

(1973) 10 MP CK 0006

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 16 of 1971

Ram Ratan Gupta

APPELLANT

Vs

The State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 18-10-1973

Acts Referred:

Constitution of India, 1950 — Article 299, 299(1)
Madhya Pradesh Excise Act, 1915 — Section 18, 64

Citation : AIR 1974 MP 101 : (1975) ILR (MP) 377 : (1974) 19 MPLJ 95 : (1974) MPLJ 95

Hon'ble Judges : P.K. Tare, C.J.; S.M.N. Raina, J.; G.P. Singh, J

Bench : Full Bench

Advocate : B.C. Verma, for the Appellant; J.P. Bajpai, Dy. Advocate-Gen., M.V. Tamaskar, Government Advocate and K.K. Adhikari, Dy. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Tare. C.J.

This is a petition under Articles 226 and 227 of the Constitution of India by an excise contractor Challenging the order, dated 22-12-1970 (Petitioner's Annexure P/1), passed by the Additional Tahsildar, Excise, Gwalior, and Recovery Officer, issuing notice to the petitioner to show cause as to why an amount of Rs. 4,905/- should not be recovered from him as arrears of land revenue towards the loss suffered by the Government in re-auctioning the licence for a liquor shop.

The case had come up for hearing before a Division Bench of this Court, presided over by one of us (namely, Raina, J. and Dwivedi, J.), which by order, dated 22-3-1972 referred the entire case for decision by a Full Bench, as Interpretation of Article 299 of the Constitution of India was involved, on which different opinions have been expressed in some cases. We, therefore, propose to dispose of the entire case as no particular question has been referred to us by the Division Bench for our opinion.

The facts leading to the present writ petition are as follows. The Collector, Gwalior. In February, 1970 auctioned the licence for a liquor shop situated at Hazire chowk, Gwalior, for the year 1970, in which the petitioner was the highest bidder. He offered the bid of Rs. 8,000/- in respect of Bhana and a bid of Rs. 3,500/- in respect of Bhangghota. He signed the bid lists dated 14-2-1970 and the auction in his favour was finalised by the Collector accepting the bid as also by the District Excise Officer, as per the respondents' Annex. R/1. Thus, the total auction price was Rupees 11,500/-. Thereafter the petitioner did not turn up and consequently the excise licence was re-auctioned on 28-3-1970 in favour of one Radheahyam Sharma for a consideration of Rs. 6,600/-. The petitioner was, therefore, given a notice to show cause as to why the balance of Rs. 4,900/-, which was the loss suffered in the re-auction and Rs. 5/- as miscellaneous expenses -- total Rupees 4,905/-, should not be recovered from him. The petitioner, instead of approaching the higher authorities of the Excise department has filed this writ petition for a Writ of certiorari, seeking to quash the order of the Recovery Officer (Petitioner's Annexure A/1) and also a Writ of Mandamus restraining the respondents from recovering the amount of the alleged loss.

On behalf of the petitioner mainly three grounds are urged by the learned counsel for the petitioner. The first ground is that there was no concluded contract and, therefore, the liability is not legally enforceable. The second ground is that there was no written contract, as required by Article 299(1) of the Constitution and, therefore, no liability arose on the basis of an unconcluded contract. The third and the last ground is that the petitioner had not committed any default and the default, if any, was on the part of the authorities constituted under the M. P. Excise Act, 1915, and, therefore, no recovery could, be made from the petitioner.

Presently, we shall deal with the questions in a serial order. But before that it is necessary to take note of the provisions of the Excise Act in the matter of auctioning excise licences and confirmation of sale and to ascertain if any written contract between the contractor and the Government is contemplated as per Article 299(1) of the Constitution of India.

Section 17 of the M. P. Excise Act, 1915, lays down that no intoxicant shall be sold except under the authority and subject to the terms and conditions of a licence granted in that behalf. We are not concerned with the three provisos, but the licence is to be granted on such terms and conditions as the Excise Commissioner may determine under the Excise law for the time being in force. Section 18 of the Act provides that the State Government may lease to any person on such conditions and for such period as it may think fit the right-

- (a)
- (b) of selling by wholesale or by retail, or
- (c)

any liquor or intoxicating drug within any specified area.

Sub-section (2) provides that the licensing Authority may grant to a lessee under Sub-section (1) a licence in the terms of his lease; and when there is no condition in the lease which prohibits sub-letting, may, on the application of the lessee, grant a licence to any sublessee approved by such authority. Section 28 of the Act provides for form and conditions of licences etc. It lays down that every licence, permit or pass granted under this Act-

(a) shall be granted--

(i) on payment of such fees (if any),

(ii) for such period,

(iii) subject to such restrictions, and on such condition, and

(b) shall be in such form and contain such particulars as the State Government may direct either generally by rules made u/s 62 or in any particular instance.

Section 31 of the Act empowers the authority granting a licence, permit or pass to cancel or suspend it on grounds stated in the section subject to such restrictions as the State Government may prescribe. Section 62 of the Act empowers the State Government to make rules for the purpose of carrying put the provisions of the Act and Sub-section (2) of the said Section specifies some of the matters on which such rules can be framed. Section 63 provides that all rules and notifications shall be published in the official Gazette and shall be effective from the date of such publication or from such other date as may be specified in that behalf.

6-A. Section 64 of the Act relates to recovery of Government dues. It may be relevant to reproduce the entire section, which is as follows:

"Section 64. Recovery of Government dues.-- (1) The following moneys, namely.- (a) all excise revenue,

(b) any loss that may accrue when, in consequence of default, a grant has been taken under management by the Collector, or has been re-sold by him, and

(c) all amounts due to the Government by any person on account of any contract relating to the Excise revenue, may be recovered from the person primarily liable to pay the same, or from his surety (if any), by distress and sale of his movable property, or by any other process for the recovery of land revenue due from land holders or from farmers of land or their sureties.

(2) When a grant has been taken under management by the Collector, or has been re-sold by him, the Collector may recover, in any manner authorized by Sub-section (1), any money due to the defaulter by any lessee or assignee".

The State Government have made the Madhya Pradesh Excise Rules for general application in exercise of powers conferred by Section 62 (2) (e), (f) and (h) of

the Act. Rule IV of the Rules relates to confirmation of auction sales. The rule reads as follows:

"The confirmation of any auction sale, whether held by the Collector himself or by any other officer shall rest with the Collector, who may accept or reject any bid at his discretion without assigning any cause."

Under the terms of auction it is provided that the Collector will have the power to accept bids finally if the amount of the bid is less than Rs. 50,000/-. In case of bids exceeding Rs. 50,000/-, it is the Excise Commissioner alone who can accept such bids finally. As the amount of the auction price in the present case was below Rs. 50,000/-, the Collector accepted the bid finally. Under Rule XXIV (1) of the Ganja and Bhang Rules, the form of licence for retail sale of Bhang is prescribed as per Form H. D. 7 (to be found at page 885 of the M. P. Local Acts, Volume III, 1970 Edition by R.K. Pandey).

