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Government Contracts and its facets

Authored By – Oishiki Bansal

Introduction

Contract acts as a very essential element in our day to day lives. In our country the statute governing contracts law is The Indian contracts Act, 1872. The State can also enter into agreement with the other parties in the country. Government contracts tend to explain the relationship of government as one of partnership and a cooperative arrangement¹. However, the executive in India derives its power to enter into a legally binding contract via Article 298² and Article 299³ of the Indian Constitution.

This article is divided into four parts for better understanding of government contracts and its facets. The First part of the article focuses on how judicial intervention has brought equality in the manner the government enters into a contract with public and private parties. The second part of the article focuses on the scope of judicial review of contractual liability of governments arising out of the contracts. The Third part discusses how the government can enter into contracts. Fourthly, the article explains the quasi contractual liability of the Indian government. To understand the quasi contractual liabilities in case of breach of contracts the legal systems of the United States and England have also been discussed.

I. Equality With Reference To Government Contracts

With the technological advancement and growing need to redistribute the resources of a nation, the role of the state as an entrepreneur and a regulator grew. With this the involvement of the private sector also increased in providing more facilities to the nation as a whole. With time the role of private and public enterprises started coinciding and both became pivotal in the growth of the nation. This led to an increase in the contracts between government and private enterprises and the interference of law in the contracts.

¹ James, V. G. (1990). EQUALITY IN GOVERNMENT CONTRACTS. *Journal of the Indian Law Institute*, 32(2), 201, <http://www.jstor.org/stable/4395317>

²The constitution of India, Article 298.

³ The constitution of India, Article 299.

Equality refers to the commonly perceived notion that those who are alike are to be treated alike until and unless there is some reasonable classification or intelligible differentia as inferred from Article 14 of the Indian Constitution.

V.G. James⁴ has discussed the judiciary's stand on the equality achieved by the government while making contracts with the private individuals and parties. He has established a relationship of the powers given to the constitution under Article 298 of the Constitution with Article 73⁵ and 162⁶ of the constitution for the Union and the State respectively. Which provides basis for the reasoning that the power of the state to enter into an agreement with a private individual or party is co – extensive with that of the executive power and the executive power is co – extensive with the legislative power thus, the legislature can restrict the power to enter into contract which are in public interest⁷.

In a case where the petitioner challenged the termination of contract on the basis of violation of fundamental right of right to equality of supply of milk by the government so that the same contract can be given to a cooperative society⁸. The Supreme Court held that the parties with whom the government enter into contract are mere party to the contract and not the employees of the government⁹ and thus Article 16(1)¹⁰ of the Constitution which is limited to government employees cannot be applied in the said case. Although in another case¹¹ the Apex Court held that “Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every government cannot act arbitrarily without reason and if it does, its action would be liable to be invalidated¹²”. In the case of Punnen Thomas v State of Kerala¹³, where certain individuals were blacklisted by the government from entering into contracts and the government further refused to hear such parties on the ground of freedom of entering into contract, the court held that the government unlike any private individual is also free to enter into contract. However, J. Mathew's dissenting opinion was that the government cannot be arbitrary and unreasonable as a free man as it is

⁴ James Supra note 1 at 200-216.

⁵ The Constitution of India, Article 73.

⁶ The Constitution of India, Article 162.

⁷ James Supra note 1 at 205.

⁸ C.K. Achuthan v State of Kerela, 1959 AIR 490.

⁹ ibid

¹⁰ The constitution of India, Article 16, clause (1); equality of opportunity in matters of public employment.

¹¹ Kasturilal V State Of Jammu And Kashmir, 1980 AIR 1992.

¹² Ibid

¹³ Punnen Thomas v State of Kerala, AIR 1969 Ker 81.

restrained by its duty and responsibilities of a democratically elected representative. The minority view of J. Mathew in the above case was approved by the Supreme Court in the case of *Erusian Equipment and Chemicals Ltd. v State of West Bengal*¹⁴, where again certain individuals were blacklisted the court held that an individual cannot be blacklisted without an opportunity of fair hearing. Blacklisting of individuals in public contracts violates the right to equality of such individuals.

