

RIGHT TO EQUALITY AND CONTRACTUAL LIABILITY VIS-À-VIS GOVERNMENT CONTRACTS

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Abstract

The subject of government contracts has assumed great importance in the modern times. Today the state is a source of wealth and the major working of the country is in the hands of the Government. Hence is a need to regulate the government contracts with a bit more concern than the normal contracts.

This paper aims at analyzing the laws relating to the government contracts. It tracks the origin of the special laws relating to government contract and further compares its current position in India with some other countries of the world. The author endeavours to make a clear cut distinction between the normal contracts entered into by the individuals and the contracts having government as one of its party. It provides detailed analysis of the requisites a valid government contract as provided in the constitution of India. It further goes on to discuss the contractual liabilities arising out of such contracts. It shows the application of provisions of the Indian Contract Act in cases of aberration from the contractual obligation either on the part of the government or the other party. The author lays emphasis on the application Article 14 of the constitution of India in cases of government contracts. It shows how the courts have held that government are not free as the individual parties in deciding the other party to the contract. Further the paper discusses a much debated topic whether writs can be issued in cases relating to government contracts.

KEYWORDS: Contracts, Government Shutdown, Governmental contracts, Right to Equality.

Introduction

The government of any state is responsible for the overall development of its state. It may, by itself or by engaging others, take up this task of development and management of the state. In the modern era of a welfare state, government's economic activities are expanding and the government is increasingly assuming the role of the dispenser of a large number of benefits. Today a large number of persons, may it be individuals or organisations, are entrusted by the government for various purposes by granting contracts, licences, jobs, quotas etc. This increases the possibility of arbitral exercise of power to grant such largess. It is because of this that the subject of government contract becomes extremely important and has to be carefully dealt with.

In the modern state, whatever be the form of government, the individual is affected in his everyday life and in the exercise of the civil rights by acts of the state and its officials in various spheres and in different ways. Some of these acts are done by the state as the sovereign while others are done by the state trading in trading and other capacities in the same manner as a private individual does.

A contract is an agreement by which one person obligates himself to another to give, to do, or permit, or not to do, something expressed or implied by such agreement. An agreement, upon sufficient consideration, to do or not to do a particular thing. Indian Contract Act, 1872 defines a contract as "An agreement enforceable by law". The word 'agreement' has been defined as 'every promise and every set of promises, forming consideration for each other'.

In this paper we intend to discuss the laws relating to the government contracts. Government contracts are those contracts to which the central government or the state government is a party. Government contracts have been accorded constitutional recognition. The Constitution of India, 1947 provides that the executive power of the union and of each state shall extend to the carrying on of any trade or business and to the acquisition holding and disposal of property and the making of contracts for any purpose. It further lays down the manner of formation of such contracts. So it is clear that the government may sue or may be sued by its name.

RESEARCH METHODOLOGY

Aim and Objective

The aim of the paper is to study and analyse the laws relating to Governmental contracts. Our research methodology required gathering relevant data from the specified documents and compiling databases in order to analyze the material and arrive at a more complete understanding and historical evolution of Contractual laws and its applicability under Government Contracts. We hope to shed light on the following questions through our research: 1) What are the laws relating to the government contracts? 2) What is the basic background of Governmental contracts and how does it affect the scenarios of government shutdown and a major problem of distribution of wealth? 2) What are relevant factors which bring about the distinction between the normal contracts entered into by the individuals and the contracts having government as one of its party and how they are to be handled? 3) What are contractual liabilities that arise under such contracts and their accountability? 4) How the courts have held that government are not free as the individual parties in deciding the other party to the contract? 5) How is the jurisdiction of the courts determined? 6) Finally, how the Government contracts issues have become increasingly intertwined with other legal specialties?

This paper has utilized both quantitative and qualitative data collection tools, but is rooted in a qualitative epistemological position that recognizes the importance of locating the research within a particular legal and historical context.

