

(1970) 10 DEL CK 0019

In the Delhi High Court

Case No : First Appeal No. 40 of 1970

Union of India and Others

APPELLANT

Vs

N.K. (P) Ltd. and Others

RESPONDENT

Date of Decision : 30-10-1970

Acts Referred:

Citation : (1971) 7 DLT 406 : (1971) 1 ILR Delhi 355

Hon'ble Judges : V.S. Deshpande, J;H.R. Khanna, J

Bench : Division Bench

Advocate : B.N. Sen, O.P. Malhotra, A.B. Saharia, Sat Pal, V.M. Tarkunde, B.R. Aggarwal, Janendra Lal and K.N. Kataria, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) This case is notable, firstly, because the present value of the goods involved runs into crores of rupees and, secondly, because of the interesting questions of law raised.

(2) The facts are undisputed. In March 1968 the appellants (hereinafter called the "Government") issued a global tender for the sale of about eighty thousand tonnes of surplus released serviceable and scrap rails mainly for export. On May 21, 1968, the respondents (hereinafter called the "Company") submitted an offer in terms of the tender conditions for the purchase of the re-layable and scrap rails. After obtaining some clarifications from the Company, the Government ultimately purported to accept the offer by the following letter :-

"GOVERNMENTOF India Ministry Of Railways (RAILWAY BOARD) New Delhi-1. dated 15th July 1968 No. 68/RS(G),"709. M/s. N. K. Private Limited, 171-C, defense Colony, New Delhi. Dear Sirs, SUB: Tender No. 1 of 1968 for Export sale of used re rollable and re-layable steel rails. Ref : Your letter Nos. Nil dated 21-5-1968, 15.6.1968. 29.6.1968, 8.7.1968, 10.7.1968 and 15.7.1968. Kindly be advised that your offer (at \$ 39 per long ton F.O.B. Indian Port for export and Rs. 458.00 per long ton for indigenous consumption) with terms and conditions

referred to in your above letters is hereby accepted. Formal contract will be issued shortly. 2. Kindly acknowledge receipt, Your faithfully, sd/- P. C. Oak, For Secretary, Railway Board."

(3) Further discussions were held between the parties and a final draft of the contract was handed over to the Company by the Government on August 27, 1968. The Company confirmed on September 18, 1968 its agreement to a few further points embodied in the said final draft. On 27th September 1968, the Government issued a circular to the various Railways that the Board had finalised an export-cw/n-internal sale contract with the Company for a period of three years and the various Railways should make available to the Company the information and facilities for the inspection of the material available with the Railways for export by the Company. On 7th November 1968 and 23rd November 1968 the Company informed the Government that they proposed to take delivery first of 53807 tonnes and then of 19680 tonnes. The Company also complained that certain Railways were selling certain rails, though these rails had been the subject matter of the contract between the parties and requested that the said Railways should be told to stop such sales. But the Government perhaps reconsidered the matter and after seven weeks ultimately informed the Company on 15th January 1969 that the Government had indicated on 15th July 1968 an intention to enter into a contract with the Company but subsequently discussions had been held with the Company culminating in the Company's letter dated 18th September 1968. This would amply indicate that no agreement had been reached on vital terms and conditions and the question of the existence of a concluded contract did not arise. The Company promptly wrote to the Government on 25th January, 1969 that its offer had been accepted by the Government on 15th July 1968 and also by subsequent conduct and called upon the Government to perform the contract. The contract contained a provision that any dispute arising under it shall be referred to arbitration. The Company, Therefore, after some fruitless discussions with the Government, filed a petition u/s 20 of the Arbitration Act, 1940 in this Court praying that the arbitration agreement be filed in Court and the dispute between the parties be referred to arbitration.

(4) In defense, the reply of the Government was that letter dated 15th July 1968 only referred to certain matters relating to prices and some other proposed terms and conditions. Unless and until a formal instrument of contract was executed in the manner required by Article 299 of the Constitution of India, there could not be a contract binding on the Union of India. It is true that a list of quantities of the available material was supplied to the Company but it was only with a view to facilitate further negotiations. No agreement was reached on vital terms and conditions, the question of there being a concluded contract did not arise at all. Further, the Government did not admit that any draft of a formal contract embodying the agreement between the parties was handed over to the Company by any officer of the Union of India authorised to enter into a contract for and on behalf of the President of India.

