

(1980) 03 SIK CK 0001
In the Sikkim High Court
Case No : Exit Petition No. 2 of 1979

S. Gajinder Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-03-1980

Acts Referred:

Citation : AIR 1981 Sikk 9

Hon'ble Judges : Anandamoy Bhattacharjee, J

Bench : Single Bench

Advocate : P.P. Juneja and A. Moulik, for the Appellant; S.R. Sarkar, General and Anup Deb, for the Respondent

Judgement

A.M. Bhattacharjee, J.—The first question that arises for determination in this writ petition is that, even assuming that the petitioner has committed a breach of the contract in question and as such is liable to pay compensation to the respondents Union of India and others, whether the respondents can legally withhold payment of any sum due to the petitioner from the respondents under any other contract or contracts between the petitioner and the respondents and appropriate such sums so withheld towards the satisfaction of its claim for compensation for breach of this contract by deducting such amount of claim or portions thereof from the sums withheld? If the answer to this question is in the affirmative and as such is in favour of the respondents, it will warrant a dismissal of this writ petition. If, however, the answer is in the negative and as such is in favour of the petitioner even then the further question that would require consideration is that whether the petitioner can obtain any relief in this writ proceeding? Firstly therefore, to the first question and to a short statement of the facts of the case which though they lie in a short compass need not be stated in much details and even a skeletal statement thereof will be sufficient for the disposal of the present petition.

2. The petitioner submitted tender for the contract works being construction of provision of deficit Order T. M. Accommodation at Darjeeling. and his case is that

as at the time of the submission of the tender the amendments made subsequently to the invitation of the tender by the respondent No. 2 were not known or made known to him, he, by his, letter being Annexure B to the petition, cancelled and revoked such tender. The case of the respondents, however, is that the tender of the petitioner was duly accepted without giving any effect to the alleged subsequent amendments and that as the petitioner failed to sight the Work Order and to take over the site and to commence the work in spite of repeated reminders and requests, the contract was cancelled by the respondent No. 2 by his letter dated 22nd Oct. 1978. vide Annexure XIX to the respondent's affidavit-in-opposition The petitioner admits the receipt of this letter in para 10 of his petition and states further that thereafter he received another letter dated 16th March, 1979 being Annexure E to his petition, asking him to deposit Rs. 4,44,000/- for the alleged extra cost of completion of the contract and that when he requested the respondent No. 3 for payment of amounts payable to him in respect of and under other contract works, he received the letter dated 26th March, 1979 from the respondent No. 3, being Annexure F to the petition, informing him that the recovery to the sum of Rs. 4.44 lakhs has been indicated by the Chief Engineer, Bengal Zone (respondent No. 2) under his telegram dated 07 Mar 79" with an endorsement thereon to the Respondent No. 2 intimating him that no payment would be made to the petitioner till further orders from the respondent No. 2 and that "a recovery to the sum of Rs. 4.44 lakhs has been noted." The other document, which requires to be referred at this stage to complete the narration of facts necessary for the present purpose, is the letter from the respondent No. 2 to the petitioner dated 13th May, 1979 which has been filed by the respondents as Annexure XXIII to their affidavit, informing the petitioner that the work was being completed at his risk and cost and the additional cost involved was Rs. 4,44,000/- and as the petitioner failed to deposit the amount though directed to do so by Annexure E to the petition, "the money is being recovered from any payment due to you" (i.e., the petitioner). Can the respondents do so? Can they withhold payment of amounts due to the petitioner under other contracts and recover therefrom their alleged claim under this contract? If they can the petition shall fail; but if they cannot this petition should succeed, unless the extent of powers under Article 226 is not wide enough to include the power to award such a relief.

3. Mr. Juneja, learned Counsel for the petitioner, has submitted that though the case of the petitioner is that he having withdrawn and revoked his tender, the respondents could no longer accept the same and thus make it a concluded and binding contract and that there being no contract, the purported cancellation thereof by the respondents and their withholding the payment of amounts due to the petitioner under other contracts and their recovery or attempted recovery from such amounts of their alleged claim against the petitioner under this contract can have no legal basis. But Mr. Juneja has, however, submitted that he is not pressing before me for decision in this proceeding any of the questions as to whether there was a contract or whether the petitioner committed any breach

thereof or whether the contract was rightly cancelled, as determination of these questions will involve disputed questions of facts not determinable in a proceeding under Article 226. Mr. Juneja has accordingly submitted that, even assuming that there was such a contract and that it was broken by the petitioner and as such the respondents may have a claim for compensation against the petitioner for such breach, as alleged still the respondents cannot have any right or authority to withhold the amount due from the respondents to the petitioner under other contracts and proceed to recover their alleged claim from such amounts, unless such claim is admitted by the petitioner or adjudicated by a Court or other proper authority according to procedure established by law.

4. The learned Advocate-General, appearing for the respondents, has, however, contended that the respondents have full right and authority to do so on their own under the powers conferred by Clause 67 of the General Conditions of Contracts (Military Engineering Services) I.A.F.W. 2249. It is, it may be noted, common ground that if I am to proceed, as I have been invited to, on the assumption that there was a contract between the parties giving rise to the alleged claim by the respondents, the terms and conditions of the said General Conditions of Contracts would apply to the contract. Let me, therefore, consider as to whether the provisions of Order 67 have conferred such wide powers on the respondents as claimed by the learned Advocate-General for the respondents or whether the apparently wide amplitude of powers, seemingly to flow from the said clause, is really not that wide, as submitted by the learned Counsel for the petitioner. The relevant portions of Clause 67 read as under:

67. Recovery from Contractor.--Whenever any claim for the payment of a sum of money arises out of or under this contract against the Contractor the same may be deducted from any sum then due or which at any time thereafter may become due to the Contractor under this or any other contract with the Government or from any other sum due to the Contractor from the Government (which may be available with Government) or from his Security Deposit or Security Bond Amount; or he shall pay the claim on demand. Any amount due to the Contractor under this contract may be adjusted against any amount (then due or which at any time thereafter become due from him to the Government on any other contract or on any other account whatsoever or withheld pending finalization and fixation of any claim against the Contractor.

