

(1973) 05 CAL CK 0016
In the Calcutta High Court

Case No : Suit No. 2566 of 1947 and Appeal No. 95 of 1969

Union of India (UOI)

APPELLANT

Vs

Kamal Kumar Goswami and Others

RESPONDENT

Date of Decision : 22-05-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 8 Rule 2, 20, 35
Contract Act, 1872 — Section 182, 70
Government of India Act, 1935 — Section 175
Limitation Act, 1908 — Article 115, 120, 12

Citation : AIR 1974 Cal 231 : 78 CWN 154

Hon'ble Judges : S.C. Deb, J; B.C. Mitra, J

Bench : Division Bench

Advocate : B. Das, H.M. Dhar and D.P. Mukherjee, for the Appellant; R.P. Bagchi and S.S. Ray for No. 1, A.P. Chowdhury and Rajat Ghosh for Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Deb, J.—This appeal is directed against the decree for Rs. 1,44,549.87 passed in Suit No. 2566 of 1947 of this Court. The Trial Court directed the appellant, who was the third defendant, to pay the full costs of the suit to the respondent Mr. Goswami who brought that action and half cost to the respondents 2 and 3 who were the other defendants in the Court below.

2. The Indian Tea Association is an incorporated association of members. The respondents 2 and 3 are the members of this Association. Mr. Goswami used to act as a contractor under the Association.

3. On September 3, 1947. Mr. Goswami filed the above suit against the Dominion of India and the other respondents on these averments made in the plaint. In 1944. the Association appointed him as a contractor to do excavation and earthwork for an aerodrome including the construction of drains in connection with Project known as Misamary Project in Assam. The Association agreed to pay

him for those works at the rate which he was getting from the Association in connection with the work done by him at Derpoan in Assam. In January 1944 he commenced the said work and completed it in July 1944. The Association have refused to pay him the balance sum of Rs. 1,97,715-6-9 pacs inclusive of interests for those works done by him.

4. Mr. Gossami claimed the above sum on the basis of a contract between him and the Association and alternatively u/s 70 of the Indian Contract Act. He added the Dominion of India as a defendant on the allegation that before filing the suit he came to know that the Association was alleging that the Association had acted as the agents of (he Government of India and if the Court found that fact to be true he would claim the above sum from the Dominion of India. He served notice u/s 80 of the CPC on the Dominion of India and then filed the suit.

5. The respondents 2 and 3, in their written statement, denied the contract pleaded by Mr. Goswami including their liability by pleading that the Association had acted as the agents of the Government of India as stated in the plaint. The Dominion of India, however, denied that fact and, inter alia, pleaded: "The plaintiff's alleged cause of action, if any, against this defendant is barred by the provision of Section 175 of the Government of India Act 1935". The appellant was substituted in place of the Dominion of India after the Constitution came into force and contested the suit.

6. The trial Court held that there was no contract between Mr. Goswami and the Association as pleaded in the plaint. The learned Judge found that the Association acted as the agents of the Government of India. He also found that Mr. Goswami lawfully did the said work not intending to do so gratuitously and the Government of India had enjoyed the benefit of the said Work.

7. In these circumstances the aforesaid decree was passed against the appellant and the suit was dismissed against the respondents Nos. 2 and 3. Hence, this appeal is directed against that decree and the judgment of the trial Court and the respondents 2 and 3 have filed cross-objection claiming full costs of this suit.

8. It is not necessary for us to go into the issues framed by the trial Court for the Counsel Mr. H. M. Dhar, appearing for the appellant, confined his contentions only to the following points:

- 1) The Association did not act as the agents of the appellant;
- (2) The plaint does not disclose any cause of action against the appellant u/s 70 of the Indian Contract Act;
- (3) The appellant did not enjoy any benefit of the said work done by Mr. Goswami;
- (4) Mr. Goswami has failed to prove the compensation claimed by him u/s 70 of the Contract Act;
- (5) The claim of Mr. Goswami is barred by the law of limitation:

(6) This Court has no jurisdiction to try this suit; and

(7) The appellant, in any event, is not liable to pay half costs of the suit to those two respondents. Mr. Goswami gave evidence and he called a few witnesses in the trial Court. The respondents 2 and 3 called many witnesses and most of them were examined on Commission in England. The appellant did not call any witness.

9. It is necessary for us to record here that Mr. Dhar did not dispute that the Association appointed Mr. Goswami to do the work mentioned in the plaint. He also did not dispute that Mr. Goswami faithfully and efficiently executed those work as found by the trial Judge. Mr. Dhar further accepted the finding of the trial Court on the quantum of work done by Mr. Goswami and thereby relieved us from going into the mass of evidence adduced on these points.

Point No. 1:

10. We are not impressed by the contention of Mr. Dhar to the effect that the witnesses called by the respondents 2 and 3 have given untrue evidence on the question of agency. These witnesses were all respectable gentlemen. Some of them were the members of the Association at the relevant time. They held very high position in life. They said that the Association acted as "honorary" agents of the Government of India and yet the appellant did not call any witness to contradict their oral testimony. Further, the documents exhibited in the suit fully support their evidence.