(5) The relevant issue before the learned Single Judge (V. D. Misra J.) was whether there was a duly executed agreement to refer the disputes arising out of the contract, if any, to arbitration. The Company examined its Director Shri R. B. Lal who deposed that Shri P. C. F Oak, Deputy Director, Railway Board, had personally handed over the final draft of the contract to him in his office on 27th August 1968. There was no cross-examination of the witness. On hearing the arguments, the learned Single Judge held that the letter dated 15th July 1968 concluded a contract between the parties as it constituted an acceptance by and on behalf of the President of India. The learned Judge further held that Shri P. C. Oak was authorised to enter into such a contract both under item 43 of Paragraph xviii of G.S.R. 585 dated 1st February 1966 and otherwise. Hence this appeal by the Government challenging these findings of the learned Single Judge. The questions for decision again, Therefore, are :-

1, Whether there was a concluded contract between the parties ? 2. Whether the said contract complied with the provisions of Article 299 of the Constitution ?

QUESTION:- u/s 7 of the Contract Act, "in order to convert a A proposal into a promise, the acceptance must be absolute and unqualified". The acceptance letter dated 15th July 1968 appears on the face of it to be absolute and unqualified. The Government could get round this acceptance only in one of the following ways :- (i) by showing that some terms either mentioned in the acceptance or left out of it had still to be agreed to between the parties before a concluded contract could come into existence. (ii) assuming that a concluded contract had come into existence on 15th July 1968, it was later varied or rescinded by subsequent negotiations.

(6) The terms and conditions accepted by the letter dated 15th July 1968 were contained in six letters written by the Company to the Government on 21st May 1968, 15th June 1968, 29th June 1968, 8th July 1968, 10th July 1968 and 15th July 1968. The most important is the letter making the offer on 21st May 1968. The subsequent letters were written by way of clarification of the terms of the offer. All these letters are in the possession of the Government but only some but not all of them have been produced by the Government. The pleading of the Government itself is vague. It says that "no agreement was reached on vital terms and conditions". It is not clear whether this refers to the lack of agreement as to the terms of offer prior to 15th July 1968 or as to the supplementary terms negotiated thereafter. Not a single term or condition was specified in the pleading as being the one about which the parties had not reached agreement. Learned counsel for the Government Shri B. Sen took us through the conditions attached to the tender and the terms contained in the offer. He referred to the following : (1) Weighment.-He pointed out that the manner in which the weight of the quantity shipped was to be determined was left to be mutually agreed to between the parties in Condition No. 2(a) of the Special Conditions of Tender. But in Condition No. 6 thereof it was laid down how the weighment of goods would be made in different circumstances and how a survey would be arranged at the

buyer's cost, if no weighment was practicable. This term was, Therefore, a definite one and was agreed to between the parties. In Condition No. 15 of the offer it is agreed that the weight shall be ascertained in the manner mutually agreed upon. (2) Shipment.-Condition No. 4 of the Special Conditions of Tender requires the buyer to arrange the shipping space in consultation with the seller. This was agreed to in Conditions 12 and 14 of the Tender, A query regarding shipping was made in item No. 6 of Paragraph J of the Government's letter dated 25th May 1968 and was answered in item No. 6 of Paragraph I by the Company in its letter dated 15th June 1968. The Government was apparently satisfied that this term also had been settled as definitely as it could be in the circumstances. For, the actual ship and the shipping line by which the goods were to be actually exported could not be decided in advance. This would be done at the time of the shipment itself. The terms relating to shipping and weighment really related to the performance of the contract rather than its content. The performance could be expected from the Company by the Government u/s 67 Contract Act only if the latter gave reasonable facilities to the former. The performance could thus be expected only in the reasonable and practicable manner.

