Chapter-V

UNJUST ENRICHMENT UNDER THE CONSTITUTION OF INDIA

5.1 Introduction

The evolution of the concept of ‘welfare State’, particularly in India today, has resulted in the phenomenon of the State entering into many fields of economic activity and undertaking upon itself tasks which were previously left to the private commercial organisations. Now, it is a well-known fact that a revolutionary change has taken place in every part of the world regarding the State’s functions in relation to its own subjects, whatever be the form of the government existing therein. Of course, the men of the laissez-faire days would be prepared to concede to the government only the minimum fictions, namely, of defence, administration of justice and police, leaving the rest to private enterprise, with the minimum of outside interference in the form of controls, regulations and the like. But, regardless of the political philosophy, the needs of an increasingly complex society have forced upon one government after another, a multiplicity of additional functions. As has been put forth by an eminent jurist, “it is one of the great contentious issues of the modern economics and political science as to new far and to what extent state intervention should be carried out in our daily lives”.1

India as one of the modern states is essentially a social welfare state and is concerned with multitude of active administrative and managerial functions towards the attainment of social welfare state. While discharging these functions the government departments, and legally constituted public authorities, as well as independent public corporations have to make contracts, buy and sell large quantities of equipments and other goods, engage and dismiss staff and undertake a multitude of ether activities regulated by the

---

law of contract. Apart from it, even government departments and incorporated public authorities themselves often deal with each other in transactions scarcely distinguishable in rem from the contracts entered into between private parties. These types of contracts are, in modern jurisprudence, known as government contracts, public law contracts, executive contracts, administrative contracts, etc.

The notable feature of the government contracts is that in these contracts, one of the parties is always the Government. It is, no doubt, true that these contracts have some similarities with the ordinary contracts entered into between one individual and another, but at the same time have some differences too. The points of similarity between these contracts may be summed up thus:

Government contracts are generally subject to the same rules of law of contract as in the case of contracts between private individuals. When a Government enters into a commercial type of transaction it shed its cloak of sovereignty and it is treated by the law as a private person in similar circumstances, provided the formalities of the law in these contracts have been complied with. The following are the instances of the same:

5.2 Contracts of Lease

Contracts for the lease of property furnish a good illustration of the application of this general principle. It is a fundamental tenet of property law that a lessor in the absence of an agreement, is not required to pay the lessee the value of improvements to the leased premises which the lessee is unable to remove at the expiration of lease. This rule applies to a lease of property owned by the Government. If a lessee instals improvements on Government premises without an authorisation to do so, be is regarded as a mere volunteer and cannot recover his expenditure.
Since the Government may validly lease property owned by it, there is no legal objection to its performing all of the functions of a private lessor, including an abrupt termination of a month to month lease. It can also be mentioned that Government can also be a lessee in many transactions and the Rent Control Act, govern the transactions.

5.3 Limitation on Liability

Another example of similarity may be found in contracts containing provisions limiting the amount of liability. In most cases a clause of this type is valid and will be enforceable, even though the Government is one of the parties. Hence, a statement in a bill of lading limiting a carrier’s liability is valid against the Government when the Government as shipper declares the value of the goods to be less than they actually are worth in order to get a lower rate.

The points on which a state contract differs from ordinary contracts may be summarised thus:

(1) A contract made the state is not only aid at securing the performance of the duties under it, as in the Case of ordinary contract, but it also employed by the state for achieving some objectives of its social and economic policy. A Government may impose, for example, on a contractor certain fair and reasonable conditions in the employment of labour. It may do this by incorporating such conditions in the standardised contracts used by it.

(2) Perhaps the most important feature of these contracts is that the performance of the contract should serve the public interest and is intimately inter-twined in the public policy. Herein lies the basic reason for treating them as belonging to a separate and distinct category. Public interest is the prime concern of the State and the State has, therefore, a right, if not a duty, to see to it that no contract made
by it, impinges adversely on public welfare. The State must have
greater freedom than that allowed in the case of an individual, viz.,
freedom to control, supervise, alter or even cancel its contracts and this
must be allowed regardless of the niceties of the law that governs
contracts between the individuals. This superior right of the
Government to supervise, amend or cancel its contracts is inherent in
the nature of the functions entrusted to it.

(3) Another feature that is easily recognised is the variation of the law of
agency in so far as it relates to the binding nature of contract made by
Government agents. The Government is not bound by a contract
purporting to be made on its behalf unless either the agent has actual
authority of Statute to make it or there is a financial appropriation
adequate to its fulfilment. The common law principle that an agent can
bind his principal by contracts within the scope of his ostensible
authority does not apply to Government as principal. Nor can there be
an agency of the Government by estoppel. These propositions of law
are expressly incorporated in statutory provisions in the U.S. and also
in France. In England it is nowhere stated that rules different from
those under the ordinary law of agency apply in the case of
Government agents. But in order to safeguard the finances of the
Government from depletion in unauthorised engagements, a special
rule about appropriation has been developed in England. A
Government contract involving the payment of money by the Crown is
invalid if Parliament has not made an express appropriation for the
purpose of the contract, with the result that a contract made by an agent
of the Crown acting within the scope of his ostensible but not actual-
authority is valid but will become enforceable only if there is a
parliamentary appropriation, for the purpose of the contract.

(4) Government contracts of today are mostly contracts of adhesion-
standard contracts in which the mental encounter and consensus ad
idem exist but in theory. And if insufficient attention has been paid so far to the special position of a Government as a contracting party it is because of innumerable contracts that are usually made by the Government. The Government can have several clauses incorporated in such contracts which give it peculiar powers in its capacity as a contracting party.

