
(1954) 07 GAU CK 0010
In the Gauhati High Court

N. Purkayastha and Another

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-07-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299
Government of India Act, 1935 — Section 175

Citation : AIR 1954 Guw 33

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

Bench : Full Bench

Judgement

Ram Labhaya, J.—This order shall dispose of two appeals No. 3 of 1951 and No. 12 of 1951. These appeals arise out of two money suits No. 83 B of 1946 and Suit No. 82 B of 1946 respectively. These suits were consolidated. The evidence was recorded in suit No. 82 B of 1946. N. Purkayastha was the plaintiff in suit No. 83B of 1946. His claim amounted to Rs. 74,546/-. It was composed of three items which are as follows:

1. Balance due on his bill 56,546-1-0 2. Consolidated compensation 15,000-0-0 3. Security Deposit 3,000-0-0

H. Sen was the plaintiff in suit No. 82 B of 1946. His claim amounted to Rs. 20,148/- which consisted of the following three items:

1. Balance of the bill 13,648-8-0 2. Consolidated compensation 3,500-0-0 3. Security Deposit 3,000-0-0

Both the suits were dismissed by the order of Mr. D. N. Hazarika, Subordinate Judge, dated 5-7-1950. The two appeals Nos. 3 and 12 of 1951 are directed against the judgment and decrees by which both the suits were dismissed. The two cases involve common questions of law and fact. They are both against the Union of India. The case of the two plaintiffs is as follows:

2. In the year 1943 during the last Great War, it was found necessary to

construct a new Telegraph line by the side of the one which already existed connecting Lumding with Manipur Road Station of the Assam Railway. The construction of the line was treated as an emergent measure. The Divisional Engineer, Telegraphs, Shillong invited tenders for Jungle clearance between Lumding and Manipur Road station. Plaintiffs submitted their tenders on 5-8-1943. They were asked to commence work on 10-8-1943, with the direction to contact Lt. R. I. Kelly, the Construction Officer at site for directions as to the work to be done and its extent. Plaintiff in Suit No. 82 had to begin his work from Dimapur end and Purkayastha, plaintiff in Suit No. 83 had to begin from the Lumding end.

3. Plaintiffs have averred that the area in which the work was to be done was extremely unhealthy. The work was to be executed during the rainy season which is the worst part of the year for jungle clearance. The area to be cleared had dense forests with bogs and marshy lands and was infested with wild beasts and poisonous reptiles. Labour could not be procured locally and in view of the urgency of the work it had to be recruited at huge expenses from distant places. They were ready to commence work on the 10th August as ordered. But as the construction officer was not available on that date the work actually commenced on 12-8-1943. It is alleged that the entire quantity of the work executed was done under the directions and supervision of the construction officer Lt. Kelly and his successor Lt. Ghosh.

The alignments were changed from time to time by the officers of the Department. These alterations account for the delay in the completion of the work which was finished by the end of November, 1943. The work done was measured by and under the supervision of Lt. Ghose. The completion vouchers were prepared in accordance with the measurement and they were issued to the plaintiffs on 30th November under the signature of Lt. Ghosh. On the basis of these vouchers plaintiffs prepared their bills. The amount due to plaintiff Purkayastha came to Rs. 2,77,180-1-0 and the amount due to Sen came to Rs. 203,818/8/- On 11-12-1943 plaintiff Purkayastha was paid a sum of Rs. 1,90,000 in part payment. Similarly plaintiff Sen was paid a sum of Rs. 1,50,000/-.

Sometime later, plaintiffs were asked to submit fresh bills according to the revised measurement by some officers of the Government. Plaintiffs protested and pressed for payment of the balance on the basis of their original bills. On 31-3-1944, a sum of Rs. 24,694/- was paid to plaintiff Purkayastha and a sum of Rs. 40,170/- was paid to plaintiff Sen. Plaintiff Purkayastha was paid a further sum of Rs. 5,940/- later, which was found due to him on the discovery of a mistake in calculation. Plaintiffs claimed the balance due on their bills. They also claimed compensation for wrongful detention of the money due to them. The claims also include demands for refund of security deposits with interest at 6 per cent, till realisation.

4. The suits were resisted on several grounds. The liability was completely denied. It was pleaded that the Divisional Engineer, Telegraph, Shillong who was

in charge of the construction of the line in question had acted in defiance of orders from superior authority. Acceptance of the two tenders from the plaintiffs was beyond his competence. It was also without the knowledge, approval or consent of his departmental heads. Collusion between the plaintiffs on the one side and the Divisional Engineer, Telegraphs, Major Sen Gupta and Lt. Ghosh on the other to defraud the Government on a vast scale was alleged.

The Divisional Engineer's competence to make payments was also challenged. In regard to the actual work, it was specifically pleaded that plaintiffs were not entitled to any payment for clearance not done by them or for clearance of an unauthorised character. By reason of the alleged collusion between plaintiffs on one side and Major Sen Gupta, the Divisional Engineer, Telegraphs and Lt. Ghosh on the other, the Union of India disclaimed all responsibility for the actions of its officers asserting that they were collusive and detrimental to the interests of the Government.

5. The pleas reproduced above were taken by written statements filed in February, 1948. The first written statements put in on 15th May conceded to the plaintiffs that the condition of the area in which the work was done were correctly described in para. 3 of the plaints. The contents of paragraphs 2 and 4 of the plaints in suit No. 83 were admitted. It is in these paragraphs that the plaintiffs alleged that the Government had decided to construct a new telegraph line and had invited tenders for jungle clearance by notice dated 29-7-1943. The conditions of the notice were reproduced in para. 2 of the plaint. In para. No. 4, it was averred that apart from plaintiffs' tenders, there were only four other tenderers for the work though notice inviting tenders had been circulated in the whole of the province through different post offices.

The statement contained in para. 3 of the plaint relating to the conditions under which the work was done was also admitted though it was contended that in spite of these conditions the rates were much higher than they ought to have been. It was further admitted that there were a few occasions when deviation had to be made under the directions of Lt. Ghosh and the Divisional Engineer, Telegraphs, Shillong Division. It was averred that completion vouchers signed by Lt. Ghosh and the plaintiffs were subsequently scrutinized by Lt. Ghosh. There was no fresh measurement. The original vouchers included items of work done which were not for the benefit of the defendant.

Plaintiffs were informed by a letter dated 4-3-1944 of the extent of the work for which they were entitled to payment. Plaintiffs submitted amended bills, in accordance with the Divisional Engineer, Telegraphs' letter dated 4-3-1944, and the amount that was due on that basis was paid in each case. These payments were in full & final satisfaction of the claims of the plaintiffs. The liability for the claim for compensation was denied. But it was admitted that the plaintiffs had a security deposit of Rs. 3,000/- each and the defendant was willing to refund the same but without any interest.