Sources of Data

- Books
- Journals

Method of Writing

The method of writing followed in this paper is both analytical and descriptive.

Mode of Citation

Uniform mode of citation has been followed hinting at the Harvard Law School's Bluebook for this paper.

POSITION AROUND THE WORLD

The Latin maxim *Rex non potest peccare*, meaning the king can do no wrong was very instrumental in the past in various countries around the world especially in the country we derive our legal legacy from, i.e. Britain. But with the development of legal theories and the increasing popularity of the Doctrine of Rule of Law given by A.V. Dicey, this maxim was started to be condemned. The rule of law is fundamental to the western democratic order. Aristotle said more than two thousand years ago, "*The rule of law is better than that of any individual.*" Lord Chief Justice Coke quoting Bracton said in the case of Proclamations: "*The King himself ought not to be subject to man, but subject to God and the law, because the law makes him King.*"

Before the advent of Crown Proceedings Act, 1947 the Crown could not be sued in a court in Britain. This privilege was traceable to the days of feudalism when the lord could not be sued in his own courts which had arisen out of the theory of irresponsibility of the state as propounded by Roman law. But the Crown Proceedings Act, 1947 abolished this procedure and permitted suits being brought against the Crown in the ordinary courts to enforce contractual liability, except a few types of contracts. Hence it is clear now that regular proceedings now lie against the crown for breach of contract, in those cases in which the petition of right earlier lay.

In the United States of America, the concept of immunity of the State as a sovereign power was taken from Britain. But America was faster to do away with this vague concept. The Congress enacted Federal Tort Claims Act, 1946, to abolish the immunity of the federal government from tortious liability. The Judiciary has, from time to time, liberalised the application of this acts though its judgements such as *India Towing Co. v. U. Section, Rayonier v. U. Section* etc.

In Australia, The Judiciary Act, 1963 lays down the laws relating government liability. An action lies against the Commonwealth in contract or tort, in the ordinary manner, by a subject or a state. The State may be sued in contract or in tort without its consent.

GOVERNMENT CONTRACTS IN INDIA

Tracing down to the History of Indian Administration Under the East India Company we find that the Courts, even then were of the view that even though East India Company has sovereign powers, if it contracts in civil capacity and if it breaks its contract it would be held answerable. The Government of India Acts of 1915 and 1935 expressly empowered the government to enter into contracts with the private individuals. The reflection of the mentioned can be seen in Section 299 of the Constitution of India, 1947.

In regard to the Contracts entered into as per the provisions of the Indian Contract Act, 1872 there is no prescribed form provided. It may be expressed or implied from the conduct of the parties. But the Government Contracts in spite of being of the same nature as the other contracts require certain additional formalities to be fulfilled. These formalities have been provided under Section 299 of the Constitution of India.

The Apex court stated the same and said that "*It may be noted that like other contracts, a Government Contract is also governed by the Indian Contract Act, yet it is distinct a thing apart. In addition to the requirements of the Indian Contract Act such as offer, acceptance and consideration, a Government Contract has to comply with the provisions of Article 299. Thus subject to the formalities prescribed by Article 299 the contractual liability of the Central or State Government is same as that of any individual under the ordinary law of contract.*" The Court further stated that with regards to the interpretation of contract, there is no distinction between the contracts to which one of the parties is the Government and between the two private parties.

Though there is no major difference between a normal contract and government contract, certain special privileges are accorded to the government in way of treatment under statutes of limitation. Working on the maxim *nulla tempus occurrit regi*, meaning no time affects the crown, Limitation act provides for longer period of limitation of suits on or behalf of the State. Privileges as to ability to impose liability and primary recourse to the court have also been accorded to the Government probably due to executive necessity and public interest.

FORMULATION OF GOVERNMENT CONTRACT

Article 299 lays down the manner of formation of government contract. Article 299(1) lays down various conditions which the contracts made in the exercise of the executive power of the executive power of the centre or a state must fulfil to be valid.