5. The second sentence of Clause 67, as quoted above, is not very material in the present case as it only provides that if any amount is due to the contractor under this contract, the same may be adjusted against any amount then due from and payable by the contractor to the Government on or under any other contract or on any other account whatsoever, and it is nobody's case that any amount was payable to the petitioner under this contract and the same was adjusted or sought to be adjusted towards any amount due from and payable by the contractor to the Government under any other contract or on any other account. The case for my consideration is just the reverse, the question being if

the petitioner is liable to pay compensation for breach of this contract in question, whether the amounts due and payable to him by the respondents under other contracts can be adjusted against such claim for compensation under this contract. The learned Advocate-General while conceding that the second sentence, as noted above, may not authorise and empower the respondents to do what they have done or attempted to do in the present case, has submitted that the first sentence undoubtedly confers on the respondents such authority and power in the clearest possible terms. On a reading of the first sentence, as quoted above, one may agree with the learned Advocate-General that according to the plain and ordinary meaning of the words of the first sentence, the respondents were authorised and empowered or were intended to be authorised and empowered to deduct their claim under this contract from the amounts payable by the respondents to the petitioner under any other contract or contracts. But Tennyson's classical expression, namely, "Words, like nature, half reveal and half conceal the soul within", is very often demonstrated in the Courts of Law, where ordinary words, whether in Statutes or other instruments are made to bear extraordinary meaning by extracting or professing to extract therefrom their supposed true intent or their half-concealed souls. Or, who knows, the reason may be otherwise and may be, as an eminent Indian Judge (Vivian Bose, J. in *The Seksaria Cotton Mills Ltd. Vs. The State of Bombay*,) has put it, that "it is not till one is learned in the law that subtleties of thought and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not versed in the law, would have no difficulty in understanding". Be that as it may, sitting, as now do, as a Judge in a Court of Law, I must go by the views of the learned and the versed in law and, therefore, I will have to try to ascertain what the words in the first sentence should mean according to those views. I say "should mean", because in my view, and this I say with very great respect to them who claim or profess to interpret words, whether in Statutes or in other instruments, no one except the authors thereof can with certainty say what was really meant by a word or set of words and all that one can say, however learned or well versed he may be in the art of interpretation, is what it should mean according to him in the given context. As we all know and as has also been pointed out by Bhagwati, J. in *Union of India (UOI) Vs. Raman Iron Foundry*, , to which quote the observations of Lord Denning in *Seaford Court Estates Ltd. v. Asher* 1949 2 KB 481 quoted in his "Discipline of Law" at page 12) to the effect that "the English language is not an instrument of mathematical precision" and "our literature would be much the poorer if it were". The learned Lord proceeded to observe that it would certainly save the Judges trouble if instruments were drafted with divine prescience and perfect clarity, but in the absence of it a Judge cannot simply fold his hands and blame the draftsman but must set to work on the constructive task of finding the true intention and, if necessary, supplement the written words so as to give "force and life" thereto.

6. The first sentence in Clause 67, as quoted hereinbefore, shall come into

operation only when "any claim for the payment of a sum of money arises out of or under this contract". As already noted, Mr. Juneja, the learned Counsel for the petitioner, has contended that such a claim, in order to attract the operation of Clause 67, must be one which is admitted by the petitioner, or if not admitted, is adjudicated by a Court or other authority according to procedure established by law, while the learned Advocate-General has submitted that any claim for money by the respondents against the petitioner, if it arises out of or under this contract, is sufficient to justify the respondents acting on their own in accordance with the provisions of this clause and it is not necessary to have such claim determined and quantified according to the legal process, even if the claim is not admitted by the petitioner and the learned Advocate-General has further submitted that if it is held that such determination and quantification is still necessary before Clause 67 can be allowed to operate, the provisions of the clause would become redundant and otiose. I have heard both Mr. Juneja and the learned Advocate-General at great length and have also considered the written arrangement filed by both of them and for THE reasons mentioned hereinafter I feel that will have to hold the first sentence of Clause 67 can operate only when the claim of the respondents is admitted and undisputed or is adjudicated, determined and assessed by a Court or other proper authority according to procedure established by law.

7. It is now fairly established that now principles of natural justice, epigrammatically enshrined in the two maxims, namely, "Nemo Debet Esse Judex in Causa Propria Sue and "Audi Alteram Partem", must, if and whenever possible, inform every legal transaction, statutory or contractual and must be allowed to operate in every field, unless their operation is ruled out by express proclamation or irresistible implication; and that if the words or expressions used in any instrument, public or private, statutory or contractual, are capable of being construed in two ways, one conforming with and the other conflicting with the rules of natural justice, the Courts must accept the construction which will be in consonance with such rules.