11. India was threatened with Japanese invasion with the fall of Burma in the last World War. The Japanese took their position on the borders of Assam. Supply to China was also threatened. There was hardly any good road and aerodrome in Assam. The Government of India was unable to meet this grave emergency and was moving heaven and earth to find out the ways and means in the matter of construction of roads and aerodromes in Assam to meet the threatened invasion.

12. The Tea-estates in Assam were mostly owned by the members of the Association. They knew this part of the country very well. They had also the resources and many contractors used to work under them.

13. In these circumstances, two Army Officers came down from Delhi to Calcutta and met two influential members of the Association. Those two members were Sir James Jones and Mr. Earnest James Nicholls. It was arranged between them in that meeting that the Association would help the War Department during that grave emergency. Then these two gentlemen, representing the Association, went to Delhi where it was arranged between the Government of India and the Association that the Association would act as the "honorary" agents of the Government of India who would finance the Association for constructing roads and aerodromes in Assam for and on behalf of the Government of India.

14. Sir James Jones is no longer alive and the aforesaid facts were stated by Mr. Nicholls and also amongst other witnesses by Sir Percival Joseph Griffiths. These

two respectable gentlemen were examined on Commission and they were not cross-examined on this aspect of the case by the counsel for the appellant. The learned Judge accepted (heir evidence and we do not find any reason to say anything against his findings.

15. The Association also appointed other contractors to do other work in connection with the other Projects in Assam for the Government of India. Those contractors were pressing for payment in connection with the work done by them from time to time. In these circumstances, Sir Percival Griffiths went to Delhi and met Sir Eric Coates who was the Military Adviser to the War Department of the Government of India. Sir Percival requested Sir Eric to make arrangements for payment to which Sir Eric agreed. Then, Sir Eric wrote a letter dated March 1, 1942 to the Association material portion of which is set out below:

"I am directed by the Governor-General-in-Council to delegate to the committee of the Indian Tea Association authority to incur miscellaneous expenditure on behalf of the Government.

A credit of one Lac in the first instance in their name will be opened immediately with the Imperial Bank of India Clive Street Branch, Calcutta against which the committee may draw. This credit will be replenished when exhausted if necessary on application by the committee to this department.

The Committee will render monthly accounts of expenditure incurred to the Controller of Military Accounts, Eastern Command. Mccrut with a copy to this department."

Copies of this letter were sent by Mr. R. L. Chamber, Deputy Finance Adviser of the appellant, to the Director of Audit, Defence Services and to the Military Accountant-General with a direction to the latter, inter alia, to this effect; "take immediate steps to open the credit with the Imperial Bank, and should the Controller of Military Accounts wish to raise any comments on the monthly accounts as he receives he should do so only through this Department."

16. It is an admitted fact that in terms of the above letter an account was opened by the Government of India with the Imperial Bank of India at Clive Street in Calcutta and it was operated by the Association. It is also an admitted fact that this account was replenished from time to time by the Government of India in terms of that letter. Further, the Association from time to time sent monthly statement of account as to the disbursements made by them from the said accounts to the Departments concerned of the Government of India and the Government of India accepted those statements as correct. These facts, in our opinion, conclusively show that the Association had acted as the agents of the Government of India.

17. Moreover, the statements made in the aforesaid letter dated March 1, 1942, conclusively show that the Governor-General-in-Council authorised the Association to incur miscellaneous expenditure on behalf of the Government of

India. This authority to incur expenditure on behalf of the Government, in our opinion, conferred a further authority on the Association to do all reasonable acts that were required to be done by the Association on behalf of the Government of India in connection with such expenditure. In other words, this power on its face empowered the Association to do all work for and on behalf of the Government of India and hence, in our opinion, it further establishes the fact that the Association had acted as the agents of the Government of India.

18. In this connection it is also necessary for us to refer to a letter dated April 26, 1946, written to the Association by Mr. S. N. Russell who was the Joint Secretary to the War Department. Mr. Russell admitted in that letter that the Association had acted as the agents of the Government of India on honorary basis. Mr. Russell gave evidence on Commission and he proved that letter. He was not cross-examined on this aspect of the case by the Counsel for the appellant. Further, the appellant did not call any witness to get rid of the aforesaid admission made by the Government of India through Mr. Russell.

19. The contention of Mr. Dhar namely that the relationship between the Association and the Government of India was that of principal and principal, in our opinion, has no substance. No principal is liable to render any account to another principal. The above letter dated March 1, 1942, militates against this contention of Mr. Dhar. No such case was even made out in the written statement of the Dominion of India. No fact was also pleaded to constitute such relationship.

20. It was then contended by Mr. Dhar that the said agency was void due to the non-compliance with the provisions of Section 175(3) of the Government of India Act, 1935. We have already quoted the pleading in this behalf and, in our opinion, that pleading is not sufficient enough to enable Mr. Dhar to raise this question. No claim can be barred under that Section for its language does not say so. The Dominion of India did not take the plea that there was such an agreement and it did not comply with the provision of Section 175(3) of the said Act. Further, the decision of the Supreme Court in the case of Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another, , is directly on this point and it is against the contention of Mr. Dhar.

21. Moreover, the said letter dated March 1, 1942, was written under the direction of the Governor-General-in-Council and it shows that the Governor-General-in-Council had already appointed the Association as its agents. The materials on the record conclusively show that the Government of India had acted upon that letter throughout. In these circumstances and in view of the decisions of the Supreme Court in the case of Union of India (UOI) Vs. A.L. Rallia Ram, , and in the case of Davecos Garments Factory and Another Vs. State of Rajasthan, , we overrule the contention of Mr. Dhar.