(5) In the law of France, third parties are given certain rights for securing observance of terms in a contract between the State and the individual contractor. Such third parties may be those who are contemplated in the contract itself as entitled to receive certain benefits and to enforce them, for example, employees of the contractor regarding fair wages clauses. Such a clause confers an enforceable right upon the employees. Third parties in the position of, say consumers, who are not specifically contemplated in the contract, have wider the law of France a right to proceed against the administration in case of failure to enforce implementation of the contract by the contractor with the State.

(6) Contracts of service made by the Government with its servants are in most countries a misnomer as the supposed contractual rights, if they exist at all, are subordinate to, and can ever be negative by, the power of the Government to dismiss them at its own will and pleasure. This power again is a sine qua non for the efficient performance of the essential duty of the Government, namely the protection of public interest. No public servant can set up a contract made with him by the State as the basis of a claim against the exercise of the State’s discretion to dispense with his services in the public interest.

We may therefore say that the essential thing to note about state, contracts is that the State has power to override them in case of necessity and that the contract will bind the State so far as no contingency arises for the exercise of
such power. The binding force of the contract is thus somewhat of a lesser
degree than in the case of purely private contracts.

5.4 Government Contract

(a) In India no other law governs the personal rights of the parties as a
contract entered by them as per the provisions of the Indian Contract
Act, 1872 governs. By means of an agreement the parties to it can
drive their own rights and duties. However the Indian Contract Act is
not an exhaustive code to govern all kinds of contracts. The Act does
not deal with the whole law of contracts and therefore, the native law
of the land may be applicable in cases in which the Act is silent.

The question whether the act is an exhaustive code with reference to the law
of contracts and if so what extent, has been considered by the Privy Council
in Irawaddy Flotilla Co. v. Bugwandas\(^2\) their Lordships said:

\[ \text{“The Act of 1872 does not profess to be a complete code dealing with the law relating to contract. It purports to do more than define an amend certain parts of the law.”} \]

Therefore in addition to the provisions of the Indian Contract Act, sometimes
provisions of other laws are also to be considered to determine the validity of
a contract. For example, while determining the validity of a Government
Contract the provisions of the Constitution are to be considered. It means in
addition to the provisions of the Contract Act on the basis of which validity of
a contract is judged, in determining the validity of a Government contract, the
following Constitutional provisions are also to be kept in view:

(1) The principles of equality as contained in Article 14, and

(2) Provisions of Article 299

If there is any violation of the above said provisions of the constitution it is
amenable to judicial review. While exercising the power of judicial review in

\(^2\) (1891) 18 Cal 620: 18 IA 121.
respect of contracts entered into on behalf of the State or Government the apex Court held that:

“The principles of judicial view would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of the power of Judicial Review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the state. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course if the said power is exercised for any collateral purpose the exercise of that power will be struck down.”

5.5 Judicial Review of Contracts of Government or Government Bodies

Judicial review of a contract is concerned with reviewing not the merit of the decision in respect of which the application of judicial review is made, but the decision making process itself. In Chief Constable of the North Wales Police v. Evans Lord Brightman said “judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.” Thus, judicial review is concerned, not with the decision, but with the decision making process.

While exercising the executive power of the Government or Government bodies there must be a balance between the administrative discretion to decide the matters whether contractual or political in nature or issues of social policy. If the balance is not maintained and the act is not reasonable then such act will be subject to judicial review. The main purpose of judicial review in administrative matters is to find the right balance between the administrative

4 (1982) 3 All ER 141 (154).
discretion to decide matter whether contractual or political in nature or issue of social policy and to set right the unfairness, if any.\textsuperscript{5}

Lord Scarman in \textit{Nottinghamshire County Council v. Secretary of State for the Environment},\textsuperscript{6} Proclaimed:

\begin{quote}
“Judicial review’ is a great weapon in the hands of the Judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficent power.”
\end{quote}

Observance of Judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has to contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the Court’s ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself.\textsuperscript{7}

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

1. Illegality
2. Irrationality
3. Procedural impropriety
4. Proportionality

\textsuperscript{5} Supra note 3.
\textsuperscript{7} Supra note 3 at p. 25.
1. Illegality means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The duty of the Court is to confine itself to the question of legality’. Its concern should be:

(a) Whether a decision-making authority exceeded its powers?
(b) Committed an error of law.
(c) Committed a breach of the rules of natural justice.
(d) Reached a decision which no reasonable Tribunal would have reached, or
(e) Abused its powers.

2. Irrationality, namely, Wednesbury unreasonableness means that a decision of public authority will be liable, to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. *Associated Provincial Picture Houses Limited v. Wednesbury Corpn.*

Two other facets of irrationality, namely, (a) whether the decision-maker’s evaluation of facts logically reflects the proper conclusion; and (b) whether the decision is impartial and unequal in its operation between different classes, have also to be taken into account.’

3. Procedural impropriety-In *Union of India v. Hindustan Development Corporation* it was held that:

“...the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy should be on some rational and reasonable grounds.”

---

8 (1948) 1 KB 223: (1947) 2 All ER 680.
In *Erusian Equipment and Chemical v. State of West Bengal*¹⁰ the Supreme Court observed that:

“When the Government is trading with the public the democratic forum of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the government that a public element and therefore, there should be fairness and equality. The state need not enter into any contract with any one, but if it does so, it must do so fairly without discrimination and without unfair procedure.”¹¹

4. Proportionality- As a matter of fact, in R.V. Secretary of State for the Home Department *ex-parte* Brind,¹² Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality.

