responsible for taking delivery on cash payment. He had to lodge claims against carriers and insurance companies. He was also responsible for carriage from railhead and the steamer stations. Having paid all the landed cost for obtaining delivery of the commodities, he became entitled to a tentative margin of Re. 1 per maund as his profit for working as a Distributor on behalf of the Government.

In paragraph 6 in addition to this margin of profit, he was promised an allowance of 2 1/2 per cent of the physical quantities for transit losses and 1 per cent per month for godown shrinkage and shortage in respect of the physical quantities which remained at the end of the month in his hands.

It is not clear from the arrangement as detailed in this letter how Government was to pay the 2 1/2 per cent and 1 per cent respectively for transit losses and godown shrinkage and shortage. The plaintiff it appears was malting these claims as these losses were ascertained. But it is obvious that these allowances were in, addition to the margin of 1 per cent profit. The profit was to be on goods received. In addition to that profit plaintiff was to be compensated for certain losses.

If there was loss in transit he was bound to pay the price even of the quantity lost and, therefore a provision was necessary to cover these losses. The price of 2 1/2 per cent of the quantity received was regarded as reasonable compensation for losses in transit which naturally could vary from consignment to consignment. Similarly some loss does occur by storage in godowns. This fact was also recognized and allowance was provided for losses due to godown shrinkage and shortage.

These allowances have nothing to do with the margin of profit. The margin of profit was to be collected by the agent from the consumers having paid the landed costs in the treasury and got the goods. The sales were to be made to the consumers on prices fixed by the Government and the Government agreed that prices would be so fixed that he would have a margin of Re. 1/-per maund.

Apparently, therefore this margin of Re. 1/-profit was not payable by the Government from its own funds. It was to be realised from the consumers. The Government having charged for the full quantity sent from Calcutta by M/s. Shaw Wallace and Co., their agents merely agreed to compensate the Distributor for losses that he may suffer in quantity either in transit or in storage. The two terms are independent.

Since the Government started receiving claims arising from losses in transit and godown shortage, it felt the necessity of explaining the position by Ext. 4 dated 21-12-1946. References had been received from the Sub-divisional Agents and District Officers. The procedure for obtaining delivery was stated. The legal position was explained in regard to the R/R''s and the S/R''s which were being handed over to the Distributors with necessary endorsements after they paid the money due on each consignment.

They were informed that by reason of the assignment of the R/R''s they became the assignees and as such they were responsible for transit losses and therefore it was for them to lodge claims with the carriers for shortage and if the carriers did not accept responsibility, these losses were to be borne by the Agents. This elucidation of the position is limited in scope which covers merely losses in transit. It does not cover shrinkage and shortage losses whilst the commodities remained stored. Therefore so far as allowance for godown shrinkage and shortage is concerned, this letter admittedly introduces no change.

In regard to transit losses, the question is whether at this stage the Government intended to modify the arrangement embodied in Ex. 1 in regard to the 21/2 per cent allowance for such losses. Evidently that could not be the intention. It is not stated there that the 21/3 per cent which was promised, to the Distributors, would not be allowed to them as they in law became the consignees. Ex. 4 explains the legal position to the Agents.

The Government were fully aware of this position and even in Ex. 1 the Government had not accepted any responsibility for losses in transit. The financial responsibility for losses was left to be borne by the Distributors. The

Government merely agreed to cover their losses by providing that it will pay 21/2 per cent of the physical quantities on account of transit losses. It would appear that this 21/2 per cent was payable by the Government even if no loss occurred in a particular consignment. It saved the parties from determining what losses were incurred in transit. A flat rate of allowance was provided to cover it.

The abstract legal position explained in Ex. 4 does not affect the contractual liability and if the Government had intended to modify the term, they would have clearly indicated it. The letter merely was explanatory in character and the Distributors were informed that the financial responsibility for actual losses was entirely theirs. It appears that the Government was being pestered with claims about the losses actually suffered. The Government had never accepted any responsibility for actual transit losses and therefore the legal position was explained.

10. This view of Ex. 4 is considerably reinforced by Exs. 6 and 5. If the Government had cancelled the 2? per cent allowance by Ex. 4, it would not have modified that arrangement by Ex. 6. In Ex. 6 the Government accepts the liability for transit losses. After considering the claims that it was receiving under this head, it decided to alter the arrangement.

