

(1970) 02 KL CK 0002
In the High Court Of Kerala
Case No : A.S. No. 187 of 1964

State of Kerala and another	Vs	APPELLANT
M/s. T. Sreeramulu and others		RESPONDENT

Date of Decision : 06-02-1970

Acts Referred:

Constitution of India, 1950 — Article 166(2), 299(1)
Contract Act, 1872 — Section 56, 73
Essential Commodities Act, 1955 — Section 3
Government of India Act, 1935 — Section 175(3), 175(3)

Citation : (1970) KLJ 799

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : P.C. Balakrishna Menon, for the Appellant; G. Viswanatha Iyer and N. Sankara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Krishnamoorthy Iyer, J.—The State of Kerala and the Additional Secretary (Civil Supplies) Board of Revenue, Kerala State, who are plaintiffs 1 and 2 in O.S.53 of 1961 on the file of the Additional Subordinate Judge's Court, Trivandrum, have filed this appeal against the dismissal of their claim for recovery of damages from defendants 1 to 5 based on breach of contract. The first defendant is a registered firm of partnership having its registered office at Madras, and defendants 2 to 5 are the members of the partnership.

2. The second plaintiff on behalf of the Board of Revenue by Ex. P-1 notification dated 4th August, 1958 published in the Kerala Gazette dated 5-8-1958 invited tenders for supply of 20,000 tons of parboiled rice in Dalwa (Nallarlu) and Gariki varieties on an average of 5,000 tons of rice every month from August 1958 to December 1958 from the District of Guntur, Krishna, East Godavari and West Godavari in Andhra Pradesh conforming to the specifications and according to the terms and conditions detailed in Ex. P-1. The Districts referred to in Ex. P-1 are known as the Delta areas of Andhra Pradesh where a ceiling price fixed by the

Central Government under the Essential Commodities Act, 1955 was in force. Ext. P-2 dated 11-8-1958 is the tender submitted by the first defendant agreeing to supply the said quantity of rice on the terms and conditions mentioned in Ex. P-1 at a commission of four annas per bag of 2 maunds nett. According to clause 16 of Ex. P-1 the final acceptance of the tender has to be by the Government. The Government accepted Ex. P-2 and informed the Board of Revenue by Ex. P-3, G.O.M.S. No.937 dated 21-8-1958. The second plaintiff communicated the fact of acceptance of the tender to the first defendant by his letter Ex. D-13 dated 22-8-1958 enclosing therewith a copy of Ex. P-3. The plea of the plaintiffs is that the defendants committed default to fulfil the terms of Ext. P-1 both in the matter of the execution of the agreement and in the Supply of the rice intended to meet urgent and immediate needs of the State wherefore the plaintiffs were compelled to purchase rice at the prevailing market rate both from the States of Kerala and Andhra and thereby sustained a loss of Rs.20,68,300.48 p. being the difference in price at which the defendants agreed to supply the goods as per Ex. P-2.

3. Broadly speaking, the defendants through separate written statements contended that they were only commission agents, there was no concluded contract between them and the plaintiffs, even if there was any such contract it was not enforceable as Article 299(1) of the Constitution was not complied with and it was also subsequently abandoned by the plaintiffs, and since during the period of contract rice was not available at or below the ceiling price fixed by the Government of India under the Essential Commodities Act, 1955 the contract became impossible of performance and the defendants are not liable in damages.

4. The Subordinate Judge in dismissing the suit found that the defendants were not mere commission agents but were suppliers of rice, that in view of the acceptance of Ex.P-2 by the Government there was a concluded contract, but the said contract is not valid and enforceable as Article 299 (1) of the Constitution was not complied with, that there was no abandonment of the contract by the plaintiffs, that the contract became impossible of performance as it was not possible to procure rice from the areas mentioned in Ex. P-1 at the prices stipulated therein, and though the defendants committed breach of contract the plaintiffs cannot claim any damages on account of payment in excess of the ceiling price referred to in Ex. P-1.

5. The findings of the learned Judge both against the plaintiffs as well as against the defendants were attacked before us. The defendants have also filed memorandum of cross-objections complaining against the decree of the trial court disallowing costs.

6. Before dealing with the contentions raised before us to their order we shall extract clauses 11, 12 and 19 of Ex. P-1 as they are very relevant for our discussion.

