
(1955) 08 CAL CK 0041
In the Calcutta High Court
Case No : Suit No. 693 of 1950

New Churulia Coal Co. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 12-08-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 3, Order 6 Rule 17, Order 6 Rule 2, 80
Constitution of India, 1950 — Article 229(1)
Contract Act, 1872 — Section 2, 65
Government of India Act, 1935 — Section 175(3)

Citation : AIR 1956 Cal 138

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Advocate : Subimal C. Roy and Amiya K. Basu, for the Appellant; G.P. Kar, Sr. Central Govt. Counsel and S.P. Mitra, Jr. Central Govt. Counsel, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Mitter, J.—This is a suit for recovery of a sum of Rs. 35,509-12-0, alternatively for an enquiry into damages suffered by the plaintiff, for interest and costs.

2. The plaintiff is a Company with its registered office at No. 8, Lyons Range, Calcutta; in the year 1946 it was in need of boilers which were then very much in short supply. In order to help Colliery companies and others who were in need of boilers the Government of India started importing second hand boilers from the United Kingdom and allotting them to such persons. One such boiler being a Lancashire boiler was allotted to the plaintiff. On arrival in India and delivery to the plaintiff the boiler was found defective. Repairs were undertaken and effected to it.

The plaintiff's case is that even with the repairs the boiler is not what it had

contracted for. According to the plaintiff the defendant had undertaken to supply a boiler with a working pressure of 150 lbs. per square inch but even after the repairs the boiler was found to be incapable of developing more than a pressure of 109 lbs. per square inch and it was not therefore what the plaintiff had bargained for, being wholly unfit for the plaintiff's use. The plaintiff called upon the defendant to take the boiler back and refund the money paid but this the defendant refused to do. Hence this suit.

3. The plaint proceeds on the basis that there was a contract between the parties entered into by the plaintiff through its Managing Agents Messrs. Business Development Ltd. of No. 8, Lyons Range, Calcutta and by the defendant through the Assistant Coal Commissioner (HQ), Department of Industries and Supplies Government of India of No. 1 Council House Street, Calcutta.

The plaintiff alleges that the defendant's said officer was duly authorised to act on its behalf and in fact had so acted in the matter of the agreement of sale to the plaintiff a second hand Lancashire boiler by Thompson 30" x 9"-3" dish ended type, working pressure 150 lbs. per square inch, manufactured in the year 1920, complete with fittings, mounting and firebars as per description contained in the specification given in the letter of the Assistant Coal Commissioner dated 18-1-1946.

The plaintiff's case is that the bargain was entered into on the basis of representations and terms contained therein. The plaintiff alleges that at the time of placing the orders it informed the Assistant Coal Commissioner that the boiler was required for the purpose of being installed in its Churulia Colliery. The price fixed was Rs. 34,000/- and was in terms of the plaint paid to the defendant by a cheque drawn in favour of the Controller of Coal Accounts.

In May 1946 the plaintiff obtained delivery of a Lancashire boiler which was found damaged in parts and was submitted for test by the Chief Inspector of Boilers, Bengal. Certain repairs thereto were advised by the said Inspector of Boilers. For some months there was correspondence between the parties as to whether any, and if so, what repairs should be effected and on 27-3-1947 the Assistant Coal Commissioner suggested certain repairs to be carried out, the cost thereof to be borne by the parties in certain proportions. These repairs appear to have taken a long time. Even thereafter the boiler according to the plaintiff could only develop a pressure of 109 lbs. per square inch.

The plaintiff alleges that on 5-7-1949 it informed the Assistant Coal Commissioner that it had rejected the said boiler and called upon him to take the same back and refund the price paid. Particulars of the plaintiff's claim are given in para 13 of the plaint which includes Rs. 34,000/- being the price of the said boiler, Rs. 64-11-0 being the Railway freight paid by the plaintiff, Rs. 325-1-0 being the handling and unloading charges and Rs. 820/- being the cost of repairs.

