
(1949) 06 CAL CK 0022
In the Calcutta High Court
Case No : Suit No. 1683 of 1946

S.C. Mitra and Co.

APPELLANT

Vs

Governor-General of India in Council

RESPONDENT

Date of Decision : 22-06-1949

Acts Referred:

Citation : (1949) 06 CAL CK 0022

Judgement

Chatterjee, J.—This suit has been instituted by the Plaintiff firm for the recovery of Rs. 35, 490-15 from the Government of India.

2. On September 16, 1943, the Director of Industries, Bengal, as the duly authorised agent of the Government of India, placed an order with the Plaintiff firm for the supply of 5,000 cane baskets at Rs. 3 per basket, to be delivered at the factory of the Director at Barrackpore Trunk Road, Baranagar.

3. Admittedly this was a war contract and was put through on behalf of the Government of India. The main argument advanced on behalf of the Defendant is that this order or contract is not binding on the Government and is not enforceable, because it was not expressed to be made in the name of the Governor-General. The order of September 16, is set out hereunder:

No. 6968-W/7-B(14).

Office of the Director of Industries, Bengal, War Supplies Section, 7, Council House Street. Calcutta, dated September 16, 1943.

M/S. S.C. Mitra and Co., 64B, Pratapaditya Road, P.O. Kalighat, Calcutta.

Dear Sir,

An order for 5,000 cane baskets folding strictly according to specifications, the details of which are known to you, is hereby placed with you at Rs. 3 per basket, delivered free of all costs at our tent factory at Barrack pore Trunk Road, Baranagar.

Only such baskets as are accepted by the Deputy Inspector of Stores and Clothing, Bengal Area, will be paid for and the decision of the Deputy Inspector of Stores and Clothing on the acceptability or otherwise of the basket will be final and binding on you. Rejected baskets are to be removed at your own cost from the factory within a day of the receipt of information communicated verbally or in writing.

Each basket should bear your mark "S.M." stamped in a corner.

The delivery is to be completed by September 30, 1943.

Yours faithfully, Sd. S.C. Mitter, Director of Industries, Bengal.

Copy to--

(1) A.O. for information, (2) General Manager, Tent Factory, (3) Chief Storekeeper, Church Lane, Calcutta.

4. Learned Counsel for the Defendant, Mr. H.K. Bose, admits the genuineness of the document and further admits that the order was placed with the Plaintiff firm and it was signed by Mr. S.C. Mitter, Director of Industries, Bengal, who was duly authorised by the Government of India to enter into the contract. But he has been instructed to take the point that the contract is unenforceable and therefore, the suit is not maintainable.

5. It has been urged by the Plaintiff's counsel that the conduct of the authorities is reprehensible and a better standard of fair play is expected from the highest Governmental authority in this country. But this is not a Court of morality but of law. I have got to decide according to law. Here law and morality may not coincide, but the Court is powerless in the matter. The State is being more and more socialised and the authorities are embarking upon schemes of public enterprise of various kinds and they have got to enter into contracts through subordinate officers. It is for the framers of Indian constitution to decide whether the formalities prescribed by Section 175 of the Government of India, Act, 1935, to the effect that all contracts shall be expressed to be made by the Governor-General or by the Governor of a province should be modified or abrogated. The National Government in Free India is expected to exhibit a high standard of public morality and should ordinarily accept as binding all contracts put through by responsible officers who are duly authorised in that behalf. Yet, until the necessary statutory modification is made in Section 175 of the Government of India Act, 1935, as amended by the India (Provisional Constitution) Order, 1947, it is binding on all courts in India. In the case of *H. Young and Co. v. Mayor and Corporation of Royal Laminators Spa* (1883) 8 App. Cas. 517, which will be dealt with later, Lindley L.J. observed that it may be said that a provision like this leads to a hard and narrow view of the law. But Parliament has thought it expedient to require that view to be taken and the court has to give effect to a clearly expressed statute although it may lead to apparent hardship. This suit involves two other orders in writing, one dated October 30, 1943, for 2,000 baskets and

the last one is dated December 29, 1943, for 5,000 baskets. They are to be found in the agreed bundle of correspondence (pp. 17 and 26). They are also signed by the Director of Industries, Bengal and in each case the letter is headed "The Office of the Director "of Industries, War Supply Section", but the Governor-General is not mentioned in either.

6. Counsel for the Defendant admits that these two orders were also placed with the Plaintiff firm and that the Director of Industries had the authority to do so, but he wants to repudiate liability on the ground of non-compliance with the technicalities prescribed by the Government of India Act.