11. The successful tenderer shall execute an agreement for the due fulfilment of

the contract in the form approved by the State Government within seven days from the date of acceptance of the tender. The stamp duty and other expenses incidental to the execution of the agreement shall be borne by him.

The successful tenderer shall, within seven days from the date of acceptance of the tender furnish cash or Government bonds or guarantee from any approved Bank for a sum of Rs. Three lakhs only by way of security for the satisfactory fulfilment of the contract. If the contract is to split up between two or more tenderers the amount of security will be Rs. Three lakhs or 5% of the value of the contract whichever is lower. The security deposit will be refunded within three months after the termination of the contract or after settling the accounts with the Supplier whichever is later. If the security deposit is made in cash no interest will be paid by the Government for such sum. In case any amount is found due to the State Government from the supplier, the Government shall have power to set off the same against the security amount.

In case the successful tenderer fails to furnish security and to execute the agreement as stated above, Government shall be competent to arrange the execution of the contract by other means at the tenderer's risk and any loss incurred by the Government on account of such arrangement will be recovered from the defaulter who shall, however, be not entitled to any gain accruing thereby.

12. The Supplier will be paid for the rice at the rate fixed by the Government of India (f.o.r. loading station) or at the prevailing market rate (f.o.r. loading station) whichever is less. The above rate will include cost of rice, cost of gunny bags, charges for weighment and incidentals up to and including loading of bags into wagons, cost of dunnage bags, dunnage material etc.

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19. In the case the successful tenderer commits breach of all or any of the conditions contained in this notification or in the agreement to be executed by him, then it shall be lawful for the Government to arrange for the purchase of rice from elsewhere at the risk and responsibility of the defaulter and in case the Government shall have incurred, sustained or put to any costs, damages, or expenses by reason of such purchase or by reason of such breach by the successful tenderer, the Government shall be entitled to recover such costs, damages or expenses from the successful tenderer who shall, however, be not entitled to any gain accruing thereby.

7. We shall now deal with the first contention, viz., whether there was a concluded contract between the parties and if so whether it is unenforceable because of noncompliance with Article 299(1) of the Constitution. The learned Judge has found that in view of the acceptance of Ext.P-2 there was a concluded contract between the parties. The defendants would, apart from contending violation of Article 299(1) of the Constitution, plead that there could not be any concluded contract between the parties without the execution of the agreement

referred to in clause 11 of Ex. P-1. The defendant also contended that there was an understanding between the parties to incorporate an additional clause in the agreement to be executed to the effect that if rice was not available for the ceiling price fixed by the Government of India the suppliers might postpone the purchase of rice till market conditions improved or until revised orders were received from Government of India fixing higher ceiling price.

8. It is thus necessary to consider whether the execution of the agreement contemplated in clause 11 of Ex. P-1 is essential for the completion of the contract between the parties. We have therefore to examine whether the said provision is a term of the bargain or is only the expression of a desire of the parties regarding the manner in which the transaction already agreed to will in fact go through. In the former case no contract can arise until the formal document is signed. The principle to decide this point was illustrated by Lord Chancellor (Lord Cairns) in *Rossiter v. Miller* (1878) 3 A.C. 1124 at P. 1139 thus:

.....If you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

9. In dealing with an identical question Parker, J., in *Von Hatzfeldt-Wildenburg v. Alexander* (1912) 1 Ch. 284 at p. 288 observed:

It appears to be well-settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the references to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire.

10. Their Lordships of the Judicial Committee in AIR 1923 47 (Privy Council) pointed out that the principle of English law summarised by Parker, J., was applicable in India also and it was applied by their Lordships of the judicial Committee in appeals from India in AIR 1924 156 (Privy Council) , AIR 1933 29 (Privy Council) and AIR 1946 97 (Privy Council) . In following the principle of law

stated in the English decisions Ramaswami, J., observed in *Kolipara Sriramulu Vs. T. Aswathanarayana and Others*, :

It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case.