22. It does not matter in the least even if that agency was void for the appellant having received the benefit of the said work done by Mr. Goswami must pay him compensation u/s 70 of the Indian Contract Act as stated later on. In these

circumstances it is not necessary for us to go into other evidence on the record for the purpose of showing that the Association acted as the agents of the Government of India. In this view of the matter we accept the finding of the trial Judge and overrule this point of Mr. Dhar. Point No. 2 :

23. Though it was pleaded in the written statement of the Dominion of India that the plaint does not disclose any cause of action against the Dominion of India but its Counsel did not raise any issue on it and accordingly the Trial Court did not frame an issue in this behalf. Be that as it may, we have allowed Mr. Dhar to make his submission on it and hence to appreciate his contentions it is necessary to set out paragraphs 7 and 10 of the plaint below: Paragraph 7:

"The plaintiff did the said work at the request of the defendants not intending to do so gratuitously. The defendants received the benefit of the said work and are bound to make a reasonable compensation therefor." Paragraph 10:

"It is now alleged that the defendants acted as the agents of the Government of India in ordering and getting the work hereinbefore mentioned done which was in connection with construction of Aerodromes. In the event of it transpiring that the defendants acted as agents as now alleged, the plaintiff will claim the relief asked for herein against the Union of India also on the basis aforesaid."

24. Now, the cause title of the plaint said that the first two defendants were sued for selves and as representing the other members of the Association and in paragraph 1 of the plaint it is said that the Association would hereinafter be called as the "defendants". In these circumstances Mr. Dhar contended that statements made in paragraph 7 solely relate to the Association and therefore the plaint does not disclose any cause of action against the appellant but we are not impressed by it.

25. The statements made in paragraphs 7 and 10 of the plaint should be read together. The words "on the basis aforesaid" used in paragraph 10 are of pivotal importance on this question. They brought the statements made in paragraph 7 into paragraph 10 and hence the pleading is that the appellant had received the benefit of the said work. Further, paragraph 1 of the plaint is to be read subject to the cause title of the plaint where the appellant has also been described as the defendant. Hence, in our opinion, the plaint discloses a cause of action u/s 70 of the Indian Contract Act against the appellant. Moreover, the word "defendants" means all parties against whom the suit is filed and the meaning of this word does not depend on the volition of the draftsman.

26. Furthermore, an alternative construction of the plaint is also possible and the substance of it is that the appellant through its agents having received the benefit of the said work is liable to pay the compensation to Mr. Goswami who lawfully did the said work not intending to do so gratuitously and therefore the contention of Mr. Dhar is without any merits.

Point No. 3:

27. Mr. Dhar urged that the Association and not the appellant had received the benefit of construction of the said aerodrome but many witnesses including Sir Percival Griffiths and Mr. Norman Dawson have said that the benefit of the construction of that aerodrome was received solely by the appellant. In this connection it is to be noticed here that Mr. Dawson supervised all those works including the construction of that aerodrome. Many witnesses have said that after its construction this aerodrome remained under the exclusive control of the Indian Army and, in our opinion, it must be so. They have said that it was a protected place and we cannot disregard their evidence in view of the said grave emergency.

28. Sir Percival Griffiths and Mr. Dawson specifically said that the appellant enjoyed the benefit of all those works done by Mr. Goswami and these two gentlemen were not even cross-examined on this aspect of the case and, further, the appellant did not even call any witness to disprove their statements.

29. The plan for this Project was prepared by the Army Officers in consultation with Mr. Nicholls and all those works were done by Mr. Goswami in accordance with the said plan to the complete satisfaction of the Government of India. Mr. Russell, in his said letter of April 26, 1946, said: "it is recognised that the Government is finally responsible for the said work" and yet he was not cross-examined on it by the Counsel for the appellant.

30. Mr. Goswami was paid Rs. 1 lakh by the Association out of the funds placed at their disposal by the Government of India. It is impossible for us to believe that the Government of India would have paid the sum of Rs. 1 lakh to Mr. Goswami through the Association without receiving any benefit of the said work done by him. The Military Accountant-General and the Controller of Accounts would not have sanctioned this payment had the appellant enjoyed no benefit and the appellant would have demanded back this money from the Association. It is on the record that even after the institution of the suit the appellant did not write a single letter to the Association making any such claim though the Association went on submitting statements of account each and every month to the appellant.

31. Mr. Dhar was in the trial Court and he failed to give us any explanation as to why the appellant did not adduce any evidence in rebuttal to show that the benefit of the said work was not received or enjoyed by the appellant in spite of all these materials on the record. The only conclusion that can be reached from the materials on the record is that the finding of the trial Judge is correct in this behalf and hence we overrule the contention of Mr. Dhar.

32. The law of Section 70 of the Contract Act is well settled by the majority decision of the Supreme Court in the case of State of West Bengal Vs. B.K. Mondal and Sons, , and yet it was contended by Mr. Dhar that this section has no application for the Government of India did not directly make any request to Mr. Goswami to do those works but this very contention was overruled by Gajendra-

gadkar, J.. (as he then was), in that majority decision of the Supreme Court.