(b) In French jurisprudence they have developed a concept of contract administrative, that is, administrative contract whereby an inherent distinction in the position of the government and the governmental authorities and private individuals in the matter of liability in contract is recognised and given effect to.¹³ Public authorities are now held in French law to be able to engage in transactions either on a private law basis-in which case they are subject to civil jurisdiction and the principles of private law- or by way of a private law contract, a contract administrative, which is compounded of elements of contract and inequalities held to be inherent in the concept of public service.

It is merely a matter of interpretation when in a specified case the question is whether it is a government contract or a private-law contract, when one of the parties to it is a governmental agency. A public authority may, for example, contract for the services of radio performers or the supply of uniforms in the form of a civil or administrative contract. But, the contracting for the

---

¹⁰ AIR 1975 SC 266
¹¹ *Erusian Equipment and Chemical v. State of West Bengal*, (1975) 1 SCC 70.
¹² (1991) 1 AC 696.
execution of typical public-service functions, such a transport service or water supply will indicate an administrative contract.

The notable category of this type of contracts is the undue preference given, and the specific privileges enjoyed, by one of the parties, viz., the governmental authority, as against the other, viz., the private individual, which it is submitted is against the fundamental and basic principles of the mutuality of the contract law of the common law. An observation of Friedmann; a distinguished author, would not be out of place to quote here in this connection. He states:

“The fundamental characteristic of a contract administrative is the recognition of certain unilateral powers of control by the administration in the public interest. The demands of the public service empower the administrative authority to carry out continuous supervision over the execution of the contract. To ensure this continuity of execution the administration has certain unilateral powers: to suspend, vary or rescind the contract, to transfer it to another party or to take it to over itself. Not only does the administrative authority have the right to interfere unilaterally in the contract; it has the duty to do so, because it is responsible for the public service...Moreover, the contract is always subject to the changing needs of public service. Thus, a long term concession for street lighting by gas may be converted into a demand for lighting by electricity, if this required by modern technical developments and public needs. If the contractor is unable to fulfil the changed conditions the contract may be terminated or transferred to another contractor.”

In American law, too, there is a growing recognition of ‘government contract’ as a distinct category although the disinclination to recognise the dualism of private and public-law contract still persists. The obvious reluctance to formally recognise it as a distinct category is evident in the observation of Williston in his classical treatise in contract when he states:

“The law governing contracts with the United States is, to a great extent, not unlike that prevailing between private

---

14 Id, at p. 292.
parties. Here and there, the Federal Courts have drawn some slight or substantial distinctions due principally to the fact that one of the parties to such contract is a sovereign and sometimes, to the fact that a special statute had to be observed or was violated.”

However, it is submitted that a clear-cut distinction is discernable even from what has been stated. This is all, the more so when it is further stated:

“It has also been firmly established that the United States is not liable for damages caused by acts performed as an integral part of its sovereign character. Just when it is not liable because the act causing the damage constituted or Governmental function is not entirely clear in many instances.”

The history of the governmental liability in contract in the U.S.A. is of course interesting. It is a fact that the United States did not permit itself to be generally sued for damages caused by its breaches until after the enactment of the Act of 1855, which established the Court of claims of the United States. Prior to such date the only remedy available was by petition to Congress for special relief. Under this statute, claims “upon contract express or implied were permitted. Subsequently Congress enacted the famous “Tucker Act” of 1887 which permits suits for claims “upon contracts express or implied, or for damages, liquidated or unliquidated, in cases not counting in torts. Thus the basis of Governmental liability for breach of contract was firmly written into general law. Without this general law, no one can say how great a hardship or inconvenience might have resulted to persons contracting with the government under various circumstances.

The English common law, in the same manner, also recognised in theory only one type of contract. There the problems of government contracts are still to a large extent sought to be solved by applying the recognised principles of contract law. However, in England while there is a denial of any special status to the government in respect of its liability in contracts there is also on the

16 Ibid.
other hand an affirmation of the overriding principle of freedom of executive action. Thus, in *R.Amphitrite v. The King*,\(^{17}\) *Rowlatt J.*, rejected the claim for damages by the owners of a Swedish ship upon the breach of an undertaking given by the British Government that the ship would ‘earn her own release’ if she carried cargo of which at least 60% was approved cargo. *Rowlatt J.*, interpreted the undertaking as an expression of ‘intention to act in a particular way in a certain event’ which could never be binding on the Government which had to ensure the welfare of the State.

Street, an eminent author, has expressed the opinion that government contracts differ from ordinary contracts and should to some extent, be governed by different legal rules.

### 5.6 Government Liability in Contracts

The extent of the liability of the Government in tortous as well as contractual cases has been provided for in article 300 of the Constitution. Article 300 covers the field of suability of the state generally as equal to that under the Previous Constitution Acts- 1935\(^{18}\) – 1919\(^{19}\) – 1858\(^{20}\). The Article runs thus:

(1) “The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by the Constitution sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.”

---

\(^{17}\) (1921) 3 K.B. 500.

\(^{18}\) Section 176.

\(^{19}\) Section 32.

\(^{20}\) Section 65.
Since this Article is declaratory of contractual liability of the Government under the existing law saved by the Constitution\(^{21}\), it is pertinent to explore the authority therefore.

It is clear that whole question turns upon a proper construction of Section 65 of the Imperial Government of India Act, 1858 by virtue of which the extent of governmental liability has got to be determined. After providing for transfer of Paramountcy of the East India Company upon the territories to the Crown of England the Act by Section 65 provided:

> “The Secretary of State in Council shall and may sue and be sued as well as in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council for India as they could have done against the same Company.”