6. The amended written statement sets up a new case altogether completely inconsistent with the case originally set up. The validity of the agreement and the payments made therein was not challenged in the first instance. What was pleaded was that payment for work done had been correctly made and nothing was due except the security deposits. The amended statement embodies a total denial of the liability on the ground that the defendant could not be sued on the contract as it was not binding on the Government for reasons given in the amended written statement. Collusion also is attributed to Divisional Engineer and Lt. Ghosh and responsibility for their action is completely disowned. It is also averred that payment received is in excess of what was due and the Government reserved their right to claim refund if so advised. The liability to the refund of security deposit also is disputed though by necessary implication. Seven issues were framed which are as follows:

1. Whether the agreement entered into between the plaintiff and the then Divisional Engineer, Telegraphs, Shillong (Major Sen Gupta) purporting to be on behalf of the Defendant was within the competence and powers of the latter? If not, whether the agreement is binding on the Defendant?
2. Whether the rates of the plaintiff accepted by the Divisional Engineer, Telegraphs were unduly excessive? If so, whether the agreement entered into by the Divisional Engineer, Telegraphs with the plaintiff was collusive, unjustified and inoperative?
3. Whether the claim of the plaintiff includes works which were not only not actually done by him but also neither authorised nor done in the interest of the Department? If so, is the plaintiff entitled to claim any amount for those works?
4. What was the quantity of work the plain-tiff did?
5. Whether the plaintiff has been fully paid?
6. Whether the claim is barred by estoppel and waiver?
7. What relief, if any, is the plaintiff entitled to?

The learned Subordinate Judge found that the agreement entered into between the plaintiffs and the Divisional Engineer purporting to be on behalf of the defendant was not within the competence of the Divisional Engineer and therefore not binding on the defendant. (2) That the rates allowed by the Divisional Engineer to the plaintiffs were excessive and unjustified. The agreement being in violation of the rules was inoperative. The evidence of collusion was predominantly in favour of the defendant. His finding on Issue No. 2 was that the agreement was the result of collusion. It was "unjustified and inoperative". He decided issue No. 6 against the defendant and observed that it had not been pressed.

In regard to issues Nos. 3, 4 and 5, he observed that these issues did not arise in view of his findings on the first two Issues. He however preferred to say

something on these issues "in passing". He then proceeded to refer to some evidence bearing on these issues and ended by answering issue No. 3 against the plaintiffs, but in regard to issues Nos. 4 and 5 he found the material on the record insufficient for their disposal. It is clear that the learned Judge meant to leave issues Nos. 4 and 5 undecided though somewhat reluctantly he came to the conclusion that plaintiffs' claims included some work which was not actually done by them and also some work which was not authorised or done in the interests of the Union.

7. Mr. Ghose learned Counsel for the appellants, has tried to show first that the contract was entered into by the Divisional Engineer, Telegraphs on behalf of the Union of India with the express or at least implied permission of the higher authorities. In signing the contract on behalf of the Union of India, he therefore did not exceed his authority. He further argued that even if there was any excess of authority, the defendant could not decline to pay for the work done which it has appropriated and made use of.

8. The clearance of jungle over a specified width had to be undertaken as a work which in official language was assigned L. B. priority. The General Headquarters, India at New Delhi wrote to the Director General, Posts and Telegraphs on 1-7-1943 (Ext. A) that the D. S. L. C. Board had considered and approved the construction of new B. S. post route to carry 5 wires from Manipur Road to Lumding (Approx. 43 miles). The Director General was asked to arrange to carry out this work simultaneously with the new railway track, which was being laid. A copy of this letter was forwarded by the Director General of Posts and Telegraphs to the Postmaster General, Bengal and Assam Circle along with his letter dated 7-7-43 (Ext. B). The Postmaster General was requested to carry out the work.

It was added in the letter (Ext. B) that the project and detailed estimates should be prepared and sanctioned by him if within his powers or forwarded to the office of the Director General of Posts and Telegraphs if beyond his powers. It was also stated in the letter that the cost of work ultimately be recovered from the War Department. The Postmaster General wrote to the Divisional Engineer, Telegraphs, Shillong, by his letter dated 14-7-43 (Ext. C) asking him to submit project and detailed estimates early for sanction if they exceeded his powers of sanction. It is apparent from these communications that notwithstanding the high priority that was assigned to this work, the normal procedure was to be followed and the project and estimates had to be submitted for sanction to the authority which had the competency to sanction them under the rules. Even the Postmaster General was not given any power to sanction any estimate in excess of his powers, by reason of the urgency.

9. After 14th July there was some telephonic conversation between the Divisional Engineer at Shillong and the Postmaster General at Calcutta. Immediately after this conversation, a telegram was sent by the Postmaster General to the Divisional Engineer at Shillong to the following effect:

Sen Gupta, Divisional Engineer, Telegraphs Sh. Copy DCSO GH Eng. T-I aaa Jungle cutting Ldg -- MPQ may be arranged by you through contractors and DCSO may make payments to contractors as otherwise, calling of tenders Will cause delay A/D Sen Gupta DCSO GH.

10. From the contents of the telegram, it appears that the Divisional Engineer was allowed to arrange for jungle cutting through contractors, with the qualification that the DCSO may make the payments to contractors as the other alternative of calling tenders would cause delay. The Postmaster General who sent this telegram was Mr. Thadani who has appeared in the case as a witness (D. W. 2) for the Union. He has explained in his statement what passed between him and the Divisional Engineer. According to him, the Divisional Engineer rang him up towards the end of July and intimated that heavy jungle cutting was necessary, He explained to him

the procedure to be followed for works of this nature, and to expedite matters asked him to arrange with the military authorities for jungle cutting.

As a matter of precaution he sent him a telegram also to that effect. The telegram is the one reproduced above (Ext. AAA). The Divisional Engineer was thus asked to contact the military authorities for payment for the work which he could get done by contractors, to be arranged by him. This was permitted in order to avoid delay. D. W. 2 has deposed that he heard nothing from the Divisional Engineer about this work till March, 1944 when tenders were submitted to him for approval. He asked for his explanation as to why directions issued were not complied with. The explanation given was that the army had refused to agree to the proposal and had also authorised him to ignore the normal procedure and to have the work executed expeditiously. He was asked to obtain written confirmation of the allegations he made which he failed to secure.

Reference was made to Brigadier Howe who according to the Divisional Engineer had authorised departure from the normal procedure. He denied having given any such direction. The only other witness on the point could be the Divisional Engineer himself. Plaintiffs have not examined him. There is no reason why the statement of Mr. Thadani be not believed, in regard to what transpired between him and the Divisional Engineer towards the end of July and the subsequent, enquiry into the allegation whether any officer of the Army authorised the Divisional Engineer to carry out the work expeditiously in disregard of the normal procedure.

11. It is not quite clear from the statement of Mr. Thadani whether the military authorities were prepared to have the work done on payment by them, It is clear however that they did not ask the Divisional Engineer to disregard the normal procedure. Even according to Ext. AAA the other alternative of calling tenders had to be followed. The Divisional Engineer could arrange with the military authorities. But failing that he could not disregard the normal procedure provided under the rules of the department.