4. According to the plaint the cause of action for this suit arose in or about June 1949 when failure of consideration occurred by reason of the boiler being

certified to have a working pressure of 109 lbs. per square inch only necessitating the rejection of the boiler. By letter dated 8-9-1949 the plaintiff caused notice to be served on the defendant u/s 80, Civil P. C. and instituted this suit on 7-2-1950.

5. The first point taken in the written statement is that the contract referred to in the plaint did not comply with the provisions of Section 175(3), Government of India Act, 1935, and as such was void and unenforceable. Without waiving the said defence the defendant further contends that the working pressure of 150 lbs. per sq. inch mentioned in the letter of 18-1-1946 was according to that test certificate of the Volcan Boiler and General Insurance Co. Ltd. and that the defendant had never given any guarantee or entered into any condition that the said pressure would be sanctioned Under the Indian Boiler Regulations.

The further defence taken is that the greater part of the damage if any, to the boiler had occurred in rail transit from Calcutta to the destination station Churulia and as such the defendant was not liable for the same. The defendant further denies the right of the plaintiff to return the boiler or to ask for refund of the price, freight and handling charges.

It is submitted that there was no failure of consideration in about June 1949 or at any other date and it is also contended that the right, if any, of the plaintiff to reject the boiler came to an end in June 1946, i.e. within a reasonable time after the delivery of the boiler to the plaintiff in May 1946.

6. A brief containing all documents disclosed by both the parties was prepared for the use of this Court but by consent of Counsel on both sides only the common documents therein were marked as exhibits. The first of such documents is a circular letter dated 18-1-1946 issued over the signature of the Assistant Coal Commissioner, stating that negotiations to procure a limited number of second hand Lancashire boilers from the United Kingdom had been concluded and definite news regarding the shipment of the boilers had been obtained.

It was also mentioned that the boilers had all been thoroughly overhauled and tested and a list of the boilers with details of each type and price was given as annexure to the letter. The specification given at the foot of the letter is as follows:

"3 Lancashire boilers by John Thompson 30" x 9"-3" dish ended type, working pressure 150 lbs. per sq. inch, date of manufacture 1920, complete with fittings, mounting and firebars".

After some correspondence which does not form part of the admitted brief there is a letter dated 9-4-1946 written by the Assistant Coal Commissioner to the plaintiff's Managing Agents informing them that a second hand Lancashire boiler which was coming from the U. K. had been allotted to the addressee for installation at Churulia Colliery and the approximate price thereof was Rs.

34,000/-. The addressee was further required to send a cheque for the amount made out in favour of the Controller of Coal Accounts.

Plaintiff's letter dated 25-4-1946 shows that the cheque was sent to Assistant Coal Commissioner on that day. The Railway receipt of the consignment was sent by the Coal Commissioner to the plaintiff's Managing Agents as an enclosure to the letter of 27-5-1946. Thereafter the boiler was taken delivery of by the plaintiff and certain defects detected.

On 20-2-1947 the plaintiff wrote to the Assistant Coal Commissioner enclosing copies of reports on the boiler from the Chief Inspector of Boilers, Bengal, and according to the plaintiff, this showed the unserviceable condition of the boiler.

The plaintiff complained that it would be something dependable but as the Chief Inspector of Boilers did not approve of it the plaintiff was forced to call upon the Assistant Coal Commissioner to arrange to take back and refund the value with freight and handling charges.

By letter dated 21-2-1947 the Assistant Coal Commissioner suggested that the repairs mentioned by the Boiler Inspector should be carried out so that the boiler could be put into commission. According to the writer the damage to the boiler had occurred in transit from Calcutta and Government was not liable therefor.

This was replied to by the plaintiff on 6-3-1947 to the effect that according to the experts the damage to the boiler was extensive and repair work would be very difficult and in the circumstances the defendant should give instructions for disposal of the boiler. On 27-3-1947 the Assistant Coal Commissioner wrote to the plaintiff that the question of returning the boiler did not arise at that stage as it was probably possible to have it repaired satisfactorily.

