CHAPTER III

CONSTITUTIONAL PERSPECTIVES

3.1 Introduction

The constitutional and legal framework for government contracts can be traced from the relevant provisions of the Constitution of India. In the present scenario the state has become the apt example for the source of wealth. In the modern era of welfare state, government economic activities are expanding and the government is increasingly expanding. The government is also assuming the role of dispenser of large number of benefits. More and More of individual’s wealth today consist of new forms of property.

3.2 Constitutional provisions:

Article 299 in The Constitution Of India

1. All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise

2. Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof
3.3 Indian Constitution provisions and Contracts

Article 299 (1) of the Constitution lays down some valid conditions for the contract which is made in the exercise of the executive power of the centre or a state and they must fulfil certain valid conditions. The general understanding of these conditions are given as follows.

- Such contracts must be expressed and must be made by the President/Governor as the case may be.
- Such contracts made in the executive power are to be executed on behalf of the President/Governor as the case may be: and
- The contracts are to be executed by such persons and in such manner as the President/Governor may direct or authorise.
- The word executed in Art 299 (1) indicates that the contract between the government and any person must be in writing. A mere oral contract is not sufficient for the purposes of Art 299(1).

3.4 Rationale behind Art 299

Contracts entered by governments are delicate and more sensitive when compared with the contracts entered by private person’s. Generally the government may have to follow a specific procedure. These specific procedures have to be definite so as to bind the government legally. The important reasons is to make sure that public fund should be protected and not depleted by clandestine contracts made by and every public servant. That is why it has been provided that state should not be saddled with liability for contracts which do not show on their face that are made on behalf of the state.

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1 ChaturbhyVithal Das Jason vs MoreswarParashram,(1954) SCR 817
2 Bhikraj Jaipuria vs. Union of India, AIR 1962 SC 113
3.4 Procedures and Formalities

The contracts entered by correspondence or by oral contract are accordingly, not binding upon the government. The contracts also fails if the person who executes is not authorised in that behalf under the present Article, by the President or Governor as the Case may be. The total or satisfactory compliance with the requirements of the article can be done only if the contract is executed by a person duly authorised by the President or Governor as the Case may be; and must be authorised by such persons on behalf of President or Governor as the Case may be and must be expressed to be made by the President or Governor as the case may be i.e in the name of the President or Governor.

Generally the courts have taken the position that Art 299(1) has not been inserted in the Constitution of India for the sake of mere form. It’s function is to safeguard the government from being saddled with the liability for unauthorised contracts. The provisions have to be embodied to protect the general public as represented by the government. Many judgements form the Supreme court of India and the High Courts have clearly proved to the fact that the terms and provisions of the Article are not merely directory but mandatory. Thus the contracts which are not in accordance with the provisions of Article 299 (1) cannot be enforced at the instance of any of the contracting parties. The government cannot be sued or the government cannot enforce the contract against the contracting parties if in case the procedures stipulated by the Constitution of India is not followed.

The Supreme Court of India has also observed that there can be no implied contract between the government and another person. The mandatory compliance requirement of Art 299 rules out all possibility of an implied contract with the

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3 Kaishimi Jrthabhai Somayya vs State of Bombay, AIR 1964 SC 1714 (1721)
4 ChaturbhyVithal Das Jason vs Moreswar Parashram, (1954) SCR 817
5 K.P.Chowdhry vs State of M.P, AIR 1967 SC 203
government and any other person. If the contract between the government and any other person is not in full compliance with Article 299 (1), it would be no contract at all and could not be enforced either by the government or other person as a contract\textsuperscript{6}. The Supreme Court has also held that if implied contracts between government and other persons are permitted then it would make Art 299 a dead letter as the person who had the contract with the government which was not executed at all in the manner provided in Art 299 could get away by pleading that an implied contract be inferred from the fact and circumstances of the case. In \textit{Malunchand vs State of Madhya Pradesh}\textsuperscript{7} the Supreme Court of India have taken a very tough and rigid stand. The judicial intelligence arising out of the Supreme Court verdicts with reference to Art 299 have created a view that the rigid and tough stand taken by the Supreme Court of India will always create problems to the practical world which face the necessary situations to implement the contractual obligations. There is also a necessity to enter into oral contract for the purpose of the day to day existence of the government. At times, contracts are entered through either oral or correspondences. Practicalities of Administrative action at times demand certain contracts to be executed without much observance to constitutional necessities. The motivating factor for judicial attitude under the Indian Constitution is to protect the government from unconstitutional contracts and on the other hand to safeguard the interest of unsuspecting and unwary parties who enter into contract with the government officials without fulfilling all the formalities laid down in the constitution.