33. A request when accepted constitutes an agreement but Section 70 of the Act does not postulate any agreement between the parties. A request may be made by a wholly unauthorised person or such request may be wholly invalid in law and yet it does not lie in the mouth of a defendant to say that he is not liable to pay compensation u/s 70 of the Act in the absence of a request where he has received the benefit of the work lawfully done by the plaintiff not intending to do so gratuitously. Hence, there is no merits in the contention of Mr. Dhar. Point No. 4:

34. Mr. Goswami claimed compensation at the rate of Rs. 20/- per 1000 cft. for the earth work and at the rate of Rs. 40/- per 1000 cft. for the drain work whereas the Association offered to pay him at the rate of Rs. 15/- for the earth work and Rs. 30/- for the drain work. The trial Judge accepted the rates of Mr. Goswami and awarded compensation on those rates.

35. It was contended by Mr. Dhar that there is no material on the record to show that those rates were the reasonable rates for Misamary Project. He further contended that Mr. Goswami did not adduce any evidence to prove that those rates were the market rates for that Project but we should record here that when Mr. Bagchi told us that Dargoan rates were the rates for Misamary Project and on that basis evidence was adduced. Mr. Dhar did not dispute those statements of Mr. Bagchi. Be that as it may, it was admitted before us by the Counsel for all parties that Misamary is situated within the District of Lakimpur. The rates proved by the respondents 2 and 3 show that Lakimpur rate for earth work per 1000 cft. was Rs. 22-8 as. They further show that the drain work rate of Lakimpur was Rs. 30/- per 1000 cft. provided that the depth of the trenches did not go below 3 ft. and the condition of the soil was not wet and provided further that the deposits were to be made by the side of the trenches.

36. It is also on the record that Mr. Dawson asked Mr. Milburne, a member of the Association, to take into consideration of all rates for earth work available to the Association for striking a mean rate for the purpose of making payment at that mean rate to Mr. Goswami. Our attention was drawn to those rates and they show that the said mean rate was Rs. 20.32 P. per 1000 cft for the said earth work. The trial Judge also took into consideration those rates and, in our opinion, he rightly held that Rs. 20/- per 1000 cft. was a reasonable rate for the said earth work done by Mr. Goswami.

37. These facts are relevant on the question of rate regarding the drain work. Mr. Goswami executed those works during the rainy season when the condition of the soil was set. The depth of the trenches excavated by his workmen was between 6 feet to 11 feet. The deposits were made by those workmen at a distance of about 70 ft. from those trenches. These facts lead to an irresistible conclusion that Mr. Goswami claimed a lower rate for those drain works. The trial Court, after considering all relevant materials on the record, came to the

conclusion that Rs. 41/- per 1000 cft. was the reasonable rate for the said drain work. We have also gone through the records and in our opinion the learned Judge rightly came to the said conclusion.

38. Further, the appellant did not adduce any evidence to show that the rates claimed by Mr. Goswami were not the reasonable or market rates for those works. Those works were done by Mr. Goswami under a precarious condition during the said emergency. He had to bring specialized workmen from the Province of Bihar to the work-site for doing those works.

Mr. Goswami made out his bills on those rates claimed by him and submitted those bills to the Association during the progress of the work. The Association paid him Rs. 1 lakh against those bills without questioning those rates. It was only after the completion of those works that the Association raised a dispute on those rates at the instance of Mr. Nicholls.

39. It is true that the rates were not settled before the work was started as found by the learned Judge but the fact that the payment was made at the bill rates, in our opinion, conclusively establishes the fact that the Association accepted those rates as reasonable market rates for those works for Misamary Project otherwise the Association would not have paid such a large sum of money to Mr. Goswami.

40. Those bills were exhibited in the trial Court without any objection. No cross-examination was directed on those rates mentioned in those bills. The appellant did not even call any witness to contradict those rates and one lakh of rupees was paid to Mr. Goswami in, terms of those bills.

41. In these circumstances, the learned Counsel Mr. Bagchi for Mr. Goswami, placed strong reliance on the decision of the Supreme Court in the case of *Piloo Dhunjishaw Sidhwa Vs. Municipal Corporation of The City of Poona*, . In that case, on the question of compensation payable u/s 70 of the Contract Act, the Supreme Court, at pp. 1204-1205, said as follows:

"The trial Court awarded to the plaintiff the invoice value of the goods delivered by him. The learned Judge was of the view that the plaintiff, as the sole selling agent of "motor spare parts" for the manufacturers in the Bombay State, was entitled to the listed price with 12 1/2% thereon because of the increase notified by the manufacturer. In the view of the learned Judge the price for which the plaintiff made out an invoice was "reasonable and proper". The High Court held that the plaintiff may recover compensation equal to the "fair price" of the goods.

In our view the High Court was in error in holding that the plaintiff is entitled not to the invoice value of the goods, but only to "the fair price" of the goods. u/s 70 of the Contract Act, a person lawfully delivering goods to another, and not intending to do so gratuitously, is entitled to demand that the goods delivered shall be returned, or that compensation for the goods shall be made. Compensation would normally be the market price of the goods. By refusing to

return the goods, the person, to whom the goods have been delivered cannot improve his position and seek to pay less than the market value of the goods. The High Court of Lahore in *Secy, of State v. G. T. Sarin and Co.* ILR 11 Lah 375 : (AIR 1930 Lah 364) held that a person without an enforceable contract in his favour supplying goods to a Government Department is entitled to a money equivalent of the goods delivered assessed at the market rate prevailing on the date on which the supply was made.