1. The contract must be expressed:

The Apex Court has observed in *K.P. Chowdhary v. State of Madhya Pradesh*, that "in view of Art.299(1) that there can be no implied contract between the Government and another person." This view was supported by saying that if implied contracts are allowed between Government and other persons, they would in fact make Article 299(1) a dead letter, as then a person who had a contract with the Government which was not at all executed as per Article 299(1) could get away by pleading that an implied contract be inferred from the facts and circumstances of the case.

2. Contracts must be expressed to be made in the name of president/ Governor.

The contract with the Government will not be binding if it is not expressed to be made in the name of President or the Governor, as the case may be. If it is not expressed to be made in the name of the President or the Governor, it will not be valid even though it is made by a person authorised by the President or the Governor.

3. Such contracts made in exercise of the executive power are to be 'executed' on behalf of the President/ Governor as the case may be.

The word 'executed' indicates that a contract with the Government will be valid only when it is in writing. An oral contract is not valid. However it is not mandated to have formal documentation between the Government and the other party. If the requisites under Article 299(1) are fulfilled, a valid contract may be

created through correspondence or through offer and acceptance. The word ‘executed’ does not by itself contemplate the execution of formal document in the creation of a valid contract with the Government.

4. The contracts are to be ‘executed’ by such persons and in such manner as the President/ Governor may direct or authorise.

The contract must be executed on behalf of the Government by a person authorised for this purpose by the President or the Governor, as the case may be. If it is made by a person not authorised by the president or the Governor, the contract will be invalid. Where the Director was authorised to execute contract on behalf of the President, but the contract was entered into by the secretary, the contract was declared invalid as it was entered into by an officer not authorised for the purpose. Article 299 does not prescribe any particular mode in which authority may be conferred; authorisation may be conferred *ad hoc* on any person. Further the Apex Court made it clear that it is not necessary that authority should be given by rules expressly framed or by formal notification.

EFFECT OF NON-COMPLIANCE

The judicial attitude towards Art.299 has sought to balance two motivations:

- On the one hand, to protect the Government from unauthorised contracts; and
- On the other hand, to safeguard the interests of unsuspecting and unwary parties who enter into contracts with Government officials without fulfilling all formalities laid down in the Constitution.

The courts have, generally, taken the position that Art. 299(1) has not been inserted in the constitution for the sake of mere form. Its function is to safeguard the government from being saddled with liability for unauthorised contracts. The provisions have been embodied to protect the general public as represented by the government. The terms of Art.299 have therefore been held to be mandatory and not merely directory. This means that a contract not couched in a particular form stipulated by Article 299(1) cannot be enforced at the instance of any of the contracting parties. Neither the Government can be sued and held liable for breach of such a contract, nor can the Government enforce such a contract against the other contracting party.

A view has been expressed that a contract not complying the conditions of Art. 299 are only relatively void but not void for all purposes. It means that while the contract is not enforceable by the parties thereto, it can still subsist for some collateral purposes.

However, the Courts have also realised that insistence on too rigid observance of all the conditions stipulated in Art. 299(1) may not always be practicable. It would be extremely inconvenient from an administrative point of view if it were insisted that each and every contract must be affected by a ponderous legal document pouched in a particular form. A Strict compliance with the conditions may be inequitable to the private parties, and, at the same time, make Government operations extremely difficult and inconvenient in practice. Consequently, in the context of the facts of some cases, the courts have somewhat mitigated the rigours of the formalities contained in Art. 299(1), and have enforced contracts even when there has been not full, but substantial, compliance with the requirements of Art. 299(1).

CONTRACTUAL LIABILITY

Article 299(2) immunizes the President, or the Governor, or the person executing any contract on his behalf, from any personal liability in respect of any contract executed for the purposes of the Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force. The immunity is purely personal and does not immunize the Government, as such, from a contractual liability arising under a contract which fulfils the requirement of Art. 299(2).