There is no provision in the Act or the Rules whereby a formal deed of contract is contemplated to be executed between the licensee and the Government. What is done is that after the acceptance of the final bid by the authority concerned, a licence is issued in favour of the licensee. The licence is to be signed by the authority empowered to issue licences and there is no provision for counter signatures of the licensee. This is the procedure for grant of excise licences as per the provisions of the M. P. Excise Act, 1915.

In respect of forest contracts, there are provisions for entering into a formal contract between the forest contractor and the Government. As such, the provisions of the Forest Act are altogether different and the practice is that a formal deed of contract between the forest contractor and the Government is contemplated by the provisions of the Act and the Rules. Section 82 of the India Forest Act, 1927, provides for recovery of money due to the Government as arrears of land revenue.

It may next be necessary to see as to how the forest contracts are entered into. Para. 102-A of the C. P. and Berar. Forest Manual, Volume 1, page 117, 1950 Edition, provides that the powers of Forest Officers to execute deeds, contracts and other instruments are regulated by Notification No. 1119-236-XV, dated 20th December 1929, where agreements or contracts have to be entered for which the standard forms are unsuited, the draft deed must be referred to the Legal Remembrancer for approval before it is executed. Thereafter, the authorities of the Forest department are empowered to execute contracts up to a certain pecuniary limit only.

Thus, the provisions of the Forest Contract. Rules clearly envisage execution of a formal deed of contract, between the forest contractor and the Government and certain officials of the Forest department are empowered to act on behalf of the Government. This aspect will have a vital bearing on the distinction sought to be drawn by the learned Advocate General whose contention is that cases under the Indian Forest Act are clearly distinguishable inasmuch as a formal deed for

contract in exercise of executive powers is necessary in forest contracts, while the M. P. Excise Act, 1915, is a complete Code by itself which does not contemplate execution of a formal deed of contract in exercise of executive powers. His contention is that on acceptance of the highest bid by the authority empowered in this behalf, there is a concluded contract as provided by the statute without execution of any formal deed and the only thing required to be done is to issue a licence in favour of the person whose bid has been accepted AS such, the contention of the learned Advocate General is that such a contract is in exercise of statutory powers and not in exercise of executive powers and for that reason. Article 299(1) of the Constitution of India would not at all be attracted to excise contracts.

Although, forest contracts are disposed of by auctions, the Forest Act and the Rules clearly contemplate execution of a formal deed of contract between the Government and the forest contractor and certain authorities of the Forest department, are empowered to act in that behalf. As such, the very basis of forest contracts is executive powers and not statutory powers. Therefore in respect of forest contracts it is absolutely necessary that there ought to be compliance with the requirements of Article 299(1) of the Constitution of India. It was for that reason that their Lordships of the Supreme Court in K.P. Chowdhary Vs. State of Madhya Pradesh and Others, laid down as follows:--

"What was said in these cases with respect to Section 175 (3) of the Government of India Act, 1935, applies with equal force to Article 299(1) of the Constitution. Two consequences follow from these decisions. The first is that in view of Article 299(1) there can be no implied contract between the Government and another person, the reason being that if such implied contracts between the Government and another person were allowed, they would in effect make Article 299(1) useless, for then a person who had a contract with Government which was not executed at all in the manner Provided in Article 299(1) could get away by saying that an implied contract may be inferred on the facts and circumstances of a particular case. This is of course not to say that if there is valid contract as envisaged by Article 299(1), there may not be implications arising out of such contract. The second consequence which follows from these decisions is that if the contract between Government and another person is not in full compliance with Article 299(1) it would be no contract at all and could not be enforced either by the Government or by the other person as a contract. In the present case it is not in dispute that there never was a contract as required by Article 299(1) of the Constitution. Nor can the fact that the appellant bid at the auction and signed the bid-sheet at the close thereof or signed the declaration necessary before he could bid at the auction amount to a contract between him and the Government satisfying all the conditions of Article 299(1). The position therefore is that there was no contract, between the appellant and the Government before he bid at the auction nor was there any contract between him and the Government after the auction was over as required by Article 299(1) of the Constitution. Further in view of the mandatory terms of Article 299(1) no implied contract could be

spelled out between the Government and the appellant at the stage of bidding for Article 299 in effect rules out all implied contracts between Government and another person. The view taken by the High Court that Section 155 (b) of the Madhya Pradesh Land Revenue Code which provides for recovery of money as arrears of land revenue would therefore ensure in favour of the Government and enable it to recover the deficiency cannot be sustained That clause provides for recovery of all moneys, falling due to the State Government under any grant lease or contract, and says that they shall be recoverable in the same manner as arrears of land revenue. The High Court was of the view that, the word "contract" in this clause includes an implied contract. But if there can be no implied contract between the Government and another person in view of the mandatory provision of Article 299(1) of the Constitution there can be no question of recovery of any money under an implied contract under Clause (b) of Section 155. The view therefore taken by the High Court that this amount, could be recovered u/s 155 (b) is not correct."

Further on their Lordships in the said case observed as follows:--

"This brings us to the second question, namely whether the amount can be recovered under any other provision of law as arrears of land revenue in this connection learned counsel for the State has referred us to Section 82 and Section 85 of the Indian Forest Act. The question whether the amount can be recovered either u/s 82 or u/s 85 of the Indian Forest Act read with the rules framed thereunder has not been investigated by the High Court, The view of the High Court that Rules 28 and 29 of the Forest Contract Rules apply after a contract in writing has been executed appears to be correct But the question whether the State can still recover the amount as arrears of land revenue by virtue of the conditions of auction, even though Rules 28 and 29 do not apply has not been investigated. This question will require investigation before the petition can be finally disposed of."

In that view their Lordships allowed the appeal of the forest contractor and remitted the case to the High Court for determining after hearing both the parties, whether there was any other provision of law or rules which would permit recovery of this amount in view of the conditions of auction.

Thus, cases under the Indian Forest Act in respect of forest contracts are clearly distinguishable and they would not conclude the question which is involved in the present case. Under the M. P. Excise Act, 1915, a contract comes into existence by virtue of the Statutory provisions and the rules and no formal deed of contract is required to be executed In fact what is granted to the contractor is a licence either to manufacture or to collect or to possess an excisable article and in lieu of consideration he is granted the necessary licence, There is no occasion for the authorities of the Excise department to execute a formal deed of contract on behalf of the Government in exercise of executive powers. Thus, the cases relating to excise contracts will stand on a different footing and Article 299(1) of the Constitution of India will be wholly inapplicable to such cases.