It has been established by the Supreme Court that Article 14 of the Constitution provides all the parties whether public or private an equal opportunity to enter into contract with the government. Government contracts are an integrative way of executing public works and our state being a welfare state fairness in making contracts is necessary.

II. The Scope Of Judicial Review Of Government Contracts

A government contract is entered into by constitutional provisions however, once a contract is entered into by the government it comes under the ambit of Indian Contracts Act. Judicial review of government contracts can be segregated as “awarding a contract” and “post – award matters”. Ravindra Kumar Singh¹⁵, has argued that the power of the Supreme Court and High Courts to review the contractual liability of the government via Articles 32¹⁶ and 226¹⁷ of Indian Constitution respectively. He has further endeavored on the reasoning on which the domain of the public and private law can be differentiated, which according to him is based on the facts of the case and thus differing on a factual basis. A contract made while exercising the powers of the executive can be said to be a government contract and thus is bound by the constitutional provision of Article 299(1)¹⁸. A statutory contract is the exercise of ordinary power¹⁹. While defining a statutory contract the Supreme Court held that just because the contract was made by “exercise of enabling power” it cannot be said to be a statutory contract²⁰. However, if the

¹⁴ *Erusian Equipment and Chemicals Ltd. v State of West Bengal*, (1975) I.S.C.C. 70.

¹⁵ Singh, R. K. (2017). *Adjudicating the Public-Private Law Divide: The Case of Government Contracts in India. Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 50(1), 54–74. <http://www.jstor.org/stable/26429200>

¹⁶ The Constitution of India, Article 32.

¹⁷ The Constitution of India, Article 226.

¹⁸ The Constitution of India, Article 299(1).

¹⁹ Singh Supra note 15 at 58

²⁰ *India Thermal Power Ltd v State of MP Appeal (civil) 1140-43 of 2000.*

contract adheres to the terms and conditions of a statute then it can be said to be a statutory contract²¹. When it comes to contracts since both the parties are private they come under the domain of private law and judicial review under Article 32²² and 226²³ cannot be availed by the parties. Although, when one party to the contract is the State, two things have to be considered. First, the liberty with the state to act efficaciously and second, fairness has to be ensured while entering into contract²⁴. The state enters into a contract as an executive thus, they lie under the ambit of 'State' as given under Article 12²⁵ and are liable to be subjected to Part III²⁶ of the constitution. Thus, it can be said that the judiciary has a scope to review the contractual liability of the state by way of the writ jurisdiction²⁷. In the case of *Tata Cellular v Union of India*²⁸, the Court opined that to avoid conditions of arbitrariness and 'favoritism' the court can review the contracts on the ground of illegality, irrationality and procedural impropriety²⁹. The State can use any method or way to award the party to the contract as there is no constitutional mandate to the same but the court can judicially review such method or way via Article 14³⁰ on the grounds of arbitrariness and fairness³¹.

III. Power Of The State To Enter Into Contracts

The government of India or a state can enter into contract with private individuals by exercising their executive power by the virtue of constitutional provisions such as Article 298, 299, 73 and 162 of the Constitution. Article 298³² empowers the State to enter into a contract and Article 299³³ provides conditions for such a contract to be a legally binding contract read with the Indian Contracts Act, 1872.

The conditions that the government needs to follow before entering into a contract are as follows-

²¹ State Of Harayana V Lal Chand AIR 1984 SC 1326.

²² Supra note 16

²³ Supra note 17

²⁴ Singh Supra note 15 at 62

²⁵ The Constitution of India, Article 12.

²⁶ The Constitution of India, Part III.

²⁷ As per Article 32 and 226 of the Constitution of India

²⁸ *Tata Cellular v Union of India*, (1994) 6 SCC 651

²⁹ Ibid

³⁰ The Constitution of India, Article 14.

³¹ *In Natural Resources Allocation, Re*, (2012) 10 SCC 1.

³² Supra note 2.

³³ Supra note 3.

- 1) The contract has to be entered in the name of the President in the case of the Union or the Governor in the case of the State.
- 2) The contract between the state and a party cannot be made orally, it has to be in a written format which can be duly executed³⁴.
- 3) The contract made has to be formally expressed, a contract by the state cannot be created impliedly³⁵.