12. There is a Schedule showing Financial Powers of the Officers of the Indian Posts and Telegraphs Department issued under the authority of the Accountant General, Posts and Telegraphs. Schedule I relates to the financial powers of the Director General; Schedule II to those of the Postmaster General. Schedule 1, Rule 9 lays down that under Rule 90 of the Book of Financial Powers, the Director General may sanction estimates for the construction of lines up to Rupees one lakh. Under Schedule II, Rule 13, the Postmaster General as the head of a circle may sanction similar works up to a maximum limit of Rs. 20,000. Under Schedule V, Rule 1, the Divisional Engineer can sanction estimates up to a limit of Rs. 6,000 only. The tenders that were issued to the contractors show that he could sanction works below Rs. 10,000/-.

13. It does not appear if any estimates were prepared. The Divisional Engineer did have some idea of the magnitude of the work. He had represented to the Postmaster General at Calcutta that heavy jungle cutting was necessary. The distance over which this jungle spread was no less than 43 miles. He had the rates before him. He could not have any doubt that work far exceeded the limits of his powers. The actual payments made by him to the contractors exceed Rs. 4 lakhs. From the statement of D. W. 2, it appears that the justification that he gave for exceeding the limits of his power was that he had directions from the military authorities to ignore the usual rules of procedure, which limited his authority. That fact has not been proved.

He thus with full knowledge of the facts entered into an agreement on behalf of the Government which under the rules he had no authority to make. Nor had he any permission from his higher authorities for making this particular commitment the way that he did. Mr. Thadani, D. W. 2 had however deposed in cross examination that the work in question was considered very important. It was referred to as one of LB priority in official correspondence. According to him, there was no question of detailed estimates of this work being submitted for sanction before it was actually taken up. It was to be submitted during the pendency of the work and soon after the commencement. He added that sometimes detailed estimates of the work were submitted after it was completed. In certain cases works were started in anticipation of the sanction of the detailed estimates.

14. In regard to the powers of the officers of the department, he had stated that work of the value of over a lac needed the sanction of the Ministry of Finance and that even the War emergency was not an exception to this rule. It was on this basis that the explanation of the Divisional Engineer was asked. The statement made in cross-examination by the witness that there was no question of any detailed estimate of the work being submitted before it was taken up, could not be reconciled with the statement made by the witness earlier. It merely reveals what did take place in actual practice at times. Rules are not implicitly obeyed always. The existence of a gulf between theory and practice is a matter of not very uncommon occurrence. The occasional departures from rules is no answer

to any objection as to the competency of an officer to make commitments on behalf of the Government.

The documentary evidence referred to above shows that notwithstanding the urgency, superior authorities insisted on sanctions being obtained. The Postmaster General had no authority to authorise the Divisional Engineer to make commitments beyond his powers. He could enter into a binding agreement only within the limits of his authority. Even if therefore there was a practice of submitting estimates for sanction after the commencement of the work, this practice could not validate contracts which by reason of want of competency or power of the officer concerned were void in law. In actual practice, it may become necessary sometimes for officers to commence works before estimates are submitted for sanction. Departmental work may not cause any difficulty but where work is to be done by a contractor, binding commitment by agreement has to be made before the work can commence.

Even in such a case, the Government may sanction the contracts where authority is exceeded bona fide and in public interest. This is conceivable and even where the commitment is made by a contract after acceptance of tenders, there is nothing to prevent the Government from sanctioning it though it would retain the right not to be bound by the transaction if it finds that the exercise of excessive authority was detrimental to its interests. The statement of this witness therefore would not invest the contract with any validity which it did not possess under the law. The result of the discussion is that the Divisional Engineer entered into a contract which he had no authority to enter into on behalf of the Union.

15. In the amended written statement, it was conceded that the military authorities when approached by the Divisional Engineer did not agree to do the work. The learned Subordinate Judge did not rely on this admission on the ground that the department got this information from the Divisional Engineer. This would not be a correct way of looking at the matter. At the time, the amended statement was put in, the department had made enquiries from the military authorities and they were in full possession of the facts. It is admitted that the military authorities were approached and did not agree to do the work or to make the payment. This admission however does, not advance the case of the plaintiffs as shown above.

16. Before considering the question whether the Union of India is not liable to be sued by reason of the Division Engineer having exceeded his authority, it would be appropriate to consider the other plea on which the suit is resisted. It is the case of the Union that the agreement on which the plaintiffs' suit is based was collusive. This collusion is sought to be inferred from the excessive rates and certain other circumstances. It is alleged that the rates at which work was given to the two plaintiffs were unduly excessive.

17. The tenders were invited on 29-7-1943. Five tenders were received on 5th August which was the last date for putting in tenders. Of these five, two tenders

of the plaintiffs were accepted on the same day with certain modifications in rates. Tender Ext. H was rejected as being full of conditions. Tender Ext. I was rejected on the plea that it was from a petty contractor who could not be entrusted with a work of such magnitude as was required to be done. Ext. J was rejected on the ground that its rates were exorbitant. There is no evidence on the record to show that the Divisional Engineer was wrong in rejecting the tender Exhibit I on the ground that it was from a petty contractor. There could be no objection to the rejection of Exhibit J for admittedly the rates in that tender were higher than those at which the plaintiffs had offered to do the work.

But it has been urged on behalf of the Union that the rates of Ext. H from B. C. Khan were lower than those of the plaintiffs and could reasonably have been accepted. The tenders of the plaintiffs had no conditions. B. C. Khan's tenders (Ext. H) had the following conditions-(1) the work will be commenced within ten days from the date of receipt of order, but the contractor does not undertake any responsibility for any delay in commencement or completion of the work due to any of the following causes -- (a) Scarcity of labourers in the locality involving importing labourers from outside, (b) Sickness amongst labourers, (c) Enemy action, foul weather or anything not within the control of the contractor, (d) Shortage of foodstuff or delay in the supply of necessary materials for want of Railway accommodation or delay in transit.

(2) In all other cases, the contractor's responsibility shall be limited to rupees three thousand only. (3) The actual cost shall be deducted from the contractor's bill if any Departmental assistance is rendered for transport of men and materials. (4) The tender is for the entire work. No part work will be undertaken. (5) The Department shall make running payments every fortnight from the date of commencement of the work to the extent of 75 per cent. of the value of work done during the fortnight. This is required to facilitate payments to labourers and to relieve the contractor from heavy financial pressure. (6) Final payment to be made within three weeks from the date of completion of the work.

Not only the Divisional Engineer but probably no one in the Department could give the work to B. C. Khan on these conditions. The first condition was the most important of all. He practically declined to take any responsibility for delay in commencement or completion of work on account of certain causes which revealed the work at the time. He could foresee at least scarcity of labour, enemy action, foul weather, shortage of foodstuffs ect. The second important condition that he laid down was that his liability shall be limited to Rs. 3,000/- only. It meant that if he thought that he could not carry on the work, he could leave it unfinished at any stage he thought fit, but his loss would not exceed the sum be specified. It would not have been possible for the department to have the work done at his full cost if this condition had formed part of the contract.