Having in view the different provisions in respect of excise contracts and the forest contracts, we may next examine the trend of the case law. In *State of M. P. v. Board of Revenue*, M. P. 1964 MPLJ 237 a Division Bench of this Court, presided over by Dixit. C. J. and S.P. Bhargava, J. with respect to the function of the authority confirming the auction observed as follows:--

"Applying these tests here, it is evident that the decision of the Excise Commissioner about the confirmation or refusal to confirm an auction sale is purely an administrative decision. There is no indication either in the Madhya Pradesh Excise Act, 1915, or the Rules made thereunder that the Excise Commissioner should base his decision to confirm or refuse to confirm an auction sale on the material or evidence obtained in a particular manner and after hearing the representation of the person concerned. In considering the question of the confirmation of the auction bid the Excise Commissioner can base his decision on whatever material he thinks fit and howsoever obtained in the course of his executive functions. In its very nature, the question whether a bid made by a person at an auction sale exceeding the limit of Rs. 30,000 should or should not be accepted has to be determined from the point of view of policy and expediency, and on considerations such as whether the person making the bid will be able to fulfil the contract and whether there was a likelihood of a higher price still being obtained at a re-auction, The order Of the Excise Commissioner refusing to confirm sale may be appealable to the Board of Revenue. But from the mere fact that an appeal from an order of the Excise Commissioner refusing to confirm a sale is permissible, it does not follow that in making the order refusing to confirm the sale the Excise Commissioner discharged a quasi-judicial function. As pointed out in the case of *Moti Mivan* 1960 MPLJ 100 :(AIR 1980 M P 157, it is entirely erroneous to think that an order is quasi-judicial because it can be reviewed or is appealable. An administrative order can be subject to review of appeal by an administrative authority in much the same way as a judicial order is by the judicial authorities. The nature of an order, which is purely administrative, and of the proceeding leading to it, is not changed when it comes up before the reviewing or the appellate authority. It is well settled that the functions and powers of the reviewing or the appellate authority can at the most be only those which the authority passing the order sought to be reviewed or appealed from would have itself exercised. The reviewing or the appellate authority would generally be guided by principles which should in its opinion have governed the proceedings under review or appeal." This view is fully supported by the decision in *R. v. Archbishop of Canterbury* (1944) 1 All ER 179 which was affirmed in appeal in *R. v. Archbishop of Canterbury* (1943) 2 All ER 791. The Excise Commissioner has to decide the question of confirmation of a sale in his discretion. No doubt, he has to exercise his discretion reasonably. But that does not mean that there is a duty cast on him to act judicially."

The Division Bench relied on the pronouncement of their Lordships of the Supreme Court in *Kishan Chand Arora Vs. Commissioner of Police, Calcutta*, .

Thus, there can be no doubt that the function of the authority accepting or refusing to accept the bid is purely administrative in nature, which does not involve any judicial or quasi-judicial process.

In *Shrimati Nanhibai Vs. The Excise Commissioner and Others*,) a Division Bench of this Court, presided over by Dixit. C. J. and S.P. Bhargava, J. held that the State Government has the exclusive rights of manufacturing, selling or possession of intoxicants or any country liquor and what is done by the auction is that the right is transferred subject to rules and restrictions in the shape of grant of a licence. As such, the delegated authority to be exercised by the Excise Commissioner or by the Collector has to be exercised subject to the rules and subject to such restrictions as may be placed on their powers by the State Government by Notification or order.

We may next take note of some pronouncements of their Lordships of the Supreme Court with respect to the scope of Article 299(1) of the Constitution of India, as also Section 175(3) of the Government of India Act, 1935, which in effect was similar to Article 299(1) of the Constitution of India. In *Karamshi Jethabhai Somayya Vs. The State of Bombay*, the question for consideration before their Lordships of the Supreme Court was whether an agreement between the Superintending Engineer and private party excluding land of latter from factory area and giving supply of water for irrigating the land permanently, was an agreement within the scope of Bombay Irrigation Act. Their Lordships held that the said agreement fell outside the ambit of the said Act and as such, the agreement was made in exercise of the executive authority of the Province and as it did not comply with the requirements of Section 175(3) of the Government of India Act, 1935, it was void and it became unenforceable for that reason. Of course, their Lordships have left the question open as to whether the agreement executed within the scope of the Bombay Irrigation Act would attract the provisions of Section 175(3) of the Government of India Act, 1935. It appears that the said question never came up for consideration before their Lordships of the Supreme Court and only some High Courts have made pronouncement in that behalf.

In *Union of India (UOI) Vs. A.L. Rallia Ram*, their Lordships of the Supreme Court laid down the principles with respect to an arbitration agreement as follows:

"The authority of an arbitrator depends upon the authority conferred by the parties by agreement to refer their differences to arbitration. By Section 2(a) of the Arbitration Act, 1940, "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not:". A writing incorporating a valid agreement to submit differences to arbitration is therefore requisite; it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the Parties. There must be an agreement to submit present or future differences to arbitration, this agreement must be in writing, and must be

accepted by the parties. Clause 13 in Form F. D. (M)70 fulfils all these requirements. But the Dominion of India being a party to the arbitration agreement, to be binding the agreement had also to conform to the requirements of Section 175(3) of the Government of India Act, 1935, for an arbitration agreement is a contract within the meaning of the Government of India Act and it must, to bind the Dominion of India, be made in the form prescribed by that section. The question which then falls to be determined is whether the letter accepting the tender of the respondent conformed to the requirements of Section 175(3) of the Government of India Act.

Section 175(3) does not in terms require that a formal document executed on behalf of the Dominion of India, and the other contracting party, alone is effective. In the absence of any direction by the Governor-General u/s 175(3) of the Government of India Act prescribing the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled. The contracts for sale of "War disposal" goods were not directed by the Governor General to be made by a formal document executed on behalf of the Governor-General as well as by the purchasing party. It is true that Section 175(3) uses the expression "executed" but that does not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of Section 175(3)."

In this connection we might advert to the observations of a Division Bench of this Court, presided over by Dixit, C. J. and G.P. Singh, J. in *Raipur Transport Co. Pvt. Ltd. v. State of M. P.*, 1968 MPLJ 854 = (AIR 1969 Madh Pra 150) to the following effect:--

"It is, therefore, plain from the decisions, to which a reference has been just made, that the function performed u/s 68-D of the Act of hearing objections to a Scheme and of approving or modifying it is essentially an administrative function, though the process of hearing objections to the Scheme is quasi-judicial. Learned counsel said that the authority specified u/s 68-D was the State Government, and he seemed to suggest that the judicial authority was the Governor. If, as held by the Supreme Court in *H.C. Narayanappa and Others Vs. The State of Mysore and Others*, , Scheme framed u/s 68-C is a "law" within the meaning of Article 19(6) of the Constitution, then It is clear that the function performed u/s 68-D is executive, quasi-judicial, as well as legislative. The fact that the function performed u/s 68-D has judicial and legislative characteristics also does not, however, take out that function from the realm of a function performed in discharge of the executive power of the State Government and which function can be regulated by the Rules of Business. The matter does not admit of any doubt in view of the observations of the Supreme Court in *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*, . The pertinent observations are: "In the

performance of the executive functions, public authorities issue orders which are not far removed from legislation and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In the complexity of problems which modern Government have to face and the plethora of parliamentary business to which it inevitably leads. It becomes necessary that the executive should often exercise powers of subordinate legislation."