It was mentioned in that letter that the damage to the boiler was of two-fold nature (1) damage due to the cracks and broken rivets and (2) damage caused by the buckled front end plate. It was suggested that the damage of the first kind should have been repaired before the boiler was shipped but that the other damage must have been caused in transit after the goods had been put on rail at the docks. To quote the words of the Assistant Coal Commissioner:

"The terms of sale were F.O.R. Calcutta and, therefore any repairs necessary to repair the buckled end plate would have to be on your account. On the other hand Government is prepared to pay for the repairs which should have been carried out in the U. K. including the scrapping and cleaning of boiler, necessary to ascertain the full extent of the damage".

The writer therefore proposed to approach the Boiler Inspector to arrange to have the boiler thoroughly repaired and put into two parts one on account of repairs which should have been carried out in the U. K. and the other on account of damage which had occurred in transit from Calcutta, which would be on the plaintiff's account.

By letter dated 30-9-1947 the Assistant Coal Commissioner enquired of the plaintiff again as to whether the proposal mentioned in the letter of 27-3-1947 was acceptable to the plaintiff. In reply dated 5-4-1948 the plaintiff stated that since it required the boiler very badly it had no choice but to agree to the said proposal,

7. Thereafter some repairs were undertaken and on 5-7-1949 the plaintiff wrote to the Assistant Coal Commissioner again, stating that according to the decision of the Boiler Inspector, the boiler had not the working pressure of 150 lbs. per square inch as was represented by the defendant's letter of 18-1-1946 and on the cases of which representation the plaintiff had purchased it.

The plaintiff added "as the boiler has not the capacity of 150 lbs. per sq. inch it is unfit for use in our colliery", and further mentioned that the boiler would not serve the purpose for which it had been bought and therefore the addressee should take the boiler back and refund the money paid by the plaintiff. To this there was no satisfactory reply from the said Assistant Coal Commissioner and the plaintiff caused M/s Mitra and Mitra their Attorneys to address a letter to the Secretary, Department of Industries and Supplies, Government of India, New Delhi, setting out all the material facts and stating that the plaintiff intended to file a suit against the Govt. of India for recovery of the sums already mentioned.

8. Mr. Kar, learned Counsel appearing for the defendant was so sanguine that the plaint could be thrown out on the ground that there was no subsisting contract between the parties, that he was content to raise the issue only, viz., whether the contract pleaded in para 1 of the plaint was enforceable in view of the provisions of Section 175(3), Govt. of India Act.

Probably realising the indisputability of Mr. Kar's contention Mr. Roy, counsel for the plaintiff said that he would raise a second issue as to whether the plaintiff was entitled to recover the amount claimed in the plaint under the provisions of Section 65, Contract Act.

Mr. Kar strongly objected to this issue being raised and he argued that there was no foundation for it in the plaint and moreover the issue involved determination of question of fact which the defendant had not had an opportunity of meeting.

Inasmuch, however, as it appears from more than one decided case that this issue was allowed to be raised even without a specific pleading and a decree passed in favour of the plaintiff I said that after hearing arguments I would consider whether relief could be given to Mr. Roy's client on that plea. On that basis counsel were required to address me on the two following issues:

(1) Is the contract pleaded in para 1 of the plaint enforceable in view of the provisions of Section 175(3), Govt of India Act? (2) Is the plaintiff entitled to recover the amount claimed in the plaint under the provisions of Section 65, Contract Act?

9. The plaintiff examined one Taradas Bhattacharjee who described himself as an

Accountant of the New Churulia Coal Co. Ltd. He said that he had been in the employ of the company since the year 1944. Only 9 questions were put to him in examination-in-chief and he was not cross-examined because counsel for the defendant objected to the evidence being given. The material questions and answers thereto of this witness are as follows:

Q. 5 Look at paragraph 1 of the plaint. In this paragraph a contract has been alleged between the plaintiff and the defendant. Yes.

Q. 6. Did you or your firm ever know before the institution of the suit whether this contract was valid or void? We never knew that the contract was void.

Q. 7. After the institution of the suit did you or your firm ever come to know that the contract was void? Although it was stated in the written statement that the contract is void we did not accept that as correct but from hearing the proceedings of the case on the 28th of April last it occurred to us that the contract Is void.