8. As already noted, Clause 67 (first sentence) will operate only when "a claim for the payment of a sum of money arises out of or under this contract against the contractor". According to the respondents and the learned Advocate-General appearing for them, the relevant clause should be interpreted to mean that it is for the Government to determine that there is a claim and that it arises out of or under this contract and that it is against the contractor and in favour of the Government and that it is for the Govt. to quantify the claim and to proceed to recover the amount, so determined and quantified, from any other sum due and payable to the contractor under this or any other contract with the Government or any other sum due to the contractor from the Government. As I have already noted, the words of the first sentence of Clause 67 are capable of being construed in that manner according to the ordinary or natural meaning of those words. According to Mr. Juneja, however, the provisions of the first sentence of Clause 67 only provide for an easy and expeditious mode of recovery of the claim

of the Government from the money payable by the Government to the contractor under this or any other contract or on any other account, but the expression "claim" in the relevant context cannot mean made and decided and assessed by the Government unilaterally and on their own but must mean a claim, which, if not admitted by the contractor, has been determined assessed by a Court or other proper authority according to procedure established by law. I also feel that it is also possible at least it is not impossible, to construe the relevant words in that manner. Now the construction put forward by the learned Advocate-General, whereunder the Government would be authorised to decided determine everything about its own claim and its recovery will be inconsistent with the principle "Nemo Debet Esse Judex in Causa Propria Sua", that is, no one should be Judge in his own cause and that construction would also enable the Government to do so on their own without hearing the contractor, which will again be inconsistent with the other principle, "Audi Alteram Partem", that is, hear the other party before he is affected or otherwise condemned, while the construction put forward by Mr. Juneja whereunder the Government would be entitled to proceed under this Clause 67 to recover as their claim only such amount, as will be determined and decided by a Court or other proper authority under the procedure established by law, will be perfectly consistent with the above noted principles and, therefore, according to the well established canon of construction, pointed out hereinbefore, I must accept the latter interpretation. As I understand it, if a power has been conferred by any instrument, whether statutory or contractual or otherwise, and such power appears to be uncontrolled, unrestricted, unfettered and unconfined, the Courts should readily proceed to have such power "canalized within banks" of the rules of natural justice to "keep it from overflowing", unless such forensic embankment is clearly ruled out by anything contained in the instrument, expressly or by irresistible implication.

9. I also feel that the decision of the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, would also support the latter interpretation though, as pointed out by the learned Advocate-General, the wordings of the relevant provisions of the clause which fell for consideration in that Supreme Court case and those of Clause 67 of this case are not similar and because of the dissimilarities, I was inclined to think at one stage that the said decision should not be used as an authority for the construction of the relevant provisions of CI. 67. The relevant provisions of the contract in that Supreme Court case, being Clause 18, were as hereunder:

18. Recovery of Sums due:

Whenever any claim for the payment of a sum of money arises out of or under this contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the

event of the gratuity being insufficient, the balance and of no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary. If such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due.

(Emphasis supplied)

10. It should be noted that the opening words, namely "Whenever any claim for the payment of a sum of money arises out of or under this contract against the contractor", in Clause 18 in Union of India (UOI) Vs. Raman Iron Foundry, and Clause 67 in the present case are absolutely similar and the said words have been construed by the Supreme Court in the aforesaid case to mean "a claim for a sum which is due and payable, i.e., presently recoverable" (p. 1271) and "a claim for a sum presently due and payable by the contractor" (page 1272) and it was observed (page 1273), approving two English decisions and the decisions of the Calcutta High Court in Javed Sheikh Vs. Taher Mallick, , of the Bombay High Court in Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros., and of the Punjab High Court in S. Milkha Singh and Others Vs. N.K. Gopala Krishna Mudaliar and Others, , that a sum does not become due and payable for any claim for compensation or damages for any breach of contract unless the same has been determined and assessed under and in accordance with the procedure established by law.

11. It is no doubt true that the words "sums due" or "remaining due", which have been used in the heading and in the body towards the end of Clause 18, quoted above, have not been so used in Clause 67 in the present case. It is also no doubt true that the Supreme Court has taken the said words in the heading as well as in the body into very important and effective consideration and has avowedly read the entire Clause 18 "as a whole, each part throwing light on the other" and has construed it "in all its parts and in its proper contextual setting". That is if may say with respect, how words, whether in a statute or in a contract, are to be read and construed and they are to be construed, not in isolation divorced from the context, but in the contextual setting But there are sufficient indications in the judgment in Raman Iron Foundry's case to show that though the Supreme Court has taken into very important consideration the existence of the expressions "sums due" and "remaining due" in the heading and in the body of Clause 18, while construing the words "whenever any claim for the payment of a sum of money arises out of or under this contract against the contractor" the said words would have been so construed even without the aid of those two expressions, which only lent further assurance and support to the construction of those words to which they would have been subjected to even otherwise. As will appear from the observations made in that judgment (pages 1271 and 1272), after noticing the heading "Recovery of sums due" and observing that according