These observations support the view that if executive functions also involve quasi-legislative and quasi-judicial functions, then those functions can also be delegated as part of the executive functions."

It is, therefore, necessary in each case to see whether the power exercised by the authorities despite an appeal or a revision being provided, is executive, legislative or judicial or quasi-judicial. The operation of Article 299(1) of the Constitution of India will depend on the question whether the power exercised is executive. It will not apply where the power exercised is either legislative or judicial or quasi-judicial. That is the distinction to be drawn in such cases.

In this connection we might advert to a Division Bench case of the Orissa High Court, presided over by G.K. Mishra, C. J. and R.N. Misra, J. in *Ajodhya Prasad Shaw v. State of Orissa* AIR 1971 Ori 458 wherein the learned Judges with respect to excise contracts under the Bihar and Orissa Excise Act 1915, made the following, observations:--

"I have already indicated that under Chapter VI of the Act a licence for sale of liquor is to be granted by the Collector. The Act imposes an embargo on import, export and transport as also manufacture, possession and sale of the intoxicants as detailed therein and stipulates grant of licences by prescribed authorities for all such purposes. Section 20 deals with licence for sale and as far as material provides as follows:-- "No intoxicant shall be sold except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Collector.

Section 38 provides,

(1) Every licence, permit or pass granted under this Act.

(a) shall be granted-

(i) on payment of such fees (if any), and

(ii) subject to such restrictions and on such conditions, and

(b) shall be in such form and contain such particulars, as the Board may direct."

It is not disputed by any of the parties before us that the Collector is the licensing authority and that a fee for such purpose is leviable. Chapter III of the Rules made by the State Government deals with sale of intoxicants and Chapter VIII of the Board's Rules deals with fees, conditions and restrictions of licences under the Act settled by auction. Thus it is manifest that the licence in question is a statutory one.

Article 299 of the Constitution provides, (1) All contracts made in the exercise of the executive power of the Union or a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

XX XX XX Law is well settled and parties before us do not seek to canvass that this constitutional requirement is not mandatory. In the field it covers it is a prerequisite to bring into existence a valid contract. The question for examination in the present case is, however, different. Is there a contract at all and in case it involves a contract is it one purported to be made in exercise of the executive power of the State Government is the question for examination. In case the result of our investigation is that it is not a contract in exercise of the executive power of the State in terms of the language used in the Article, it would follow that this constitutional requirement has no application. I have already indicated that the settlements of the shop, the collection of the fee and the grant of the licence are all statutory acts by the prescribed authority. The intention of the Constitution is not to extend the principles in Article 299(1) of the Constitution to cover all possible contracts. That is why specific reference has been made to contracts "in the exercise of the executive power". It is not necessary for the present purpose to examine whether the licensing process involves a contractual agreement. Possibly there is an element of contract in the settlement, but certainly it is not one entered into in the executive power of the State but is regulated by the statute or the rules made thereunder. In the circumstances in the case of a statutory licence even based upon a contract the requirements of this Article cannot be invoked."

It may be noted that the provisions under the M. P. Excise Act, 1915, are more or less analogous. Thus the Division Bench of the Orissa High Court drew a distinction between cases where the power exercised is in lieu of the statutory provisions and not executive in character and further opined that Article 299(1) of the Constitution will not be attracted where the power exercised is statutory and not executive.

However we may take note of the view as expressed by a Division Bench of this Court, presided over by K.L. Pandey, and A.P. Sen. JJ. in *Chironjilal v. State of M. P.*, 1968 M. P. Rev Nir. 564 wherein the learned Judges purported to follow the dictum of their Lordships of the Supreme Court in *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, . We may observe that the learned Judges

constituting the Division Bench did not take note of the distinction between the forest contracts and excise contracts, the former of which are required to be completed by the execution of a formal deed and to those cases certainly Article 299(1) of the Constitution would be applicable. To excise contracts at least, the said Article will be inapplicable as it is the statute which brings into existence a contract, by the auction bid being accepted by an authority and the consequent issuance of a licence without execution of any formal deed on behalf of the Government. As this distinction was clearly ignored, we are unable to endorse the view of the Division Bench in that behalf, and, in our opinion, it would be wrong to apply the principles laid down by their Lordships of the Supreme Court in *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, relating to forest contracts to cases of excise contracts.

We may further advert to the very same case of *K.P. Chowdhry v. State of Madhya Pradesh 1971 R N 132 (Madh Pra)* decided by a Division Bench of this Court presided over by Bishambhar Dayal, C. J. and Shiv Dayal, J. in pursuance of the remand order passed by their Lordships of the Supreme Court. The Division Bench held that the deficiency on resale of a forest contract by the Government would not be recoverable as arrears of land revenue by virtue of Section 82 or 85 of the Indian Forest Act, and as there was no rule which would make the amount of such deficiency recoverable as arrears of land revenue u/s 82 of the Indian Forest Act, the amount could not be recovered by the Government in that manner. The conditions published with the auction notice could not be enforced as a rule of law and would not come within the ambit of Section 82 of the Act. As there was no bond of the kind mentioned in Section 85 of the Act, that section also was inapplicable and consequently the State had no remedy to recover the amount as arrears of land revenue. In that view the writ petition filed by the forest contractor was allowed.

As a result of the discussion aforesaid, we are clearly of the opinion that Article 299(1) of the Constitution of India is inapplicable to cases of excise contracts as the power exercised by the excise authorities is not executive in nature, but it is clearly a statutory power and no formal deed of contract is required to be executed on behalf of the Government.

While construing Article 299(1) of the Constitution of India, we may observe that the said Article contains two essential ingredients. One is that the contract should be made in exercise of the executive power of the Union or the State. In that event it has to be expressed to be made by the President or the Governor, as the case might be and such contracts and assurances of property made to the exercise of the executive power have to be executed on behalf of the President or the Governor by such persons in such manner as may be authorised by the President or the Governor. We may next advert to Article 166 of the Constitution of India, which prescribes the manner in which the executive actions of the Government of a State are to be expressed. They are required to be expressed to be taken in the name of the Governor and signed by a person authorised in

that behalf. This brings us to Article 154 of the Constitution of India, which provides that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Sub-clause (2) of the said Article provides that nothing in the Article shall-- (a)

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

Therefore, Sub-clause (2) of Article 154 of the Constitution of India contemplates that executive power can be conferred by the Parliament or a State Legislature on any authority subordinate to the Governor. Thus, the Legislature can certainly act in that behalf and if such powers or functions are conferred by the Legislature. We feel that they will be outside the scope of Articles 166 and 299(1) of the Constitution of India and the source of the authority in that behalf will be statutory and not executive in nature. In our opinion, such a distinction ought to be drawn, as was done by a Division Bench of the Orissa High Court in AIR 1971 SC 158 (supra). We would, therefore, reject the contention of the learned counsel for the petitioner that there was no concluded contract. In our opinion, the petitioner's liability arose on account of the statutory provisions in the M. P. Excise Act, 1915, by acceptance of the petitioner's bid and the consequential issuance of a licence would only be a formality. As no formal deed of contract in exercise of executive power was required to be executed on behalf of the Government. Article 299(1) of the Constitution was wholly inapplicable.