The plaintiff had made out an invoice in respect of the goods delivered. The Transport Manager accepted the goods on behalf of the Corporation and appropriated them. He had satisfied himself that the rates quoted were "proper rates". The plaintiff was paid in respect of other goods supplied at the rates quoted in the price-list together with incidental charges. The plaintiff was the sole selling agent in the Bombay State and the additional 12 1/2% which the plaintiff claimed on the listed price was by reason of the increase in the price made by the manufacturers. There is no reason to hold that the invoice price was more than the market value of the goods. If it was the contention of the Corporation that the market rate was less than the invoice price it was open to the Corporation to lead evidence about the ruling rates at which the spare parts were sold in India by other agents of the manufacturers. But no such attempt was made. The, plaintiff, in our judgment, was entitled to the market value of the goods at the date of supply, and, in our judgment, the invoice value was the prevailing market value of the goods".

42. Mr. Bagchi also placed strong reliance on the case of *Great Eastern Shipping Co. Ltd. Vs. Union of India (UOI)*, where the defendant adduced no evidence to contradict the rate of freight proved by the Company for carrying a cargo of coal from Calcutta to Cochin and following the above decision of the Supreme Court it was held that the defendant was liable to pay compensation u/s 70 read with the third paragraph of Section 73 of the Contract Act to the Company at that rate which was held to be the market rate in that case.

43. In Appeal No. 215 of 1971. *Union of India v. Satish Chandra*, of this Court there was an arrangement between the Land Customs Authorities and the Railway Administration under which the Station Master of Bongaon used to handle the railway wagons for the purpose of checking by the Customs Officers for preventing the smuggling of goods to the then East Pakistan and for that extra work the Railway Administration used to pay those Station Masters at the rate of Rs. 7.50 per wagon. While that arrangement was subsisting Mr. Ghose became the Station Master of Bongaon and he did the said work and his bills upto July, 1958 were duly paid at that rate by the Union of India who however refused to pay his subsequent bills and that refusal was made after his retirement from the service. In these circumstances, the trial Judge decreed the suit u/s 70 of the Contract Act by allowing him compensation at the said rate and therefore in the Court of Appeal it was urged before me and A. N. Sen, J., for the Union of India that the said rate was not the market rate for that work but we

overruled it by following the said decision of the Supreme Court in our unreported judgment dated September 14, 1972. Hence, the law is well settled on this point.

44. Mr. Goswami and the respondents 2 and 3 adduced evidence on the market rates for those works. The appellant did not adduce any evidence to show that those rates were not the market rates. The Association paid Rs. 1 lakh to Mr. Goswami at the said rates. The appellant knew about that payment from the monthly statements of account submitted by the Association to the appellant and in spite thereof the appellant did not raise any dispute on those rates even after receiving the notice u/s 80 of the Code of Civil Procedure.

45. In this view of the matter it must be held that the trial Judge rightly awarded the said compensation against the appellant. Further, it is well established by the decision of this Court in the case of *Justin Hull v. Arthur Francis Paull*, reported in 24 Cal WN 352 : (AIR 1920 Cal 1009) that the Court of Appeal should not ordinarily interfere with the assessment of compensation made by the trial Court. We do not find any justification in holding that the trial Court erred in any way in awarding the said compensation and moreover on a review of all relevant materials on the record we have also come to the conclusion that Mr. Goswami is entitled to receive compensation at the rates claimed by him for those works for in our opinion those rates were the market rates for the said work done by Mr. Goswami and hence we overrule the contention of Mr. Dhar. Point No. 5:

46. It is an admitted fact that Mr. Goswnmi started those works on January 27, 1944 and completed them on July 10, 1944. This suit was filed on September 3, 1947 and Mr. Dhar contended that it was time-barred under Article 115 of the Limitation Act 1908. But that Article has no application for there is no contract between the appellant and Mr. Goswami whose claim is based on Section 70 of the Contract Act and therefore it is governed by Article 120 of the Limitation Act, 1908. Hence, the suit was filed well within time. Further, the decision of this Court in the case of *Upendra Krishna v. Naba Kishore*, reported in 25 Cal WN 813 : (AIR 1921 Cal 93) is directly against the contention of Mr. Dhar and hence it is without any merits. Point No. 6:

47. It was contended by Mr. Dhar that there is nothing on the record to show that leave under Clause 12 of the Letters Patent was granted for instituting this suit but in our opinion there is no substance in this contention. The materials on the record conclusively show that the learned Master, after receiving the plaint, went to a learned Judge of this Court who granted such leave but his Lordship inadvertently forgot to put his signature below the endorsement made in that behalf. The Writ of Summons served on the defendants also show that leave under Clause 12 was granted by the learned Judge. It was the mistake of said learned Judge and also the mistake of the learned Master whose duty was to see that it was signed by his Lordship.