The twin approach of protecting the day to day machinery of the government on one hand and to save the funds of the exchequer making the constitutional and judicial perspective very complicated. In India there are many examples where many judgments are given in favour of the state which has not actually followed the

\textsuperscript{6} AIR 1968, SC 1218

\textsuperscript{7} Ibid
constitutional mandate. In some cases the courts have also passed the view that some formalities have to be followed and complete observation of the constitutional principles is not necessary. In these cases the courts have taken the view that substantial compliance alone is necessary or mandatory. Many jurist have stated that the judicial view is oscillating between liberal and rigid interpretation of Article 299 of the Indian Constitution. A contract to be valid under Article 299 has to be in writing. It does not however mean that there should always be a formal legal document between the government and other contracting party. There can be a valid contract through correspondence or through offer and acceptance if all the legal conditions under Article 299 (1) of the Constitution of India is fulfilled. The Supreme Court of India in *Union of India vs Rallia Ram*\(^8\) states that the constitutional provisions under Article 299 (1) of the Constitution of India stipulates that only a formal document can bind the government of India in a contractual obligation. But the same court also held that in the absence of any direction by the President or Governor as the case may be prescribing the manner in which a contract has to be executed, a valid contract may result in the correspondence between the parties concerned.

The Supreme court also held that a tender may be considered as valid provided the purchase of the goods in pursuance of an invitation by, and acceptance be in writing which is expressed to be made in the name of the President and executed on his behalf by a person authorised for the purpose would conform to the requirement of Article 299 (1) of the Constitution of India. In *Union of India vs N.K.Pri Ltd*\(^9\) the Supreme court has held that the correspondence between the parties ultimately resulting in the acceptance note was held to amount to a contract. This means that a binding contract by tender and acceptance can come into existence if the acceptance is made by a person duly authorised in this behalf by the President.

\(^8\) AIR 1963 SC 1685  
\(^9\) AIR 1972 SC 915
3.5 Service agreements

In *RanjitKumar vs State of West Bengal*, the Supreme Court of India has observed the following. The first point is that in order to claim the Constitutional protection under Article, the plaintiff must have a proper and binding contract of service with the defendant. Such a contract of service must comply with the formalities prescribed by Article 299 of the Constitution, that is, it must be executed on behalf of the President or the Governor by an officer empowered in that behalf. Admittedly in the instant case there is no such contract of appointment in the prescribed form. It is contended by Mr. K. C. Mookerjee that in the absence of such a contract in the prescribed form, the plaintiff is precluded from obtaining a declaration from the court that the plaintiff is a Govt. servant. Mr. Mookerjee has cited a decision of this Court in the case of *Subodh Ranjan vs Major N. A. O' Callaghan*, in which Bose, J. held that a person whose service agreement is not in conformity with the requirement of Section 175(3) of the Government of India Act, 1935 and Article 299 of the Constitution, is not a servant of the Union of India and as such he cannot take advantage of Article 311(2) of the Constitution. His Lordship has held that the provisions of the section and the Article to be mandatory and not directory.

The question has to be decided, first, whether the employment of the Government servant is contractual, second, whether such employment requires a formal document in writing as prescribed by Article 299 of the Constitution and third, whether in the absence of such a formal employment the Government servant loses his status of being a Government servant and forfeits the protection guaranteed by the Constitution under Article 311(2). The point raised is very serious and deserves very careful consideration. It may be granted that the origin of Government service is contractual. There is an offer and acceptance in every case. Once appointed, however,

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10 AIR 1958 Cal 551
11 AIR 1956 Cal.532
the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statutory Rules framed and altered unilaterally by the Government. But does service under the Government require a formal document in every case? Except in the case of covenanted service or in a very small number of cases where there is employment on special terms, there is no formal document. Usually Government service starts with nothing more than a letter of appointment and except in the case of a microscopic minority, there is nothing more. After appointment, the name of all employee is included in the Civil List and in the case of some officers, the appointments are gazetted. Their salary is paid out of the consolidated fund. This state of affairs has been continuing ever since the Government of India was taken up by the Crown after the Sepoy Mutiny. This is so notorious that the Court is bound to take judicial notice of this fact as also the fact that the successive legislatures, British Parliament and Constituent Assembly, who are responsible for the framing of the Indian Constitution, knew of this state of affairs. In my judgment, the various provisions of the Constitution must be read in this background.