to the heading Clause 18 would apply to a sum due, meaning thereby "a sum for which there is an existing obligation to pay in praesenti, or in other words, which is presently payable the Supreme Court, while proceeding to consider the import of the words "whenever any claim for the payment of a sum of money arises out of or under this contract against the contractor" in the "body of Clause 18, has observed (page 1271, Para 8) that "the language used in the body of Clause 18 also supports the view that it is with recovery of sums presently due and payable by the contractor to the purchaser that this clause deals" and that "Clause 18 does not lay down the substantive rights and obligations of the parties under the contract" but is merely intended to provide a mode of recovery of a claim arising out of or under the contract". And after construing the words "whenever any claim etc" in the manner as stated above, the Supreme Court has proceeded to observe (page 1272) that the view it has taken about the construction of the aforesaid words also "becomes irresistible when we consider the last words of Clause 18, namely, the contractor shall on demand pay to the purchaser the balance remaining due" which clearly postulate that the reference in the clause is to a sum presently due and payable by fee contractor to the purchaser". It is therefore, possible to conclude, which I hereby do, that the Supreme Court would have construed the words "whenever any claim for the payment of a sum of money etc." in the same way as it has done even without the aid of the said two expressions "sums due" and "balance remaining due is the heading and the body of the clause and the said two expressions only lend further assurance and support to such construction and I will, therefore, regard this Raman Iron Foundry's case as an authority for holding that the words "whenever any claim for the payment of a sum of money etc" in Clause 67 of the contract in the present case also mean "a claim for a sum of money which is due and payable, i.e., presently recoverable" and "a claim for a sum presently due and payable by the contractor" and not a claim for compensation or damages for any breach of contract which has not become due and payable by being determined, assessed and quantified by a Court or other proper authority under and in accordance with the procedure established by and under the law.

12. The learned Advocate-General has very strongly contended that in. view of the dissimilarities in the wordings in Clause 18 of the contract in Union of India (UOI) Vs. Raman Iron Foundry, and Clause 67 in the present case and, in particular, in view of the presence of the expressions "sums due" and "remaining due" in the former and the absence thereof in the latter, the decision in Raman Iron Foundry's case cannot be regarded as an authority for the construction of Clause 67 in this case. I have already discussed in extensor the process of my reasoning for following the said Supreme Court decision as an authority for construing Clause 67 in this case. And I would only add that even if for the dissimilarities as noted above the decidendi and the ratio in Raman Iron Foundry's case are not to be regarded as direct authorities for the construction of this Clause 67 the logical conclusions from the ratio and the reasonable inferences on deductions therefrom are clear enough to apply in the construction

of Clause 67. I remember that Lord Asbury for, *Quinn v. Lesthem* 1901 AC 495 observed: that "a case is an authority for what it actually. Decides and is not an authority for what "may seem to logically follow from" the observations made therein and I know that these observations have been quoted with approval by a unanimous Bench of the Supreme Court, speaking through Hegde, J., in *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*, . I, however thought that the Courts which are obliged to follow the law declared by the Supreme Court as binding, should treat a decision of the Supreme Court as an authority not only for what it declares or decides express enunciation but also for what follows from such declarations by clear implication by way of logical deduction. I found it rather difficult to understand as to how, as a Court subordinate to the Supreme Court and mandated by Article 141 of the Constitution to follow the law declared by it, I could refuse to follow the clear logical conclusions from the observations in a Supreme Court decision on the theory that a case is not an authority for what "may seem to logically follow" therefrom, so long Article 141 would continue to exist or the system of justice in this country continues to be precedent-bound, as it is now. I thought that not only as a matter of judicial propriety and decorum, but also in order to make the law of the land uniform, as far as possible, the Courts were to follow not only the actual decision of the apex Court, but also all logical conclusions therefrom and I was afraid, that the authority of the decision of the apex Court might often be bereft of much of its authority and utility if the clear logical conclusions therefrom are excluded And I would still like to think that even if clear logical conclusions from the: observations in the decisions of the Supreme Court, though flowing irresistibly therefrom, are not binding on me; I should prefer to be bound thereby, as far as I can in order to reach our cherished goal of uniformity of law. It may be possible for the Supreme Court, in its judicial wisdom, to ignore the logical conclusions from its own decision and to label them as devoid of authority, as has been done by it in the said *Sudhansu Sekhau Misra's* case; but it may not I am afraid; be an act of propriety for the Courts sub ordinate to the Supreme Court to refuse to follow and ignore clear logical conclusions from the observations in Supreme Court decisions. For that will really be a step towards the proposition that such Courts are not also bound by the; obiter dicta or the Supreme Court; we have not, I think, come to that position and the position is just the contrary. Anyway, what may become the superior may not and often does not become a subordinate.

13; Therefore, on my own reading of Clause 67 in this case, as quoted above, in accordance with the rules of natural justice and also reading the same in the light of the observations of the Supreme Court in *Raman Iron Foundry's* case, I come to the conclusion that the said clause does not lay down the substantive rights and obligations of the parties under the contract but merely provides a mode of recovery by, the Government of its own claim against the contractor from any amount due to the contractor from the Government under any contract; but such a claim must be for a sum presently due from and payable by

the contractor and must, unless admitted by the contractor, be determined and assessed by a Court or other proper authority under and in accordance with the procedure established by law. And in that view of the matter, I must hold that the respondents cannot, under the terms of Clause 67, recover their alleged claim against the petitioner from any amount due from and payable by the respondents to the petitioner under any other contract or on any other account, in the manner in which the respondents have proposed or proceeded to do so (vide their Annexure XXIII, dated 13th May, 1979), unless such claim is admitted by the petitioner or adjudicated by a Court or other proper authorities under and in accordance with the procedure established by the law.