(7) Reference was also made to the term of the offer that the contract was to come into force on the opening of Letter of Credit by the Company in favor of the Government and it was pointed out that no such Letter of Credit was opened by the Company. If this argument is advanced to show that a concluded contract had not been arrived at between the parties, then it is untenable. For, the same term in the offer makes it clear that the contract was to be concluded by the acceptance of the offer. A distinction is made between the conclusion of the contract and its coming into force. By the latter is obviously meant the performance of the contract. What the argument really amounts to, Therefore, is the Government could have refused to allow the Company to take delivery of the goods unless the Letter of Credit was opened by the Company in favor of the Government. But this is not the same thing as saying that a concluded contract had not come into existence at all. The Government has not either pleaded or argued that the contract once concluded was later broken by the Company by failure to open the Letter of Credit. This could be the only significance of the delay on the part of the Company to open the Letter of Credit. This matter has no other importance. On the contrary, the repudiation of the contract by the Government was in the nature of an anticipatory breach which absolved the Company from the obligation to open a Letter of Credit thereafter.

(8) It cannot be said, Therefore, that any of the terms of the contract had remained un-agreed between the parties on 15th July 1968.

(9) Shri B. Sen strongly relied upon the decision of the House of Lords in *Thomas Hussey v. John Horne-Payne* (1878) 4 AC 311. Though the letter of acceptance by Mr. Hussey, in that case, was absolute and unqualified on its face, it could not conclude the contract because prior to it Mrs. Horne-Payne had agreed that the payment of the price should be made by Mr. Hussey in Installments. But the

number of Installments and the period over which they were to be spread had not been agreed upon. The payment of price is an essential term in a contract. Had Mrs. Horne-Payne not agreed to receive the payment in Installments, the law would have presumed that the price was to be paid simultaneously with the conveyance of the property. But this presumption was displaced by the agreement to the contrary between the parties. But the agreement had not become definite and, Therefore, the ostensible acceptance of the offer was insufficient to bring a contract into existence. No such essential term of the contract has remained unsettled between the parties in the present case. This decision, Therefore, has no application to the present case.

(10) Shri Sen next argued that the words "formal contract will be issued shortly" in the acceptance letter dated 15th July 1968 also indicated that the contract was to come into existence later and had not been concluded by the letter dated 15th July 1968. The word "formal" is to be understood in the light of events preceding its use. If the negotiations are too general and the terms are not defined with the required degree of precision, then it would be necessary to formulate them into a formal document; till such formal document is executed, there would be no concluded contract in such a case. Similarly, if because of the uncertainty of the intentions of the parties, the execution of a formal contract has itself been made a condition of the bargain, then also a contract would not come into existence at all till a formal document is executed. Lastly, if only some of the terms had been agreed while other material terms remained to be settled, then also a completed contract could not be arrived at. We have already seen above that all the material terms of the present contract had been agreed to between the parties prior to 15th July 1968. Because of this background it would appear that the expression "formal contract" is not used in the sense that no contract had been arrived at till then between the parties. On the other hand, the reason for the use of this expression is to be found in the letter dated 15th July 1968 itself; the acceptance therein is to terms and conditions referred to in the six letters of the company mentioned therein. The contract was thus spread over these six letters to which the terms and conditions of the tender were also attached. It is with a view to put all the terms of the contract in one consolidated document that the expression "formal contract" seems to have been used. This meaning is supported by the words "will be issued shortly". If Shri Sen's argument that the contract had yet to be arrived at by agreement of the parties were to be correct, then words "will be issued shortly" would be most inappropriate. For, a joint action of both the parties would then be required. On the contrary, the issue of the formal contract was to be by the Government alone unilaterally. This shows that such issue was a ministerial act. For, the agreement between the parties had already been arrived at when the terms in the six letters of the Company were accepted by the Government. The issue of the formal contract was thus only a matter of convenience and not one on which hinged the coming into existence of a concluded contract.

(11) Ordinarily, a "formal" contract is contrasted with preceding informal

negotiations. The formality of the contract then becomes important. In this case, however, there is no such antithesis. For, the documents preceding the acceptance were themselves formal documents. The tender notice issued by the Government was a formal document which enumerated the terms on which the offer was to be made. The General Conditions of Tender, the Special Conditions of Tender, Instructions to Tenders, Shipping terms and Schedule of Stocks, were all enclosed with the notice. The offer by the Company was also formal document in which the terms were stated precisely. The relevant part of Condition No. 11 of the offer was as follows :-

"THE contract will be completed immediately the acceptance of the offer is conveyed to us."