11. It is in the light of these decisions we have to understand the legal effect of clause 11 in Ex. P-1. The two significant parts of the said clause are that the successful tenderer shall execute an agreement for the due fulfilment of the contract in the form approved by the State Government within seven days from the date of acceptance of the tender and in case the successful tenderer fails to execute an agreement the Government shall be competent to arrange the execution of the contract by other means at the tenderers's risk and any loss incurred by the Government on account of Such arrangement will be recoverable from the defaulter. Though Ex. P-2 was accepted by the State Government they did not communicate the acceptance to the defendants. They informed the fact of acceptance only to the Board of Revenue by Ex. P-3. The Board of Revenue was not also asked to communicate the acceptance to the defendants though the Board of Revenue was requested to take immediate action for the purchase of goods. In Ex. D13 the second plaintiff said:

You are therefore directed to furnish within seven days from the date of this communication, the prescribed security of Rs. 3 lakhs only either in cash or Government bonds or in the alternative a guarantee for the above amount from an approved bank and to execute the necessary contract agreement in the form approved by Government and also to commence the supply immediately. The draft of the agreement will be sent to you shortly for execution.

12. It does not appear that any draft agreement was forwarded either by the Board of Revenue or by the Government to the first defendant for execution in spite of the definite requests of the latter by Exs. D-12 dated 1-9-1958 and D9 dated 29-9-1958. Early in September 1958 the first defendant began complaining that the market rates in the delta areas in Andhra Pradesh had gone up and were far higher than the ceiling price fixed by the Government of India and requested for further clarification from the second plaintiff as to what they should do under the circumstances. This was indicated in their letters dated 1-9-1958, 13-9-1958 and 14-9-1958. The letter dated 14th September 1958 is Ex. P.6. Though P.W. 1 would deny the receipt of the letter dated 1-9-1955, it is admitted in paragraph 9 of the plaint. Ex.P-8 is the draft of the registered reply dated 23-9-1958 sent by the second plaintiff to the first defendant to his letter of 13-9-1958. While pointing out that the clarification requested for is unnecessary

in view of clause 12 of Ex. P-1, Ex. P-8 said:

You have only to execute the bond and commence supply as per the terms of the tender notification. Purchases should not be postponed until the prices reach the ceiling rate. Your failure to furnish the security and execute the agreement tantamounts to a breach of the conditions contained in the tender notifications for which you are liable under the provisions contained in clauses 11 and 19 thereof in addition to forfeiture of earnest money which please note.

13. The above evidence clearly proves that the intention of the parties was that in the absence of a formal agreement executed by the defendants, plaintiffs will not be bound by the contract. It follows that the execution of the agreement was a term or a condition of the contract, and not merely a formality. We are therefore constrained to differ from the conclusion of the learned Subordinate Judge and hold that because of the failure to execute the agreement there was no concluded contract between the parties.

14. The next aspect relates to the plea of the defendants that there was an understanding between the parties to incorporate the additional clause referred to in paragraph 8 of the first defendant's written statement in the agreement to be executed. The learned Subordinate Judge has found against the defendants' plea and we find no reason to differ. Ex. P35 is the minutes of the meeting held in the Secretariat on 2-8-1958 where the terms and conditions in Ex. P1 were settled. We were not referred to any decision of the Government subsequent to Ex. P35 to add any further term or condition to Ex. P1. The defendants' plea on this aspect has therefore to fail.

15. If the provision relating to the execution of the agreement in Ex. P1 is not a term of the bargain between the parties, let us examine whether the contract satisfies the requirements of Article 299 (1) of the Constitution. The said Article reads:

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.

16. The counter-part of Article 299 (1) of the Constitution is Section 175 (3) of the Government of India Act, 1935. Shah, J., in *Union of India (UOI) Vs. A.L. Rallia Ram*, pointed out:

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 preserving the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled.....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).

17. In *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd., Venkatarama Ayyar, J.*, held that u/s 175 (3) of the Government of India Act, 1935 a contract entered into by the Governor of a province must satisfy three conditions: It must be expressed to be made by the Governor; it must be executed; and the execution should be by such persons and in such manner as the Governor might direct or authorise. As pointed out by their Lordships of the Supreme Court in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, reason behind Section 175 (3) of the Government of India Act is that the State should not be saddled with liability for unauthorised contracts and it is enacted in the public interest and invests public servants with no authority to bind the State by contractual obligations incurred for the purposes of the State. In considering the content of Article 299(1) of the Constitution in *K.P. Chowdhary Vs. State of Madhya Pradesh and Others, Wanchoo, J.*, voicing the unanimous view of the Court said:

What was said in these cases with respect to S. 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 a valid contract as envisaged by Article 299(1), there may not be implications arising out of such a 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.