The governmental liability is practically the same as that of a private person, subject, of course, to any statutory provision to the contrary. If the government derives any benefit under a contract which is void for non compliance with the requirement of Article 299(1), the contract will be void and unenforceable but it will be held liable to compensate the other party under Section 70 of the Indian Contract Act. Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Article 299 does not exclude the quasi-contractual liability of the state. It does not deprive a person of compensation of the work actually done or services rendered under Section 70 of the Indian Contract Act. It is a liability that arises on equitable grounds even though express agreement or contract may not be proved. If Sec. 70 were to be held inapplicable, it would lead to extremely unreasonable consequences and may even hamper the working of the Government.

There are three conditions that are to be fulfilled for the application of Section 70 of the Indian Contract Act:

- A person lawfully does something for another person or delivers something to him.
- He does not intend to do so gratuitously
- The other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

If the above conditions are fulfilled the person enjoying the benefit will be liable to make compensation to the other party in respect of the things so done or delivered or to restore it. Therefore it is clear that if the requirements of Section 70 are fulfilled the party who has actually supplied the goods or rendered the services for, the other party without intention to do so gratuitously can claim compensation from the other party who has enjoyed the benefit of the supply made or services rendered.

It is to be noted that for the purpose of Sec. 70 the services or delivery must not be imposed on the other party. The other party has option to accept or reject it. The acceptance and enjoyment of the thing done or delivered must be voluntary.

If the agreement with the government is void as the requirement of the Article 299(1) have not been complied, the party receiving the advantage is bound to restore it or to make compensation for it to the person from whom he has received it. Thus, if a contractor enters into an agreement with the Government for some work and receives payment therefrom and the agreement is found to be void as the requirement of the Article 299(1) have not been complied with, the Government can recover the amount advanced to the contractor under Sec. 65 of the Indian Contract Act.

GOVERNMENT CONTRACT AND ARTICLE 14

Art. 14 of the Constitution of India prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly, and in public interest in awarding contracts. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated against, to the detriment of public interest. Government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenders and contractors.

Before 1979, the position was that the Government enjoyed lots of discretion in the matter of awarding contracts to whomsoever it liked. The contractual freedom of the government was equated practically to that of a private person. The Apex Court observed that when one person is chosen rather than another, the aggrieved party cannot claim the protection of Art.14 because the choice of the person to fulfil a particular contract must be left to the government. It is perfectly open to the Government even as it is to a private party to choose a person to their liking to fulfil a contract which they wished to perform.

But in course of time, the judicial attitude has undergone a sea change on this question. The Supreme Court observed that the government is not and should not be as free as an individual in the matter of entering into contracts and that whatever its activity, the government is still the government. But at the same time, the award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation of tender and that is not open to judicial scrutiny.

Further it was observed in *Ramana Dayaram Shetty*, It was held that where the Government is dealing with the public, whether by giving of jobs or entering into contracts or issuing quotas or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

The main principles that emerged out of *Ramana* are:

- The Government does not have an open and unrestricted choice in the matter of awarding contracts to whom so ever it likes.
- The Government is to exercise its discretion in conformity with some reasonable non-discriminatory standards or principles.
- The Government is bound by the standards laid down by it.
- The Government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle which in itself is not “irrational, unreasonable or discriminatory”.

In order to ensure that the Government exercises its power to award contracts in a non-discriminatory manner, the Supreme Court has from time to time has laid down following guidelines:

- The Government must lay down some norms or standards if eligibility. These standards ought to be rational and non discriminatory. A democratic

government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

- The government must adhere to, and must not deviate from, the standard laid down by it.
- The Government ought not to be award the contract to someone not fulfilling the prescribed conditions of eligibility. If the authority does so, its action becomes discriminatory since it excludes other persons similarly situated from tendering for the contract and that would be plainly arbitrary and without reason.
- The terms and conditions issued in the advertisement inviting tenders cannot be altered to the advantage of a particular person having regard to the fact that if such favourable terms and conditions were known to all other participants, they would have participated in the tender.
- For execution of any work, tenders must be invited. The contract must be awarded to one of the lowest tenders except when, in a specific case, there are some rational and reasonable grounds.