(12) The Government insisted that the word "completed" should be replaced by the word "concluded". This was agreed to by the Company in its letter dated 29th June 1968. This shows the intention of the Government to make it appear that in the eye of law the acceptance of the offer would bring into existence a concluded contract. The Government did not want to leave any room for doubt in this respect. The draft of the so-called "formal contract" given to the Company on 27th August 1968 was not in any way more formal than the tender, the offer and the acceptance. It is not the formality which was, Therefore, wanting but only the consolidation which was intended to be effected later. This conclusion accords with the consensus of the authorities.

(13) In *Harichand Mancharan v. Govind Luxman Gokhale*, Law Reports 50 I.A. 25 the terms of the contract had been agreed to between the parties and the very first condition of the contract was that "the bargain paper in respect of the sale of the said immovable property shall be made through a vakil within two days from this day". Accordingly formal documents were prepared by the defendant's solicitors in which certain additional terms were inserted which could not be agreed to by the plaintiff. It was argued for the defendant that there was no concluded contract till the formal bargain paper was signed by the parties. This contention was rejected by the Judicial Committee of the Privy Council who held at page 31 of the report that "the parties had come to a definite and complete agreement on the subject of the sale; they embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change; the reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document". In *Shankarlal Narayandas v. New Maffussil Company, Ltd.*, Law Reports 73 I.A. 98 an oral offer for the sale of a pressing and ginning mill was accepted with the stipulation that there were to be other usual terms which were to be incorporated in an agreement to be drafted by the solicitors. The question was whether the acceptance concluded the contract or whether the contract was to come into effect only when the other usual terms along with the

agreed terms were to be incorporated into a formal document drafted by the solicitors. Their Lordships of the Judicial Committee reversed the decision of the High Court and held at page 108 that "the facts do not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary, their Lordships consider that there was ample evidence to prove that both parties intended to make, and believed that they had made, a binding oral agreement. Their desire and intention to put that agreement into formal shape does not affect its validity".

(14) In *Rossiter V. Daniel Miller* (1873) 3 AC 1124, the offer was subject to certain conditions. It was accepted subject to the conditions and stipulations printed on the plan". The House of Lords held that there was a completed contract. Lord Blackburn said at page 1151 :

"THE mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation".

(15) In *Branca v. Cobarro*. 1947 2 A.E.R. 101, the agreement was called by the parties to be "a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed". The appellants have called the agreement of 15th July 1968 to be a provisional one in the memorandum of appeal. If by this the appellants mean that all the terms of the contract contained in the several documents mentioned in the acceptance letter of 15th July 1968 were to be embodied in a formal contract, then this did not make any difference to the finality of the contract of 15th July 1968. For, the agreement of 15th July 1968 could be said to be provisional only in the sense that the same terms were to be embodied in a consolidated document as was the case in *Branca v. Cobarro*.

(16) In 8, Halsbury's Laws of England, 76, in the opening sentence of paragraph 130, dealing with the conditions of a contract, the law is stated as follows:

"WHERE there is a definite acceptance of an offer, the fact that it is accompanied by a statement that the acceptor desires that the arrangement should be put into a more formal shape does not relieve either party from his liability under the contract."

(17) The crux of the matter is expressed in the following words of Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander* (1912) 1 Ch. 284 :-

"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."

We are of the view that the terms which were already agreed to between the parties but were spread over various documents were to be consolidated in one formal document which could be called the contract, and Therefore the issue of the formal contract by the Government was neither a term of the bargain nor was it a condition precedent to the coming into force of the contract.

(18) The following features of the letter dated 15th July 1968 showing that it concluded the contract may be noted, namely, (1) the offer was accepted with terms and conditions referred to in the six letters of the Company specifically mentioned; (2) these letters included not only the offer with its term No. 11 but also the letter of 29th June 1968 by which the Company agreed that the acceptance of the offer would conclude the contract and (3) it is stated that the offer was "hereby accepted", that is to say, it was accepted by that very letter.