Instead of allowing 21/2 per cent on physical quantities received, the Government decided to raise the margin of profit from Re. 1/-to Rs. 1/10/-. Now it was open to the Government at this stage to leave the Distributor to recover even this annas -/10/- from the consumers by fixing the price in such a way that this additional charge may fall on the consumers.

The Government did not consider that expedient. It decided to charge annas ten per maund less from the distributor to raise his margin by that amount. This way the margin of profit was raised and it was stated in this letter that this extra annas -/10/- which the distributors would get would approximately give them 21/2 per cent that was stipulated to them by Ex. 1.

The arrangement was to take effect from specified dates as stated above. This letter therefore shows that Ex. 4 did not nullify the liability of Government so far as transit losses are concerned. That liability was conceded in Ex. 6. The basis of computation or method of payment was changed by Ex. 6 from certain dates. But this document does not deal with the liability that had accrued before the modification was made. Therefore by Ex. 6 the previous liability which had already been incurred was not washed out. Ex. 5 reiterates what was said in Ex. 4.

It was emphasized that the Government had no responsibility for transit losses. To this statement, it was added that the Government had recently raised the profit margin by annas -/10/- which brought out the fact that the responsibility of the Government so far as transit losses were concerned ended when the Distributors got the commodities at annas -/10/- per maund less than the landed cost. Even this letter involves no repudiation of the liability in regard to transit losses preceding the modification of the original arrangement by Ex. 6.

The plea of the Government therefore that there was no responsibility at all resting on the Government for transit losses for the period before the modification of the agreement receives no support at all from the documentary evidence on the record.

11. Mr. Medhi has gone a step further. He thinks that the margin of Re. 1 profit included whatever the Government had to pay on account of transit losses. The question Mr. Medhi is raising is one of fact. He cannot at this stage improve on the written statement of the Government. He cannot raise any new question of fact at this stage. This would be taking the other side completely by surprise.

The contention is not admissible and may be ruled out on this basis. But since Mr. Medhi urged it seriously and spent some time over it, it may be noticed. He urged that Ext. 6 shows that the margin of profit was raised from Re. 1 to Rs. 1/10/-. If this increased margin included loss in transit after the modification, the Re. 1 margin that was available to them before should be deemed to cover their transit losses for the period before the modification. This argument is prompted by the circumstance that the Government when altering the arrangement in respect of its responsibility for transit losses, gave it this peculiar shape.

It decided that the payment shall be made by reducing the landed cost by annas -/10/- per maund. The rest of the arrangement was allowed to stand. Under the original arrangement which remained unmodified the Re.1 margin of profit was being realised from the consumers as stated above. The Government was not paying it. It could have been a part of the agreement that the profit of margin would include claims for loss in transit also. But as shown already the terms embodied in Ext. 1 do not bear that interpretation.

The profit of Re. 1 is distinct from payments that the distributors were promised on account of godown shortage and losses in transit. We do not think that this contention has any force. The finding on the first issue cannot be sustained.

12. Issues No. 2 and 4(a) have been decided in favour of the defendant on the ground that the provisions of the Essential Supplies (Temporary Powers) Act bar the institution of the suit. Reliance is placed on Section 16(2) of the Act in support of this contention. The Provisions of Section 16 are as follows:

16(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of any order made u/s 3.

(2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of any order made u/s 3.

13. The two provisions of Section 16 are very comprehensive in character. They provide immunity from suits, prosecutions or other legal proceedings for all

persons when they are doing anything in good faith in pursuance of an order u/s 3. Clause (2) is limited to suits for damages caused or likely to be caused by anything done in good faith or intended to be done in pursuance of an order made u/s 3.

Immunity may be claimed therefore by the Government or by its officers u/s 3 if claims are covered by this section when the claims arise out of anything done or intended to be done in pursuance of an order u/s 3. Section 3 invests the Central Government to pass certain orders which may appear to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or securing its equitable distribution and availability at fair prices. By orders under this section the Government may provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

Clause 2 of Section 3 gives a list of orders that may be passed, but the provision is without prejudice to the generality of the powers conferred on the Central Government by Section 3(1). Powers of the Central Government can be dele, gated to the Provincial Government u/s 4. The contention is that the Government is immune from any liability, for, so far as the supply and the control of the commodities in question is concerned, the Government was acting under the provisions of the Essential Supplies (Temporary Powers) Act.