This brings us to the last question whether the amount of loss can be recovered from the petitioner as arrears of land revenue. The learned counsel for the petitioner relied on the Division Bench case of this Court in 1971 R N 132 (Madh Pra). In our opinion, that case is clearly distinguishable. So far as the, M. P. Excise Act, 1915, is concerned, Section 64 of the Act itself makes all dues to the Government recoverable as arrears of land revenue and it is not necessary, to rely on any rules or orders. Thus, resort to the provisions of Section 155 of the M. P. Land Revenue Code, 1959, is not necessary as the statutory authority has to be found in the M. P. Excise Act, 1915. The manner of recovery as provided by the M. P. Land Revenue Code, 1959, would be available to the Government in such cases.

However, the learned counsel for the petitioner further urged that the petitioner had made no deposit and, therefore, no concluded contract came into existence. According to the learned counsel the deposit would be a condition precedent and in the absence of such deposit, it cannot be held that there was a concluded contract. In this connection attention was invited to the pronouncement of their Lordships of the Supreme Court in State of Madhya Pradesh and Another Vs. Firm Gobardhan Dass Kailash Nath, . That was a case of forest contract and the conditions subject to which the tenders could be validly made were that the person making such a tender had to deposit on the spot 25% of the purchase price as the initial deposit and the final bid if accepted had to be sanctioned by

the Chief Conservator of Forests on the spot. As the initial deposit was not made, their Lordships held that there was no concluded contract between the firm and the Chief Conservator of Forests as the condition precedent of an initial deposit could not be waived. We may observe that the principle will certainly be applicable to forest contracts. We have exhaustively indicated the manner of entering into the excise contracts, which stand on a different footing and, therefore, in our opinion, the analogy of forest contracts cannot at all be applied to excise contracts. In this connection we may again at the risk of repetition detail the manner in which the excise contracts come into existence. Section 18 of the Act confers power on the State Government to a lease to any person on such conditions and for such period as it may think fit, the right--(a) of manufacturing, or of supplying by whole-sale, or of both, or (b) of selling by wholesale or by retail; or (c) of manufacturing or of supplying by wholesale, or of both and selling by retail, any liquor or intoxicating drug within any specified area. Sub-section (2) of Section 18, provides that the "licensing authority" may grant to a lessee under Sub-section (1) a licence in the terms of his lease: and when there is no condition in the lease which prohibits sub-letting, may, on the application of the lessee, grant a licence to any sub-lessee approved by such authority.

Thus, the right of a person to sell intoxicants comes into existence by virtue of Section 18 of the Act. Rule IV of the M. P. Excise Rules, framed u/s 62 (2) (e), (f) and (h) empowers the Collector or any other officer to accept or reject any bid without assigning any cause.

In the present case the final bids of the petitioner in both the cases regarding Bhang and Bhanahota were accepted by the Collector and the petitioner also signed the bid lists, which were counter-signed by the District Excise Officer. As such, the petitioner's liability arose when his bid was accepted. On a reference to the conditions of auction as contained in Annexure R/4, it is pertinent to note that an excise contractor is required to deposit 1/6th of the amount upon his bid being accepted as deposit which would be liable to be forfeited. Thus, the deposit is not a condition precedent, but is a condition which follows the acceptance of the bid. As such, the coming into existence of a contract by virtue of the statutory provision is not dependent on a deposit of the 1/6th amount as a condition precedent and as such the case of *State of Madhya Pradesh v. Firm Gobardhan Dass Kailash Nath* (supra) relating to a forest contract would be distinguishable. In forest contracts also initial deposit of 25% of the auction bid is required to be made. But the contract comes into existence not merely by acceptance of the bid, but by execution of a formal deed of contract as required by Article 299(1) of the Constitution of India. Therefore, we are unable to hold that the said condition of deposit is an ingredient part of a contractor's liability coming into existence. The liability arises upon the contractor's bid being accepted by the authority empowered in that behalf. It appears that the petitioner after signing the bid lists never cared to appear thereafter and avoided to discharge his responsibilities arising out of the auction sale. Thus, the excise

authorities had full justification for re-auctioning the licence and they had legal authority to recover the amount of loss from the petitioner.

As a result of the discussion aforesaid we are of the opinion that all the contentions raised on behalf of the petitioner fail and accordingly this petition cannot succeed. It is dismissed with costs. Counsel's fee in this Court shall be Rs. 200/-, if certified. The outstanding amount of the security deposit after deduction of costs, if any, shall be refunded to the petitioner.

Singh, J.

This is a petition under Article 226 of the Constitution of India for issuance of a writ in the nature of mandamus to restrain the State of Madhya Pradesh and its officers from realising from the petitioner a sum of Rs. 4,900/- on account of deficit arising in reauction of an excise contract.

The facts are that excise contracts of District Gwalior for the year 1970-71 were auctioned by the Collector from 14th to 16th February 1970. The conditions of auction were contained in a sale memo issued by the Collector. Clause 4 of this memo provided that in case of shops which were leased out in the previous year for more than Rupees 50,000/- or in respect of which bid offered in the auction for 1970-71 may be in excess of that amount the auction will be subject to the approval of the Excise Commissioner and that every successful bidder will have to deposit one-sixth of the bid money immediately in advance. It was further provided in Clause 13 that if a shop had to be reauctioned on account of any default of the purchaser, he will be liable for any deficit in price which will be realised as arrears of land revenue. In the auction held on 14th February 1970 the petitioner was successful bidder in respect of two shops situate in Hazaribag; one for retail sale of Bhans and the other for Bhang Ghota. The bid offered by him for Bhang shop was Rs. 8,000/- and for Bhang Ghota shop Rs. 3,500/-. These bids were accepted by the Collector. After the conclusion of the auction, the petitioner signed declaration that he had offered the bids after reading the conditions of auction contained in the sale memo and that he was bound to comply with the said conditions. In addition to this, the petitioner signed a document styled as Nilam Band or bid list in respect of each shop. These documents mention that the petitioner offered the bids of Rs. 8,000/- and Rupees 3,500/- which were accepted. They also mention that all the conditions of auction which were announced to the bidders were heard by the petitioner and he had understood them. The documents are signed by the petitioner and also by the Collector and District Excise Officer. The petitioner, however, did not deposit one-sixth of the bid money as required by Clause 4 of the sale memo as a result of which the shops were reauctioned by the Collector on 28th March 1970 for Rs. 6,600/-. The difference thus between the prices fetched in the auction and reauction was Rs. 4,900/-. It is this amount which is being recovered from the petitioner by the Excise Authorities as arrears of land revenue.