These terms were extra-ordinary and unusual. The rates given have to be seen in the light of these conditions. There is no justification for comparing the rates of B. C. Khan with those of the plaintiffs for rates could be compared only if other

things are equal B. C. Khan's rates being on his terms did not supply the basis or the test for a finding that the rates of the plaintiffs were excessive. The only other tenderer of substance, offered to do the work at rates which are higher than, those of the plaintiffs. The Divisional Engineer had practically no choice. No one else in his place would have selected B. C. Khan for the work in these circumstances. The examination of tenders therefore does not show that it was possible for the Divisional Engineer to get the work done at rates substantially lower than those of the plaintiffs.

18. It has been argued that tenders were invited only on 29th July, the time allowed for tenders was so short that it is probable or at least likely that contractors who could do this work did not get notice. This possibility cannot be ignored even though no direct evidence has been given to show that contractors were available who would have done the work at lower rates. There is however an explanation for this conduct. The work was described as of LB priority. The Post-master General at Calcutta had suggested a procedure which if the Military authorities had agreed to, might have obviated the necessity of calling for tenders. The idea was to do the work swiftly.

In giving short time for submission of tenders, the Divisional Engineer may claim with some show of reason that he was acting faithfully and with zeal. There is however the other side of the picture. If he was not faithful to the Government or if he had any ulterior object and wanted to benefit the contractors of his own choice or himself or both the short duration allowed for submission of tenders was a circumstance that could be made use of. If a period of another week or so had been allowed for tenders, the conduct of the Divisional Engineer may not have given rise to any suspicion. The circumstance though by itself not very conclusive has got to be seen in the light of other evidence bearing on the conduct of the Divisional Engineer in the matter of this work.

19. It has also been argued that compared to Railway rates, the contract rates were excessive. The plaintiffs relied on forest rates. The railway rates on which the Union has relied are really the scheduled rates for the War period. Sujan Singh, D. W. 1 stated that the schedule was corrected upto November, 1942 and the rates in Ext. Sections (3) with an addition of 350 per cent. could represent the rates for the War period. Even if this addition is allowed, the rates of the plaintiffs are admittedly higher. But it is not fair to judge the plaintiffs by even the scheduled rates of the war. The scheduled rates gave an approximate cost of different items. They are used for preparing estimates. These schedules continue to remain in force for long periods. They do not change according to the fluctuations of the rates in the market.

The result therefore is that it is rarely possible for the Government to get its work done according to its scheduled rates. The tenders that are accepted are sometimes below the scheduled rates, sometimes far above the scheduled rates. The actual rate at which the work is done for the Government always depends on numerous changing factors which have a bearing on the costs of the work, but at

the relevant time it was not merely the cost; the element of risk was also a very important consideration. The rates of the railway therefore cannot be any dependable basis for an adjudication that the rates which were allowed to the plaintiffs were grossly excessive, by reason of ulterior considerations.

20. It is next argued that both the Divisional Engineer and the Construction Officer (Lt. Ghosh) were in collusion with the contractors for their mutual benefit and to the detriment of the Government. In support of this plea reliance has been placed on the following circumstances which are revealed by the evidence led on behalf of the Union.

21. It is claimed that check passes were issued by the Divisional Engineer Ext. OO (series) on 3rd or 4th August to H. Sen, one of the two plaintiffs. Some passes appear to have been issued and there is no satisfactory explanation from the plaintiffs' side accounting for their issue before Sen's tender was accepted. If they were issued in order to enable him to collect labour for this work, it would be legitimate to infer that the Divisional Engineer had made up his mind to give the work to Mr. Sen somehow before the tenders had been opened.

22. The plaintiffs have claimed that N. Purkayastha the plaintiff was present at Lumding with about 600 coolies by the 10th of August. The circumstance is somewhat unusual though it should not be impossible for the contractors to be ready to fulfil their undertaking.

23. There are some discrepancies in the statements of Purkayastha, P. W. 1 and P. W. 5, the brother of H. Sen, the plaintiff, on how the tenders were submitted and how and when security deposits were made. No definite or positive conclusion can be safely drawn from these discrepancies.

24. The Divisional Engineer accepted the tenders of the plaintiffs by letters Exts. 4 (1) and 4 (2), but not at their rates. There were reductions in the rates of both the tenders. The result was that both got the same rates. This reduction of rates is against Rule 426 (1) in Chapter 9 page 165 of the Posts and Telegraphs Manual, Volume II. This conduct may also be regarded as something contrary to the rules and in excess of the powers of the Divisional Engineer. Another unusual thing that he did was that he allowed each of the plaintiffs to begin from one end without specifying how much work each one was to do. This could have given rise to complications unless the two plaintiffs were partners and to the knowledge of the Divisional Engineer. Circumstances surrounding the acceptance of the tenders of the plaintiffs leave the impression that the Divisional Engineer knew the plaintiffs at the time. He had also an inkling of their arrangements inter se. He went out of his way to equalise their rates and gave the contract to them without division of work as if there was no conflict of interest between them.

25. The failure of the Divisional Engineer to forward the estimates and tenders for sanction even after the commencement and during the pendency of the work is the most serious lapse on his part. The contract work was completed by the end of November. Substantial sums were paid to the plaintiffs in part payment in

December. It was only in March after audit objections that the tenders were sent up for sanction. They were not sent up even after the completion of the work in the ordinary course. This conduct is wholly indefensible considering the magnitude of the work and its enormous cost to the Government. Failure on the part of the Divisional Engineer to insist on the completion of the work within the stipulated time and omission to take action for delay also point to the conclusion that he was soft to the contractors.

26. The bills for work done were handed over on 3-12-1943, by the contractors to the Divisional Engineer direct. The cheques in part payment on 11th December were similarly handed over by the Divisional Engineer himself to the contractors. This procedure is opposed to the office routine. The Divisional Engineer does not receive bills normally; nor does he hand over the cheques himself. Payment on 11th December was made in spite of objections from the office accountant. The bills were not accompanied by completion certificates. The name of the officer who measured the work was not disclosed. The accountant intimated to the Divisional Engineer that in the absence of the estimates it is not possible to check the distance (Ext. RR) and they will have to be guided by the certificate given by the Construction Officer (in charge).

It was suggested that the Construction Officer may be asked to give a detailed certificate that he has actually measured the work done and counted the number of trees shown as cut in the contractor's bill vide Article 558 of I. A. C., Vol. II. There were other objections also to payment in part. The completion certificate was obtained later on from Lt. Ghosh, but not by the plaintiffs. Final payment in full satisfaction of the claim of the plaintiffs was made on 31st March. This payment was made on a revised measurement communicated to the plaintiffs on 4-3-1944 by the Divisional Engineer. The result of this revision was that certain items of work were not allowed. The plaintiffs did protest by their letter dated 6-3-1944 but after the protest, payment was accepted by both the plaintiffs on the basis of the revised statement showing the total volume of work for which they were entitled to payment.