18. A contract by tender or correspondence will therefore be valid only if the conditions laid down in Article 299 (1) of the Constitution are fulfilled.

19. The learned Advocate General submitted on the basis of Ex.P3 which is expressed to be in the name of the Governor, that Article 299 (1) has been satisfied. Ex.P3 is only a communication by the Government to the Board of Revenue and it is expressed to be in the name of the Governor because of Article 166(2) of the Constitution. It is no doubt, true that the second plaintiff has sent

a copy of Ex. P3 to the first defendant enclosed with Ex. D13. But that cannot affect the question. The conditions to satisfy Article 299 (1) of the Constitution in cases of contracts settled by correspondence are that the invitation for tender should be by or on behalf of the Governor and the acceptance of the tender should be in writing expressed in the name of the Governor and the contract is executed on his behalf by a person authorised in that behalf by the Governor. There was no attempt on the part of the plaintiffs to prove these facts. The learned Advocate General relied on the decision in *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd.*, and *Union of India (UOI) Vs. A.L. Rallia Ram*, to show that under similar circumstances it was held that Article 299(1) of the Constitution was complied with. The decision in *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd.*, was based on the finding that Y.K. Lall, Executive Engineer, who executed the arbitration agreement was specifically authorised to do so within the meaning of Section 175(3) of the Government of India Act, 1935. The said decision, in our view, cannot assist the learned Advocate General. In *Union of India (UOI) Vs. A.L. Rallia Ram*, the question was whether the acceptance of a tender by the Director of Purchase resulted in a binding contract for the purpose of enforcing an arbitration clause therein. Shah, J. observed:

The correspondence between the parties ultimately resulting in the acceptance note, in our judgment, amounts to a contract expressed to be made by the Government and therefore by the Governor-General, because it was the Governor-General who had invited the tender through the Director of Purchases, and it was the Governor-General who through the Chief Director of Purchases accepted the tender of the respondent subject to the conditions prescribed therein. The authority of the Chief Director of Purchases to contract for sale of "war disposal" goods and sign the contracts is not denied. The Chief Director of Purchases has subscribed his signature in his official designation and he has not stated in the description that the contract was executed on behalf of the Governor-General, but on a fair reading of the contents of the letter, in the light of the obligations undertaken whereunder, it would be reasonable to hold that the contract was executed on behalf of the Governor-General.

20. The decision therefore proceeded on its own facts. Ex. P1 is not expressed in the name of the Governor of the State. We are searching in vain for any authority in favour of the additional second plaintiff either by the issue of a notification or otherwise to issue Ex. P1 on behalf of the Governor. The learned Advocate General was fair to submit that he also could not trace any such authority. In these circumstances, we hold that Article 299(1) of the Constitution has not been complied with. Our findings therefore are that there was no concluded contract because the formal execution of an agreement which was a term of the contract was not carried out and even if there was a concluded contract it is not enforceable for want of conformity with Article 299 (1) the Constitution.

21. We shall next consider the plea of the defendants that there was abandonment of the contract by the plaintiffs. On this aspect we find no difficulty to agree with the conclusion of the learned Subordinate Judge. The plea of abandonment is based on the following facts. There was a conference held by the Minister for Food on 3-10-1958, attended by the Second Member of the Board of Revenue, the Finance Secretary, and the Secretary, Agricultural Department. Ex. P48 represents the minutes of the conference. It was decided to purchase rice from open market both from within the State and from outside. All attempts to procure rice by the first plaintiff failed. The first plaintiff therefore thought of utilising the good offices of the Minister for Food of Andhra Pradesh to procure rice from there. There was therefore a conference in New Delhi on 7-11-1958. Ex. P34 is the minutes of the meeting signed by the respective Ministers for Food. In pursuance to the said decision Ex. P27 order was placed for purchase of 10,000 tons of rice at the rates mentioned in Ex. P34 both from Andhra Pradesh Rice Millers' Association and from the first defendant. It is because of Ex. P27 that the defendants contend that there was an abandonment of the contract evidenced by Exs. P1 and P3. We cannot agree. There is no plea of substitution. There is absolutely nothing to show that the plaintiffs dispensed with the performance of the contract. The fact that subsequent orders were placed with the first defendant for the purchase of rice would not amount to an abandonment of the prior contract. We therefore find, in agreement with the learned Judge, that the contract was not abandoned by the plaintiffs.