The second point to be noted is that the terms of service and emolument of a Government servant are not determined by contract. They are to be found in statutory Rules and can be varied unilaterally by the Government without the consent of the Government servant concerned. Regarding the rights of a Government servant, there are Constitutional provisions which, on the one hand, makes it terminable at the pleasure of the President of the Union or Governor of a State and, on the other, restricts that pleasure by express Constitutional provisions - which restrictions' amount to very valuable constitutional guarantees. Articles 310 and 311 contain these constitutional provisions regarding Government servants.
The relationship between the Government and its servants is clearly not like an ordinary contract of service between a master and a servant. It is something different. In the case of a Government servant, even though Government service starts with a contract of employment, after appointment the Government servant acquires a status defined and regulated by law and rules by the Constitution itself. The relationship between the Government and its servants was never intended to be regulated nor in fact is regulated by contract. The stringent provisions as to contract as found in Article 299 have, therefore, to be applied with a great deal of caution in the case of Government servants. Looked at from this view and in the background of facts hereinbefore stated, I think that the Constitution framers never intended that there must be a formal contract of employment in the case of every Government servant and such formal contract must comply with the formalities prescribed by Article 299 of the Constitution. It was never intended by the framers of the Constitution that in the absence of a formal contract of employment in the prescribed form, a Government servant, who was drawing his pay out of the consolidated fund, would not be entitled to Constitutional guarantee under Article 311(2) or would not be entitled to enforce his right in a Court of Law. In the case of *H. S. Bedi vs Government of Pepsu, AIR 1953 Pepsu 196(C)*, Teja Singh, C. J., makes the following observation at page 199:

"I am prepared to concede that when a Government offers a job to a person and the latter accepts it or when a person applies for a job and the Government agrees to appoint him on that job, there comes into existence a sort of agreement between the Government on one hand and the person concerned on the other, but I am not convinced whether such an agreement would come within the purview of the term 'contract' used in Article 299. The most important thing to note in this connection is

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12 *AIR 1953 Pepsu 196(C)*
that all persons employed by a State or the Union, except those appointed under Clause (2) of Article 310, hold office during the pleasure of the President or the Governor, as the case may be and not by virtue of any kind of contract. This is definitely laid down in Clause (1) which says:

Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union, or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

Then taking into consideration the fact that Article 299 forms part of Part XII which relates to finance, property, contract and suits, I am inclined to think that the operation of Article 299 is limited to contracts relating to property, etc. and in case of persons who join regular service of the Union or a State it is not necessary at all that they should enter into any kind of contract. The object of a contract is to regulate the mutual rights and duties of the parties and as regards persons who are in regular service of a Union or a State their rights and duties are laid down in the Constitution and the rules of service framed by the Government under the powers given to them by the Constitution".

In Union of India vs Jyotiirmoyee\(^\text{13}\) the Calcutta High Court held that the plaintiffs contract of service cannot be enforced as it contravened the provisions of Section 175(3) of the Government of India Act, 1935 and/or Article 299 of the Constitution of India. This Bench after examining large number of decisions for and against such contention came to the conclusion that the contract of service with the

\(^{13}\) AIR 1967 Cal 461
government officers cannot be struck down for non-compliance with the said provisions.

3.6 Statutory contract and Article 299

The general view is that Article 299 does not apply to statutory contract which means that contracts made in exercise of statutory powers and not general executive powers. In Sate of Harayana vs Lalchand\[^{14}\] the Supreme court of India held that here is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Under Art.299 (1), three conditions have to be satisfied before a binding contract by the Union or the State in exercise of the executive power comes into existence:

1. The contract must be expressed to be made by the President or the Governor, as the case may be.
2. It must be executed in writing. And
3. (3) the execution thereof should be by such person and in such manner as the President or the Governor may direct or authorize. There can be doubt that a contract which has to be executed in accordance with Art. 299(1) is nullified and becomes void if the contract is not executed in conformity with the provisions of Art. 299(1) and there is no question of estoppel or ratification in such case. Nor can there by any implied contract between the Government and another person.

In HarShanker & Ors. vs The Deputy Excise & Taxation Commissioner & Ors.,\[^{15}\] this Court held that the writ jurisdiction of the High Courts under Art.226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purpose of selling the exclusive right to vend

\[^{14}\] AIR 1984 SC 1326
\[^{15}\] 1975 AIR 1121
liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was interpreting the provisions of the Punjab Excise Act, 1914 and of the Punjab Liquor Licence A Rules, 1956 and speaking for the Court, said:

"The announcement of conditions governing the auction were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by the prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them.

The powers of the Financial Commissioner to grant liquor licence by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned, by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal right and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

To the same effect are the decisions of this Court in State of Haryana & Ors. vs Jage Ram & Ors.\textsuperscript{16} and the State of Punjab vs M/s Dial Chand Gian Chand & Co.\textsuperscript{17} laying down that persons who offer their bids at an auction to vend country liquor

\textsuperscript{16} 1971 AIR 1033
\textsuperscript{17} 1962 AIR 496
with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of and acceptance of their bids by a petition under Art. 226 of the Constitution.