It is to be noticed that this important provision has two facts. The first clause specifies that suability shall be vested in the Secretary of State which in England is vested in different corporate bodies Ministers, Post Master General, Attorney-General and the like. This clause has nothing to do with extent of liability of the Government or rights and remedies of the individual shall be equal to those as possessed by the preceding East India Company. The extent of liability of East India Company can be ascertained judicially.

The judicial decisions determining liability of the East India Company or the Government though numerous in the field of Torts were meagre in the field of Contract. One reason may be that even in the Government circles throughout, barring one or two whispers of useless dissent, contractual liability of the Indian Government was regarded as equal more or less to that of a private individual under the ordinary law of the land. Even a legislation contrary to it would be *ultra vires* as violative of section 65 of the Constitution Act, 1858,

\(^{21}\) Article 372 of the Constitution of India.
was the outcome of Privy Council Judgment in *Secretary of State v. Moment*\(^2\) where the Burma Act tried to take away right to sue, Lord Haldane stated the rule finally: “Their Lordships are of the opinion that the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a civil contract in any case in which he could have similarly sued the East India Company”. The implied Burma Act was held *ultra vires*. The purpose of 1858 Act as not indiscriminate adoption of the archaic common law rule of immunity but to adopt it in a refined shape, for the preamble to the “Act itself says that it is ‘An Act for the better Government of India.’”

That being so, the cases which have adjudicated and established the liability of the East India Company in contract, must be taken as part of substantive law on the question. The earliest judicial authority which granted exemption to the Government in respect of the acts of the Government was an observation of Peacock, C.J., in *Pand O Steam Navigation Co. v. Secretary of State*,\(^2\) as follows:

“Where an act is done or a contract entered into in the exercise of powers usually called sovereign rowers by which we mean powers which can not be lawfully exercised except by a sovereign or a private individual delegated by a sovereign to exercise them, no action will lie.”

This principle was once again enunciated by the Calcutta High Court in *Nobin Chunder Dey v. Secretary of State*.\(^\)\(^2\)\(^4\) The facts of the instant case were that under certain regulation the license for sale of ganja was to be given to highest bidder at the auction to be conducted by a Government department. The highest bidder had to deposit certain licence-fee before licence could be issued. The plaintiff who was the highest bidder deposited the requisite fee but subsequently the Government refused (and there was no question of

\(^2\) *M.L.J. 459* (P.C).
\(^3\) (1861) 5 *Bom. H.C.R. App. A.*
\(^4\) (1875) *I.L.R. 1 Cal. 11.*
revocation of the licence which is a quasi-judicial act and is thus justiciable) at all to grant the licence or even to return the said deposit fee. The plaintiff sued for ‘breach of contract’. Both in the lower court as well as in the High Court the action failed for complete reliance placed upon the observation of Peacock, C.J., in P. & O. case. Garth, C.J., who delivered the judgment of the Court concurred with Phear, J.

“It is submitted that even the above observation is not an authority for the view that in cases where the Government has committed a breach of contract, the remedy is by way of Petition of Right. Because- firstly, the decision is based upon the dicta of Peacock, C.J, in P & O. case which was a case of tort committed in pursuance of commercial business and the Government was held liable in that case. Secondly, even if the dicta in the P. & O. case is taken a correct statement of law the matter does not go too far. For in Nobin Chunder’s case there was no question of any breach of contract - indeed there was no contract at all, Phear, J, therefore, stated, “I am also of the opinion that the evidence… in this case fails to establish any such contract on the part of the Government as that upon which the plaintiff relies.”

Thirdly, if it was not a contract, what it was the nature of the transaction? It was an act done in pursuance of licensing power of the State- power which is an attribute of all, sovereign States to regulate private business for collective social good.

Fourthly, the proposition that contractual liability of the Government being a specie of non-sovereign act - is equal to that of an ordinary individual is
warranted by decisions both prior and after the passing of the Government of India Act, 1858.

In *Moolalay v. The East India Company*, the company had entered into a contract with the plaintiff and had committed breach thereof and pleaded immunity from action equal to one accorded to Crown. This plea was rigidly excluded:

“It hath be said that the East India Company have a sovereign power; be it so; but they may contract in a civil capacity, it cannot be denied that in a civil capacity they may be sued; in the case now before the Court; they entered into a private contract; if they break their contract, they are liable to answer for it.”

*Bank of Bengal v. East India Company*, is another instance where contract of agency was involved. A servant of the company during the course of employment wrongfully acted; thereby the company was benefited. In a suit to recover the unjust benefit so accrued the company pleaded immunity. Again this suggestion was dispelled and the company was held liable for restitution as under the ordinary law of contract. It was observed that “the fact of the company having been invested with powers usually called sovereign powers did not constitute them sovereign.”

Judicial decisions after passing of the Government of India Act, 1858 have substantiated the rule so established. Thus in *Forrester v. Secretary of State*, the plaintiffs were successors of a Jagirdar who was under a sovereign and had purchased certain arms for himself. Upon the conquest by the company of the territory, the arms of the Jagirdar were also seized although the Jagirdar remained in the same position wider the company administration. The plaintiff sued to recover territory as well as damages for seizure of arms. The Judicial Committee held that territory was taken from the Ruler under the Act of State which was not questionable. But their Lordships allowed the

---

27 (1785) 1 Bro. C.C. 469.
28 (1831) Bigwell Rep. 120.
29 (1874) 12 Beng. L.R. 120 (PC) at pp. 166-67.
appeal so far as the “arms suit” was concerned by inferring an ‘implied contract’ to pay the value of arms so seized together with interest at the rate of 12% per annum and remitted the case to India for disposal and decree accordingly.