22. We shall next take up the question whether the contract had become impossible of performance and become void. The finding by the learned Judge on this aspect is in favour of the defendants. The discharge of contract by the principle of frustration is contained in Section 56 of the Contract Act. The said Section authorises the court to grant relief on the ground of subsequent impossibility when it is found that the whole purpose or basis of the contract was rendered impossible on account of any unexpected event which was not in the contemplation of the parties at the time of the contract. As was pointed out in *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, .

It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be change in the significance of obligation that the thing undertaken would, if performed, be a different thing from that which was contracted for.

23. No such thing is in the case before us. It is therefore not open to the defendants to invoke the principle of Section 56 of the Contract Act.

24. In the written statement the first defendant would contend that it was not the intention of the parties that the defendants should procure rice at a price beyond the maximum fixed in the Central Government's Order and that at all times during the period mentioned in Ex. P1 the market price prevailing in the Delta areas of Andhra Pradesh was considerably higher than the controlled price. Prior to Ex. P1 there was a conference in the Food Minister's Room in the

Secretariat at Trivandrum on 2-8-1958 evidenced by Ex. P35. The Food Minister presided over the conference and it was attended by the Member, Board of Revenue, Commissioner of Civil Supplies, Food and Agricultural Secretary and the Finance Secretary. Ex. P 35 shows that the first defendant was consulted regarding the market position of the price in Andhra Pradesh at about the time and it was stated by them that it was right from 1-5-1958 and the prices per bag were higher by Rs. 4 to 5 than the ceiling prices fixed by the Government of India and the prices were then going down and it was expected the prices would come down below the ceiling price. It was also stated by the first defendant that it would not be possible for them to supply the rice immediately. In the light of the discussion the tender then submitted by the first defendant for the supply of 50,000 tons of rice was rejected and the revised invitation for tender Ex. P1 was issued.

25. Ex. P11 is the order dated 30-12-1957 issued by the Government of India in exercise of the powers conferred by clause (c) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955, fixing the maximum prices at which rice could be sold in the districts of Krishna, West Godavari, East Godavari & Guntur in Andhra Pradesh. This order was in force on the dates of Exs. P1 and P2. According to clause 12 of Ex. P1 the defendants should supply rice at the rate fixed by the Government of India (f.o.r. loading station) or at the prevailing market rate (f.o.r. loading station) whichever is less. The reason for the Government to invite offers for the supply of rice from the Delta districts of Andhra Pradesh must have been the fact that rice was available there at prices fixed by the Government of India. Immediately after Ex. P2 the first defendant was repeatedly writing letters that the prices had not come down and it was not possible to procure rice for the price mentioned in clause 12 of Ex.P1. In reply to Ex.P4 the first defendant wrote the original of Ex. D 12 on 1-9-1958 to the Board of Revenue pointing out that the market price is about Re. 1/- more than the Government ceiling rate and the price was expected to come down and if the Government was anxious to procure rice urgently it could be done only at that rate. Though P.W.1 would say that the Board of Revenue did not get the letter of 1-9-1958 the receipt of the same is admitted in paragraph 9 of the plaint. The first defendant on 13-9-1958 sent Ex.P5 to the Board of Revenue drawing their attention to the letter of 1-9-1958. Ex. P8 is the copy of the reply sent by the second plaintiff. It does not appear that subsequent to Ex. P3 the prices in the Delta districts of Andhra Pradesh came down to the Ceiling price fixed by the Government of India under Ex. P11. On the other hand, the subsequent purchase made by the plaintiffs based on Exs. P 48, P27, P28, and D4 show that they were effected at the then market price both from the Delta area and outside within the State of Andhra Pradesh and also within the State of Kerala. It was admitted by the Advocate General that for the purchases effected from the Delta districts in spit of Ex. P11 the first plaintiff was compelled to pay the prevailing market price which was very much more than the price fixed under Ex. P11. When Ex. P1 was issued and when the tender was submitted the plaintiffs as well as the first