The observations in HarShankars case, supra, did not touch upon the question whether such a contract must be in compliance with Art. 299 (1) of the Constitution. The question whether the process of licensing by public auction of liquor vend involves a contract at all or is merely the grant of a privilege and the bidding at a public auction is with a view merely to fix the price for the purchase of the privilege, has been engaging the attention of the High Courts for quite some time. In Smt. Nanhibai vs The Exercise Commissioner, M. P. & Ors. the Madhya Pradesh High Court held that the State Government has the exclusive privilege of manufacturing, selling and possessing intoxicants which it has power to lease for consideration under s. 18 of the M.P. Excise Act, 1915 and that every auction of excise contract for sale of intoxicants is a leasing of the Government's right of selling intoxicants. P.V. Dixit, C.J. speaking for the Court made the following observations on this point which are pertinent:

"The principle that the State Government has exclusive right of manufacturing, selling or possessing intoxicants or, any country liquor intoxicating drug runs through ss. 13 to 18 of the Act. The important condition that must be satisfied before any licence can be granted to a person for manufacture or sale by any country liquor intoxicating drug is that the person must first obtain the privilege or the right of manufacturing or selling the intoxicating drug. In every auction sale of a liquor shop at which liquor is sold in wholesale, or retail, there is a sale of the lease of the Government's right of selling country liquor intoxicating drug. On the acceptance of a bid of a person at an auction sale, contract for the demise of the Government's

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18 AIR (1963) MP 352.
interest is brought into existence and this is 'followed by the grant of a licence to the person whose bid has been accepted'.

These observations of the learned Chief Justice have since been approved of by a Full Bench of the High Court in *Ram Rattan Gupta vs State of M.P*\(^{19}\). The other two cases on the point which we must notice are: *Ajodhya Prasad Shaw & Anr. vs State of Orissa & Ors.*\(^{20}\) and *M/s Shree Krishna Gyanoday Sugar Ltd. & Anr. v. State of Bihar & Anr.*\(^{21}\)

In *Ajodhya Prasad Shaw's case, the Orissa High Court and in M/s. Shree Krishna Gyanoday's case*, the Patna High Court interpreting like provisions of the Bihar & Orissa Excise Act, 1915 held that where the State Government in exercise of its powers under s. 22\(^{22}\) of that Act grants exclusive privilege to any person on certain conditions under s. 22 (1) and a licence is received by that person under s. 22 (2), it cannot be contended that it amounts to a contract made in exercise of the executive power of the State within the meaning of Art. 299 (1) of the Constitution. R.N. Misra, J. speaking for the Court in Ajodhya Prasad Shaw's case tried to highlight the problem in these words:

"Law is well settled and parties before us do not seek to canvass that this constitutional requirement is not mandatory. In the field it covers it is a prerequisite to bring into existence a valid contract. The question for examination in the present case is, however, different. Is there a contract at all? and in case it involves a contract is it one purported to have been made in exercise of the executive power of the State Government? The learned Judge went on to say:

\(^{19}\) AIR 1974 MP 101  
\(^{20}\) AIR 1971 Ori 158  
\(^{21}\) JT 1996 (7)  
\(^{22}\) Contract caused by mistake of one party as to matter of fact.—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.
"In case the result of our investigation is that it is not a contract in exercise of the executive power of the State in terms of the language used in the Article, it would follow that this constitutional requirement has no application. I have already indicated that the settlement of the shop, the collection of the fee and the grant of the licence are all statutory acts by the prescribed authority. The intention of the Constitution is not to extend the principles in Art. 299 (1) to cover all possible contracts. This is why specific reference has been made to contracts "in exercise of the executive power". It is not necessary for the present purpose to examine whether the licensing process involves a contractual agreement. Possibly there is an element of contract in the settlement, but certainly it is not one entered into in the executive power of the State but is regulated by the statute or the rules made thereunder. In the circumstances in the case of a statutory licence even based upon a contract the requirements of this Article can not be invoked."

In M/s. Shree Krishna's case, supra, N.P. Singh, J speaking for the Court rightly observed that when the State Government in exercise of its powers under s. 22 of the Act grants the exclusive privilege of manufacturing, or supplying or selling any intoxicant like liquor to an person on certain condition, there comes into existence a contract made in exercise of its statutory powers and such a contract does not amount to a contract made by the State in exercise of the executive powers.

There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Under Art. 299(1), three conditions have to be satisfied before a binding contract by the Union or the State in Exercise of the executive power comes into existence : (1) The contract must be expressed to be made by the President or the Governor, as the case may be. (2) It must be executed in writing. And (3) The execution thereof should be by such person and

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23 Supra note 21
in such manner as the President or the Governor may direct or authorize. There can be no doubt that a contract which has to be executed in accordance with Act. 299(1) is nullified and becomes void if the contract is not executed in conformity with provisions of Art. 299(1) and there is no question of estoppel or ratification in such cases. Nor can there be any implied contract between the Government and another person: *K.P. Choudhary vs State of M.P.*, *Mulamchand vs State of M.P.*, *State of M.P. vs Rattan Lal* and *State of M.P. vs Firm Gobardhan Dass Kailash Nath*.