Q. 8. (Put by the Court): What is your understanding now? Is it void or not void? -- It occurred to us that the contract is void.

Q. 9. What is your understanding now --the contract is void?

--Yes it occurs to me now that the con-tract stands to be void.

There can be no doubt that there was an agreement arrived at between the plaintiff on the one hand and the Assistant Coal Commissioner of the Department of Industries and Supplies, Govt. of India on the other about the purchase and sale of a second hand Lancashire boiler.

The question is whether this agreement Is one enforceable at law as against the Govt. or whether it is not so enforceable. If the answer to this question be in the affirmative there is a binding contract between the parties; if the answer be in negative, it must, in my opinion, be held to be void.

10. In recent pronouncements of this Court it has been held that an agreement of this kind which does not comply with the requirements of Section 175(3), Govt. of India Act, is void. The reported cases on this point are, among others, -- "The Province of Bengal v. S.L. Puri" 51 Cal W. N. 753 (A) and -- " Ram Nagina Singh Vs. Governor-General in Council, .

11. In the second case decided by the late Sinha J. the matter had been argued in great detail and the learned Judge came to the conclusion that the contract was void. The finding of the learned Judge was not assailed in appeal, the judgment of the Appeal Court being reported in -- " Union of India v. Ramna-gina Singh" 89 Cal LJ 342 (C).

12. So far as this Court is concerned it has come to be accepted almost universally that an agreement to which the Union of India is alleged to fee a party, is void if it does not comply with the requirements of Section 175(3), Govt.

of India Act, 1935.

Reference in this connection may be made to the judgments of Sarkar J. in -- "Sildi and Co. v. Governor-General of India, Suit No. 1704 of 1946 (Cal) (D), in -- Associated Live Stock Farm (India) Ltd. v. Governor-General of India in Council", Suit No. 1084 of 1946 (Cal) (E), in -- "Deokarandas Provudayal v. Union of India", Suit No. 1972 of 1946 (Cal) (P) and the judgment of the Appeal Court delivered by Chakravartti C. J. and S. R. Das Gupta J. in -- "Associated Live Stock Farm (India) Ltd. v. Governor-General in Council", Appeal No. 93 of 1951, D/- 29-4-1954 (Cal) (G).

13. Certain observations contained in a recent judgment of the Supreme Court i.e. in -- Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others, to which reference is frequently made are apt to be misconstrued. The question there was whether the election of a particular person was void inasmuch as it was alleged that he was a partner of Moolji Sicka and Co. a firm which had outstanding contracts for the supply of Bidis to the Union of India. The Supreme Court came to the conclusion that certain contracts were subsisting on 15-11-1951 between Moolji Sicka and Co. and the Union of India.

Article 299(1) of the Constitution of India, which formed the subject-matter of discussion in that case, is in terms practically identical with Section 175(3), Govt. of India Act. 1935. Referring to the common practice of Govt. officers all over the country entering into a variety of contracts, often of a petty nature, almost daily, the Supreme Court observed:

"It may be that Govt. will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect; there being nothing to prevent ratification," especially if it was for the benefit of Govt."

Government was not a party to that appeal and consequently the attitude of Govt. towards the contracts referred to, was unknown. There was no knowing as to whether Govt. would ratify the contracts or would contend that they were unenforceable. But in the present case there is no question of ratification because the Govt. expressly disclaims that there was any contract between the parties.

In my view, the agreement in this suit, not, being in the form prescribed by Section 175(3), Govt. of India Act, must be declared to be un-enforceable in law with the necessary consequence that under the provisions of Section 2(g), Contract Act it must also be declared to be void.

14. The question then remains as to whether it can be given relief under the provisions of Section 65, Contract Act. Section 65 provides:

"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".

Before the Court can grant relief u/s 65, it has to arrive at a finding about the time when the agreement was discovered to be void, if that be in issue between the parties, and also to determine what are the advantages which a party has received which it must restore or for which it must pay compensation. When the party from whom redress is sought is a State Govt. or the Central Govt. there is an additional obstacle created by Section 80, Civil P. C.