(19) Shri Sen then went on to point out that even after 15th July 1968 further discussions took place between, the parties. A final draft of the contract was handed over to the Company on 27th August 1968. After comparing it with the terms of the contract concluded by the letter of acceptance of 15th July 1968 the Company wrote on 18th September 1968 that they agreed further to the four points mentioned therein. Shri Sen's argument was that if these four points had to be agreed later then a contract could not have come into existence on 15th July 1968. Let us, Therefore, examine these four points. Point I says that the term of the contract shall be three years from 16th November 1968 to 15th November 1971. But the period of the operation of the contract had already been fixed as three years in paragraph 5 of the Company's letter dated 29th June, 1968 and the terms contained in this letter were expressly accepted by the Government in the letter dated 15th July 1968. Point 2 was that a minimum quantity of ten thousand tonnes would be exported by the end of third quarter. This was merely the division of the total quantity of eighty thousand tonnes to be exported into convenient periods. The third point was concerned with the increase in the security deposit. The Company expressed its agreement to this at the request of the "Government as a supplementary term. The fourth point was that the Company agreed with the Government's view-point regarding the transfer of the contract to the foreign or Indian principals of the Company. These terms were either already agreed to or, if new, were merely supplementary. It could not be inferred from them that previously there was no contract between the parties. In our view, the mere fact that further negotiations took place between the parties either for adding new terms to the existing contract or for finalising the performance of the contract does not annul the contract which had been concluded on 15th July 1968.

(20) We are supported in this view by the Federal Court decision in Jainarain Ram Lundia v. Surajmull Sagarmull (1949) 11 FCR 379 in which Hussey v. Horne-Payne was distinguished and reliance was placed on Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs (1890) 44 Ch. D. 187, as explained in Bellamy v.

Debenham (1890) 45 Ch. D. 481, and Perry v. Suffields (1916) 2 Ch. 187, the law was summed up by Mukherjea J. in the following words:-

"IF after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive. Once completed, the contract can be got rid of only with the concurrence of both the parties."

(21) Shri Sen also relied on the decision in May v. Thomson (1882) 20 Ch. D. 705. But in our view this decision does not apply at all to the present case as at no stage in that case was there any concluded agreement between the parties. We, Therefore, conclude that the letter dated 15th July 1968 converted the proposal made by the Company, including the clarifications given thereafter, into a promise within the meaning of section 7 of the Contract Act inasmuch as the acceptance conveyed thereby was absolute and unqualified whether viewed in the light of the negotiations preceding it or subsequently to it.

QUESTION No. 2:- Article 299 of the Constitution lays down three main requirements to be fulfilled by a contract with the Government, namely:- (1) It is to be expressed to be made by the President; (2) It shall be executed on behalf of the President; (3) by such person and in such manner as the President may direct or authorise.

(22) The contract consists of the offer and the acceptance. The offer was invited by the tender notice. The tender notice is expressed to be made by the President of India. It also defines the President of India to mean the Government of India, Ministry of Railways (Railway Board). It is issued by the Director of Railways, Railway Board, for and on behalf of the President of India. The offer was originally not addressed to the President but was subsequently expressly deemed to be addressed to the President of India and was open for acceptance on behalf of the President. The acceptance of 15-7-1968 was entitled "Government of India, Ministry of Railways, (Railway Board)" which by virtue of the definition in the tender notice means the President of India. According to the decision in Union of India (UOI) Vs. A.L. Rallia Ram, , the acceptance has, Therefore, to be construed as being expressed to be made by the President. The acceptance is signed by Shri P. C. Oak for Secretary, Railway Board. The words "for and on behalf of the President of India" do not follow the signature of Shri P. C. Oak. In Rallia Ram's case also the Chief Director of Purchases subscribed his signature in his official designation but did not state in the description that the contract was. executed on behalf of the Governor-General. Shah J. speaking for the Court observed at page 175 of the report that :

"ON a fair reading of the contents of the letter, in the light of the obligations undertaken there under it would be reasonable to hold that the contract was executed on behalf of the Governor-General. No rules made by the Governor-

General have been placed before the Court showing that in executing a contract for the sale of "War disposal" goods, the officer authorised in that behalf must describe himself as signing on behalf of the Governor-General of India".

This decision is, Therefore, an authority for the proposition that even without the use of the words "for and on behalf of the President of India" the acceptance by an authorised officer can be regarded as having been for and on behalf of the President of India if in fact it was a contract with the Government. It is common ground that the President has not laid down the manner of execution of the contract. This is an additional reason that the omission of the words "for and on behalf of the President of India" would not be fatal to the validity of the acceptance.