14. This brings to the question as to whether the petitioner can have his remedy in a writ proceeding under Article 226 of the Constitution. The learned Advocate-General has very strongly urged that even if the respondents are recovering or are attempting to recover their claim under this contract from the amounts due and payable to the petitioner under other contracts without any justification or authority that would at most amount to non-payment of amounts due under those other contracts and as such would amount to a breach of such contracts, but no remedy lies for a breach of contract in a writ proceeding under Article 226 of the Constitution, particularly after its amendment by the Constitution (42nd Amendment) Act, 1976. The learned Advocate-General has contended that as the present writ petition was filed on 7-6-79, when the provisions of Article 226 stood amended and very much circumscribed by the aforesaid Amendment Act of 1976, it would, throughout its career be governed by such amended provisions, even though the said Article was again amended by the Constitution (44th Amendment) Act, 1978, with effect from 1-8-1979, restoring thereby the Clause (1) of Article 226 to its former position obtaining before the 42nd Amendment. The learned Advocate-General has also contended that even if it is held that the provisions of Article 226, as amended by the Constitution (44th Amendment) Act, 1978, having come into operation during the pendency of this writ petition, should thereafter govern the present proceeding, the petitioner still can have no remedy in this proceeding as it is a settled law that a right arising or flowing from a contract cannot be enforced by a writ petition under the provisions of Article 226 as it stood before the 42nd Amendment Act, 1976, or as it now stands restored after the 44th Amendment Act, 1978. The learned Advocate-General has, in support of his contention, mainly relied on the Division Bench decision of the Delhi High Court in *Niranjan Lal Dalmia Vs. Union of India and Others*, which, according to him, has stated the latest position in law on the subject, after considering various Supreme Court and other High Court decisions and the facts whereof, according to him, are similar to the facts of the present case.

15. The law relating to the position of the Government in respect of contracts entered into by it with private parties has undergone revolutionary changes. It was once thought that in matters relating to contract, the Government is as free as any free individual and that though Article 298 specifically provides that "the

executive powers of the Union and of each State shall extend to the making of contracts for any purpose", yet, as pointed out in the said Delhi case (at p. 156), "in carrying on these activities, the Government would be on the same level as any other person" except that the formalities relating to the names of the parties and the execution thereof, as prescribed by Article 299, are to be complied with. But as will appear from the decisions of the Supreme Court from 1975 and onwards, e.g., in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, , *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the recent trend is otherwise and it is now laid down that the Government is not and should not be as free as an individual" and that "whatever its activity, the Government is still the Government". In *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, , it was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government like any other private individual, has the absolute right to enter into contract with anyone it pleases. But it was held by the unanimous Court, speaking through Ray, C.J., that the Government is still a Government when it enters into contract of when it is administering largess and that "the State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure" (page 269) and in that case "a citizen has a right to claim equal treatment" (page 268).

16. Be that as it may, it should be noted that even otherwise, the actual decision in *Niranjan Lal Dalmia Vs. Union of India and Others*, , cannot apply to the facts of this case because, as pointed out in that judgment (at p. 157, para 8), it was "made clear that the damages claimed from the petitioner were neither being appropriated nor recovered from other amounts admittedly payable by the Government to the Petitioner." It was pointed out (at p. 158) by Deshpande, J. (as his Lordship then was) in that case that there is a "distinction between mere withholding of money and recovery of the claim of the Government from such money by adjustment or appropriation" and that (at 160) "it is arguable that if the Government attempts to recover the property of the petitioner without justification in satisfaction of a wrong claim made by the Government against the petitioner, then the petitioner may be able to maintain a writ petition to get the action of the Government quashed". In *Marwar Tent Factory Vs. Union of India and Another*, , it was held by a Division Bench (at p. 36) that "if the dues are simply withheld for any reason, right or wrong ... normally a Writ Court may not grant a writ directing payment", but it was pointed out by the Division Bench that it was "not a case of mere withholding" and the writ was granted. And Deshpande, J. observed in *Niranjan Lal Dallmia's* case (at p. 160), that the Court in *Marwar Tent Factory's* case "would not have entertained the writ petition if the impugned, action of the Government consisted merely in the withholding of the

money admittedly payable to the contractor as distinguished from the recovery of the disputed claim of the Government from the contractor". The Division Bench decision in Marwar Tent Factory's case, relied on by Mr. Juneja, and also the observations quoted above in the Division Bench decision in Niranjana Lal Dalmia's case are, therefore to my mind, authorities for the proposition that if the respondents have merely withheld the payment of the amounts due so the petitioner in respect of and under other contracts, that would only amount to a breach of a contract for which a writ shall not lie; but if the respondents have not merely withheld the payment due to the petitioner, but have also recovered or attempted to recover and adjust therefrom their alleged claim against the petitioner under this contract, a writ would lie for quashing such action. To the same effect is the decision of the Full Bench of the Delhi High Court in Mohan Meakin Breweries Limited Vs. Union of India and Others, , where Tatachari, C.J. speaking for the Full Bench consisting of himself and also Deshpande and Yogeshwar Dayal, JJ., who constituted the Division Bench in Niranjana Lal Dalmia's case observed (at p. 257) that the action of the Government in recovering the amount or in adjusting or appropriating the same is dehors the terms of the contract and since it is not covered by the terms of the contract and the contract does not give the Government any such power of recovering any claim, decided and assessed by itself, from the other amounts due and payable to the contractor under other contracts, the action of the Government is to be regarded as an illegal exercise of its executive power against which a writ petition would be maintainable.