15. The trial of the issue as to whether relief can be given u/s 65 necessarily involves a trial of at least two questions of fact. So far as my experience on the Original Side goes an issue of fact is never allowed to be raised unless it is to be found in the pleadings.

Mr. Roy drew my attention to the provision of Order 14, Rule 3, Civil P. C. and argued that it was open to the Court to raise issues from sources other than pleadings. In -- AIR 1943 29 (Privy Council) , their Lordships of the Judicial Committee allowed the question to be canvassed before them although the Chief Court of Lucknow had refused to entertain it.

16. Turning to the facts of this case I think it would be wholly undesirable to allow the plaintiff to raise an issue of this kind on the pleadings before me. There is no allegation in the plaint about the agreement having at any time been discovered to be void. Although the point was expressly taken in the written statement no application was made for amendment of the plaint.

The only evidence relating to the discovery of the void nature of the agreement, is to be found in the oral testimony of Taradas Bhattacharja which has been set out practically in extenso. It is strange that no director of the company or of the Managing Agents thought fit to adduce evidence to that effect but it was left to a subordinate officer like an accountant to come and testify to that fact.

According to Bhattacharya it occurred to him at the hearing of the trial that the agreement was void although he was aware that the point had been taken in the written statement. The witness never used the word "occurred" in his evidence. Even then I think it does not help the plaintiff. The evidence is of a most unsatisfactory character. If the directors of the plaintiff company were at all vigilant they should have found out immediately on perusal of the written statement that the defendant was challenging the existence of the contract itself.

If there was a misunderstanding or misapprehension in the minds of the directors of the plaintiff company at any time before the institution of the suit there would have been no difficulty in their appreciating the correct position after a perusal of the written statement. Bhattacharya did not state as to what had come out at the trial of the suit on 28-4-1955 which led to the discovery of the void nature of the agreement. He did not even suggest that he had come to discover this fact from the respective contentions of the learned counsel appearing on both sides.

On the 28th April a question arose as to whether this issue on Section 65 could be allowed to be raised at all. Discovery is a question of fact and like other issues of fact it involves a finding as to when It was made, who made it and how it was made. All these elements about the discovery of the nature of the agreement are singularly lacking in the testimony of Taradas Bhattacharya.

On this evidence I feel that the Court ought not be asked to hold that the agreement was discovered to be void on the date mentioned by this witness and if I was called upon to record a finding as to whether the agreement was discovered to be void on the 28th April I should certainly refuse to do so.

17. The date of the discovery becomes material for the purpose of computation of the period of limitation. It is now settled that, in the absence of special circumstances, the date when the agreement is discovered to be void, is the date of the agreement - itself, -- Abdullah Ashgar Ali v. Ganesh Das, AIR (20) 1933 PC 63 .

18. It may be urged that there are special circumstances in this case in view of the fact that from 1946 to 1949 the parties had gone on treating as if there was a valid and subsisting contract between them. It is possible that it had never occurred to the directors of the plaintiff company that the existence of the contract might be challenged by the defendant but there is no evidence of any special circumstances in this case which prevented such discovery being made at a date earlier than 28-4-1955.

19. The plaint is on the footing that there was a good and valid contract between the parties and that the defendant committed breach thereof by supplying a boiler which did not correspond with the description of that which was ordered. The defendant is asked to refund the purchase price and expenses incurred. The plea now put forward is wholly inconsistent with the above. According to the judgment of the Judicial Committee in -- Mohan Manucha's case (I)":

"The principle underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation".

Referring to the right of the appellants their Lordships observed that:

"they cannot have at one and the same time a right to insist that they have a valid subsisting special contract governing the transaction of loan entitling them to a specific rate of interest and a right to say that their money was advanced under a void agreement".

The right u/s 65 can only arise when the right claimed under the contract disappears. The two cannot co-exist. This is borne out by the judgment of Lord Hobhousc in the first leading case on this point in -- "Bassu Kuar v. Lala Dhum Singh" 15 Ind App 211 (PC) (K). The facts of this case as given at p. 216 of the report are as follows:

"Barumal and Dhum Singh who were bankers in Sharanpur had dealings together as a result whereof Dhum Singh came to owe Barumal a sum of Rs. 33,359/3/6. It was then agreed between them that Dhum Singh should. transfer to Barumal or to his wife Basso Kuar, certain villages for the sum of Rs. 55,000/- and that his debt should be set off against the price.