(23) The only question that remains to be considered is whether Shri P. C. Oak was a person authorised by the President of India to execute the contract? The President of India for the purposes of this act has been defined in the tender notice as "the Government of India, Ministry of Railways (Railway Board)". In entering into a contract the Government acts in exercise of its executive power within the meaning of Article 298 of the Constitution. This executive power of the Railway Board is to be distinguished from its statutory powers and functions under the Indian Railway Board Act, 1905 and the Indian Railways Act, 1890. These, two statutes have. Therefore, no relevance to the present case in which the Railway Board acts as the Government of India in the Ministry of Railways. The distinction, if any, between the "Central Government" within the meaning of sections 197 and 195 of the Criminal Procedure Code and the Railway Board made in K.N. Shukla Vs. Navnit Lal Manilal Bhat and Another, is not relevant.

(24) The President acting under Article 299(1) of the Constitution has adopted different methods to authorise a person to execute a contract on his behalf. The first one was to issue a notification. The current notification is Gsr 585 dated 1st February 1966 which opens as follows :-"

"IN exercise of the powers conferred by clause (1) of Article 299 of the Constitution, and in supersession of the notification of the Government of India in the Ministry of Law No. Gsr 1161 dated the 1st December 1958, the President hereby directs that the undermentioned contracts and assurances of property made in the exercise of the executive power of the Union may be executed on his behalf follows:-"

Then follow forty-two paragraphs Each paragraph opens with the description of a particular type or types of contract and then goes on to specify the particular officers which are authorised to execute the particular type or types of contract. Paragraph xviii deals with the contracts in the case of the Ministry of Railways. The present contract was partly for serviceable rails and partly for scraps. Serviceable rails can be covered by the words "stores" which is wide enough to include any materials required by the Railway Board for the operation of the Railways. A contract for scrap and stores is specifically covered by Item No. 9 of

paragraph xviii which is as follows :-

"CONTRACTS connected with the sale of scrap, ashes, coal dust, empty containers and stores."

(25) Most of the officers who are authorised to execute such contracts belong to the zonal railways with the exception of the Chief Mining Engineer who alone belongs to the Railway Board. No other officer of the Railway Board is authorised to execute such a contract. Learned counsel for the Company Shri Tarkunde had argued before the learned Single Judge that Item No. 43 of paragraph xviii covered the present contract. As a Deputy Director of Railway Board was authorised to enter into such a contract by Item No. 43, Shri P. C. Oak was authorised to execute the present contract on behalf of the President. This argument was accepted by the learned Single Judge but is, in our opinion, not based on a correct construction of the notification.

(26) The scheme of the notification is to divide the different contracts, which may be entered into by the Government of India into various types according to their nature and content, and then to designate the officers who are authorised to execute them on behalf of the President. The object of the notification is to authorise different officers to execute these different types of contracts before they are actually executed. Hence the contracts are distinguished from each other by their nature and content and not by the officers which may ultimately be authorised to execute them. For, ex hypothesi the notification deals with unexecuted contracts. While each type of contract is different from the others by its nature and content, the officer or some of them, who are authorised to execute all or most of the contracts may be common. Item 43 reads as follows :-

"ALL deeds and instruments other than those specified above."

That is to say, all contracts other than those which are covered by Items I to 42 are to be executed by the designated officers of the Railway Board. The thrust of the words "other than those specified above" is to exclude from Item No. 43 all those contracts which are covered by Items I to 42. The present contract for the sale of scrap and stores is specifically covered by Item 9. It is not, Therefore, covered by Item No. 43.

(27) The argument for the Company is that the present contract is not covered by Item No. 9 merely because it is not signed by any officer mentioned in Item No. 9. Such a construction is opposed to the object of the notification which is to authorise officers to execute contracts which are yet executed. Item 43 is residuary clause intended to include all deeds and instruments other than those which are included in Items I to 42. If Item 43 is made to include a contract covered by Item 9 merely because it is signed by an officer authorised under Item 43 but not under Item 9 then the residuary clause would be converted into an over-riding clause and the distinction between the two would be ignored. In fact there is a real over-riding clause in paragraph Xli of this notification, which is as follows :-

"NOTWITHSTANDING anything hereinbefore contained, any contract or assurance of property relating to any matter whatsoever may be executed by the (specified officers)".