It is well settled that Art. 289(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Art. 299(1) has no application to a case where a particular statutory authority, as distinguished from the Union or the States enters, into a contract which is statutory in nature. Such a contract, even though it is for securing the interests of the Union or the States, is not a contract which has been entered into lay or on behalf of the Union or the State in exercise of its executive powers. In respect of forest contracts which are dealt with by this Court in *K.P. Choudhary's, Mulamchand's, Rattan Lal 's and Firm Gobardhan Dass's cases*, supra, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Act. 299(1), whereas under the Punjab Excise Act, 1914; like some other State Excise Acts, once the bid offered by a person at an auction-sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. It is settled law that contracts made in exercise of statutory powers are not covered by Art.

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24 1967 AIR 203  
25 1968 AIR 1218  
26 1967 MPLJ 104  
27 AIR 1973 SC 1164
299(1) and once this distinction is kept in view, it will be manifest that the principles laid down in *K.P. Chowdhary* Mulamchand's, *Rattan Lal's and Firm Gobardhan Dass's* cases are not applicable to a statutory contract. In such a case, the Collector acting as the Deputy Excise & Taxation Commissioner conducting the auction under r.36(22) and the Excise Commissioner exercising the functions of the Financial Commissioner accepting the bid under r. 36(22A) although they undoubtedly act for and on behalf or the State Government for raising public revenue, they have the requisite authority to do so under the Act and the rules framed thereunder and therefore such a contract which comes into being on acceptance of the bid, is a statutory contract failing outside the purview of Art. 299(1) of the Constitution.

We are clearly of the opinion that in the case of a Statutory contract like the one under the Excise Act, the requirements of Art. 299(1) cannot be invoked. In *A.Damodaran & Anr. vs State of Kerala & Ors*, the Court interpreting s.28 of the Kerala Abkari Act, 1967 which was in parimateria with s.60 of the Punjab Excise Act, 1914 held that even if no formal deed had been executed as required under Art. 299(1), still the liability for payment of the balance of the licence amount due could be enforced by taking recourse to s.28 of the Act. The Kerala High Court rejected the contention of the appellants by holding that the liability to satisfy the dues arising out of a bid was enforceable under s.28 quite apart from any contractual liability and this view was upheld by this Court on the ground that the word 'grantee' in s.28 has a wide connotation to mean a person who had been granted the privilege by acceptance of his bid. It was further held that the statutory duties and liabilities arising on acceptance of the laid at a public auction of a liquor contract may be enforced in accordance with the statutory provisions and that it was not condition precedent for the recovery of an amount due under s.28 of the Act, that the amount due and recoverable should be

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28 1976 AIR 1533
under a formally drawn up and executed contract. This is in recognition of the principle that the provisions of Art.299 (1) of the Constitution are not attracted to the grant of such a privilege to vend liquor under the Act.

In State of U.P. vs Kishori Lal Minocha's case,\(^{29}\) there was re-auction of a liquor vend on the highest bidder's failure to deposit one-sixth of the bid amount as security deposit and the question was whether the State was entitled to recovery in a suit the deficiency on re-auction. The decision in Minocha's case is clearly distinguishable for two reasons: first, there was nothing to show that the bid had been accepted by the Excise Commissioner under r. 359(2) of the U.P. Excise Manual. Further, r. 357 under which the excise authorities put the vend to re-auction had not been published in the official gazette as required by s.77 of the U.P. Excise Act, 1910 and thus had no statutory force. No such question arises in these cases as the liability that is sought to be enforced against the respondents by the impugned notices of demand is a statutory liability in terms of condition 15(1) of the conditions of auction read with r.36(23) of the Rules and the amount is recoverable from them in the manner laid down in s.60 of the Act.

The short question that falls for determination in these appeals is whether the State Government was entitled to realise the difference which the respondents had agreed to pay under the terms of auction of a liquor vend and the amount realised on reauction of the vend, as also the defaulted instalment of the licence fee payable in respect of a liquor vend.