The contention put in this form is beautifully vague. For claiming immunity it has got to be shown that the state in this case issued an order or orders u/s 3 of the Act and the liability which the plaintiff is seeking to enforce arises from the fact that action was taken in pursuance of the order of the Government u/s 3. No such order has been placed before us. From the documentary evidence on the record, it appears that the Government was arranging supplies essential to the life of the community. The commodities were brought to Assam by the Government acting through its agents M/s. Shaw Wallace and Co. It was in the province of Assam that these commodities were delivered to distributors appointed by Government on payment of the landed cost. The distributors then had to distribute the quantities to the consumers on prices fixed by the Government. There was a contractual arrangement between the Government and the Distributors. So far as receiving of deliveries and the distribution of the goods are concerned, the parties were not acting under orders passed u/s 3. They were acting in pursuance of a certain arrangement made between them.

The liability which the plaintiff seeks to enforce is entirely contractual and we do not see how this responsibility can be avoided by pleading that Section 16(2) of the Essential Supplies (Temporary Powers) Act bars the suit as a whole. No case has been made out so far as this contention is concerned and this contention also is overruled to the extent that it arises out of dealings in Sugar and Wheat.

14. The issue in regard to limitation (No. 4) need not detain us. The learned Subordinate Judge found that the suit would be barred under Article 2 of the First Schedule of the Limitation Act if the claim was based on any civil wrong or tort.

The whole of the claim in this case arises out of a contract. So far as the plaintiff is concerned, his suit is based on the arrangement disclosed by Ext. 1 which he accepted. Since the claim arises out of contract, it is not necessary to examine whether it would be barred if it had been based on any alleged civil wrong or tort.

15. There is no waiver or acquiescence giving rise to estoppel against the plaintiff which is the subject-matter of issue No. 3. For a finding on the question of estoppel the learned Judge again relied on the modification in the original terms of the agreement brought about by Ext. 6. We have already dealt with this point and the modification in the agreement does hot create any kind of impediment in the way of the plaintiff claiming what may be due to him on account of losses in transit or godown shortages. Mr. Medhi has not attempted to support this plea.

It may be observed at this stage that I have assumed when discussing whether the plaintiff has cause of action for the suit or not that there is an enforceable agreement. The entire discussion is on that assumption. It was necessary to discuss it on that assumption as the plea of the Government is that even if the agreement may be enforceable, the plaintiff has no cause of action on the modified terms of the agreement.

16. The learned Judge when dealing with issue No. 4 also held that in the absence of a formal contract entered into between the plaintiff and someone properly authorised by the defendant, the plaintiff could not sue on the arrangement which forms the foundation of the suit by virtue of the provisions contained in Sections 175 and 176, Government of India Act, 1935 and Article 299 of the Constitution of India.

This plea of the defendant does not fall under issue No. 4 or 4(a). The plea that the arrangement between the parties was not enforceable as it did not comply with the requirements of Section 175, Government of India Act, 1935, which was in force when this arrangement was made, was not expressly put in issue. The learned Counsel for the appellant has argued that the point was not even raised in the written statement. The learned Counsel is not correct here. For, in the 1st paragraph of the written statement it was pleaded that there was no legal agreement in existence.

It is true that the basis of the plea was not stated. It was not specifically said that the arrangement sued upon did not comply with the requirements of Section 175 of the Government of India Act, but the plea that the contract, had no legal existence was raised. It is unfortunate that this plea was not expressly made the subject-matter of issue.

It was however considered by the learned Judge, though very perfunctorily. His conclusion was that the arrangement is not enforceable against the defendant. Mr. Ghose has argued that Ext. 1 read with Ext. 3 completes the arrangement and as the Secretary to the Government of Assam in the Department of Supplies himself made the; offer, the Government was entering into the contract and therefore there was substantial compliance with the requirements of Section

175(3) which provides that

all contracts made in the exercise of the executive authority of the Dominion 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.

It is argued that the section does not provide for any particular form of the agreement. The arrangement was fully set forth in Ext. 1. It was accepted by the other side. The arrangement was made directly with the Government. The execution of a formal agreement was not such an omission as could be fatal to the arrangement made.

It is further argued that even if the omission to execute a contract on behalf of the Governor by a person duly authorised for the purpose may make the agreement unenforceable, its ratification was possible as held by their Lordships of the Supreme Court in-- Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others, It is further urged that even if there is no valid ratification, plaintiff would still be entitled to restitution of any advantage that the Government received under the agreement or the contract. For, if the agreement is discovered to be unenforceable and therefore void, Section 65 of the Contract Act would come into play.