17. It should be noted that in all these three Delhi cases, namely, Marwar Tent Factory's case, Niranjana Lal Dalmia's case and Mohan Meakin Breweries' case, the clause of the contract which fell for consideration was Clause 18 of the General Conditions of Contract, which also fell for consideration in the Supreme Court case in Union of India (UOI) Vs. Raman Iron Foundry, and which has been quoted hereinabove while discussing the said Supreme Court case. I have already held that both on principles of construction according to the rules of natural justice as well as on the authority of the said Supreme Court decision in Raman Iron Foundry's case, construing Clause 18 as aforesaid, the relevant Clause 67 of the General Conditions of Contract in this case has got to be construed to have conferred powers on the Government to recover its claim against the contractor from the amounts due and payable to the contractor under other contracts, only when such claim is admitted by the contractor or is adjudicated by a Court or other proper authority according to the procedure established by law and, therefore, the action of the respondents in recovering or attempting to recover its alleged claim against the petitioner, which is neither admitted by the petitioner nor adjudicated under legal process, from the other dues payable to the petitioner under other contracts, is not a mere breach of the contract but something which is dehors the terms of the contract and, therefore, as held in the aforesaid three Delhi cases, such action must be regarded to be justifiable in and amenable to writ jurisdiction under Article 226 of the

Constitution.

18. The learned Advocate-General has, however, contended that all the aforesaid three Delhi cases were decided under the provisions of Article 226, as it stood prior to the Constitution (Forty-Second Amendment) Act, 1976, when the powers conferred thereunder were very wide. But by the amendments introduced by the said 42nd Amendment, the powers were limited and circumscribed to a great extent and the learned Advocate-General has contended that the present petition having been filed on 7-6-1979, when the said Amendment was in force, must be governed by the provisions of Article 226 as amended by the said 42nd Amendment, even though by the Constitution (Forty-Fourth Amendment) Act, 1978, the relevant provisions of Article 226(1) have been restored to their former position with effect from 1-8-1979, by S. 30 thereof. This, therefore, brings me to one of the oldest questions in the realm of the interpretation of Statutes, namely, if a law is changed during the pendency of a proceeding, whether such proceeding would attract or be affected by such change of law? As is expected, authorities on this question are legion but it is not necessary to cite or refer to those number-less authorities for my present purpose as the following proposition may, in my view, be taken to be well-settled:

- (1) the new law shall apply to pending proceeding if such law unmistakably manifests its intention to that effect by express enactments or by necessary intendment;
- (2) the new law shall not apply to pending proceedings if it would prejudicially affect the existing substantive rights;
- (3) the new law shall apply to pending proceedings, if such law relates to or affects changes only in matters relating to procedure or evidence, unless the effect thereof would be to deprive a person of a vested right.

19. Now, as pointed out in Halsbury's Laws of England (Simonds Edition Vol. 36, pages 426-427), "legislation increasing the jurisdiction of particular Courts by empowering them to determine matters previously remediable in other Courts is prima facie applicable to existing, as well as future causes of action" and that "provisions introducing new remedies have been classed with provisions as to procedure for the purpose of the rules relating to retrospective effect, so that they are prima facie applicable both to proceedings subsequently commenced in respect of existing causes of action and to existing proceedings, whether pending before a Court of first instance or an appellate tribunal". There can be no doubt that the latest amendment of Article 226 by the Constitution (44th Amendment) Act, 1978, has increased the jurisdiction of writ Courts by empowering or re-empowering them to determine matters which were not determinable by such Court under the previous amendments introduced by the 42nd Amendment Act of 1976 and were, therefore, "previously remediable in other Courts" and has thus introduced "new remedies" in respect of those matters. And, therefore, on the principles noted above, the provisions of the latest amendment of 1978,

though introduced about two months after the present proceeding has been instituted, should apply to the present proceedings.

20. The learned Advocate-General has mainly and very strongly relied on the unanimous decision of the Seven Judge Bench of the Supreme Court in Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another, in support of his contention that the amendments introduced in Article 226 by the 44th Amendment Act of 1978 shall not apply to this proceeding pending on the date of the commencement of those amendments as, according to him, it has been laid down in that decision that amendments conferring wider jurisdiction on Courts cannot apply to pending proceedings unless there are express provisions to that effect. But it appears to me that far from being an authority on that question, as contended by the learned Advocate-General, the decision has expressly left that question open and undecided. As very strong reliance has been placed by the learned Advocate-General on this decision, propose to discuss the same in some details.

21. In that case, a suit for ejectment and other reliefs under the provisions of, the Bombay Rents etc. Control Act, 1947 was filed by the respondent on 22-7-1958 and was dismissed by the trial Court on 28-10-1961 and the first appellate Court confirmed the same on 25-10-1963. Under the provisions of the aforesaid Act, as it then stood, no further appeal lay and accordingly the respondent filed revision in the High Court of Gujarat against the appellate judgment under the provisions of Section 115 of the Civil P.C.

22. About two years thereafter, while the aforesaid revision was pending, the Bombay Rent Act, 1947 was amended with effect from 17-6-1965 and the amended Section 29(2) thereof conferred on the High Court a wide revisional jurisdiction, much wider than it had or could have under the general law contained in Section 115, Civil P.C. The High Court proceeded on the basis that the amendments applied to the pending revisional proceeding and in the exercise of the wide powers conferred by the said amendments, reversed the first appellate judgment and decreed the suit. The appellant filed the appeal to the Supreme Court with special leave against the judgment of the High Court.