The objective of Article 299³⁶ is to protect the government from being burdened government with onerous liability occurred due to unauthorized contracts or any spurious claim made due to any contract made by an unauthorized way³⁷. In the case of Seth Bhikraj Jaipuria V Union of India³⁸, the Supreme Court held that a contract made without adhering to any of the essentials as mentioned in Article 299 of the Constitution would render the contract as null and void. And the question as to whether all the essentials are being fulfilled in not solely the question of law but also a question of fact³⁹. Section 175(3)⁴⁰ and Article 299⁴¹ are similar in nature nonetheless no mode of authorization has being prescribed by both the provisions. Thus, the preferred mode of authorization is publication of the contract in the Official Gazette of India⁴².

A government contract by the virtue of Article 299(1)⁴³ is executed in the name of the President/Governor, nonetheless according to Article 299(2)⁴⁴ provides immunity to the President/Governor against liability arising out of contractual obligations. In case of breach of contract the party to the contract can sue the Government of India or a state directly in the court of law. In the case of Mulamchand v State of Madhya Pradesh⁴⁵, the Court held that the doctrine of estoppel or ratification cannot be used in government contracts as it will defeat the constitutional provisions.

³⁴ Seth Bhikraj Jaipuria V Union of India, AIR 1962 SC 113.

³⁵ K.P. Chowdhary v State Of Madhya Pradesh, 1967 AIR 203.

³⁶ Supra note 3.

³⁷ Singh Supra note 15 at 56

³⁸ Seth Bhikraj Jaipuria V Union of India, AIR 1962 SC 113.

³⁹ Nirod Baran Banerjee V Dy Commissioner of Hazaribagh, AIR 1963 SC 113.

⁴⁰ Government of India Act, 1935; Section 175(3).

⁴¹ Supra note 3.

⁴² James Supra note 1 at 207

⁴³ The Constitution of India, Article 299(1)

⁴⁴ The Constitution of India, Article 299(2)

⁴⁵ Mulamchand v State of Madhya Pradesh, AIR 1968 SC 1218.

IV. Quasi - Contractual Liability Of The State

This section of the article discusses the development of quasi - contractual liability of the state by way of a comparative study of the legal systems of the USA and England. In the United States by virtue of “The Court of Claims Act” and the “Federal District Courts Act”, the judiciary has the power to decide the quasi – contractual liability of the United States. The Acts provide that the Court can decide the liability of the United State in cases of contracts; implied or expressed and the liability which is not included under the ambit of torts. While adjudicating the liability of the United States, the Court made a distinction between contracts that are implied in fact and law. In the case of *Clarke v United States*⁴⁶, where there was a contract between a private individual and the government of United States to provide a ship for some consideration and on the breach of the contract the Court observed that, since the plaintiff is asking for relief out of the facts of the contract he is entitled to damages. The Court has observed that only the contracts that are implied in fact can be included in the expression “contracts implied or expressed⁴⁷”. Secondly, according to the Acts mentioned above the Courts have been given power to award compensation in cases of unliquidated and liquidated damages which do not come under the ambit of torts. In the case of *Bigby v United States*⁴⁸, where a private individual sustained injuries while using a public elevator and the injuries were sustained due to negligence of a government employee, and thus, sued the United States for breach of an implied contract. The court held that the plaintiff only had the recourse to action under the law of torts and not under contracts. However, now the plaintiff cannot sue the state under torts after waiving the right in torts. Thus, the principle that is established in the United States is that there will be quasi contractual liability of the government in cases of breach of contract wherever a remedy is available against a private individual⁴⁹. Further, where there is any liability that arises against the government which involves the law of torts, the courts do not have any jurisdiction to adjudicate such cases.

England follows the rule that the crown can do no wrong, however, in the case of quasi – contractual liability this view has been changed by the help of various precedents and The Crown Proceedings Act, 1947⁵⁰.

⁴⁶ *Clarke v United States*, (1877) 95 U.S. 539.