Another landmark in the history of States contractual liability is the Full Bench decision of Madras High Court in *Vijaya Ragava v. Secretary of State.*\(^\text{30}\) In this case a municipal statute empowered the Governor in Council to terminate the contract of service and to dismiss an employee on grounds of misconduct. The plaintiff a municipal commissioner was removed from service and no grounds were given at all for such action. He brought an action for wrongful breach of service contract and the defendant pleaded sovereign immunity. The Court accepting the line of thinking propounded in *Hari Bhanji’s case,*\(^\text{31}\) awarded damages against the Government. As to contractual immunity it was said “The Governor in Council removed the plaintiff, professing to act under the municipal law and not under a sovereign right outside that law”.\(^\text{32}\) Muttuswami Ayyar, J., who had the privilege of taking part in Hari Bhanji’s case again substantiated his earlier view in this case also.

“A careful examination of the Act of Parliament amending the law relating to such petitions... will show that proceedings against the Crown in England, even where there is a legitimate case for the remedy, have in Her Majesty’s Court, and according to law as it stands at present, the Secretary of State is liable to be sued in those cases in which the late East India Company might be sued.”\(^\text{33}\)

Besides these cases, the subsequent case law shows that the principle enunciated thus as settled. In *Shiva Bhajan v. Secretary of State,*\(^\text{34}\) a case on tort committed in pursuance to Statutory duty and where damages were not awarded, the above position in contract was supported. Referring to section

\(^{30}\) (1884) I.L.R. 7 Mad. 466 (F.B.).
\(^{31}\) (1882) I.L.R. 5 Mad. 273.
\(^{32}\) Supra note 15 at p. 472.
\(^{33}\) Id at p. 478.
\(^{34}\) (1904) 6 Bom. L.R. 65.
65 of the Government of India Act, 1858 by virtue of which the Secretary of State was to succeed the East India Company’s liabilities, etc., Jenkins, C.J., citing P. & O. case says the Secretary of state was to succeed to debts and liabilities lawfully incurred or contracted.\(^{35}\)

Among the cases under the Government of India Act, 1935, two Privy Council decisions Raugachari v. Secretary of State,\(^{36}\) and, Venkata Rao v. Secretary of State,\(^{37}\) finally established the rule that in India in cases of contract a subject as of right under ordinary law can ‘sue’ the Government without recourse to Petition of Right, Lord Roche who decided both these cases relating to service contracts answered the question to either such action against the Government was well founded as follows: “The answer to the first question seems to their Lordship plainly to be in the affirmative”.\(^{38}\) His Lordship went even one step further,\(^{39}\) when he observed:

“Breach of contract by the Crown can in England be raised by petition of right. The fact that for a different reason, namely, that service under the East India Company at pleasure—a precisely similar suit could not have been brought against the company does not in their Lordships’ view conclude the matter either under clause 2, section 32 of the Act, 1919 or on the reasoning of Sir Bernes Peacock in P. & O. case.” Therefore the Board concluded:

“There Lordship are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of the Contract of service would not have been available to the plaintiff.”

Right to redress against Government in breaches of contract was held to be an established rule based on State morality in Ram Gulam v. U.P. Government,\(^{40}\) where damages were not awarded for the action itself had no indicia of any

\(^{35}\) Id at p. 68.
\(^{37}\) Id at p. 31
\(^{38}\) Id at p. 29.
\(^{39}\) Id at p. 35.
\(^{40}\) AIR. 1950 All, 206.
contract. But the suggestion of sovereign immunity was brushed aside by Seth, J.\(^{41}\)

Among the post-constitution decisions *P.C. Biswas v. Union of India*,\(^{42}\) is a case directly on the point. The plaintiff entered into a contract for the supply of lime for a Government Stone quarry, which came to an abrupt and for non-compliance of the terms on the part of the Government. Allowing the appeal suit, Ram Labhaya, J., referring to constitutional provisions under Articles 299 and 300 reiterated the established view as follows:

“It follows, therefore, that subject to statutory conditions or limits the contractual liability of the State under the Constitution is not only enforceable but it is the same as that of any individual under the ordinary law of contract. No position of privilege has been given to the Government in respect of its contractual liabilities. It stands on the same footing as any other individual.”\(^{43}\)

It is, therefore, submitted that Constitution Act, 1935 & 1919 have determined the liability of the Government in contracts equal to that of East India Company shorn of archiac English remedy by way of Petition of Right. It is again submitted that the judicial decisions which have authoritatively adjudicated the extent of contractual liability of the East India Company are uniform upon the point that in Contracts, its liability was similar to that of an ordinary individual under the law of contract since contract is a specie of non-sovereign activity. The same is the position of the Government too. Further, the only limit within which Government can enter into a contract is that it should not be inconsistent of the mandatory provisions of Article 299 of the Constitution or derogatory to constitutional operation of the State machinery.

\(^{41}\) Id at p. 207.

\(^{42}\) AIR 1956 Assam 85.