In a case between private persons there can be no doubt that an offer of bid in

accordance with the conditions of auction and its acceptance result into a binding contract between the parties. Had the instant case been such a case the petitioner would have been clearly liable for the loss arising on reauction of the shops. But it is contended by Shri Verma, the learned counsel for the petitioner, that the contract in the instant case was entered into by the State in the exercise of its executive power and to be effective and binding it must conform to the requirements of Article 299 of the Constitution and, as those requirements have not been fulfilled, the petitioner cannot be held liable for its breach. The learned Deputy Advocate General, who appeared for the respondents, in reply submitted that the bid lists which are signed by the petitioner and the Collector satisfy the requirements of Article 299, that the said Article has no application when a contract is entered into by the State Government or any other authority in exercise of a statutory power, and that in the instant case the contracts were entered into by the Collector in the exercise of statutory power conferred under the Madhya Pradesh Excise Act, 1915, and for this reason Article 299 did not apply to them.

The first question, therefore, to whether the bid lists incorporate contracts in the manner required by Article 299(1). This provision has been considered in a number of cases by the Supreme Court which established that to comply with its requirements the contract (1) must be expressed to be made by the President or the Governor, as the case may be, (2) it must be executed, and (3) it must be executed by such persons and in such manner as the President or the Governor, as the case may be, direct or authorise; *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, : *State of M. P. v. Ratanlal* 1967 MPLJ 104 at p. 107 (SC). In *Union of India (UOI) Vs. A.L. Rallia Ram*, which was a case u/s 175(3) of the Government of India Act, 1935, it was held that the word executed does not mean that there should be a formal document, and that a contract may come into existence by correspondence or by tender and acceptance of tender. In this case a tender notice was issued by the Government of India. Department of Food, and the acceptance note, which was also in the name of the Government of India was signed by the Chief Director of Purchases, who was authorised to execute contracts on behalf of the Governor General. On these facts it was held that the requirements of Section 175(3), which were similar to those contained in Article 299(1), were satisfied even in the absence of a formal document. In that context the Court said:

"A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of Section 175(3)."

Union of India (UOI) Vs. A.L. Rallia Ram, does not hold that to fulfil the requirements of Section 175(3) the contract need not have been expressed to be made in the name of the Governor-General or that it need not have been signed

by a person authorised by the Governor-General. Indeed, the case decides otherwise and this is how it has been understood in subsequent cases. In *Karamshi Jethabhai Somayya Vs. The State of Bombay*, it was clearly held that *Ralliamram's* case does not depart from the principles laid down in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, and that a contract by correspondence, which is not expressed to be made by the Governor-General and which is not signed by a person authorised by him, cannot meet the requirements of Section 175(3). Similarly, in 1967 MPLJ 104 (SC) (*supra*), which was decided by a Bench of five Judges, it was held that three conditions, noticed earlier, must be satisfied for meeting the requirements of Article 299(1). *Union of India (UOI) Vs. A.L. Rallia Ram*, was referred and distinguished in *Ratanlal's* case 1967 MPLJ 104 (SC) on the ground that notice of tender in that case was on behalf of the Government of India which, under the relevant rules, meant the Governor-General and the acceptance was made by an authorised person.

Reliance was placed on behalf of the respondents on the following observations in *Union of India (UOI) and Others Vs. N.K. Private Limited and Another*, :

"It is now settled by this Court that though the words "expressed" and "executed" in Article 299(1) might suggest that it should be by a deed or by a formal contract a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President".

It is difficult to read these observations to mean that the contract need not be expressed to be made in the name of the President or the Governor, as the case may be, if it comes into existence by acceptance of tender by a person duly authorised. In my opinion the case only refers to the principle decided in *Union of India (UOI) Vs. A.L. Rallia Ram*, that there need not be any formal deed if other conditions are satisfied. The three conditions to which I have earlier referred must be satisfied even in a case of contract coming into being by tender and acceptance. As already stated, it was clearly held so in 1967 MPLJ 104 (SC) (*supra*), a case decided by five Judges, and the observations relied upon from *Union of India (UOI) and Others Vs. N.K. Private Limited and Another*, , which was a case decided by three Judges, cannot be read as departing from the holding in *Batanlal's* case 1967 MPLJ 104 (SC).

Turning now to the bid lists in the instant case, it will be seen that they bear the heading "Excise Department. Madhya Pradesh" but from this heading it is not possible to hold that the documents are expressed to be made in, the name of the Governor. Further, although these documents are signed by the Collector, no order has been brought to our notice that the Collector is authorised to execute an agreement of this nature on behalf of the Governor. It is true, as I shall show later, that the Collector is authorised to auction the contracts and to accept bids, but that is not the same thing as an authority under Article 299(1) to execute a contract on behalf of the Governor. In my opinion, therefore, the bid lists, though signed by the petitioner and the Collector, do not fulfil the requirements of Article

299(1).

The next question is whether Article 299(1) of the Constitution is applicable when the State Government or a subordinate authority enters into a contract under the authority of a statute. The argument of the respondents on this point is that contracts made in the exercise of statutory power by the Union or a State are not "contracts made in the exercise of the executive power" within Article 299(1).

Article 154(1) of the Constitution declares that the executive power of the State shall be vested in the Governor which is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Clause (2) of this Article, however, contemplates that the executive Power may be conferred by the legislature on a subordinate authority. The executive power of a State as stated in Article 161 extends to the matters with respect to which the legislature of the State has power to make laws. Then Article 166 provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. The Article further provides that orders and instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor. The Article also provides for making of rules of business for convenient transaction of the business of the Government and for allocation among Ministers of the said business. The executive power of the Union and each State extends, as provided in Article 298, to the carrying on of any trade or business and to the acquisition, holding and disposal of property and "the making of contracts for any purposes." This power is subject to the laws made by the Union and the States in their respective spheres. Then comes Article 299 which reads as under:

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

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such, contract or assurance on behalf of any of them be personally liable in respect thereof."

The Constitution does not contain any definition of "executive power". Although an exhaustive definition of executive power may not be possible, it is understood to signify "the residue of Governmental functions that remain after legislative and judicial functions are taken away: *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, . The Supreme Court in *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*, quoted with approval the following passage from

Halsbury's Laws of England, Vol. 7 :

"Executive functions are incapable of comprehensive definition, for they are merely the residue of the functions of Government after Legislative and judicial functions have been taken away. They include, in addition to the execution of the laws, the maintenance of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and State assistance and insurance." (p. 192).