defendant were under the impression that rice would be available in the Delta districts of Andhra Pradesh at the rates mentioned in Ex. P11 and the contract was on that basis. Legally it was not possible for the defendants to supply rice from those areas except through surreptitious markets. The contract therefore was entered into on a basic assumption of the availability of rice in the Delta area in the Andhra Pradesh at the controlled price. This is clear from Ex. P 35. In view of the difficulty to procure rice from the Delta area at the controlled price it was agreed that the tender submitted by the first defendant for 50,000 tons of rice should be rejected. Ex. P1 is the tender notification based on the decision at the conference evidenced by Ex. P35. Ex. P35 itself shows that the parties thought and expected that the prices would come down to about the ceiling prices within ten days. That was the basis of the contract and if subsequent to the contract the prices did not come down the contract has to fail as no rice could be supplied at the ceiling rate. We are therefore of the view that the basic condition underlying the contract failed and therefore the contract became invalid. The contract has therefore become void and become incapable of performance. We therefore hold on this point that in view of the the failure of the basic condition the defendants are not obliged to perform the contract and are not answerable for any damage.

26. The next question relates to the quantum of damages. Damages are claimed on the basis of purchases made by the Government from the State of Kerala and from the State of Andhra Pradesh. Ex. P-33 is the statement filed by the plaintiffs showing the details of the purchases. Ex. P-33--Part II--shows the actual purchase made in Andhra at rates in excess of the ceiling-rate. The loss claimed by the plaintiffs on that account is Rs. 19,32,665.69 p. and the loss on account of the local purchases is Rs. 1,35,634.56 p. The total loss thus claimed is Rs. 20,89,300.45p. The learned Subordinate Judge has disallowed the claim for the reason that the loss was due to paying more than the ceiling price which is illegal. The award of compensation for loss caused by breach of contract should be based on Section 73 of the Contract Act. The law imposes a duty on the plaintiffs to mitigate the loss caused by breach of contract. Ex. P-1 shows that the supplies had to be at the ceiling price. If on account of the default of the defendants, the plaintiffs were compelled to pay a higher ceiling price the claim is justified but not otherwise. The dates on which purchases were made in Andhra are not given in Ex.P-33. But they were purchases effected as per Exs. P-27, P-28 and D4 which were in the months of November and December 1958 and February 1959. On 1-9-1958 the first defendant wrote Ex. P-12 letter to the second plaintiff about the availability of Mallarlu rice in the Delta area of Andhra State at Re. 1/- more than the Government ceiling rate. They expressed their willingness to procure rice at that rate if the Government was willing. Even if purchase at a price above the maximum price fixed under law is justified the plaintiffs should have accepted the same and mitigated the damages. If they had ordered goods when they received Ex.D-12, they could have saved a substantial portion of the plaint claim incurred as loss.

27. It was contended by the learned Advocate General that ceiling prices do not control the value of property for assessment of damages and relied on the decisions in *British Motor Trade Association v. Gilbert* 13. (1951) 2 All. E.R. 641 and *Mouat v. Betts Motors Ltd.* (1958) 3 All. E.R. 402. The facts were that at a time when the price of cars was controlled, the purchaser covenanted to sell the car to the seller at the controlled price minus depreciation. For breach of the covenant by selling the car to a third party for a price higher than the controlled price, the court allowed as damages the amount received by way of sale price, even though it was above the controlled price. They are cases of unjust enrichment made by commission or of wrongs. We do not think that these cases are authorities for the broad proposition cited by the learned Advocate General. The effect of awarding damages on the basis of the price paid in contravention of Ex.D-11 will be to legalise an act which is an offence under the Essential Commodities Act, 1955. We therefore overrule the plea of the Advocate General on this point.

28. We agree with the conclusion of the learned Judge that the defendants with reference to the contract in question are not mere commission agents but were suppliers of rice.

29. It therefore follows that the appeal has to fail and we dismiss the same with costs. The memorandum of objections filed is also without substance. In disallowing costs of the defendants the learned trial Judge has given proper reasons and no sufficient ground was shown to interfere with his discretion. We dismiss the same with costs.