⁴⁷ Alan W. Mewett, (1959), *The Quasi – Contractual Liability of Governments*, UTPLJ, 13(1), 58.

⁴⁸ *Bigby v United States*, (1902) 188 U.S. 400

⁴⁹ *Supra* note 47 at 63.

⁵⁰ The Crown Proceedings Act, 1947, Section 4(1)

In the case of *Feather v The Queen*⁵¹, the Court observed that a “petition of right” is available to private individuals in case of breach of contract, where such contracts were for providing goods to the crown or any public service⁵². Further, in the case of *United Australia Limited v Barclays Bank Limited*⁵³, the Court opined that where the crown has committed any legal wrong for which any individual party would have been liable, the crown would be held liable, whether such wrong is in the nature of torts or any other legal wrong. Although in England the principle is much different than that of the United States. In a case where a petition of rights was filed for compensation against the “Defence of the Realm Regulations”, the court held that there is no need to look into contractual liabilities and whether there is a breach of contract or not, what needs to be looked into is the when something is legally done, the obligation is on the subject to complete the consequences arising out of such legal act. Thus, in England it has been made clear that the crown can sue for quasi – contractual liability arising out of the breach of a contract. Moreover, this view has been solidified after the enactment of the Crown Proceedings Act of 1947.

In India the quasi – contractual liability of the government has been inferred from the Indian Contract act, 1872 and the stance has been made clear by the judiciary. Quasi contractual liability is applied against the government so as to prevent any kind of “unjust enrichment” arising out of these contracts. In case of the breach of contract or any term of the contract, the parties can claim compensation via Section 70 of the Indian contract Act, 1872 or if the contract already has any arbitration clause the parties can resort to the same. In the case of *State of Haryana v Lai Chand*⁵⁴, the court held that a statutory contract does not lie under the ambit of Article 299 of the Constitution. In the case of *State Of West Bengal V B.K Mondal and Sons*⁵⁵, there was no authorized contract made between the respondent and the officers who asked the respondent to do the work. However, the work done by the respondent was accepted by the government, however, refused to give the award of the contract to the respondent. The government stated the reason that there was no official contract made and authorized as per Section 175(3)⁵⁶ and Article 299⁵⁷.

⁵¹ *Feather v The Queen*, (1886) 6 B. & S. 257, 294.

⁵² This view was upheld in the case of *Anglo Saxon Petroleum Company v Lords Commissioners of the Admiralty*, (1947) 1 K.B. 794, 801-2.

⁵³ *United Australia Limited v Barclays Bank Limited*, (1941) A.C. 1

⁵⁴ *State of Haryana v Lai Chand*, A.I.R. 1984 S.C. 132.

⁵⁵ *State Of West Bengal V B.K Mondal and Sons*, AIR 1962 SC 779.

⁵⁶ The Government of India Act, 1935, Section 175(3).

⁵⁷ The Constitution of India, Article 299.

Thus, the respondent claimed that since there was no official contract the liability of the government lied under Section 70⁵⁸ as the government has reaped the benefit of the contract. The court held the government to be liable and asked the government to pay compensation to the respondent. The Court further opined that since the fields covered by Section 70 of the Contracts Act and Section 175(3) of the Government of India Act are different, Section 70 of the Contracts Act, 1872 will directly or indirectly nullify the effect of Section 175(3) of the Government of India Act.

Conclusion

The executive in India performs three functions i.e. of quasi-legislative, quasi-judicial and executive⁵⁹ thus, the power of the executive needs to be controlled. The Indian Constitution itself provides the executive the power to enter into contracts with the private parties and individuals. On the breach of the terms and conditions of the contract, both the parties should have equal opportunity to hold each other accountable and liable for the damages. The relief to liability arising out of the contract is provided under Section 70⁶⁰. Where the question is related to public domain i.e. in the interest of the public, the parties can also ask for relief by way of writ jurisdiction. The Courts have the power to determine the validity of the contracts on the principles of fairness and equity.

⁵⁸ The Indian Contracts Act, 1872, Section 70.

⁵⁹ James Supra note 1 at 214.

⁶⁰ Supra at 58.