48. No litigant should ever suffer due to any mistake or fault of the Court is the

law laid down in the cases of *Rodger v. Comtoir d' Escompte de Paris* LR 3 PC 465; *Jai Berham v. Kedarnath Marwari* 49 Ind App 351 : (AIR 1922 PC 269) ; *Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others*, . Further, in the case of *Jang Singh Vs. Brijlal and Others*, , *Hidayatullah, J.*, (as he then was) says this:

"There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim, "*Actus curiae neminem gravabit*".

In this view of the matter we overrule this contention of Mr. Dhar "who then contended that Mr. Goswami having obtained leave to institute this suit under Clause 12 of the Letters Patent by pleading that the contract in suit was entered into in Calcutta within the jurisdiction of this Court and having failed to prove this contract we should hold that this Court has no jurisdiction to try this suit for, according to him, no part of the cause of action had arisen within its jurisdiction but again we overrule this objection.

49. The Government of India opened the said account with the Imperial Bank of India of Clive Street which was and still is situated in Calcutta within the jurisdiction of this Court. The Association acted as the agents of the Government of India in Calcutta within the jurisdiction of this Court. Mr. Goswami was to be paid from this account by the Association. Mr. Goswami went to the office of the Association which was and still is situated within the jurisdiction of this Court and he demanded payment of the balance sum but the Association refused to pay him. This demand and refusal took place in Calcutta within the jurisdiction of this Court. All these facts constituted a part of the cause of action for this suit. Leave under Clause 12 of the Letters Patent was duly granted and therefore this Court has jurisdiction to try this suit. We also do not find any justification in holding that such leave should be confined solely to the averments made in the plaint as contended by Mr. Dhar.

50. It was lastly contended by Mr. Dhar that this Court has no jurisdiction to try this suit for the appellant does not carry on any business within the meaning of that expression used in Clause 12 of the Letters Patent as held in the case of *Doya Narain Tewary v. Secy. of State for India in Council*, reported in (1887) ILR 14 Cal 256, and in the case of *Govindarajulu Naidu v. Secy. of State*, reported in AIR 1927 Mad 689.

51. The case of *Doya Narain Tewary v. Secy. of State for India in Council* (1887) ILR 14 Cal 256 (supra) was decided in the year 1866. It appears from pages 273-274 of the report of that case that the Secretary of State for India in Council used to carry on business at that time within the jurisdiction of this Court. In spite of this fact a Division Bench of this Court, by giving a restricted meaning to the words "carrying on business" used in Clause 12 of the Charter, came to the

conclusion that this Court had no jurisdiction to try that suit. In our opinion, no reliance can any longer be placed on that decision for it is contrary to the decision of the Supreme Court in the case of Union of India (UOI) and Another Vs. Ladu Lal Jain, .

52. The case of C. Govindarajulu Naidu Vs. The Secretary of State for India in Council, was decided in the year 1927 by the Madras High Court by following the decision in Doya Narain Tewary's case (1887) ILR 14 Cal 256 and for the same reason we are unable to place any reliance on that decision.

53. We do not find any justification in giving a restricted meaning to the expression "carry on business" used in Clause 12 of the Charter. The learned Judges who delivered judgments in those two cases cited by Mr. Dhar followed the earlier decision but when those earlier cases were decided the Government of India did not carry on any business and this vital fact was overlooked by their Lordships. In our opinion, these two decisions in any event ceased to be good law the moment the Government of India entered the field of commerce for the law changes with the changing Society.

54. It has been held by the Supreme Court in Union of India (UOI) and Another Vs. Ladu Lal Jain, that the Government of India carries on business in its Railway undertakings and the Court concerned had jurisdiction to try that suit against the Union of India for the head office of that Railway undertaking was situated within the territorial limits of that Court. It was admitted by Mr. Dhar before us that the head office of one of the Railway undertakings of the Government of India was situated at Fairlie Place in Calcutta within the jurisdiction of this Court at the time of institution of this suit and that head office is still situated therein. He, however, contended that this Court has no jurisdiction to try this suit for the cause of action for the suit did not arise out of any transaction between Mr. Goswami and the said Railway undertaking of the Government of India.

55. Apart from the aforesaid admission of Mr. Dhar we should also take judicial notice of the facts namely that the head office of one of the Railway undertakings of the Government of India was situated within the jurisdiction of this Court at the time of institution of the suit and it is still situated there as was pointed out by my learned brother to Mr. Dhar in course of hearing of this appeal. In these circumstances, Mr. Bagchi argued that the contention of Mr. Dhar was without any substance for it is covered by my two decisions in Great Eastern Shipping Co. Ltd. Vs. Union of India (UOI), and in the case of Union of India v. Khemchand Rajkumar, reported in ILR (1972) 2 Cal 154.

56-57. In Great Eastern Shipping Co. Ltd. Vs. Union of India (UOI), at pages 157 and 158 of the report I said as follows:

"No leave under Clause 12 is necessary if at the commencement of a suit the defendant carries on business within the jurisdiction of this Court. It does not matter in the least that leave under Clause 12 of the Letters Patent was obtained on the averments that a part of the cause of action had arisen within the

jurisdiction of this Court. The defendant in its Eastern Railway Administration carried on and still carries on business from Fairlie Place which was and is still situate within the territorial limits of this Court and this Court having jurisdiction over the defendant to entertain the suit, no leave under Clause 12 of the Letters Patent was at all necessary.