Equally futile is the contention that the respondents had withdrawn their bid and therefore they could not be mulcted for the difference between the amount which they were liable to pay and the amount realized by re-sale of the vend. This is not a case of the type reported in Union of India &ors. vs M/S.Bhim Sen Walati

\(^{29}\) 1980 AIR 680
Ram which laid down the well-settled principle that an offer can always be withdrawn before it is finally accepted and that a conditional acceptance is not an acceptance in law. In Bhim Sen Walati Ram's case, supra, the Court held that the contract of sale was not complete till the bid was confirmed by the Chief Commissioner and till such confirmation the person whose bid had been provisionally accepted was entitled to withdraw his bid and that when the bid was withdrawn before the confirmation of the Chief Commissioner, the bidder was not liable for damages on account of any breach of contract or for the shortfall on the re-sale: It was observed:

"It is not disputed that the Chief Commissioner has disapproved the bid offered by the respondent. If the Chief Commissioner had granted sanction under 'cl.33 of Ex. D-23 the auction sale in favour of the respondent would have been a completed transaction and he would have been liable for any shortfall on the resale. As the essential pre-requisites of a completed sale are missing in this case there is no liability imposed on the respondent for payment of the deficiency in the price."

In HarShanker's case, supra, the Court held that the writ jurisdiction of the High Courts under Art. 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. In dealing with the question, Chandrachud, J. said:

"The powers of the Financial Commissioner to grant, liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ

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30 1971 AIR  2295
31 Supra note 15
petitions be questioned by those who held their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could even have a binding force."

3.7 Personal Liability and Article 299

"A writ of certiorari can only be issued against an inferior Court or against a person or persons who are required by law to act judicially or quasi-judicially. It is a high prerogative writ and its purpose is to prevent a judicial or quasi-judicial body from acting in excess of jurisdiction conferred upon it by law or to see that in exercising its jurisdiction the body acts in conformity with principles of natural justice. Such a writ can never lie to correct executive or administrative acts. An executive or administrative act may be illegal or ultra vires and a subject may challenge it in a Court of law but it cannot challenge it by a writ of certiorari. The very basis and the foundation of the writ that the act complained of must be a judicial or a quasi-judicial act. The right to obtain a writ of certiorari is a very important and valuable right that the subject enjoys. It is by means of this writ that the subject can compel the judicial or quasi-judicial body to act within the four corners of its jurisdiction, and, the Court should not be chary of exercising its jurisdiction to issue writs of certiorari and prohibition and wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals the Court ought to exercise as widely as they can, the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

Further, on their Lordships give the tests for the determination of the question whether the order in question is judicial or quasi-judicial and say:
"In the first place a duty must be cast by the Legislature upon the person or persons who is, or are empowered to act, to determine to decide some fact or facts. There must also be some lis or dispute resulting from there being two sides to the question he has to decide. There must be a proposal and an opposition. It must be necessary that he should have to weigh the pros and cons before he can come to the conclusion. He would also have to consider facts and circumstances bearing upon the subject. In other words the duty cast must not only be to determine and decide a question but there must also be a duty to determine or decide that fact judicially. If the determination or decision of the authority resulted in binding the subject so as to affect his right or impose a liability upon him and if the exercise of the power by the authority is made dependant by the Legislature upon a contingency or a condition which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then, the Court would come to the conclusion that there is a duty upon the authority not only to decide and determine but to decide and determine judicially."

In Chathurbhuj v Moreshwar it was held that "All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President ... and all such contracts... made in the exercise of that power shall be executed on behalf of the President ... by such persons and in such manner as he may direct or authorise."

The contention was that as these contracts were not expressed to be made by the President they are void. Cases were cited tons under the Government of India Acts of 1919 and 1935. Certain sections in these Acts were said to be similar to article 299. We do not think that they are, but in any case the rulings ,under section 30 (2) of the Government of India Act, 1915, as amended by the Government of India Act of 1919

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33 1954 AIR 236
disclose a difference of opinion. Thus, *Krihsnaji Nilkant vs Secretary of State*\(^{34}\) ruled that contracts with the Secretary of State must be by a deed executed on behalf of the Secretary of State for India and in his name. They cannot be made by correspondence or orally. *Secretary of State vs Bhagwandas* and *Devi Prasad Sri Krihhna Prasad Ltd. vs Secretary of State* held they could be made by correspondence. Secretary of State V. O.T. Sarin & Company took an intermediate vie, and held that though contracts in the prescribed form could not be enforced by either side. A claim for compensation under section 70 of the Indian Contract Act would lie. *Province of Bengal vs S. L. Puri* took a strict view and held that even letters headed "Government of India" did not comply with, the rule in section 175 (3) of the Government of India Act, 1935. The Federal Court was called upon to construe section 40 (1) of the Ninth Schedule of the Government of India Act, 1935. It held that the directions in it were only directory and not mandatory, and the same view was taken of article 166 (1)\(^{35}\) of the present Constitution by this court in *Dattatreya Moreshwar Pangarkar vs State of Bombay*.\(^{36}\) None of these provisions is quite the same as article 299. For example, -in article 166, as also in section 40(1) of the Government of India Act of 1935, there is a clause which says that "orders" and "instruments" and "other proceedings" "Made" and "expressed" in the name of the Governor or Governor-General in Council and "authenticated" in the manner prescribed shall not be, called in question on the ground that it is not an "order" or "instrument" etc. 'made" or "executed" by the Governor or Governor-General in Council. It was held that the provisions had to be read as a whole and when that was done it became evident that the intention of the legislature and the Constitution was to dispense with the proof of the due "making" and "execution" when the form prescribed was followed but not to invalidate orders and