This payment was in full satisfaction of their claim. On 23rd March, revised bill was prepared and payment in full satisfaction on this basis was made to the two plaintiffs on 31st March. This resulted in the complete discharge of their claims by agreement. After the final discharge of the claims of the, plaintiffs, the Divisional Engineer himself without any reminders from the contractors reopened the matter on the basis of the letter of the plaintiffs dated 6th March, several months after, and offered to pay them for some more items of work. Not only he had no authority to do it, his, motive in doing so also is questionable. He had made the final payment. A sum of Rs. 5,989 was paid to Purkayastha on 15-6-1944 by reason of some mistake in calculation and a further payment of an indefinite sum was offered later unasked. Plaintiffs have admitted that Mr. Gupta is a brother of the Divisional Engineer. He was a partner of the plaintiffs in a Sawmill and was its Managing Director with a salary of Rs. 300/- p. m. in

addition to 5 per cent. commission.

This concern was started according to plaintiff Purkayastha in 1944 or early in 1945. When actually it commenced working is not disclosed. A brother of Purkayastha was in the Forest Office at Shillong. He was functioning as Working Plan Officer. Both the plaintiffs had a joint account in the Bank of Assam since August 1943. This related to the jungle clearance which is the subject matter of these suits. All cheque of Rs. 40,000/- was given to Chandra Sekhar, brother of Purkayastha, plaintiff on this account. It was given in December, 1943. The money drawn from the joint account could either be taken out for joint business or it should have been debited to account of the partner who was drawing it. Purkayastha did not allege that this sum was drawn for his own purposes. A joint purpose for which the money was spent is not disclosed. It has been suggested that it had something to do with the part-payment received by the plaintiffs.

27. The learned Subordinate Judge found that "the bona fides" of all concerned appeared to be extremely doubtful". He was also of the view that the rates allowed were excessive. He held the agreement to be inoperative having been made in violation of the rules. The evidence on collusion seemed to him to be preponderatingly in favour of the defendant.

28. There is an impressive array of circumstances which casts a cloud of suspicion on the "bona fides" of the Divisional Engineer and to a certain extent, on that of the Construction Officer. These circumstances also indicate the possibility of the existence of an ulterior motive which the Union has attributed to its employees. I have found that there is not enough material for holding that the rates were excessive in the sense that it was possible for the Divisional Engineer under the circumstances to get the work done at lower rates. There is ample material, however, to show that the Divisional Engineer was very indulgent and soft to the contractors.

He has succeeded in paying them off without intimating to superior authority what he was doing. He himself exercised the powers of the Union in dealing with these contractors. No man in his place would have taken all this responsibility on his own shoulders. His offer of some more money to the contractors after they had given valid discharges of their claim brings into clear relief his anxiety to help them. He was not faithful to the Union in the discharge of his duties. Whether he made any profit for himself is a matter which may not be regarded as substantiated on the evidence on this record. Lieut. Ghosh was also co-operating. His conduct too is not above suspicion.

29. I however propose to go further and to assume for purposes of examining the legal position that these officers derived some benefit for themselves also. Loss may have been caused to the Union therefore by excessive payments by the inclusion of items of work for which payment could not be demanded or made. But before examining it, reference may be made to the conduct of the superior officers in relation to the contracts in so far as it has a bearing on the main

question involved in this case.

30. From the statement of Mr. Thadani, D. W. 2, it appears that the tenders were sent up for sanction in March, 1944, before the final payment was made. Even though the Divisional Engineer had acted contrary to the directions he received, the liability, under the contract was not repudiated. The Divisional Engineer was not ordered to stop making any more payments. The contractors were not informed that the Government did not take any responsibility for the work done by them. The result was that the final payments were made to the plaintiffs for work done under the contract. It is undisputed that all the work that was sought to be done over a distance of 43 miles in the shape of jungle clearance and cutting of trees was done by the plaintiffs between themselves and the Government has appropriated that work by installation of the line for which all this clearance was necessary.

Some three months after the final payment, another sum was paid to one of the plaintiffs and some months later, another sum was offered to them which they did not accept. Plaintiffs sent notices u/s 80, C.P.C. Responsibility for payment for the work done was not denied even at that stage. The suits were instituted & in the written statement put in on 15-5-1947, no objection was taken to the authority of the Divisional Engineer in entering into agreements with the plaintiffs for this work nor were his bona fides questioned on any basis. The suits were resisted mainly on the ground that the plaintiffs had received all that they were entitled to and had given complete discharges on 31-3-1944.

There was thus no repudiation of liability till 15-5-1947 from the Government on any basis whatsoever. It was for the first time in the amended written statement which was put in on 16-7-1948 that pleas which formed the subject-matter of issues were raised. As observed above, these pleas made out a new and wholly inconsistent case by the withdrawal of valuable admissions made in plaintiffs' favour. It is now to be seen in the light of above facts whether the Union could be sued for the amounts which the plaintiffs claim as still due to them for work done under the agreements. If their suits are found to be competent, it will have to be determined whether on facts they are entitled to any more money for the work done by them under the agreements.

31. I have found above that the Divisional Engineer, Telegraphs did exceed his authority in being a party to the execution of the contracts on which these suits are based. Section 175(3), Government of India Act, 1935, which was applicable at the relevant time reads as follows:

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 contracts in these cases have been executed in the manner laid down in this section. Their validity cannot be questioned on the score of noncompliance with any rule directing the manner in which they had to be executed. But they were not executed by such persons as were authorised by the Governor-General. The Divisional Engineer had no authority to enter into these contracts as found above. Section 175(3) is thus clearly contravened, though Mr. Ahmed did not base his argument on any provision contained in Section 175(3), Government of India Act, 1935. The requirement of law embodied in this clause is undoubtedly mandatory. This is settled law and this position has not been disputed by the learned Counsel for the plaintiffs. It would follow that the Government is not bound by the contracts which are sued upon. The suits are admittedly based on these contracts. No alternative cause of action has formed the basis of these suits.

Mr. Ghose however has argued relying on -- *Ram Nagina Singh Vs. Governor-General in Council*, that if the contracts are now found to be not binding on the Government of India on the ground that they contravened the provisions contained in Section 175(3), Government of India Act, the claims would be covered by Section 65, Contract Act which provides that

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.

It is pointed out that it is a case of discovery that the agreement is void and therefore the Union which is now not in a position to restore the benefit that it has received, has to make compensation for the work done or the services rendered.

32. In *Ram Nagina Singh Vs. Governor-General in Council*, it was held that:

(1) Section 175(3) was mandatory and noncompliance with provisions thereof rendered the contracts on behalf of the Government void and not binding on the Government.

(2) That in the case of a statutory person, who is incompetent to make any contract except in compliance with the formalities prescribed by the statute, there is no inherent disqualification or incompetency to make a contract as in the case of a minor or a lunatic.