It was further contended that as the said cargo was delivered to Southern Railway Administration, benefit u/s 70 of the Contract Act was enjoyed not by the Eastern Railway Administration but by the Southern Railway Administration and so this Court had no jurisdiction to try this suit. This argument is wholly misconceived and fallacious. It is true that the goods were delivered to Southern Railway Administration but the benefit of the works for carrying the said cargo was received by the Eastern Railway who was to send those goods to Southern Railway from Calcutta. Moreover, the suit is for realisation of compensation for services rendered by the plaintiff to the defendant and not for delivery of any goods belonging to the plaintiff.

Apart from what is said just now, this suit is against the defendant and not against any of the Railway Administrations. The defendant is the owner of all these Railway Administrations including the properties and assets of these Railways. These Railway Administrations have no legal entity and they cannot sue nor be sued in their names. Those Railway Administrations cannot have any right nor they can incur any liability and it is the Union of India who can incur any liability and can enforce its rights in connection with its Railway undertakings. The defendant does carry on business within the jurisdiction of this Court as said before and the Court has jurisdiction to try this suit irrespective of the question whether any part of the cause of action had arisen within the jurisdiction or not and I overrule the contentions of the learned Counsel for the defendant."

And in the case of Union of India v. Khem-chand Rajkumar ILR (1972) 2 Cal 154 (supra) at pages 189 and 190 of the report I said this:

"Under Clause 12 of the Letters Patent a suit can be filed in this Court if at the time of commencement of an action the defendant shall carry on business within its territorial limits. Jurisdiction of this Court in this case does not depend on the cause of action. Similarly when the cause of action has wholly or partly arisen within its territorial limits this Court has jurisdiction to try the suit notwithstanding the fact that the defendant does not carry on any business within its territorial limits. In other words, jurisdiction based on the cause of action and the jurisdiction based on the person of the defendant are two independent categories and they have no relation with each other. Two illustrations will make the position clear. Suppose A carries on business within the jurisdiction of this Court and he has obtained a loan which is wholly unconnected with his business from B at Patna. In this case, B can file a suit for recovery of this loan in this Court as A carries on business within its jurisdiction and though the loan is wholly unconnected with the business of A, still this Court has

jurisdiction to receive, try and determine the suit as A is carrying on business within its jurisdiction. Coming now to the next illustration, suppose X carries on business at Patna and he comes down to Calcutta and obtains a loan from Y at Calcutta to meet his personal expenses wholly unconnected with the business and then goes back to Patna without repaying the loan. Y can file a suit in this Court as the cause of action has arisen within its jurisdiction though X is no longer staying within the jurisdiction of this Court and this cause of action of Y has no connection with the business of X.

When under Clause 12 of the Letters Patent this Court has jurisdiction over a private individual who carries on business within its jurisdiction at the commencement of the action, it cannot be said this Court has no jurisdiction over the Government when it carries on business within its jurisdiction. The States and the Central Government have various departments for administrative purposes, but those departments have no legal entity. No department of the Government can sue nor be sued. No department can hold any property nor can have any legal right. Government is the owner of the properties and undertakings managed and run through its departments. All rights in relation to those properties and undertakings are the rights of the Union of India or the States concerned. Similarly, all obligations incurred by the respective departments in relation to those properties and undertakings are the obligations of the respective Governments. It is true that every department is provided with separate funds, but that does not mean that the right of an outsider to receive payment from the Government is confined to the funds allocated to a particular department with whom he has dealt with. The decree-holder is entitled to execute a decree against any property of the Government including any funds of the Government irrespective of the fact that a particular property or a fund is utilised by a particular department of the Government.

Under the Constitution all properties belonging to the Central Government belong to the Union of India. Similarly the Constitution has empowered the Central Government to carry on business and to enter into contracts with the third parties. Under the Constitution all suits by or against the Central Government must be filed by or against the Union of India and not by or against any department of the Central Government. A suit can be filed against the Union of India for breach of a contract and for incurring other obligations under a contract. The cause of action for such a suit may either be a breach of contract or for not discharging the obligations incurred by the Government under the contract. But the Union of India and not a department is the defendant in such a suit. If the Union of India does not carry on any business within the territorial limits of a particular Court, such a Court cannot have any jurisdiction over the Union of India unless the cause of action, either wholly or partly, arises within its jurisdiction. In this case the jurisdiction of the Court is invoked on the basis of a cause of action having arisen either partly or wholly within the jurisdiction of the Court. But, if the Union of India carries on business within the jurisdiction of a court it becomes wholly irrelevant to consider where the cause of action for such

a suit has arisen as that Court shall have the jurisdiction over the Union of India. In this connection it should also be remembered that the jurisdiction over the defendant and the jurisdiction over the subject-matter of the litigations are two independent matters.

In my opinion, this Court under Clause 12 of the Letters Patent has jurisdiction to receive, try and determine a suit against the Union of India if the Union of India carries on any business within its jurisdiction at the time of commencement of a suit against it irrespective of the question as to where the cause of action relating to such a suit has arisen."

58. Hence, we overrule the contention of Mr. Dhar and hold that this Court has jurisdiction to try this suit for the Government of India used to carry on business at the time of institution of the suit within the jurisdiction of this Court and it was wholly unnecessary for Mr. Goswami even to ask for leave under Clause 12 of the Letters Patent to institute this suit. Point No. 7.