\(^{34}\) AIR 1937 Bom.449  
\(^{35}\) Art.166 (1) provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor  
\(^{36}\) 1952 AIR 181 1952 SCR 612
instruments otherwise valid. Article 299(1) does not contain a similar clause, so we are unable to apply the same reasoning here.

This is a type of contract to which section 236(3)\(^{37}\) of the Indian Contract Act would apply. This view obviates the inconvenience and injustice to innocent persons which the Federal Court felt in *J. K. Gas Plant Manufacturing Co., Ltd. vs The King. Emperor*\(^{38}\) and at the same time protects Government. 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 safeguarded. 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 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. In the present case, there can be no doubt that the Chairman of the Board of Administration acted on behalf of the Union Government and his authority to contract in that capacity was not questioned. There can equally be no doubt that both sides acted in the belief and on the assumption, which was also the fact, that the goods were intended for Government purposes, namely, amenities for the troops. The only flaw is that the contracts were not in proper form and so, because of this purely technical defect, the principal could not have been sued. But that is just the kind of case that section 230(3)\(^{39}\) of the Indian Contract Act is designed to meet. It would, in our opinion, be

\(^{37}\) A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

\(^{38}\) 1947 49 BOMLR 591

\(^{39}\) According to Section 230 (3), where the principal, though disclosed, cannot be sued
disastrous, to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form.

It may be that Government will not be bound by the contract in that case, but that is a 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 if that was for the benefit of Government. There is authority for the view that when a Government officer acts in excess of authority Government is bound if it ratifies the excess. Accordingly it was held that the contracts in question here are not void simply because the Union Government could not have been, sued on them by reason of Article 299(1). In State of U.P vs Murli Lal in the present case where the contract was entered into 'Without complying with the requirements of Art. 299 (1) of the Constitution the question of ratification could not arise because on the view which has already been followed such a contract is void and is not capable of ratification. However, we do not wish to express any final opinion on the applicability of S. 235 of the Contract Act to cases where the contract suffers from the infirmity that the requirements of Art. 299 (1) of the Constitution have not been complied with. The reason is that before the High Court no contention appears to have been advanced on behalf of the plaintiff based on S. 235 of the Contract Act nor has the plaintiff's counsel chosen to satisfy us that even if S. 230 (3) was not applicable the decree should be sustained on the ground

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40 AIR 1971 SC 2210
41 Liability of pretended agent.—A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing. —A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing."
that relief could be granted by virtue of S. 235 of the Contract Act. The appeal thus
succeeds and the judgment and decree of the courts below are hereby set aside and the
suit of the plaintiff is dismissed. In the circumstances of the case the parties are left to
bear their own costs throughout.

In Chaturbhuj vs Moreshwar\textsuperscript{42} the contention was that as these contracts were
not expressed to be made by the President they are void. Cases were cited under the
Government of India Acts of 1919 and 1935. Certain sections in these Acts were said
to be similar to article 299. We do not think that they are, but in any case the rulings,
under section 30(2) of the Government of India Act, 1915, as amended by the
Government of India Act of 1919 disclose a difference of opinion. Thus, Krishna
Prasad Ltd vs Secretary of State\textsuperscript{43} ruled that contracts with the Secretary of State must
be by a deed executed on behalf of the Secretary of State for India and in his name.
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enforced by either side, the remedy available against the government through the
Constitution of India for breach of contractual obligation is always a debatable topic.
The issue of whether writ jurisdiction will apply has also been considered in many
cases.

3.8 Public Law Remedy in Government Contracts

The remedy available against the government through the Constitution of
India for breach of contractual obligation is always a debatable topic. The issue of
whether writ jurisdiction will apply has also been considered in many cases.