\(^{43}\) Id at p. 90.
5.7 Applicability of Section 65 and 70 of the Contract Act, *vis-à-vis* Article 299 (1) of the Constitution

The Supreme Court in *State of West Bengal v. B.K. Mondal* has considered the possibility of the application of Sections 65 and 70 of Contract Act to the Contracts which are not in compliance of the requirements of Article 299(1) of the Constitution. In order to protect the innocent parties, the Supreme Court in the instant case held that if the Government derives any benefit under an agreement not fulfilling the requisites of Article 299(1) or Section 175 (3) of the Government of India Act, 1935, the Government may be held liable to compensate the other contracting party under Section 70 of the Contract Act on the basis of the quasi contractual liability to the extent of the benefit received. The reason is that it is not just and equitable for the Government to retain any benefit it has received under an agreement which does not bind it. Article 299(1) is not nullified if compensation is allowed to the plaintiff for work actually done or services rendered on a reasonable ground and not on the basis of the terms of the Contract. Gajendragadkar, C.J., rejected the contention that by allowing a State to be sued under Section 70 of the Contract Act the Court would be indirectly enforcing the contract which is void because of disregard of the mandatory provisions of the Constitution. In his view the liability under Section 70 was different from and independent of a true arid contractual liability. After stressing the point that the liability under Section 70 could not arise unless the benefit had been enjoyed voluntarily, the learned judge quoted with approval the following observations of Jenkin, C.J., in *Suchanda Ghosal v. Balram Mardana*.

---

45 Section 70 is as follows: "Where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered.
46 (1911) I.L.R. 38 Cal. 1.
“The terms of Section 70 are unquestionably wide, but applied with discretion they enable the courts to do substantial justice in case where it would be difficult to impute to the persons concerned relations actually created by the Contract.”

However, Mr. Seervai, in his treatise on the Constitutional law, doubts the correctness of the Supreme Court decision in Mondal’s case. He states that the objection to the view taken by Gajendragadkar, C.J., can be best put in the words of Sir Maurice Gawyer:

“It is... difficult to appreciate the common sense of enforcing a contract under the provisions of Sections 65 and 70 where it is expressly forbidden by the Statute governing the corporation.”

He further contends that the Supreme Court has given no reasons for rejecting the argument that having retard to the requirements of Section 175 of the Government of India Act, 1935, the Government lacked the capacity to make a contract in a manner different from that prescribed by that section, and therefore, the decision of the Privy Council in Mohiri Bibi v. Dharmodas Ghosh directly applied. There the Privy Council held that as a minor was incompetent to contract, Section 65 had no application. Sir Maurice Gawyer, Mr. Seervai quoted, said that if the Act under which a corporation exists is mandatory and requires the contract to be under seal, the corporation has no capacity to contract except under seal. Such contracts alleged to be entered into with corporations are neither agreements nor contracts within the meaning of those words as defined in the Contract Act and the same applies to the contracts of the Union and the States which are required to be made indicated by Article 299.

47 Constitutional Law of India, at pp. 809-10
48 Pollock & Mulla, Indian contract and Specific Relief Act, 13th edn. 2006 vol I and II.
49 Lexis Nexis Butterworths Nagpur at p. 354.
49 Ibid.
50 (1903) 30 I.A. 114.
It is submitted that the Supreme Court’s decision is not only in keeping with the requirements of justice but is also logically correct. Statutory provisions in relation to the contractual capacity of an artificial entity like a corporation or State may be of three kinds. They may intend in the interest of documental authenticity, or they may be necessary to define the identity of an artificial personality, or they may define the area and functions of that entity and thereby may delimit its capacity. In the last two cases the contract will be void for the violation of such provisions. However, a clear distinction between the two must be noticed. In the second case the contract is void because it is not a contract at all by that entity, whereas in the latter case the contract is void because it is beyond the power of that entity to enter into such a contract. Where a contract is void because of the second type of infirmity there cannot be any logical objection to the applicability of Sections 65 and 70 in such cases. It is only where a contract is void because it is ultravires that entity that the reasoning of the Privy Council decision in Mohari Bibee v. Dharmodas Ghosh\(^1\) on minors contract is applicable.

Whatever be the merits of the decision of the Supreme Court in Mondals case, it has been followed by the Supreme Court in New Marine Coal Co. v. Union of India.\(^2\) The Supreme Court in both the cases has adopted the view on practical considerations also. Modern Government is a vast organisation. Officers have to enter into a variety of petty contracts, many a time orally or through correspondence without strictly complying with Article 299(1).

If in such a case what has been done is for the benefit of the Government and for its use and enjoyment and is otherwise legitimate and proper, Section 70 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contracts have not been made as required by Article 299. If Section 70 was to be held inapplicable, it would had to extremely unreasonable consequences and may even hamper the day-

\(^{1}\) Ibid.
\(^{2}\) AIR 1964 S.C. 152.
to-day working of the Government. Like ordinary citizen even the Government is subject to the provisions of Section 70 of the Contract Act. The basis of Section 70 of the Contract Act is the equitable doctrine of restitution and not any implied contract. In the Mondal’s case, a Government official requested a contractor to construct a building for the Government, accepting his tender for the same. The building was constructed and accepted. When the contractor was not paid, he filed a suit against the Government for the recovery of the amount. The Government pleaded that the request in pursuance of which the building was constructed was unauthorised and that there was no privity of contract between the State and the contractor. The Supreme held that the contract did not fulfil the requirements of Article 299(1) and as such was not enforceable, but the State was still liable to make good the loss suffered by the contractor under Section 70 as a quasi-contract. Section 70 lays down three conditions, namely, (i) the person should lawfully do something for another person or deliver something to him; (ii) in doing so, he must not act a gratuitously; and (iii) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. In the instant case, all the three elements were satisfied and so the Government was liable. Similarly, if under the contract with the Government, a person has obtained any benefit, he can be sued for the dues under Section 70 though the contract does not conform with Article 299.53

The Supreme Court again considered the question of the applicability of Section 70 in Mulamchand v. State of Madhya Pradesh.54 Following the Mondal’s case, the Supreme Court, in the instant ease, held that the provisions of Section 70 can be invoked by the aggrieved party to the void contract, if all the conditions of Section 70 are satisfied, the Section imposes upon the latter the liability to make compensation to the former in respect of, or to restore the thing so done or delivered.