23. On behalf of the appellant, two points were urged before the Supreme Court in support of his contention that the Amendment Act of 1965, widening and enlarging the revisional jurisdiction of the High Court, could not apply to the proceedings pending on the date of the commencement of the aforesaid Amendment Act. It was firstly contended that the right to appeal or to move in revision "attached to a litigation when it commences and it is not affected by any subsequent amendment, unless an express provision is made giving retrospective operation to the amendment" and that the right to appeal or to move in revision "which originally attached to the litigation will continue to govern it till it is finally decided". Secondly, it was contended that by the time the amendment Act of 1965 was passed and enforced, i.e., 17-6-1965, the order of the first appellate Court dated 25-2-1963 acquired finality, subject to the limited

jurisdiction that could be exercised in the pending revisional application u/s 115, Civil P.C., and such finality (even though some-what limited) could not any further be disturbed or in any way affected by the amendments of 1965. It was urged that the Amending Act having come into force on and from 17-6-1965, the appellate judgment dated 25-2-1963 acquired finality by that date (subject to the revisional proceeding then pending u/s 115, Civil P.C.) and was No longer open to or assailable by any further appeal or revision on the date when the amendments came into effect and as such the amendments, providing for wider and larger interference, cannot be allowed to effect such finality "in the absence of a provision in the amending Act making the amendment expressly or by necessary implication retrospective".

24. Shah, J., speaking for the unanimous Court, observed that it was "not necessary to express any opinion on the first question, because...on the second point raised, the appeal must succeed".

25. The aforesaid decision, therefore, cannot be treated as any authority for the broad proposition, as urged by the learned Advocate-General, that an amendment or a change of law, conferring wider jurisdiction on Courts or providing further or larger remedies cannot apply to pending proceedings in any case. And, for the matter of that, and this I say with great respect, no general proposition of law has been, in so many words, laid down in that case and all that has been decided is that the Amendment Act of 1965 could not apply to the pending revisional proceeding, as when the Amendment Act came into operation about two years after the judgment sought to be revised was passed, the judgment acquired some sort of finality as it could not be assailed in revision on that date and further, the period of limitation for moving in revision, being ninety days, having expired long before that date. In fact the earlier Supreme Court decisions in Indira Sohanlal Vs. Custodian of Evacuee Property, Delhi and Others, and Moti Ram Vs. Suraj Bhan and Others, , where change or amendment of law was applied to proceedings in respect of orders made prior to such change or amendment, were distinguished in this case by pointing out that the relevant orders in those cases did not acquire any finality before the law was changed or amended. One may, therefore, venture to think, obviously with due respect, that if the first appellate order in this Keshavalal's case did not acquire any finality (though limited) by the time when the Amendment Act of 1965 was passed and enforced, the decision in the said case would or might have been otherwise.

26. Be that as it may, in the present case, the orders of the respondents assailed by the petitioner in this writ proceeding, being dated 26th Mar., 1979 (Annexure F to the petition) and 13th May, 1979 (Annexure XXIII of the respondents' affidavit) have not and cannot be said to have acquired any sort of finality on 1-8-1979 when Article 226 has been amended by the 44th Amendment Act of 1978 and those could very well be assailed afresh on or after that date by a fresh proceeding thereunder and as such, according to the ratio of the decision in Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another, the amended

article should apply to the present proceeding, though initiated about two months earlier on 7-6-1979.

27. The decision in Garikapatti Veeraya Vs. N. Subbiah Choudhury, is generally referred to as a leading authority for the proposition that a lis, throughout the rest of its career including all stages in appeal, revision, etc., is to be governed by the law in force at the date of the commencement of the lis and any change in the law subsequent to the commencement of the lis shall not affect its career, unless the new law so provides expressly or by necessary intendment. In my view, however, what was decided by the Supreme Court in that case, speaking through S.R. Das, C.J., was that if there was a right of appeal under the law operating at the date of the institution of the suit, such right attaches to the parties immediately on the commencement of the lis and shall be preserved to the parties thereto till the rest of career of the suit including appeals and all other proceedings therefrom and such right shall continue to be governed by the law prevailing at the date of the institution of the suit, wholly unaffected by any subsequent change in law, unless any such subsequent law takes away such right by providing to the contrary, expressly or by necessary intendment. In other words, what was decided was that (page 556) "the old law, which created that right of appeal, also continues to exist to support the continuation of that right" and not that if there was no right of appeal or further appeal under the old law, such absence of right of appeal shall also continue to operate and that even if a subsequent amendment confers such a right, the old law shall continue to negate such right. To put it differently, what was decided in Garikapatti's case was that a right of appeal under the law then in force accrues to the litigant as on the date the lis commences and continues even with the change of law, unless such law expressly or by necessary intendment takes away such right; but the Supreme Court did not and had no occasion to decide in that case that even the absence or negation of such right existing at the date of the institution of the lis shall also continue as before, even though a subsequent law expressly confers such a right.

28. Be that as it may, as I understand it, a law widening and enlarging the jurisdiction of a Court to award more or better or fuller relief's shall apply to all proceedings pending on the date of the commencement of such law, unless on such date the action or the non-action or the order assailed or impugned in such pending proceeding has, but for such pending proceeding, become otherwise final. This also appears to me to be the only logical conclusion from the Judge Bench decision, of the Supreme Court in Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another, , referred to hereinbefore, and as I have already stated, while discussing the Union of India (UOI) Vs. Raman Iron Foundry, . I should be bound by the clear logical conclusions from the decisions of the Supreme Court.

29. I am also inclined to think that the observations of the Supreme Court in Sree Bank Ltd. Vs. Sarkar Dutt Roy and Co., are also authorities for holding that

the amended Article 226 shall apply to the present proceeding which though commenced before, was pending at the date of, such amendment. After referring to the general rule against retrospective operation of Statutes, except those relating to matters of" procedure, it was pointed out by Sarkar, J. (at 1956) that "it is recognised that the general rule is not invariable and that it is a sound principle in considering whether the intention was that the general rule should not be applied, to "look to the general scope and purview of the Statute and at the remedy sought to be applied and consider what was the former state of the law and what it was that the Legislature contemplated" and the following passage from Craies on Statute Law was quoted with approval:

if a Statute is passed for the purpose of protecting the public against some evil of abuse, it may be allowed to operate retrospectively although by such operation it will deprive some person or persons of a vested right.