59. It was contended by Mr. Dhar that the trial Judge has passed an extraordinary Order by directing the appellant to pay half costs of the suit to the respondents 2 and 3 and Mr. Dhar argued this point without making any attempt even to distinguish the cases relied on by the Trial Court. He urged that Mr. Goswami and not the appellant should pay them their half costs of the suit for Mr. Goswami had lost the action against them.

60. Mr. Goswami did not know that the Association had acted as the agents of the appellant, A few days before sending the notice u/s 80 of the CPC Mr. Goswami came to know from his brother that the Association was repudiating the liability on the allegation that they have acted as the agents of the appellant. In these circumstances Mr. Goswami caused the Notice u/s 80 of the Code to be served on the appellant so that the appellant could come out with the truth by admitting the said agency. The appellant did not give any reply to that notice and Mr. Goswami had to file the suit against those respondents who admitted in their written statement, that the Association had acted as the agents of the appellant who however wrongly denied the truth of this fact in its written statement.

61. In view of the wrongful denial those respondents had to call a number of witnesses and they were cross-examined at length on behalf of the appellant for shifting its liability on the Association who acted as the agents, on honorary basis, of the appellant. The Trial Court had to frame an issue in this behalf at the instance of the appellant and considerable costs had to be incurred in view of this attitude of the appellant who lost on that issue.

62. No doubt the suit has been dismissed against those respondents but, in our opinion, the trial Judge did nothing extraordinary in directing the appellant to pay half costs of the suit to them. We have looked into those authorities relied on by the Trial Court and they support its order. In this view of the matter the learned Judge rightly exercised his discretion in making that order and hence the contention of Mr. Dhar is without any merits.

63. Having disposed of all the points of Mr. Dhar we will now take up the question raised by Mr. Bagchi namely that this appeal is time barred. The decree was passed on June 29, 1967 and on the same day the solicitors for the respondents 2 and 3 put in the requisition for drawing up of the decree and simultaneously with it the appellant's solicitor also put in the requisition for the certified copy of the judgment and the decree. The judgment was filed on November 13, 1967 and the Department sent the folios to the appellant's Solicitor on March 26, 1968 and on the same day the appellant's solicitor furnished the stamps for its certified copy. The draft decree was settled on August 8, 1968 and it was signed by the trial Judge on September 18, 1968 and then it was filed on January 2, 1969. The Department furnished folios on March 26, 1969 to the appellant's Solicitor who on the same day furnished the stamps and the certified copies of the judgment and the decree were delivered to him on May 2, 1969 and this appeal was filed on May 28, 1969.

64. Mr. Bagchi placed strong reliance on the decision of the Judicial Committee in the case of *Pramathanath Roy v. Lee*, reported in 49 Ind App 307 (AIR 1922 PC 352) and on the decisions of the Supreme Court in *Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others*, , and in the case of *State of Uttar Pradesh Vs. Maharaj Narain and Others*, . in support of his contention that the appellant was not entitled to any deductions of time from September 18, 1968 for filing this appeal in view of the dual system prevailing on the Original Side of this Court. He argued that it was the duty of the appellant's solicitor to make "tadbirs" to the Department so that the Department could file the decree the moment it was signed on September 18, 1968.

65. In *Pramathanath's* case 49 Ind App 307 : (AIR 1922 PC 352) it was found by the Judicial Committee that the appd-lant was guilty of laches and therefore that case does not assist Mr. Bagchi. The law laid down by the Supreme Court in those two decisions is that the time stops running the moment the requisition for drawing up of the decree and for the certified copies are put in. Further, the solicitors have no duty to go to the Department for making "Tadbirs" for the Rules of the Original Side of this Court do not cast any such duty on them. Hence, we overrule his contention and hold that this appeal is not time barred.

66. Now in support of the cross objection the learned Counsel Mr. Chowdhury, for those respondents, contended that they are entitled to the full costs of the suit either from the appellant or from Mr. Goswami. He cited several decisions but in the view we have taken in this matter it is not necessary for us to discuss them.

67. No leave under Order 1, Rule 8 of the CPC was obtained for instituting the suit against them as representing all other members of the Association and therefore the other members of the Association are not parties to the suit. Hence, the Trial Court by disallowing the other half costs of the suit made these respondents personally liable to bear those costs of the suit which they cannot realise from the other members of the Association. This fact was overlooked by the Trial Court and therefore in our opinion, their cross objection should be

allowed.

68. Mr, Dhar contended that Mr. Goswami should pay those costs but Mr. Bagehi contended otherwise and said that appellant should pay them. We are unable to accept the contention of Mr. Bagehi because Mr. Goswami has put these respondents to this loss by not obtaining leave under Order 1, Rule 8 of the Code. Further, in the absence of these two respondents it would have been impossible for Mr. Goswami to prove his case against the appellant on the question of agency. He had taken full advantage of their presence and at the same time by not suing them in their representative capacity has put them into that loss.

In this view of the matter we allow the cross objection and direct Mr. Goswami to pay the other half costs of the suit to these two respondents. This appeal is dismissed with costs. Certified for two counsel.

B.C. Mitra, J.

69. I agree.