(28) This over-riding clause applies to each and every contract which may be entered into by the Government of India. This would largely become superfluous if Item 43 of paragraph Xviti were to be construed so widely as to be not merely residuary clause but also an over-riding clause. It could not be intended that there should be two over-riding clauses in the same notification. To construe Item 43 as an over-riding clause would mean that any officer mentioned in Item 43 would be authorised not only to execute the contracts which are mentioned therein but all other contracts mentioned in Items 1 to 42, for the execution of which none of the officers mentioned in Item 43 is authorised. The untenability of this view is hidden in the present case by the fact that an officer of the Railway Board mentioned in Item 43 has executed the contract relating to the Railway Board. But this argument can be applied to every type of contract mentioned in paragraphs 1 to 42 for the execution of which no officer mentioned in Item 43 is authorised. By this argument every such contract would fall under Item 43 merely because it is executed by an officer mentioned in Item 43. This would be putting a premium on the violation of the provisions of Items 1 to 42 in paragraph xviii. For, any contract falling within Items 1 to 42 which is not executed by an officer authorised to execute them can be brought under Item 43 by merely making an officer mentioned therein to execute it. Such an absurd result could not have been intended by the notification. We hold. Therefore, that in construing the notification, only the description of the various types of contracts is material. The officers later authorised to execute the various types of contracts are not a part of the description of such contracts. Item 43 of paragraph Xvtti has Therefore, no application to the present case, and Shri P. C. Oak, as Deputy Director of the Railway Board, was not authorised to execute this contract under Item 43 of paragraph

(29) The second method by which a person may be authorised by the President under Article 299(1) to execute a contract falls outside the notification considered above. Even a person, who is not enumerated in the said notification, can be authorised by the President to enter into a particular contract. For, as was held by the Supreme Court in the *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd.*, , and in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, , Article 299(1) is silent as to the manner in which a person may be so authorised by the President.

(30) We have, Therefore, to consider whether in the circumstances of the present case, such authorisation can be inferred as it was inferred by the Supreme Court in the *State of Bihar v. M/s.Karam Chand Thapar Brothers Ltd.* and in *Seth Bikhraj Jaipuria v. Union of India*

(31) The offer made by the Company was apparently studied by the Railway Board. For, on 25th May 1968 Shri P. C. Oak, Deputy Director, Railway Board,

required the Company to state if the offer was to be deemed to have been addressed to the President. On 3rd June 1968, another officer Shri Parasuraman, Joint Director for Secretary, Railway Board, called for further clarification from the Company. On 22-6-1968, Shri P. C. Oak wrote to the Company as follows :

"THE Board desire that the period of validity of your offer may please be extended."

After the acceptance of 15th July 1968 and the finalisation of the draft contract on 27th August 1968, a circular addressed to all the Railways was issued by the Board on 27th September 1968 in the following words :

"REFERENCE Board's letter of even number dated 28-3-1968 wherein the zonal railways were requested to declare the surplus re-layable and re-rollable rails that can be made available for export sale against the above-mentioned tender. Accordingly, on the information furnished by the Railways in their letter quoted in the margin, the Board have finalised an export-cum-internal sale contract with M/s. N.K.(P) Ltd., New Delhi, for a period of 3 years, entitling them to export stock of such surplus rails available with the Railways. The detailed terms and conditions of the contract will be apprised to you when finalised".

This letter proves conclusively, in our opinion, that the offer of the Company was accepted by the Board itself. Shri B. Sen, learned counsel for the Government, argued that the finalisation of the contract could refer either to the acceptance of 15th July 1968 or to the final draft of the contract handed over to the Company on 27th August 1968. If it referred to the latter then it did not refer to the former. In our view, it does not make any difference whether it refers to the latter or to the former. In either case, it shows that the Board has itself accepted the offer made by the Company. If Shri P. C. Oak had not been authorised to sign the letter of acceptance, his action would have been disowned by the Board. But it was never disowned even till now. On the contrary, it was adopted as action of the Board itself in this circular letter,