Whatever may be the amplitude of the executive power, there can be no doubt, as the passage quoted above signifies that one of the functions of the executive is the execution of laws made by the legislature; (See Willis, Constitutional Law, p. 131; Laski, Grammar of Politics, 2nd Edition, p 295). Therefore, if a law made by the legislature empowers the State Government to enter into a contract, the exercise of that power by the Government is an exercise of executive power. The source of the power in such a case is legislative, but the nature of the power conferred is executive. Therefore, it is not correct to say that if the State Government enters into contract in the exercise of a statutory power the contract is not made in the exercise of executive power. I have already referred to Article 166 which requires every executive action of the Government to be expressed in the name of the Governor in whom is vested the executive power under Article 154. How can it be said that if the Government acts in the exercise of a power conferred by an Act of the legislature, its action need not be expressed or performed in the manner required by Article 166 on the ground that it is an action under a statute and, therefore, not an executive action. The answer to this question must obviously be in the negative, for action of the Government under a statute is also an executive action in exercise of executive power.

Indeed, the Supreme Court in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, held that a quasi-judicial power conferred by a statute on the State Government is an executive power to be exercised in accordance with Article 166 and the rules made thereunder provided the rules conform to the principles of judicial procedure. Therefore, I have no doubt in my mind that the natural meaning of the words "in exercise of the executive power of the Union or of a State" as used in Article 299 takes in contracts made by a State under a statutory authority. It is true that the State can enter into contracts under Article 298 in the exercise of its executive power unaided by any statute, but that does not mean that a contract entered into with the aid of a statute is not in the exercise of executive power. As already stated, execution of a statute by the Government is an executive power and, therefore, contracts entered into under the authority of a statute must also be held to be in the exercise of executive power. Further, the object of formalities prescribed by Article 299, as in the case of its predecessor Section 175(3) of the Government of India Act, 1935, is protection of public interest by safeguarding the Government against unauthorised contract: *Mulamchand v. State of M.P.*(a)

*** ** (b) *** ** (c) *** ** (d) *** ** (e) delegate to the Chief Revenue authority or the Excise Commissioner all or any of its powers under this Act, except the power conferred by Section 62 to make rules;

(f) *** **

(g) permit the delegation by the Chief Revenue authority, the Excise Commissioner or the Collector to any person or class of persons specified in such notification, of any powers conferred or duties imposed upon it or him by or under this Act, or exercised or discharged by it or him in respect of the excise revenue under any other Act for the time being in force."

Rule IV of the Rules for General Application made under the Act provides that the confirmation of any auction sale, whether held by the Collector or by any other officer, shall rest with the Collector. The form of licence for the retail sale of Bhang is prescribed by the rules in Form H.D. 7 which is to be signed by the Collector alone. The rules do not provide for execution of any contract. u/s 7 of the Act the State Government issued a notification No. 54-A/V.ER. dated 4th July, 1959 (published in the Gazette of 31st July 1959) by which it delegated to the Excise Commissioner its power to grant a lease of any right specified in Section 18 (1). This notification also authorises the Excise Commissioner to further delegate its power u/s 18 (1) to the Collector. In exercise of the power conferred under this notification read with Section 7 (g), the Excise Commissioner every year authorises the Collectors to grant leases u/s 18 (1). By notification No. Cr. D (A) 1/69 published in Gazette of 28th November, 1969 the Excise Commissioner authorised all Collectors to auction excise contracts for the year 1970-71 subject to one reservation that if the bid offered for a shop was in excess of Rs. 50,000/- its acceptance would be subject to the sanction of the Excise Commissioner. It was under the authority of this notification that the Collector auctioned the contracts which are in dispute in the instant case.

These and other relevant provisions of the Act and the rules and the notifications were construed by this Court in *Shrimati Nanhbai Vs. The Excise Commissioner and Others*, and it was held that the State Government has the exclusive right of manufacturing, selling and possessing intoxicants which it has power to lease for consideration u/s 18 and that every auction of excise contract for sale of intoxicants is a leasing of the Government's right of selling intoxicants. The following conclusions of the learned Judges on this point are relevant:

"The principle that the State Government has exclusive right of manufacturing, selling or possessing intoxicants or any country liquor intoxicating drug runs through Sections 13 to 18 of the Act.

* * * *The important condition that must be satisfied before any licence can be granted to a person for manufacture or sale of any country liquor intoxicating drug is that the person must first obtain the privilege or the right of manufacturing or selling the intoxicating drug. This is clear from Section 18..... * * * * In every auction sale of a liquor shop at which liquor is sold

in wholesale or retail, there is a sale of the lease of the Government's right of selling country liquor intoxicating drug. On the acceptance of a bid of a person at an auction sale, a contract for the demise of the Government's interest is brought into existence and this is followed by the grant of a licence to the person whose bid has been accepted."

These conclusions reached in *Shrimati Nanhbai Vs. The Excise Commissioner and Others*, were reaffirmed by another Division Bench in *Gulab Rai and Sons v. State* 1972 MPWR 595 : (1973 TLR 2066). On the basis of these authorities the correctness of which has not been challenged before us it has to be held that an excise contract for selling an intoxicating drug is a sale under the statutory power conferred by Section 18. This section confers power in terms on the State Government, but the Act by Section 7 authorises the delegation of this power to the Excise Commissioner and a sub-delegation by him to the Collector. I have already referred to the notification issued by the State Government under this section by which the Government delegated its power u/s 18 to the Excise Commissioner and further empowered him to delegate that power to the Collector. The Excise Commissioner by another notification which has also been referred to earlier delegated his power u/s 18 to the Collector. Thus, the auction held by the Collector in the instant case was in exercise of a statutory power conferred on him by Section 18 read with Section 7 of the Act and the notifications issued thereunder. He was also the authority empowered under the rules to accept the bids and issue the relevant licence. It is thus clear that the contracts resulting from the auction in the instant case were entered into by the Collector in the exercise of a power conferred on him under a statute. For the reasons already indicated the provisions of Article 299(1) are not applicable to such contracts. The contracts were, therefore, not void and the obligation arising under them for payment of loss incurred by the Government in case of reauction was enforceable against the petitioner by recovering the same as arrears of land revenue u/s 64 of the Excise Act.

For these reasons, I agree that the petition be dismissed in terms proposed by my Lord the Chief Justice,

Raina, J.

I have had the benefit of perusing the separate orders recorded by My Lord the Chief Justice and my learned brother Singh, J. Both have come to the conclusion that the petition should be dismissed in the terms proposed by My Lord the Chief Justice; and I agree with this conclusion. But, they have expressed divergent views in regard to the construction of Article 299(1) of the Constitution. According to Singh, J., where a State Government itself enters into a contract in exercise of statutory power, Article 299(1) is applicable; but when an authority subordinate to the Governor is conferred power by statute to enter into a contract, Article 299(1) is inapplicable, My Lord the Chief Justice, on the other hand, has expressed the view that contracts made in exercise of statutory power by the Union or a State do not fall within the purview of Article 299(1) of the

Constitution; and I am inclined to agree with him for the following reasons :

Article 299(1) of the Constitution is reproduced below for facility of reference :

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

It is clear from the language of Clause (1) of Article 299 that it deals with only such contracts as are made in the exercise of the executive power of the Union or of a State. If the intention of the authors of the Constitution had been to bring within the purview of this clause all contracts made by or on behalf of the Union, or by or on behalf of a State, it would not have been necessary to qualify such contracts by the expression "made in the exercise of the executive power". The construction of this expression is, however, not free from difficulty and that accounts for the divergence of opinion.