30. Now, whether it was proper or improper, good or bad, is a different matter, but the fact remains that by the amendments of Article 226, introduced by the 42nd Amendment, all Writ-Court remedies, except. those for the protection of any of the fundamental rights conferred by Part III of the Constitution or for the redress of any injury of a substantial nature or resulting in a substantial failure of justice and arising out of any contravention of the provisions of the Constitution or any other Statutory law of from any proceeding thereunder, were taken away, while by the amendments introduced to Article 226 by this 44th Amendment, all such remedies have again been made available not only for the enforcement of fundamental rights but "for any other purpose", as they were available under the Article as it stood prior to the 42nd Amendment. In the Statement of Objects and Reasons and the Notes of Clauses accompanying the Bill for the 44th Amendment Act, 1978, it is stated that "the ammedment proposed in the Bill are mainly for removing or correcting the distortions which came into the Constitution by reason of amendments enacted during the period of the "Internal Emergency" meaning thereby the amendments introduced by the 42nd Amendment Act of 1976, and that, as one such measure the amendments provided "to restore Article 226 to the form in which it was prior to its amendment by the Constitution (Forty-Second Amendment) Act", "subject of a modification". Fortunately enough, we have been able to get rid of the English rule of construction according to which one cannot look at the Statements of Objects and Reasons even for discovering the background of a particular legislation and to find out the evil which it intended to remedy...the rule which according to Lord Denning (in his Discipline of Law at p. 10) is "odd enough" and as a result of a series of decisions of the Supreme Court the position in India is now more or less settled that such Statements can be looked into at least for the purpose of ascertaining the object of enactment or the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent of the defect, mischief or evil which it sought to remedy or the reasons for the remedy.

31. Now, according to those who sponsored the amendments introduced by the 44th Amendment Act, the provisions of the Constitution including those of Article 226 were distorted by the earlier amendments and the present amendments have been introduced to remove or correct those distortions. "Distortions" of the provisions of the Constitution or for the matter of that, of any law, is surly an "evil or abuse" and if there were such "distortions" of Article 226 as a result of the earlier amendments and the present amendments have been introduced to correct and remove those distortions by enlarging its power and jurisdiction and restoring the earlier remedies then the amendments are to be regarded to have been "passed for the purpose of protecting the public against some evil or abuse", within the meaning of the passage from Craies, quoted hereinabove and quoted with approval by the Supreme Court in Sree Bank's case AIR 1966 SC 1953 and, therefore, as pointed out in the said passage, the amendments "may be allow-to operate retrospectively, although by such operation it will deprive some person or persons of a vested right".

32. I am, however, of the opinion that the petitioner is entitled to relief in this proceeding, even if it is held that the present proceeding is to be governed by the provisions of Article 226 as it stood on 7-6-1979 when the present proceedings were initiated, i.e. by the provisions of Article 226 as amended by the 42nd Amendment Act, 1976.

33. I have already held that the respondents cannot recover their alleged claim against the petitioner arising out of or under this contract from any amount due and payable to the petitioner from and by the respondents under this or any other contract or contracts or on any other account, unless such claim is admitted by the petitioner or adjudicated in appropriate forum in accordance with law and, therefore, any such recovery will deprive the petitioner of his property without the authority of law, thereby infringing his right to property under Article 31 of the Constitution and his right to acquire, hold and dispose of property under Article 19(1)(f) of the Constitution as those two Articles stood on the date of the commencement of the present proceeding and before the 44th Amendment Act. And the petitioner would, therefore, be entitled to relief under Sub-clause (a) of Clause (1) of Article 226 as it stood amended by the 42nd Amendment Act, 1976, whereunder a writ was to issue for the protection and enforcement of any of the rights conferred by Part III of the Constitution. It may be noted that in Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, , the writ petition filed by the petitioners under Article 32 for the enforcement of their fundamental right to property under Article 31(1) of the Constitution was allowed as the respondents in that case deducted and threatened to deduct further some amount from the amount of the current bills payable to the petitioners under earlier contracts, as such deduction was found to be not justifiable under the law. As already pointed out, in this case the recovery or the threatened recovery by the respondents of the alleged claim from the amounts payable to the petitioner under other contracts is also unjustified in law and, therefore, there can be no reason as to why an appropriate writ or order shall not issue to protect the

petitioner from the deprivation of his right to property, as was done in Binani Bros."s case. In. my view, therefore, the petitioner is entitled to an appropriate writ or order in this case even if the present proceedings are to be governed by the provisions of Article 226 as amended by the 42nd Amendment Act of 1976.

34. In the result, the writ petition is allowed, the letter (Annexure XXIII to the respondents" affidavit) dated 13th May, 1979, in which the respondents intimated to the petitioner that the alleged claim of Rs. 4.44 lakhs is being recovered from any amount due to the petitioner, and also so much of the letter (Annexure F to the petition) dated 26th Mar., 1979, as relates to such recovery or threat of recovery, are quashed and the respondents are directed not to adjust or recover in any manner their alleged claim as afore said or any portion thereof from and out of the amounts due and payable or which may hereafter become due and payable to the petitioner under this or other contracts or on any other account, until such claim of the respondents has been adjudicated by a Court or other proper authority under and in accordance with the procedure established by law. In the circumstances of the case. I make no order as to costs.