Dhum Singh executed a deed by which he acknowledged the receipt of the whole purchase money and conveyed the villages to Basso Kuar, and he endorsed on the deed a memorandum showing the balance only of the price, after allowing for the debt, was paid in cash. No money was actually paid."

"Barumal took away the deed and signed a letter prepared by Dhum Singh in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not In accordance with certain conditions for which he had stipulated and declining to complete the purchase, he demanded what was owing to him.

Dhum Singh on his part Insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on 3-8-1880 against Barumal and Basso Kuar for specific performance of the contract praying for the registration of the deed and for an order on Barumal to pay the balance of Rs. 55,000/- less Rs. 35,359/3/6 with interest".

The Subordinate Judge decided in favour of Dhum Singh and gave him a decree. But on appeal the suit was dismissed.

20. Thereupon Barumal renewed his demands for the payment of his debt, and not being able to get it he in conjunction with his wife Basso, instituted a suit on 10-9-1884 alleging in the plaint that Dhum Singh had taken steps contrary to the engagement between the parties and that the contract set up by Dhum Singh had been declared by the High Court to be invalid.

21. Dhum Singh's defence was that Barumal always denied the existence of a contract and the claim of Barumal therefore as to the repayment of the debt was barred by limitation. When the matter came up to the High Court it was held that the defence was sound in law and Barumal's suit was dismissed on the ground of limitation. The decision of the High Court was set aside by the Judicial Committee. Delivering judgment Lord Hobhouse observed:

"Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. They think that it is substantially put upon the right ground in the plaint. It must be remembered that it has throughout been common ground to both disputants that there was a contract made between them and that among its terms were the sale of villages for Rs. 55,000/-, the retention by Dhum Singh of his debt of Rs. 33,359/3/6 as part payment and the payment by Barumal of the balance. Their quarrel was about other matters.

In their. Lordships" view the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on Dhum Singh. He was no

longer in the position of being able to allege that his debt to Bharumal had been wiped out by the contract and that instead thereof Bharumal was entitled to the villages. He became bound to pay that which he had retained in payment for his land".

22. It is therefore apparent that the obligation to pay compensation or to restore the benefit received under a void agreement is completely different from that under the agreement itself. The obligation to make compensation in respect of the contract discovered to be void is like a phoenix that can be raised again by one of the parties from the dead ashes of its former self. Before the new right can come into being the old right must die; the cause of action u/s 65, Contract Act cannot exist side by side with the cause of action under the contract itself.

The difficulty felt by me in dismissing outright the plaintiff's claim u/s 65 is due to the decision in the case of -- Mohan Manucha v. Manzur Ahmad Khan (I) and to two other judgments to which I shall presently refer. But in my opinion these judgments should be considered as, exception to the general law that a party should not be allowed to succeed on a case not made out in the pleadings.

23. In "Haranath Kuar v. Indar Bahadur Singh" AIR 1922 PC 403 (L), the Judicial Committee upheld the claim u/s 65. The appellant instituted a suit to recover from the respondent, with mesne profits a half of an Oudh Talukdari estate under a deed of the sale dated 2-1-1880, by which the respondent purported to sell to the appellant's deceased husband; alternatively the appellant claimed by her plaint to recover Rs. 25,000/- the purchase money, with interest.

The Subordinate Judge dismissed the suit on the ground that the respondent had merely a right of expectancy in the estate and no property passed under the deed of sale. With regard to the money claimed he held that it was barred by limitation. On appeal, the Court of the Judicial Commissioners held that the agreement was void u/s 23, Contract Act; consequently principles of equity could not be invoked to give effect to it.

24. Before the Board the money claimed was based on Section 65. Dealing with this point Sir Lawrence Jenkins observed:

"Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Inder Singh in the villages which he purported to sell by the instrument of 2-1-1880, and that the true nature of those rights was not discovered by the plaintiff, or Rachpal Singh earlier than the time at which his demand for possession was resisted and that was well within the period of limitation."