54 AIR 1968 SC 1218.
But the Supreme court has made it clear that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the Contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person. So where a claim for compensation is made by one person against another under Section 70, the justice basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi—contract or restitution. Thus, applying these principles, it is manifest that a person whose contract is void for non-compliance with Article 299(1) of the Constitution would be entitled to compensation under Section 70 if he had adduced evidence in his support.

Relying upon these cases the High Court of Madhya Pradesh in *State of Madhya Pradesh v. Jhankar Singh*, held that where an agreement does not comply with the requirements of Article 299(1), the party to the contract is entitled to relief under Section 70 if the three conditions mentioned in the section are satisfied.

In the instant case, the plaintiff in whose favour a contract was executed by the Forest Department for sale of the forest produce brought a suit for recovery of instalments paid under the contract after deducting the profits earned by him contending that the contract was invalid. It was held by the High Court that the burden was on the plaintiff to show how much he had earned from the forest, as then alone he would be entitled to the balance outstanding from the instalments paid.

### 5.8 Agency in Government Contract

Whenever a contract is entered into by any person other than the President or the Governor personally, the President or Governor stand in the position of a principal and that other person in the position of an agent. The Constitution wider Article 299 requires that the agent should be authorised by the principal

---

55 AIR 1973 M.P. 274.
and he should enter into contract in the name of the principal. To this extent Article 299 follows the normal principles of the law of agency. Under the private law of agency the principal is bound by every act done by the agent under his actual or ostensible authority, and these acts of the agent, which are done by him in the name of the principal without either actual or ostensible authority, may be subsequently ratified by the principal. Thus, where a contract made by an agent is not binding upon he principal because it is beyond or in excess of the agents authority, it is open to the principal, (certain conditions being satisfied) to ratify the act of the agent, and, if it is so ratified, the contract would be binding upon the principal in the same manner as if it had been made with his previous authority. It was on this principle that in a very old case, namely, Collector of Masulipatnam v. Venkata, it was held that a contract made by a public official in excess of his authority may be binding upon the Government if it is subsequently ratified. Also an agent may be held personally liable either for breach of warranty or under the contract.

In Government contracts the actual authority of the agent will be generally found in the notifications published in the official gazettes. But the Supreme Court has also held that such an authority can be ad hoc. In State of Bihar v. Karam Chand Thappar, Mr. Iyer, J., observed: “It was further argued for the appellant that there being a Government notification of a formal character, we should not travel outside it and find authority in a person who is not authorised there under. But Section 175(3) of the Government of India Act, 1935, does not prescribe any particular mode in which authority must be conferred. Normally, no doubt, such conferment will be by notification in the official gazette, but there is nothing in the section itself to prescribe authorisation being conferred ad hoc on any person, and when that is established, the requirements of the section must be held to be satisfied.”

---

56 (1861) 8 M.I.A. 529.
58 Supra note 53.
59 Id at p. 20.
So far as the application of the doctrine of ostensible authority in case of public agent is concerned, there is very little authority to draw any conclusion. In *State of Madras v. S.A. Husain*,\(^60\) the Madras High Court quoted with approval Story’s observation that the doctrine of ostensible authority did not apply to public servants. But this was unnecessary in view of the finding of the Court that the respondent was actually not misled. In India, the Supreme Court is ready to imply ad hoc authority from oral evidence and attendant circumstances and in face of official notifications to the contrary, there is much scope for holding that the question of the authority of the public agent may be a question of fact.

In so far as ratification is concerned, before 1968, a judicial view was expressed that though, ordinarily, the Government could not be sued on informal contracts, yet the Government could accept the responsibility for them by ratifying them.\(^{61}\) Certain observations of the Supreme Court in *Chaturbhuj v. Moreshwar*,\(^{62}\) however, created some confusion on this point. The actual decision in this case has been explained by the Supreme Court in subsequent cases,\(^{63}\) is that though a contract which is in contravention of article 299(1) is void and unenforceable against the Government, it is not a nullity for collateral purposes, e.g., for determining whether a person entering into such a contract has disqualified himself for purposes of election under the provisions of Representation of the People Act, 1949. But, in coming to this conclusion, Bose, J., speaking for the court observed:

> “It may be that Government will not be bound by the contract in that case, but that is very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially that was for the benefit of Government.”\(^{64}\)

---

\(^{60}\) AIR 1963 Mad. 140.

\(^{61}\) *N.Purkayastha v. India* AIR 1955, Ass. 33.

\(^{62}\) AIR 1954 S.C. 236.

\(^{63}\) *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779.

\(^{64}\) Supra note 53 at p. 507.
But the Supreme Court in *Mulamchand v. State of Madhya Pradesh*\(^{65}\) has again taken a rigid view of article 299(1) and has held that there is no question of ratification or estoppel by or against the Government in case of a contract not conformity with article 299(1). The reason given is that article 299(1) has not been enacted for the sake of form and the formalities of article 299(1) cannot be dispensed with. If the plea of the Government regarding estoppel or ratification is admitted, that would mean repeal of an important constitutional provision intended for the protection of the general public.