The expression "executive power" has not been defined in the Constitution, although some of the provisions deal with its scope and extent. Article 73 of the Constitution lays down the extent of the executive power of the Union; while Article 162 lays down the extent of the executive power of a State. Article 298 provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to certain other matters including making of contracts. There can be no doubt that executive functions include execution of laws. In fact, execution of laws is one of the most important functions of the executive. If we carefully scrutinise the provisions of the Constitution relating to the executive power of the Union or a State, it would appear that it is either derived directly from the Constitution itself or from a statute. The executive power derived from the Constitution itself may be called inherent power of the Union or a State, for the exercise of which it needs no legislative sanction. The power derived from a statute may be referred to as statutory power, although executive power in its widest connotation includes both, the power derived from a statute and the power inherent in it. In *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, their Lordships were called upon to consider the scope and extent of the executive power. It was held by their Lordships that executive power is not confined to carrying out of laws and that in order to enable the executive to function, it is not necessary that there must be a law already in existence. Thus, their Lordships recognised the existence, of executive power inherent in the executive authorities not derived from any statute. It appears that the expression "executive power" is sometimes used in a limited sense as referring merely to the inherent power and not the power derived from a statute,

A contract can be made by or on behalf of the Union, or by or on behalf of a

State either in exercise of the statutory power or the inherent power; but in either case the nature of the power is executive. There can be no question of a contract being made either in exercise of the legislative or the judicial power. If we carefully examine the language of Article 299 along with the language of Article 298 of the Constitution, it would appear that the executive power mentioned in both these Articles is the non-statutory executive power and not the statutory one. Article 298 was amended by the Constitution (Seventh Amendment) Act, 1956. The Article, as it stood before and after the amendment is indicated below :

Before 1-11-1956 After 1-11-1956

"298 (1) The executive power of the Union and of each State shall extend, subject to any law made by the appropriate Legislature, to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts.

"298. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purposes Provided that --

(a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws be subject in each State to legislation by the State; and

(2) All property acquired for the purposes of the Union or of State shall vest in the Union or in such State, as the case may be."

(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to the legislation by Parliament."

The Article, as it stood before the amendment, provided that the executive power to acquire or dispose of property, or make any contract shall be subject to any law made by the appropriate Legislature. This clearly shows that it referred to the non-statutory executive power because in the case of a statutory executive power, it, having originated from the statute, is completely controlled and circumscribed by it: and there would be no necessity of making it subject to a law made by the appropriate Legislature. The amendment in 1956 was made to make it clear that the Union Government as well as the State Governments were competent to carry on any commercial or industrial undertakings, whether or not they were related to a matter within the legislative competence of the Union or a State Government, as the case may be. But the Article, as amended, clearly refers to the non-statutory executive power, because it has been made subject to laws made by the appropriate Legislature.

It appears to me that Article 299 also refers to the non-statutory power; otherwise the expression "in the exercise of the executive power" in Clause (1) of

the Article would be rendered meaningless and redundant. It is a salutary and sound principle of construction of statutes that the Court should avoid a construction which would render a part of the statute devoid of any meaning. A Court should always presume that the Legislature inserted every word for a purpose and it should be deemed not to have wasted its words or said anything in vain. This principle is applicable with greater force to the construction of a provision of the Constitution. No doubt, in certain circumstances, a Court may be compelled to reject certain words as meaningless; but this is permissible only where the statute may be reduced to a nullity or rendered ineffective.

In *Quebec Railway v. Vandry* AIR 1920 PC 181, their Lordships, while construing a statute, observed that the Legislature is deemed not to waste its words or to say any thing in vain.

In *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*, their Lordships observed at p. 377 as under:

"It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."

Singh, J., while dealing with the argument that the words "in the exercise of the executive power" must be construed narrowly to exclude contracts made in the exercise of statutory power, took note of the fact that if Clause (1) of Article 299 is construed otherwise, these words would be rendered redundant. In his view these words were mere surplusage; and he referred to an English decision in *Auchterarder v. Kinnoull* (1839) 7 ER 841 (HL) in which it was observed that though a statute is never supposed to use words without a meaning, it is always allowed the privilege of using words not absolutely necessary. In my opinion, a conclusion that the Legislature has used words without any purpose or meaning cannot be drawn, unless no other reasonable construction is permissible. In "The Interpretation of Statutes" by Maxwell, Twelfth Edition, p. 36, it has been stated that a construction which would leave without effect any part of the language of a statute will be rejected and every word should be given a meaning. This general rule of construction may, however, be departed from in the case of absolute necessity or intractability of the language used as held in *Salmon v. Duncombe*. (1886) 11 AC 627.

No doubt, the extent of the executive power is wide enough to include the power derived from statute; but in order to determine whether the expression "executive power" has been used in a limited sense meaning "inherent executive power" or in a wider sense as including executive power derived from a statute, it would be necessary to consider which construction best harmonises with the subject of the Article and the context in which it is used. In *Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate*, their Lordships quoted with approval the following principle of interpretation of statutes as stated in *Maxwell on Interpretation of Statutes*, 9th Edition, p. 55 :

"The words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained."

So far as contracts made in the exercise of a statutory power are concerned, they are regulated by the provisions of the statute itself and, therefore, it would not be necessary to make any express provision in regard to them in the Constitution itself. It, therefore, appears that Clause (1) of Article 299 was enacted to regulate contracts made in the exercise of the non-statutory executive power. It would here be pertinent to refer to the decision of the Supreme Court in *Karamshi Jethabhai Somayya Vs. The State of Bombay*, . From the observations made by their Lordships in paragraph 8 of the said judgment it would appear that the argument that the provisions of Section 175(3) of the Government of India Act, 1935, which corresponded to Clause (1) of Article 299 of the Constitution, would not be attracted if the agreement was made under the provisions of the Bombay Irrigation Act was impliedly accepted, though the question was not expressly decided. In *Ajodhya Prasad Shaw and Another Vs. State of Orissa and Others* a Division Bench of the Orissa High Court held that the provisions of Clause (1) of Article 299 are not attracted in a case where the contract was made in exercise of the statutory power. These decisions support the view that the words "executive power" as used in Clause (1) of Article 299 of the Constitution mean the non-statutory executive power.

I may here mention that I find another difficulty in accepting the view of my learned brother, Singh, J. It is obvious that Clause (1) of Article 299 covers all contracts, whether made by the Union or a State, or by any subordinate authority in exercise of the executive power of the Union or the State as the case may be. In my opinion, it would not be permissible to construe this clause in a limited sense while dealing with a contract entered into by a subordinate authority, and in a wider sense while dealing with a contract entered into by the Union or the State itself.