"It was thus that the agreement was discovered to be void and the discovery in their Lordships' view was one within the words and the meaning of Section 65,

Contract Act."

25. In the case of -- "Mohan Manucha v. Manzur Ahmad Khan (I)", the claim on a mortgage executed by the defendant-respondent in favour of the appellant was resisted on the plea that the absence of written permission by the Collector of the District under para II of the Third Schedule to the CPC rendered the mortgage void. This plea was upheld by the trial Judge and the suit was dismissed. The claim on the personal covenant contained in the mortgage deed was held to be barred by limitation.

The Chief Court of Lucknow refused to entertain the claim u/s 65. In the course of argument before the Board counsel formally asked for, and was granted, permission to abandon the claim on the personal covenant and to treat the whole transaction as rescinded on the discovery that the mortgage was void. Sir George Rankin, who delivered the judgment of the Judicial Committee observed :

"..... the transaction in question in the present case was an open and honest transaction and its invalidity was at the time obscured by the difficulty in applying para II of the Third Schedule correctly to the particular facts For ten years payments of interest were made and received thereunder.

In these circumstances" their Lordships are of opinion that in the special circumstances of the case the security of 12-8-1919, was not discovered to be void until after the present suit was instituted on 7-8-1934. On this view no question of limitation can arise u/s 65 since the circumstances giving rise to their right to rescind did not come to the appellants' knowledge until after the action brought".

Referring to the Chief Court it was observed: "Their Lordships think that their attitude towards the question of pleading was unduly rigid".

"A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he was to restore what he received thereunder. What defence the respondents can have desired to make on this aspect of the case is not revealed by anything in the judgment of the Chief Court, apart from the question of limitation, with which their Lordships have already dealt, and from the contention that Section 65 cannot apply where there is a transfer of property and not a mere agreement.....

There is no reason to apprehend that by allowing the appellants to obtain relief u/s 65 any injustice to the respondent can result. On the contrary, "prima facie" it is hardly just that the rights of the parties in respect of the transaction of 12-8-1919, should be dealt with in part and in part postponed. Though it is a matter of discretion, result so inconvenient needs to be justified by solid reason, and their Lordships see no sufficient reason to prevent restitution being ordered in this case."

26. My attention was also drawn to the judgment of the Supreme Court in the case of -- Srinivas Ram Kumar Vs. Mahabir Prasad and Others, (M). In this case

the plaintiff had paid Rs. 30,000/- to the defendant, and the question was as to the terms on which it was paid. The plaintiff claimed that there was an agreement between the parties whereby the defendant covenanted to sell a property for Rs. 34,000/- and had put him in possession of the house agreed to be sold in part performance of the contract, promising to execute the conveyance as soon as the title deeds were returned from a third party.

The defendants contended that there never was any agreement to sell the house and that the story of the contract of sale as set up was entirely false. The defendants admitted the advance of Rs. 30,000/- by the plaintiff, but their case was that it was meant as a loan carrying interest at 6 per cent, and possession of the property was given for facilitating payment of interest due on this loan and not in part performance of the contract of sale. The Subordinate Judge came to the conclusion that the story of the contract of sale as alleged by the plaintiff was not established and dismissed the plaintiff's claim for specific performance but gave a decree on the defendant's admission.

27. The plaintiff preferred an appeal to the High Court of Patna. The High Court, however, took a different view and dismissed the suit in its entirety. The Supreme Court felt to grant the plaintiff-appellant relief and observed that:

"The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings & which the other side was not called upon or had an opportunity to meet. But when the alternative case which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.

A demand of the plaintiff based on the defendants' own plea cannot possibly be taken as a surprise by the latter and no question of adducing evidence on these facts could arise when they were expressly admitted by the defendant in his pleading. In such circumstances when no injustice can possibly result to the defendant it may not be proper to direct the plaintiff to a separate suit. As an illustration of this principle reference may be made to the pronouncement made by the Judicial Committee in -- *Mohan Manucha v. Manzur Ahmad Khan (I)*".