According to the Apex Court, the Court can review administrative discretion in awarding a contract on the following grounds:

- Illegality
- Irrationality
- Procedural Impropriety

WRITS IN MATTERS OF GOVERNMENT CONTRACTS

When it comes to exercise of contractual powers by governmental authorities, the function of the courts is to prevent arbitrariness and favouritism and to ensure that the power is exercised in public interest and not for a collateral purpose. This has been a question of debate whether one could resort to the writ jurisdiction for imposing contractual obligations on a public authority.

The question of breach of contract is one which primarily falls within private law under Contract Act, and that the remedy therefore lies in a civil court and not under writ jurisdiction. The implementation and interpretation of a clause in a contract cannot be the subject matter of a writ petition. The contracting parties are not governed by any constitutional provision but by the provisions of the contract act which would determine the rights and obligations of the concerned parties. No question arises regarding the violation of Art.14 or any of the other constitutional provision, when the government acts within the contractual field. The Supreme Court ruled that a party could not claim under Art.226 enforcement of contractual obligation and recover damages. Proper relief for the party would lie to seek specific performance of contract or damages in a civil court. One of the main reasons for this judicial stance was that question of breach of contract would depend on facts and evidence, such seriously disputed question regarding breach of contract ought to be investigated and determined on the basis of evidence which may be led by contesting parties. This can be done in a properly instituted civil suit rather than in a writ petition.

But then in *Shrilekha Vidyarthi v. State of Uttar Pradesh*, the view started to change. The court observed that Art. 14 strikes at arbitrariness in governmental action and ensures fairness and equality of treatment.

The position now is that where the dispute lies within the contractual field pure and simple a writ petition is not maintainable. The relation between the parties is governed by the contract. But contractual obligations may fall under judicial review if there is some *public law* involved therein. The action of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and validity of such an action would be tested on the avail of Art. 14.

Thus, when the matter falls with the realm of public law rather than of private law, the High Court can take cognizance of the same under Art. 226. If the government take unreasonable and arbitrary decisions while acting in pursuance of a contract, the matter would fall under the writ jurisdiction. There is the duty on the State to act fairly in respect of a contract as well. A writ petition is maintainable to challenge action by a public administrator when it is exercising statutory or administrative power even within the frame of contractual relationship between the authority and the person concerned. There is now a growing body of cases where writ petitions have been held maintainable where contract has been statutory flavour, or where some question of public law is involved.

CONCLUSION

It is therefore clear that the Government is as much capable as a person to enter into a contract. But it may be noted that the contracts entered into by the government as a party and all other kinds of contracts cannot be said to be on the same level. This is because of a simple reason that Government is loaded with special duties and responsibilities and hence it shall act in a more sensible way, its functioning is to be regulated in a proper way. Hence whenever Government enters into any contract, such contracts shall comply with some extra requirements that have been enumerated in Art. 299 of the Constitution of India. Non- compliance to such requirements will render such contract null and void. In many of its judgements the apex court has made its intentions clear as to strict adherence of the provisions. The present position is that the extent of compliance depends on case to case basis and substantial compliances have been accepted by the Court. There is not much difference as to the contractual liability pertaining to the government contract as they are in normal contracts. Both Section 70 and Section 65 are applicable when either party makes any default in its contractual obligation. Government is not immune and suits can be filed against the government for specific performance of contract or else for compensation as per Indian Contract Act, 1872. The government is vested with a lot of duties and responsibilities and at the same time has been conferred with various powers. Hence, it needs to be act non- arbitrarily in its approach while entering in any contract. Government is not as free as an individual to decide the other party to its contracts. It is not its discretionary power to enter into any contract with anyone. Article 14 is applicable in these contracts. Hence Government contracts are to be awarded on merit and not on any arbitrary decision without giving opportunity to all on the same stand.

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