### 5.9 Unjust Enrichment: Modern Approach

(i) There must be public or Common Law duty—the law was that mandamus would lie only to enforce a duty which is public in nature. Therefore, a duty private in nature and arising out of a contract was not enforceable through the writ. It was on this basis that in *CIT v. State of Madras*,\(^{66}\) the court refused to issue mandamus where the petitioners wanted the Government to fulfil its obligation arising out of a contract. However, in *Gujarat State Financial Corpn. v. Lotus Hotel*,\(^{67}\) the Supreme Court issued writ of mandamus for the specific performance of a contract to advance money. In this case, the Gujarat Financial Corporation, a government instrumentality, had sanctioned a loan of Rs 30 laths to Lotus Hotel for the construction but later on refused to pay the amount.

A public duty is one which is created either by a statute, rules or regulations having the force of law, the Constitution, or by some rule of common law.\(^{68}\)

The public duty enforceable through mandamus must also be an absolute duty. Absolute is one which is mandatory and not discretionary. Therefore in

\(^{65}\) Supra note 49 at p. 356.

\(^{66}\) AIR 1954 Mad 54.

\(^{67}\) (1983) 3 SCC 379.

\(^{68}\) *Commr. of Police v. Gordhandas*, AIR 1952 SC 16.
Manjula Manjari v. Director of Public Instruction, the court refused to issue mandamus against the Director of Public Instruction compelling him to include the petitioner’s textbook in the list of approved books because it was a matter at the complete discretion of the authority. However, if the authority is under law obliged to exercise a discretion, mandamus would lie to exercise it in one way or the other. Mandamus would also lie if the public authority invested with discretionary powers abuses the power or exceeds it, or acts malafide. Mandamus, thus, is issued to compel performance of public duties which may be administrative, ministerial or statutory in nature. A statutory duty may be either directory or mandatory. A statutory duty, if intended to be mandatory in character, is indicated by the use of the words “shall” or “must” but this is not conclusive as “shall” and “must” have, sometimes, been interpreted as ‘may’. Therefore, what is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the statute in which the duty has been set out. Even if the duty is not set out clearly and specifically in the statute, it may be implied as co-relative to a right. If in the performance of this duty, the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the court may issue mandamus to that authority to exercise its own discretion.

Writ of mandamus along with suitable directions can be issued by the court for the protection and enforcement of fundamental rights. Mandamus cannot be issued to enforce administrative directions which do not have the force of law, hence it is discretionary that the authority accept it or reject it. But where the administrative instructions are binding, mandamus would lie to enforce them.

---

69 AIR 1952 Ori 344.
70 Alcock Ashdown & Co. v. Chief Revenue Authority, 50 IA 227.
As discussed above, the provisions of Article 299 (1) of the Constitution (Section 175(3) of the Government of India Act, 1935) are mandatory and if they are not compiled with, the contract is not enforceable in a court of law at the instance of any of the contracting parties. In these circumstances, with a view to protecting innocent persons, courts have applied the provision of Section 70 of the Indian Contract Act, 1872 and held the Government liable to compensate the other contracting party on the basis of quasi-contractual liability. What Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of the fact the something was done by one party for the other and the said work so done has been voluntarily accepted by the other party. Thus Section 70 of the Contract Act prevents ‘unjust enrichment’. This doctrine is explained by Lord Wright in Fobrosa v. Fairbairn in the following words:

“Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which is against great conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has called quasi-contract or restitution.”

The doctrine applies as much to corporations and the Government as to private individuals. The provision of Section may be invoked by the aggrieved party if the following three conditions are satisfied. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing

75 Chatturbhaj Vithaldas v Moreshwar Parasharam. AIR 1954 SC 236.
76 (1942) 2 All ER 122.
77 Id. at p. 135.
or delivering the same thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these three conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Thus, in *State of W.B v. B.K. Mondal*,78 at the request of a government officer, the contractor constructed a building. The possession was obtained by the officer and the building was used by the Government, but no payment was made to the contractor. It was contended that as the provisions of Article 299(1) of the Constitution had not been complied with, the contract was not enforceable. The Supreme Court held that the contract was unenforceable but the Government was liable to pay to the contractor under Section 70 of the Indian Contract Act, 1872 on the basis of quasi-contractual liability. Gajendragadkar, J. (as he then was) rightly stated: “In a sense it may be said that Section 70 should be read as supplementing the provisions of Section 175(3) of the Act.”79

It is submitted that the following observations of Bose, J.80 Lay down correct law on the point: “We feel that some reasonable meaning must be attached to Article 299(l). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safe-guarded. On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself” by having recourse to the proper form.

In between is a large class of contracts, probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper

---

78 AIR 1962 SC 779.
79 Id at p. 789.
80 Supra note 75 at p. 817.
form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. If not, its interests are safeguarded as we think the Constitution intended that they should be.”

If a person enters into a contract with the Government and is entitled to certain benefits there under, he can approach a court of law. The question, however, is as to whether he can file a petition under Article 32 or under Article 226 of the Constitution of India, in *R.K. Agarwal v. State of Bihar,* the Supreme Court classified cases of breach of contract in three categories:

(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament. But the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Acts or Rules framed there under and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and the person aggrieved is not statutory but purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

The first type of obligations were held to be enforceable under Article 226 of the Constitution by applying the doctrine of promissory estoppels.

The second category covers those cases where the contract is entered into between an individual and the State in the exercise of some statutory power.

---

81 Ibid.
82 *(1977)* 3 SCC 457.
In these cases, the breach complained of is of a statutory obligation. In such cases, an action of public authority is challenged and hence, a petition is maintainable.

With regard to the third category of cases, the rights of the parties flow from mere terms of the contract entered into by the State and a party to such contract cannot invoke writ jurisdiction of the Supreme Court under Article 32 or of a High Court under Article 226 of the Constitution of India.