7. In the plaint, it is stated that the Plaintiff delivered all the 7,000 baskets under the two orders of September 16 and October 30, 1943. It is further alleged that the Director of Industries failed to tender the baskets for inspection to the Ordnance Inspection Department, Cossipore, until January, 1944. By that time many of the baskets had become rotten by reason of careless storage and want of care. Several baskets were given back to the Plaintiff by the Director's department for repairs and re-tender. The Plaintiff took back the baskets, effected the repairs and re-delivered some of them and the Director took delivery thereof. The Plaintiff offered delivery of the balance, but the Director wrong hilly refused to take the same.

8. With regard to the third order of December 29, 1943, the Plaintiff firm's case is that they duly manufactured the baskets and tendered the same, but the Director refused to accept delivery. Thereafter, on the representation " of the Plaintiff firm, the Director asked them to tender the baskets under the last order. This is borne out by the letter dated January 31, 1944, addressed by Mr. M. Gupta, Director of Industries, Bengal, to the Plaintiff firm.

9. The Plaintiff firm's case is that they gave delivery to the Director of a lot of 610 baskets of February 3, 1945. Later on the Plaintiff offered delivery of the remaining baskets under the last contract, but the Defendant wrongfully refused to accept or pay for the same. The undelivered baskets became useless to the Plaintiff and they could not be sold in the market and they are lying at the Plaintiff's godown since January, 1946.

10. According to the Plaintiff, the Director paid for 3,139 baskets and has failed to pay for the remaining 8,861 baskets. The Plaintiff claims Rs. 27,130-13-0, being the price of 8,861 baskets and certain sums for godown rent and coolie hire, cartage and also for interest.

11. A large number of issues was raised by the Defendant, but I am now trying, with the consent of the parties, only three preliminary issues of law. These issues are as follows:

1. Are the contracts or orders in suit void and unenforceable in view of Section 175(3) of the Government of India Act? If so, is the suit, as framed maintainable?

2. Is the suit maintainable in the absence of registration of the Plaintiff firm

under the Partnership Act at the date of institution of the suit?

3. Is notice u/s 80 Code of Procedure Code in conformity with that section?

12. Issue No. 1. Having regard to the language of Section 175 of the Government of India Act, I am constrained to hold that the contracts or orders in suit are void and are unenforceable and therefore, the suit is not maintainable. These orders or contracts do not satisfy the requirements of Section 175(3). I quote here Clauses (1), (2) and (3) of Section 175 of the Government of India Act as it stands after the amendment aforesaid:

175. (1) The executive authority of the Dominion and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Dominion or of the Province, as the case may be and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively and to the making of contracts.

(2) All property acquired for the purposes of the Dominion or of a Province, as the case may be shall vest in His Majesty for those purposes.

(3) All contracts made in the exercise of the executive authority of the Dominion or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

13. It is to be observed that Section 30(7) of the Government of India Act, 1915, corresponded to some extent to Section 175(7) of the Act of 1935. But Section 30(3) of the Act of 1915 only required that every contract shall be executed by such person and in such manner as the Governor-General in Council, by resolution, directs or authorises. Section 175(3) of the Act of 1935 goes further and demands that the contract must be expressed to be made by the Governor General. Power to make contract is conferred by Section 175(1) of the Government of India Act. Under Sub-section (3) all contracts made in exercise of the executive authority of the Dominion shall be expressed to be made by the Governor-General. These contracts are not so expressed. Moreover, under that sub-section, all contracts made in the exercise of the executive authority of the Dominion shall be executed on behalf of the Governor-General by such persons or in such manner as he may direct or authorise. No argument has been put forward to uphold the validity of a contract aliunde Section 175(3) of the said Act. The effect is that these orders are not enforceable contracts, because they do not satisfy the mandatory provisions of the statute. The language of Section 175 is explicit. The section applies to all kinds of contracts. It is impossible for me to accede to the argument of the learned Counsel for the Plaintiff that, as it is not a question of want of capacity but merely one of non-compliance with formalities, this statutory and unqualified obligations can be waived or dispensed

with by invoking the doctrine of ratification. This contention is founded upon a number of unsound arguments. Firstly, ratification implies an act done without authority by a person professing to act as an agent for some principal. Here, the agent who professed to act, did not act without authority, but he had been authorised to place the orders. Secondly, there can be no ratification of a void contract. If authorities are needed, they can be found quoted in Pollock and Mulla's Indian Contract Act, 7th Ed., p. 554. It is settled law that a transaction, which is void ab initio can not be ratified. Since the decision of the well-known case of *Ashbury Railway Carriage and Iron Co. v. Riche* (1875) 7 H.L. 653, it can not be doubted that a contract which is ultra vires or beyond the powers of a company is void in its inception and cannot be ratified even by the assent of the whole body of shareholders.