(3) In the case of agreements, Section 65 applies only to a case where benefit or advantage is derived under an agreement before it is discovered to be void. If the benefit is received after the agreement is discovered to be void, then the advantage cannot be said to have been received under the agreement. Section 65 embodies and is an expression of the principle of restitution and of prevention of unjust enrichment.

(4) The section enunciates the principle of restitution and should be liberally construed in order to do equity and justice between the parties. The intention of the section is to prevent a party to a void agreement to retain benefits received under it.

(5) The ordinary presumption is that the parties know the law and are presumed to know it, but the presumption may be rebutted by the special circumstances in a case, if it is proved as a fact that the parties were under a misapprehension as to their rights and did not know in fact that the agreement which they had entered into was void by reason of a statutory provision of which they had no knowledge or appreciation.

The learned Judge also held that Section 70 was also applicable to the facts of the case before him. On appeal a Division Bench of the Calcutta High Court did not agree with the view that Section 70 also could apply to the case, but the decision of Sinha J. was affirmed on the basis that though the agreement in the case did not comply with the provisions contained in Section 175(3), the plaintiffs were entitled to compensation for the bricks supplied by them to the Government by reason of the principle of restitution embodied in Section 65 which was held applicable, vide -- "Union of India v. Ramnagina Singh" AIR 1955 NUC 506 (Cal) (B).

33. It is necessary according to the Calcutta decision on which Mr. Ghose has placed reliance, that the benefit or advantage should have been derived by the Union under an agreement before it was discovered to be void. Mr. Ahmed points out that the plaintiffs knew that the Divisional Engineer, Telegraphs had no power to enter into contracts on his own authority for works exceeding Rs. 10,000/- in value. This condition is printed on the tender forms which the plaintiffs got. They could not be unaware of it. The Divisional Engineer also could entertain no doubts about the limits of his authority. The plaintiffs thus entered into the agreements fully knowing that the Divisional Engineer had no authority to execute them on behalf of the Union. It cannot be said therefore that the benefit that the Union of India received under the contract was before the plaintiffs had the knowledge that the agreements were not binding on the Union.

This contention in my opinion should not prevail. Contracts generally are executed by the officer on the spot. The Divisional Engineer was in charge of the area in which the work of jungle clearing had to be done. He could with the sanction of higher authorities execute the contracts. The plaintiffs could not be expected to make enquiries whether such sanction had been received. There was no absolute prohibition against the Divisional Engineer asking for tenders or executing the contracts. All that was needed was that there should be previous sanction from the competent authority. He invited tenders by a public notice, had securities deposited, accepted the tenders and got the work done. He even paid substantial sums to the contractors in December after the completion of the work in part payment of their bills.

He delayed no doubt asking for sanction from higher authorities, but this was a fact of which the plaintiffs were unaware. He paid the balances due to the plaintiffs according to his measurements and obtained final discharges from them on 31st March. He even paid another sum of about Rs. 5940/- to Purkayastha, plaintiff in June 1944. At no stage during the whole of this period plaintiffs got any indication of the fact that the Divisional Engineer had executed the deeds of agreement without obtaining permission from superior authority and entirely on his own responsibility. After payment in June he again offered to pay for some work not included in the measurement given in his letter of 4th March. There was then a controversy. The plaintiffs demanded a much larger sum. They ultimately sent a notice to the Government u/s 80, Civil P. C.

Even upto that time they were not told that the Government was not bound by the contracts and that they had no valid claims in law against the Union of India. The suits were instituted in December, 1946. The first written statement was put in on 15-5-1947. Even upto this time the Union had not discovered that the agreements executed by the Divisional Engineer, Telegraphs on behalf of the Union were in excess of his authority and as such not binding on, it. The Union did not resist the claim on this basis. On facts the plea was that plaintiffs had taken advantage of the occasional absence of the constructing officers and avoided keeping to the proper alignment. On detection he had to rectify the mistakes. They were not entitled to payment for extra work done by them by reason of their intentional deviation from the alignment made by the Department.

There was also the plea that plaintiffs had accepted final payments in full satisfaction of their claims on 31st March, There were other pleas. But the agreements were not repudiated. The claim made in each case for the refund of security was admitted. The Union itself did not discover till 16-7-1948, that the contracts were not binding on it. This may be due to the fact that during the War time financial restrictions were considerably relaxed. It was in the amended written statement of July, 1948 that the Union put forward the plea that the contracts were not binding for various reasons. The discovery by the Union that it was not bound by the agreements sued on came more than a year after the institution of the suits. I have no reason for finding that plaintiff's were aware of the true legal position earlier. It cannot be said therefore that the work done from which the Union has undoubtedly benefited was done after the contracts were discovered to be void or of no legal effect against the Union.

34. It is true that the agreements in both the cases were not binding on the Union but there is nothing to prevent the Union from ratifying them. Mr. Thadani, D. W. 2, the Postmaster General (Bengal and Assam) deposed as a witness that after sending his telegram (Ext. AAA) he did not hear anything about the contract work till some time in March, 1944 when as the result of audit objections the Divisional Engineer was forced to send papers up for obtaining necessary sanction of the tenders. By that time plaintiff Purkayastha had received a sum of Rs. 1,90,000/- out of a total of Rs. 2,77,180/- which he

claimed by his bill of 3-12-1943. Sen, plaintiff received Rs. 1,50,000/- out of his claim of Rs. 2,30,818/-. The work of jungle clearing began in August and was finished by about the end of November. The tenders were received by the Post-Master General in March, 1943 before the final payment was made.

Explanation was asked for from the Divisional Engineer and enquiries made. But the Divisional Engineer was not prevented from making the final payments. The liability for the work was not repudiated. The contractor was not so told. He even could receive another sum of about Rs. 5000/- in June, 1944 on the basis of a mistake in calculation. Before final payments were made, the Post-Master General became aware of the huge sums that were being claimed and of the rates in the tenders. Further payments could have been withheld. The facts had become known to the Post-Master General before payments made on 31st March and in June 1944; Mr. Ghose infers from these facts that there was ratification of the agreements by the Government. There is some force in this argument but I do not propose to base my decision on this point.

My view is that the plaintiffs did their part under the contracts without knowing that the agreements did not bind the Union. They were all the time under the misapprehension that the Divisional Engineer had the necessary authority to enter into the agreements. D. W. 2 did state that there was no question of preparing estimates and obtaining sanction for work before it actually commenced in this case. From the view point of the Union it would have been enough if the Divisional Engineer had sent the papers up for sanction even after the work had commenced. If this was so how could the contractor know that the needful was not done and it was possibly for this reason that there was no repudiation of these agreements by or on behalf of the Union till long after the institution of the suits.

35. Mr. Ahmed has also contended that Section 65 cannot apply to this case as the purpose of the agreements was fraudulent. There was moral turpitude involved in their making. In support of his contention he has relied on -- "Rudragowda Yesh vantgowda v. Gongowda Basagowda" AIR 1938 Bom. 54 (C). In this case it was held that

Section 65 may in conceivable cases cover cases of agreements which are void ab initio when there has been some misapprehension; but it does not apply to agreements not only void ab initio but known to be so from the beginning and a fortiori to agreements of a fraudulent nature involving moral turpitude on the part of the parties to it. Hence, where an agreement between the parties creates false evidence to defeat the succession of real owner of the property and also, purports to compound a non-compoundable case, no suit lies u/s 65 to recover any money paid in pursuance of the contract.