The facts were certainly exceptional. There was a clear admission by the defendant and the Supreme Court thought that the justice of the case would be met by granting relief to the plaintiff on the defendant's admission. In the case before me, there is no admission. The defendant has denied the plaintiff's claim in form and in substance.

The defence that the contracts were void; was taken expressly in the written statements as early as 1950, and I do not see any justification for the plaintiff's conduct in this case. If the plaintiff's case be true that it discovered the agreement to be void only on 28-4-1955, a new cause of action has arisen to the plaintiff on the date which ought to be the subject-matter of separate

proceedings.

28. Entertaining a case not to be found in the pleadings is a procedure which the Judicial Committee has strongly deprecated in many cases. To quote from the judgment in the case of -- AIR 1943 34 (Privy Council) .

"While a rigid practice of refusing leave to amend pleadings is far from commendable, to entertain a case of which the pleadings contain no suggestion is another matter altogether."

It will thus be seen that the facts, both in --"Manucha"s case (I)" and -- "Srinivas Ramkumar"s case (M)" were exceptional while In -- "Haranath Kuar"s case (L)" the money claim, which was ultimately upheld, was included in the plaint. In this case, as already mentioned, no application was made for leave to amend the plaint. It was probably not done deliberately in order to avoid the objection which might be taken by the defendant on the ground of Section 80, C. P. C.

The learned counsel for the plaintiff wanted to circumvent this objection by arguing that there would be no necessity of serving a fresh notice u/s 80 in a case like this and he relied on the observations of the Bombay High Court in the case of -- Lady Dinbai Dinshaw Petit and Others Vs. The Dominion of India and Another, .

This case, however, in my opinion, does not help the plaintiff, because the learned Chief Justice of the Bombay High Court pointed out that where the amendment of the plaint gives further grounds in support of the contentions and allegations which constitute the plaintiff"s cause of action and are merely by way of amplification of the averments already there, it cannot be said that the cause of action has been altered and that a fresh notice u/s 80, C. P. C. is necessary.

Mr. Roy also relied on certain observations of this Court in this case of -- "Ezra v. Secy, of State" 30 Cal 36 at p. 72 (P). There it was held that if the plaintiff wanted to rely on certain facts which were not within his knowledge at the date of institution of the suit and attempted by suitable amendment of the plaint to incorporate these in the plaint no fresh notice u/s 80 is necessary.

If the passage relied on means that no fresh notice is necessary because the relief claimed is not altered, although the cause of action made out in the amended plaint is different, I venture to think that it is not in harmony with later pronouncements of various Courts including those of the Judicial Committee.

In the case of -- AIR 1927 176 (Privy Council) , the Judicial Committee held that the section was explicit and mandatory and admitted of no limitations and no exceptions. If that be so, I do not see how the plaintiff can excuse itself for not having served the notice u/s 80, C. P. C. with respect to this new and altered cause of action.

29. Lastly, I should mention that it has been held in various cases decided by this

Court from time to time that in respect of the cause of action u/s 65, Contract Act as against Government, a suit will not lie except after service of a notice u/s 80, C. P. C. In this connection, the following judgments may be referred to:-- the judgments of Sarkar J. in --Suit No. 1704/46 (Cal) (D), in -- "Deokarandas Provudayal v. Union of India", Suit No. 1972/ 46 (Cal) (F) and my judgment in the suit of -- "Nalini Ranjan Guha v. Domn. of India", Suit No. 3594 of 48 (Cal) (R)".

30. In the result, I hold on Issue No. 1 ghat the agreement is void and unenforceable as against the Govt. of India. As regards issue No. 2, I hold that the plaintiff cannot properly raise it and even if the plaintiff be allowed to raise it, the suit would be bad for want of notice u/s 80, C. P. C. Moreover, I do not find that the agreement was discovered to be void at that time or in the manner alleged by the plaintiff's witness Taradas Bhattacharjya and the suit would fail on that ground also. In the result, the suit is dismissed with costs Certified for two Counsel.