14. Large number of authorities has been cited by learned Counsel on both sides, to whose diligence and ability I am indebted. It is not necessary to discuss all of them. In my opinion, it is really a question of construction of the relevant statute. To accede to the argument that the Government is bound by the doctrine of ratification would render nugatory the relevant provisions of an Act of Parliament. One should remember the settled principle that you cannot do indirectly what you can not do directly.

15. *H. Young and Co. v. Mayor and Corporation of Royal Lamington Spa* (supra) is the leading authority. Lord Blackburn and Lord Bramwell held that Sub-section (1) of Section 174 of the Public Health Act, 1875 (38 and 39 Vict. Clause 55), which enacts that "every contract made by an urban authority, whereof the value "or amount exceeds ₹50, shall be in writing and sealed with the "common seal of such authority" is, obligatory. It was held to be not merely directory and it is applied to an executed contract of which the urban authority had the full benefit and enjoyment and which had been effected by their agent duly appointed under their common seal.

16. When the legislature in its wisdom has made provisions for the protection of the Government and the tax-payers by requiring the observance of certain solemnities or formalities, it is idle to contend that the same may be dispensed with on the plea of ratification. In such a case, what is called "ratification" really means entering into a new contract and that would again necessitate compliance with the formalities prescribed.

17. In *Kessoram Poddar and Co. v. Secretary of State for India* ILR (1926) Cal. 969, it has been held that, in order that a contract may be binding upon the Secretary of State for India in Council, it must be made in strict conformity with the provisions laid down in Section 30 of the Government of India Act, 1915. If it is not so made it is not valid as against him. If a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State in Council and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that that

should be taken as a precedent which will be binding upon the Secretary of State in every case. In that case, the learned Judge, Chotzner J., followed Young's case (supra) and did not accept the contention put forward by the Plaintiff that the mandatory provisions with regard to the framing of contracts could be dispensed with, when the same had been in fact ignored and payments had been made on the basis of such a contract.

18. In *Akshoy Kumar Banerjee v. Municipal Commissioners of Tollygunge Municipality* (1942) 46 C.W.N. 393, a single Judge of this Court, Roxburgh J., held that a contract between a municipality and a private individuals which is not in writing and not signed and sealed as required by Section 103(3) of the Bengal Municipal Act, is not binding on either the municipality or the other party, although the contract may have been executed. Accordingly, the municipality cannot maintain a suit on such a contract or recover anything thereunder. In that case, it was further held by the learned Judge that Section 65 of the Contract Act would apply to such a case and the party receiving some advantage under such contract would be bound to make compensation to the latter on the principle of quantum meruit, where the latter had suffered loss. But, unfortunately for the Plaintiff, such a claim has not been made in this case.

19. *Province of Bengal v. S.L. Puri* (1945) 51 C.W.N. 753, is a case exactly in point. In that case Gentle J. had to deal with as application by the Government of Bengal u/s 33 of the Arbitration Act, 1940. A responsible officer of the Government of Bengal, describing himself as the Foodgrains Purchasing Officer of Bengal, entered into a contract with Mr. Puri. It was in writing and was headed "Government of Bengal" but it was in the form of a letter addressed to Mr. Puri confirming the purchase made from him by the officer on behalf of the Government. Then followed the description and other necessary details of the goods sold and a provision for submission of disputes to the arbitration of Bengal Chamber of Commerce. The learned Judge held that the document had been printed and brought into existence at the instance of the Government. Yet the argument was made that there was no legal contract between the Government and Mr. Puri on the sole ground it was not expressed to be made by the Governor of Bengal. The learned Judge, although he commented on the attitude of the authorities, followed Young's case (supra) and Kessoram Poddar's case (supra) and held that the contract was not in accordance with the statutory provisions of the Government of India Act and did not bind the Government. There is conflict of authority as to whether a contract, in order to satisfy the conditions of Section 175 or its previous counterpart Section 30, must be incorporated in a formal deed. In *Secretary of State for India in Council v. Yadavgir Guru Dharmgir ILR* (1935) 60 Bom. 42, a Bench of the Bombay High Court held that, in order to bind the Secretary of State, there must be a deed executed in his name and by the proper authority. In *Secretary of State for India in Council Vs. Bhagwandas Goverdhandas*, , another Bench of the same High Court took the opposite view and held that it is not necessary that a contract, in order that it may comply with Section 30 of the Government of India Act of 1915, must be by a deed and it

may be entered into by correspondence. The same view has been taken in *Deviprasad Srikrishna Prasad v. Secretary of State for India* ILR (1941) All. 741. In my opinion, although the provisions of old Section 30 or the present Section 175 of the Government of India Act are mandatory and all contracts on behalf of the Secretary of State or the Government of India or the Dominion, in order to be enforceable, must be in writing and in the name of the appropriate authority, it is not essential that it should be incorporated in a formal deed or be under seal. It is sufficient compliance with the statute if the contract is evidenced by correspondence or by a tender and its acceptance or by other documents of a less formal nature, provided the prescribed requisites are found therein.