36. I have already come to the conclusion that the plaintiffs were not aware from the beginning that the agreement was void or not binding on the Government. In regard to the fraudulent nature of the matter the decision is distinguishable. In

this case the agreement between parties was for the creation of false evidence to defeat a true claim of succession. The object of the contract was illegal. The parties to the suit were parties to the agreement. The distinctive feature of the present case is that object of the contract was not illegal or fraudulent. The Divisional Engineer was ordered to have the jungle clearing done. The agreements were for the jungle clearing. Where an agreement is hit by Section 24 as in Rudragowda Yeshvantgowda Vs. Gangowda Basagowda Patil, Section 65 may not apply. But in this case neither the consideration nor the object was illegal. The agreements are not against public policy. This decision therefore is of no assistance.

37. In Bava C. Gopalaswami Mudaliar Vs. The Annadhana Kattalai of Sri Tyagarajaswami temple by Trustee, Vaithilinga Pandarasannadhi and Another, it was laid down that

Section 65 does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them.

This is not the case here. The Divisional Engineer is no party to the contract. He signed it on behalf of the Union of India. Plaintiffs have been found not to have been aware at the time of entering into the contract that there were limitations on the power of the Divisional Engineer which deprived the contract of all legal effect. -- K. Perumal Mudaliar Vs. Province of Madras, is another case cited by Mr. Ahmed. It was held there that

where the correspondence disclosed that the contract was negotiated between the superintendent of a Government Soap Institute, who was not authorised by the Government, and the defendant and that the contract was also concluded between the same two parties and this was done with the permission of the Director of Industries who had been authorised by the Government, neither the Government nor the Director of Industries entered into a contract with the defendant and the contract was therefore invalid, as it did not comply with Section 175.

In this case the Government sued on the basis of the contract. The suit was for damages for failure of the defendant to supply oil as agreed upon. It was held that by reason of the contravention of Section 175 no binding contract came into existence. No one has any quarrel with the proposition laid down in this case. I have already come to the conclusion that the contract is not binding on the Union by reason of the fact that Section 175(3) has been contravened.

38. The next case relied on is -- Jharia Coal-field Electric Supply Co. Ltd. Vs. Kaluram Agarwala, In this case it was held that

where money is voluntarily paid under an illegal agreement which has been carried into effect, the money so paid cannot be recovered back, if parties are in "pari delicto" and they had knowledge of the illegality of, the agreement before

payment.

It was also held that:

The provisions of Section 65 apply to a case only if the parties are competent to contract and the agreement, though void from its inception, is discovered, after they have acted on the faith of it to be not enforceable by law. It has no application where the parties, though competent to contract, were in "pari delicto" and they knew the unlawfulness of the agreement before they acted on it. Nor does it apply where the object of the agreement was illegal to the knowledge of both parties and they acted on it or derived benefit therefrom.

This decision also has no application. The parties to the contract and the parties to the suit are not in "pari delicto." The Union of India was never a party to any fraud. The object or the consideration of the agreement was also not unlawful. All that may be said is that the Divisional Engineer had the dishonest intention of making some personal gain at the cost of the Government and this was known to the plaintiffs. But if plaintiffs are claiming anything in excess of what is due to them, the Union can resist the claim to that extent. Where the lawful object of the contract has been achieved, services have been rendered or goods supplied or work has been done and the Government have benefited thereby, this case will have no application. This case was between parties who entered into an unlawful agreement with full knowledge of its illegality.

Here in the case before us, the Union of India was not aware of any illegality at the time the contracts were entered into, nor was it "pari delicto" or aware of any contemplated fraud. -- "Guddappa Chikkappa v. Balaji Ramji" AIR 1941 Bom 274 (FB) (G) also is a case between parties who entered into contract, the object of which was illegal. There was a benami sale in favour of the plaintiff without consideration in order to enable the defendant to defeat his creditors. Both plaintiffs and defendants joined in perpetrating a fraud on defendant's creditors. Plaintiff sued for possession. It was held that

no court will allow itself to be sued as an instrument of fraud, and no Court, by the application of rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud.

The principle laid down in this case is the same as in the "Patna case (F)" referred to above and has got no application to the case.

39. The last case to which reference has been made in support of this contention is -- "Sitarampur Coal Co. Ltd. v. T. H. Colley" 13 Cal W. N. 59 (H). This case arose out of a contract between the plaintiff and a public servant who was employed for assisting the plaintiff in purchasing a boiler. His duties as a public servant conflicted with his obligations under the contract. The contract was held to be against public policy. This suit is not between plaintiffs and the Divisional Engineer. No fraudulent agreement between them is sought to be enforced. The suit arises out of contracts which have been executed on behalf of the Union and

sought to be enforced against the Union, who had no knowledge of any intended fraud sought to be practised on it by the plaintiffs and the Divisional Engineer in collusion.

The Divisional Engineer, Telegraphs had no inherent disqualifications to enter into contracts. He could enter into binding commitments on behalf of the Government within certain limits. He exceeded his authority and thus contravened the provisions contained in Section 175(3) of the Government of India Act, 1935. In the absence of any inherent disqualification or incompetency to make the contract, the case should not be outside the ambit of Section 65. I entirely agree with observations of Sinha J. in *Ram Nagina Singh Vs. Governor-General in Council*, that

the section enunciates the principle of restitution and should be liberally construed in order to do equity and justice between the parties. The intention of the section is to prevent a party to a void agreement to retain benefits received under it.

Even in spite of the contravention of Section 175(3) that is involved, the contract may not be regarded as wholly void. It is not binding on the Union. The result would be that the Union could not be sued on these contracts. The Divisional Engineer may himself be sued. The contract may be enforced against him. The Union could have ratified the agreements and may not be entitled to oppose the demand for restitution or for restoration of status quo ante by payment of reasonable compensation for work done, if as in this case it was discovered after the contracts have been completely performed that they were not binding on the Union. No difficulty would arise in a contract which is executory. The Government could repudiate it where Section 175(3) is contravened. But it cannot by any show of justice retain the benefit it has received under agreements which do not bind it.