Mr. Medhi urges that the agreement is void by reason of the failure on the part of the parties to comply with the requirements of Section 175 of the Government of India Act, 1935. It is therefore void and a complete nullity. It is not capable of ratification, nor was it ratified and so far as Section 65 is concerned, plaintiff cannot rely on it as his case is based on contract and not on the basis that the contract has been discovered to be void and he is entitled to restitution.

All these questions were not raised before the learned Subordinate Judge and have not been dealt with by him. It appears that these questions could not have been raised before the learned Subordinate Judge as at least so far as the plaintiff is concerned, he had no notice of the plea that the arrangement was unenforceable till the time of the argument. The point was not in issue. Therefore all the questions could be raised on his behalf. If Section 65, Contract Act is found to be applicable, it may be necessary for the plaintiff to produce further evidence. The questions which require determination under this head therefore are:

(1) Whether the arrangement disclosed by relevant documents on the record is unenforceable by reason of the absence of a contract executed in conformity with the requirements of Section 175, Government of India Act, 1935?

(2) If the agreement is unenforceable, whether it was capable of ratification and was in fact ratified?

(3) Has the Government received any advantage under the arrangement and is the plaintiff entitled to claim restitution u/s 65, Contract Act?

(4) What amount, if any, including compensation, is due to the plaintiff on the terms of the alleged contract or under the provisions of Section 65, Contract Act, if it is found to be applicable?

17. There has been no proper trial or determination of the several facts of the same question which is involved in the issues. These issues cover all the points that remain undetermined including issue No. 5, on which the learned Additional Sub-Judge gave no finding. The case shall be remanded to the trial Court for disposal according to law after the determination of the issues settled above. The order of remand shall be limited to the claims arising out of commitments relating to sugar and wheat.

18. It is not necessary to remand the claim so far as it relates to salt. This part of the claims rests on a distinct basis. The foundation of the claim is the order by which this particular commodity was decontrolled at a time when the plaintiff alleges he was in possession of about 5,000 maunds of salt. His case is that he suffered a loss of about Rs. 9,976/- by the commodity becoming decontrolled.

The prices fell and he lost to the extent alleged. He was bound to keep on hand till that date under the term of his arrangement with the Government, a specified quantity of salt. The quantity he had was within the specified limit. The claim under this head may be examined on the basis that that was an enforceable arrangement and alternatively on the basis that the arrangement was absolutely unenforceable by reason of its non-compliance with the provisions of Section 175, Govt. of India Act, 1935.

Assuming that there was an enforceable arrangement between the parties the plaintiff was the distributor under the terms of the alleged contract which forms the basis of the suit. He was bound to keep a certain quantity of salt with him as stipulated. This was his arrangement with the executive authority and the Government entered into the contract as any other individual may have done.

Plaintiff''s own case is that the liability of the Government was contractual. But the agreement between the parties could not control the statutory powers of the Government relating to removing control over controlled commodities. The control was removed by the Government acting in a different capacity. The plaintiff cannot say that the other party to the contract decontrolled the goods to his detriment. The Government when decontrolling acted under different capacity and not as a party to the alleged contract. The power to control or decontrol commodities vesting in it by the statute could be exercised at any time untrammelled by the conditions of any arrangement between it and other parties. The plaintiff could not be unaware of it.

In any case his ignorance of the law on the point which is not even alleged, would not put him in any position of advantage against the Government. We do not see how he can claim any damages from the Government by reason of the fact that the Government acting in another capacity and not as a party to the agreement decontrolled salt.

Mr. Ghose, the learned Counsel for the appellant has not been able to give us any intelligible basis for sustaining plaintiff''s claim under this head. In the alternative if there was no enforceable agreement, the Government did not derive any benefit from the salt in plaintiff''s possession and the claim for damages for loss by reason of the fall in its value would not be within the scope of Section 65, Contract Act No claim for damages can conceivably fall u/s 65, Contract Act. Damages may be claimed only when there is a breach of a contract.

We think this claim has got no merit. There is no point in remanding this part of the claim for any further investigation. The plaintiff''s claim so far as it relates to salt to the extent'' of Rs. 9,976/14/- must therefore be disallowed. The finding of the learned Additional Subordinate Judge on this point therefore is maintained and the dismissal of the claim to this extent shall stand.

The appeal is partially allowed. The rest of the decree is reversed and the case is remanded to the trial Judge. Plaintiff''s claims arising out of his dealings in wheat and sugar shall be disposed of by him in the light of directions given above. Parties shall bear their own cost in this Court.

Deka, J.

19. I agree.