20. Mr. Sisir Das has referred me to the case of *Renter v. Electric Telegraph Company* (1856) 6 E1. and B1 341 : 119 E.R. 892. That case is really an authority for the proposition that where a contract is within the scope of the business of a company, the contract, although not executed in accordance with the terms of its charter, should be deemed to have been ratified, if not authorised by the company, by the acceptance of the work and by payments there for from time to time which were incorporated into the accounts of the company and were duly audited and passed. In that case, there was no question of the infraction of any statute and the act which was held to be binding on the Corporation was not ultra vires or void in its inception.

21. The next case cited by Mr. Das is *Madura Municipality v. K. Alagirisami Naidu* ILR (1939) Mad. 928. In that case, Section 65 and Section 70 of the Contract Act were applied in a case where the contract was found to be unenforceable for want of sanction u/s 68 of the Madras District Municipality Act, 1920. But it was also held that the ratification of such a contract was not of any avail, because a contract which is forbidden by law can not be retified u/s 196 of the Indian Contract Act. This case is of no use to the Plaintiff and really negatives the contention of the Plaintiff on the question of ratification.

22. I have already observed that there is no question in this case of the recovery of compensation or restoration of benefit u/s 65 or 70 of the Contract Act and there is no claim made on the basis of quantum meruit in the plaint in this case.

23. In my view, the cases which deal with municipalities or corporations are of no aid while we are discussing contracts with Government and where the Parliament or the legislature has prescribed mandatory statutory formalities.

24. I decide issue No. 1 in favour of the Defendant and I hold that the contracts or orders are unenforceable. Mr. Das has urged that, although they may be unenforceable, they are not void but are voidable and therefore, there is scope for ratification and he argues that there are clear evidence of ratification in the letters of the Defendant's attorneys, who, on behalf of the Government, admitted the contracts unequivocally. He urges that I should decide in the Plaintiff's favour. I regret I cannot do so. u/s 2(g) of the Indian Contract Act, an agreement not enforceable by law is said to be void. These contracts or

agreements being unenforceable by law are void and I must hold that this suit is not maintainable.

25. Issue No. 2. I do not think it is proper to allow the Defendant to raise this issue, because this point with regard to the non-registration of the firm was not taken in the written statement. At a very late stage, shortly before the hearing of this suit, notice was given on May 10, 1949, nearly three years after the institution of the suit, that the Defendant would urge this point. In *Radha Charan Saha v. Motilal Saha* (1937) 41 C.W.N. 534, a single Judge of this Court, Mitter J., had to deal with a case somewhat similar. There a suit was instituted by an unregistered firm on May 25, 1934, after the Partnership Act had come into force. No exception was taken in the written statement on the ground of non-registration of the firm. The suit was decreed on contest against some of the Defendants and ex parte against others. There was an appeal by the Defendants who had appeared, but that appeal was not proceeded with, as the ex parte decree had been set aside on the application of the Defendants who had not appeared. When the suit came up for hearing afresh, a plea was taken that the suit was not maintainable, on the ground of the non-registration of the firm u/s 69 of the Partnership Act at the time of the institution of the suit. The firm had been registered, on June 20, 1934. The objection was upheld by the courts below, but this High Court held that the suit ought not to have been dismissed merely on the ground of non-registration of the firm at the date of the institution of the suit. One of the points made by the learned Judge was that the suit should have been deemed to have been instituted on the date when the firm was registered. This observation has been strongly commented upon and I may say with respect, very properly commented upon, by Harries C.J. and Verma J. in *Firm Laduram Sagarmal v. Jamuna Prasad Chaudhuri* ILR (1939) Pat. 144. The same view has been taken by Leach C.J. and another learned Judge of the Madras High Court in *K.K.A. Ponnuchami Goundar v. Muthusami Goundar* ILR (1942) Mad. 355. If this point had been taken in the written statement and if it was open to the Defendant to urge the same at the trial, then I would have held, having regard to the language of Section 69(5) of the Indian Partnership Act, that a suit by a firm which had not been registered at the date of the institution of the said suit is not maintainable, Registration of the firm is a condition precedent to its right to institute a suit and registration at a later stage can not cure or remedy the initial defect.