I do not think that the provisions of Section 175(3) would be nullified if compensation is allowed to the plaintiffs for work that they have actually done on a reasonable basis and not on the basis of the terms of the contract. Section 175(3) hits the agreements which offend against its provisions. It does not go beyond it. Allowing compensation for services rendered on work done for the Government from which it has derived benefit is not opposed to any provision of the statute. I am conscious of the fact that there is considerable divergence of judicial opinion on the point. Most of these cases have been considered in AIR 1952 Cal 306 (A). I agree in the conclusion that Section 65 should be applied to an agreement which is discovered to be void by reason of its failure to comply with the statutory requirements. I may add that Mr. Ahmed did not dispute the applicability of Section 65 on the ground that its effect would be to nullify the provision of Section 175(3). The result of the discussion is that plaintiffs could sue for compensation for work done for the Government under the provisions of Section 65, Contract Act on the findings arrived at by me above, even if the contracts are held not to have been ratified:

40. Mr. Ahmed has next argued that the case of the plaintiffs is not based on the provisions of Section 65, Contract Act. They are suing on contracts. There is no allegation in the plaint that the contracts were discovered to be void after the completion of the work. The plaintiffs have not based their claims even in the alternative on Section 65, alleging that the contracts were discovered to be void after they had been performed. He urges that the decision of the case cannot be based on grounds outside the pleadings of parties. He relied on -- Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, in support of his contention. In this case it was held that the decision of a case cannot be based on grounds outside the pleadings of the parties and, it is the case pleaded that has to be found. Without an amendment of the plaint the Court was held not entitled to grant relief not asked for.

Mr. Ghosh concedes that the general proposition their Lordships laid down in the above case reproduces the law as contained in the Civil Procedure Code. In that case compensation had been claimed on the ground of breach of instructions. The position was abandoned and later compensation was sought on the basis of failure of consideration. This was not allowed. The facts of the present case are very different. The situation here is that tenders of the plaintiffs are accepted. The agreements were executed between them and the Union of India through its representative the Divisional Engineer, Telegraphs. The work was done under those agreements. The Union raised the plea that the agreements were not binding on it a long time after the institution of the suit. On this plea it has been found that the agreements contravened the provisions contained in Section 175(3) and therefore defendants cannot be sued on these agreements. The discovery that agreements are not enforceable against the Union is made during the pendency of the suit.

Plaintiffs in substance have claimed payment for work done. Even if they cannot claim compensation on the basis of or on the terms of their agreements, the claim for compensation on reasonable rates still remains. In any case the discovery that the agreements are not enforceable against the Union having been made during the pendency of the suit, plaintiffs cannot be penalised for not basing their claim on that ground. They were not aware when they instituted the suits that the agreements were not enforceable. The suit therefore cannot be dismissed on that basis and the Supreme Court decision on which Mr. Ahmed has relied is not applicable to the facts of this case.

41. Collusion between the contractors on one side and the "Divisional Engineer and the Construction Officer on the other even if taken as established, would also not justify the dismissal of the suits. I assume for purposes of the argument that there was collusion between plaintiffs and the officers of the Government who are concerned with these agreements. The object of the collusion was that officers would benefit in the process. The contractors too may have been intended to be benefited illicitly. Assuming that all this happened, the contracts would be voidable at the instance of the Union. The Union may have avoided or

repudiated them. This did not happen. The contracts have been executed.

In a case like this the remedies of the principal against the agent are: (1) to recover damages for want of skill and care and for disregard of the terms of the mandate; (2) to obtain an account and payment of secret and illicit profits which have come to the hands of the agent as an agent and finally, the principal's right to resist the agent's claims for commission and for indemnity against liability incurred as mandatory by showing that the agent has acted as a principal himself and not merely an agent. This view receives support from the decision reported in -- Maneklal Mansukhbhai Vs. Jwaladutt Pilani,

The proposition of law has been laid down on the strength of the decision in -- "Christoforides v. Terry 1924 AC 566 (K). It will appear therefore that where the agent has made secret or illicit profits, the contract with the third party would not be rendered void. But the principal can recover the illicit gain from the agent. This and the other two remedies are available to the principal under the ordinary law of contract and where agent happens to be a public servant, the contract itself would not be binding on the principal if there is contravention of the provisions contained in Section 175(3) which now corresponds to Article 299 of the Constitution.

42. The next question that arises for determination is the one which formed the subject-matter of issue No. 3 in the Court below. The issue involved the question whether the claims of the plaintiffs include works which were not only not actually done by them but were also neither authorised nor done in the interest of the Department.

Plaintiffs can succeed only if it is found that the work for which no payment has been made was done under the instruction of the officers of the Union in accordance with the terms of the agreement and the Union benefited thereby.

43-49. (His Lordship discussed the evidence bearing on issue 3 and concluded): I agree therefore with the learned Sub-Judge in his finding on issue No. 3 that plaintiffs' claims include items for which they are not entitled to any payment and I hold further that plaintiffs have not succeeded in showing that they have any legitimate claim to payment for any work outside that shown in the Divisional Engineer's letter of 4th March. The result is that plaintiff Purkayastha's claim for a sum of Rs. 50,446-1-0 and Sen's claim for a sum of Rs. 13,648-8-0 must be disallowed. The claims of both for damages also must fail, as compensation has been claimed for delay in payment of legitimate dues which have been found not to exist.

50. It is not necessary to decide whether plaintiffs have already received payment in excess of what was due to them. Defendant has not put forward any claim by way of setoff on account of any excess payment that may have been made by its officers. The right to institute separate suit for it has been reserved. In these circumstances there is no need for going into this question and the

evidence that bears on this aspect of the matter need not be considered.

51. The findings arrived at above cover issues Nos. 5 and 6 and in the view that we take of the matter it is not necessary to give any finding on issue No. 4.

52. Plaintiffs have also claimed refund of the security deposits. The amount of security in each case was Rs. 3,000/-. H. Sen agreed before suit that a sum of Rs. 700/- may be deducted from his security deposit. His claim is reduced to Rs. 2,300/-. The claim to refund of the above items is irresistible. Under the agreements security deposit could be forfeited under certain circumstances. The agreements are not binding on the Union of India. The deposits therefore could not be forfeited under the agreement. Nor have they" actually been forfeited. No other basis has been shown why the refund of security deposits be not ordered.

The agreements are no doubt not binding but that cannot affect the claim for a refund of the security deposits. In the first written statement this demand was conceded. The trial Judge has given no reasons for disallowing this item of the claim in each case. Mr. Ahmed, the learned Advocate for the respondent also has not been able to put forward any defence so far as this part of the case is concerned. Plaintiffs are undoubtedly entitled to get back the amounts to their credit as security deposits and it is to this extent alone that the decrees of the Court below require modification. We do not think plaintiffs are entitled to any interest on these amounts. The demands for refund of security deposits was coupled with other substantial claims which have been found to be untenable.

If refund of deposits alone had been sought, there would probably have been no resistance to the claim as is evident from the original written statement. Even in the amended statement no specific plea so far as this part of the claim is concerned was raised. The decrees of the Court dismissing the suits are reversed. N. Purkayastha is allowed a decree for a sum of Rs. 3,000/- and H. Sen shall be granted a decree for Rs. 2,300/-. The appeals are; allowed to this extent.

53. Plaintiffs have completely failed to substantiate their claim for compensation for work done. Their success is to a very nominal extent. It is limited to a part of the claim about which there was no serious dispute. In these circumstances we shall leave the parties to bear their own costs throughout.

Deka J.

54. I agree.