(32) Right from the beginning till the end, namely, in asking clarifications of the offer, in accepting the contract, in subsequent negotiations, in repudiating the contract and again in discussing the matter with the Company. Shri P. C. Oak was throughout acting for the Railway Board. At no stage during the negotiations or even during the pleadings made before the learned Single Judge has the Railway Board stated that any particular action of Shri P. C. Oak was unauthorised. If Shri P. C. Oak had not been authorised to act for the Railway Board, there could have been no negotiations at all between the parties and no contract could have come into existence between them and no contract could have been repudiated later by the Government. Obviously, Therefore, even the Government found it impossible to take up the stand that Shri P. C. Oak was not authorised to act for the Railway Board. If Shri P. C. Oak was thus authorised to act for the Railway Board throughout the negotiations, it would be highly improbable that he would not be authorised to communicate the acceptance of the offer of the Company on

behalf of the Railway Board. No reason has been either pleaded or advanced why Shri P. C. Oak should have been authorised to do everything else but should not have been authorised merely to communicate the acceptance of the Railway Board to the Company.

(33) It is true that in the tender notice the Director was mentioned as the officer to whom the offer addressed to the President was to be sent and also as the officer who could cancel the contract in case of a default on the part of the other contracting party. But it is well-known that in a Government office the Head of the Department, as the Director was, does not himself do all the work. The Joint Director and the Deputy Director could do the work as they did in the present case with the explicit or the implicit authority of the Director. In Gsr 585 dated 1st February 1966, the over-riding clause Xli includes all the Secretaries and Additional Secretaries to the Government of India as being officers entitled to enter into any contract whatsoever on behalf of the Government of India. The Members and the Additional Members of the Railway Board are Secretaries and Additional Secretaries to the Government of India. Ex-Officio as is mentioned even in the current Telephone Directory. The offer of the Company was accepted by these officers and, Therefore, it was circularised that the contract had been finalised by the Board. The other officers including Shri P. C. Oak, Deputy Director, working under these officers could, Therefore, carry out their instructions even if he himself was not mentioned in Paragraph Xli of the said notification. All or most of the correspondence in respect of this contract has been done by Shri P. C. Oak. Without the correspondence, there could have been no contract in the present case. Therefore, the correspondence must be presumed to have been authorised. The authorisation is thus made by the Board acting through the Members and Additional Members of the Board in favor of Shri P. C. Oak.

(34) We are of the view, Therefore, that the acceptance of the offer of the Company was by the Board itself acting through the authorised officers such as the Secretaries or the Additional Secretaries. It was, therefore. apparently with their approval that the acceptance was communicated to the Company by Shri P. C. Oak on 15th July 1968. Shri Oak was thus authorised to communicate the acceptance and, Therefore, to enter into the present contract by the acceptance. Such authorisation must have been made by the Board and was, Therefore, valid.

(35) In Karamshi Jethabhai Somayya Vs. The State of Bombay, , the Supreme Court had to consider the question whether there was a concluded agreement between one Karale and the Government or the Canal-officer. The documents evidencing such an agreement were not produced by the Government. Subba Rao J. speaking for the Court observed as follows;-

"THE Government, being the defendant in this case, should have produced the documents relevant to the question raised. While it is the duty of a private party to a litigation to place all the relevant matters before the Court, a higher responsibility rests upon the Government not to withhold such documents from

the court".

(36) In *British Guiana Credit Corporation v. Clement Hugh Da Silva* (1955) 1 WLR 248 also the defense raised by the Corporation was that the Governor had not authorised the higher pay claimed by the respondent therein. The Judicial Committee of the Privy Council, however, observed at pages 258-259 as follows :-

"THE defendant corporation now argues that there was no proof that the Governor in Council had ever approved this merging of the salary and gratuity so that the whole became salary. The answer to the argument is that it was for the corporation to prove the absence of such approval. The corporation had raised the matter by way of defense and it was for them to establish it".

A fortiori, the above observations apply to the present case inasmuch as the Government has raised this defense at the stage of the argument even without having pleaded it. The Government is in possession of the files on which the present contract was dealt with. Since Shri P. C. Oak was dealing with it and since the acceptance of the contract was by the Board, the inference is irresistible that the acceptance letter dated 15th July 1968 was issued by Shri P. C. Oak as an officer who was authorised to do so by the Board which is defined as the President of India in the tender. We, Therefore, hold that Shri P. C. Oak was authorised by the Board to accept the offer of the Company by the letter dated 15th July 1968.

(37) On the above findings, the appeal is dismissed with costs.