26. No application was made for the amendment of the written statement. In my view, it is not right at this late stage to allow the Defendant to take such a plea of non-registration of the firm without any pleading inasmuch as the Plaintiff, if the point had been taken at the earliest possible opportunity, could withdraw the suit and file a fresh suit after registration of the firm and avoid all questions of limitations.

27. Issue No. 3. I take up the third issue. Learned Counsel for the Defendant had argued a similar point in a case which I decided recently: *Bhupal Chandra Dutt v.*

Governor-General of India in Council (1948) 52 C.W.N. 808. He has cited a recent Privy Council judgment--Government of the Province of Bombay v. Pestonji Ardeshir Wadia ILR (1949) Bom. 110 : L.R. 76 IndAp 85. That judgment really adds nothing new to what the Judicial Committee had decided in the leading case of Bhagchand Dagadusa v. Secretary of State for India in Council ILR (1927) 51 Bom. 725 : L.R. 54 IndAp 338. It is settled law that the provisions of Section 80 Code of Procedure Code are imperative and must be strictly complied with. In the recent Privy Council case, a suit had been instituted by three trustees, but two of them had never served any notice u/s 80 and both the Bombay High Court and the Judicial Committee held that the provisions of Section 80 had not been complied with. As a matter of fact two of the trustees were appointed as such in January, 1934, but the notice u/s 80 had been served in October, 1943. Therefore, no notice had at all been served on behalf of these two trustees. The Judicial Committee quoted with approval the judgment of Sir Beaumont C.J., who observed that the names and addresses of all the Plaintiffs must be given in the notice u/s 80. The notice in that case had been given on behalf of the Wadia Trust, which was itself not proper and a. 80 could not be complied with, specially when the two trustees came in later and they could not possibly claim the benefit of the notice served on the Government before their appointment.

28. I held in Bhupal Dutt's case (supra) that notices u/s 80 must not be too strictly or too narrowly construed. They must not be construed, as if they are pleadings and they need not set out all the facts or details of the case which the Plaintiff intends to prove. Such notice is sufficient if it substantially fulfils the object in informing the Government or the public officer of the nature of the suit proposed to be instituted. Until that judgment is reversed by a higher tribunal, I would like to adhere to what I said in that case. In the present case, the notice u/s 80 is attacked, because it does not state the description of the Plaintiff and the cause of action. The attorney starts by saying that he is addressing the Secretary to the Government of India on behalf of their clients "Messrs. S.C. Mitter and Co. of 64, Bowbazar Street, Calcutta." Mr. Bose's point is that the name, description and address of the party must be given. The name and address have been given, but not the description. It would be pushing technicality to absurd limits if I accede to this contention. Clearly the notice sets out all the details which shows that a business firm had entered into a number of contracts with the Government on three dates, September 16, October 30 and December 29, 1943. Certain particulars are set out. Then other facts are given, showing the breaches of these contracts. It is also urged that some allegations have been made in the plaint, specially in paras. 4, 5, 6, 10, 11, 12 and 14, which are not in the notice. All the details or facts need not be set out in the notice. The Plaintiff must be described and the facts constituting the cause of action must be stated in such a manner that the party can be identified without difficulty and the nature of his claim understood by the authorities, so that the Government may offer a settlement or may deal with the matter on its merits. The Government here had no difficulty in

either identifying the party or in dealing with the claim on its merits and the reply given by Mr. Sushil C. Sen, solicitor for the Central Government at Calcutta, to the Plaintiff's attorney, dated July 28, 1945, shows that the Government clearly understood the whole case and dealt the matter in the fullest possible manner. In Kessoram Poddar's case (supra) it was held that Section 80 of the CPC requires the "cause of action" to be stated with some amount of precision, but the words should not be taken in a narrow sense., the object of the section being merely to inform the Defendant substantially of the grounds for complaint: See also Baidya Nath Roy v. Ram Chandra Bannerjee (1936) 41 C.W.N. 92 and Srinivas Mull v. Secretary of State for India in Council ILR (1938) Pat. 345.

29. I hold that the notice complies with the provisions of Section 80, Code of Criminal Procedure.

30. In the interests of clients, it is desirable that solicitors should have the plaint drawn by counsel and should forward a copy of the draft plaint as part of the notice u/s 80, Code of Criminal Procedure That would avoid all difficulties and possible divergences and variations between the plaint and the notice which in some cases may be fatal.

31. On issue No. 1 I have held that the suit is not maintainable.

32. I dismiss the suit accordingly with costs on scale No. 2.