\textsuperscript{42} AIR 1954 SC 236
\textsuperscript{43} 21 TLR 319
\textsuperscript{44} AIR 1941 All 377
\textsuperscript{45} 11 Lah 375
In *P.K. Banerjee vs L.J. Simonds And Anr.*,\(^{46}\) the contentions raised against the maintainability of the application were: (a) The right of the appellant to the goods is disputed and questions relating to property will not be tried in mandamus proceedings; Mazumdar J. found in respondent's favour upon this contention, basing his conclusion upon the opinion expressed in the judgments at p. 557 in *Kesho Prasad Singh vs Board of Revenue*\(^ {47} \) and at p. 527. In the matter of *Abdul Rasul*\(^ {48}\) the respondents being servants of the Crown, Section 270(1), Government of India Act, prohibits the institution of proceedings against them in respect of any act done or purported to be done in the execution of their duty, except with the consent of the Governor-General in his discretion; such consent not having been obtained, the application cannot prevail. (b) Rule 5, Chap. XXIX of the Rules of this Court, made pursuant to Section 51, Specific Relief Act, requires that, unless otherwise ordered, a rule under Section 46 calling upon a public servant shall also call upon any person to show cause who may be affected by the act to be done or foreborne; the Governor-General is such a person and he has not been called upon or served with the rule nisi ordered in this application and the omission is fatal, *vide Kesho Prasad Singh's case Kesho Prasad Singh vs Board of Revenue*.\(^ {49} \)

In *State of Assam vs Thulsi Sing*\(^ {50} \) the court held that in this particular case it was merely enforcing a statutory provision and not an obligation arising out of contract.

In *Shafulla vs State of U.P.*\(^ {51} \) the court directed the government not to resort to recovery of revenue through revenue recovery methods but to pursue the case as

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\(^{46}\) AIR 1947 Cal 307  
\(^{47}\) 1911 ILR 38 Cal 553  
\(^{48}\) AIR 1915 Cal. 91  
\(^{49}\) ibid  
\(^{50}\) AIR 1964 SC 42  
\(^{51}\) AIR 1961 All 485
ordinary breach of contract. In *Kesho Prasad Singh vs The Board Of Revenue*, the court held that:

In the third place, no order will be made, unless the Court is satisfied that the doing of or forbearing from the act is consonant to right and justice, and such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person against whom the order is sought. In the present case, before the Court could hold that the act sought to be done is clearly incumbent upon the members of the Board of Revenue, we should have to determine that the plaintiff is the rightful owner of the Dumraon Raj estate; but that is the very matter in controversy between the plaintiff and the infant defendant in the regular suit. No doubt, the plaintiff has obtained a decree in the Court of the Subordinate Judge, but the propriety of that decree has to be considered by this Court. It is obviously impossible for this Court to adjudicate, for the purposes of this application, upon the very question in controversy between the parties in the appeal. It is an elementary principle that the title to property will not be tried in mandamus proceedings, and the writ will not be issued, when it is necessary to try or decide complicated or extended questions of fact: *United States vs General Land Office* and *Gregory vs Blanchard*, it has been contended that the application ought not to be entertained, because the specific act required to be done is not to be done within the local limits of the ordinary original jurisdiction of this Court, as no part of the Dumraon Raj estate is situated within such local limits. The learned Counsel on behalf of the petitioner has, however, argued that this circumstance is immaterial, because the members of the Board of Revenue reside within the local limits mentioned, and all that is required is that a notification should he issued by them in the official Gazette that the estate has linen released. The substance of the argument is that the order declaring the infant a ward of Court and directing

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52 1911 ILR 38 Cal 553
53 (1866) 5 Wallace 562
54 (1893) 98 Cal. 311 : 33 Pacific 656
possession to be taken on his behalf was made within the jurisdiction of this Court, and an order for withdrawal of the original order may similarly be directed to be made here. In support of this view, reliance has been placed upon the decision of the Bombay High Court in *Haji Hassam Mahomed*\(^{55}\). This case does support the view that the act required to be done, in so far as it may be done within the local limits of the ordinary original civil jurisdiction of this Court namely, the issue of an order of cancellation of the original order, might, if a good case were made out, be directed under Section 45 of the Specific Relief Act. It is not necessary, however, to deal with this matter in further detail nor to arrive at a final decision upon this point, because the application must fail upon the other grounds mentioned. In our opinion, the Rule must be discharged, and as the application has been wholly misconceived, it must be, dismissed with costs. In *Union of India v. Anglo Afghan Agencies*\(^{56}\) the court observed the following:-

Under our jurisprudence the Government is not exempt from liability to, carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise, solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen. We agree with the High Court that the impugned order passed by the Textile Commissioner and confirmed by the Central Government imposing cut in the import entitlement by the respondents should be set aside and quashed and that the Textile Commissioner and the Joint Chief Controller of Imports and Exports be directed to issue to the respondents import certificates for the total amount equal to 100% of the f.o.b. value of the goods exported by them, unless there is some decision which fails within cl. 10 of the Scheme in question. "The doctrine, involved in this phase of the

\(^{55}\) 1902 4 Bom. L.R. 773  
\(^{56}\) AIR 1968 SC 718
case is often treated as one of estopped, but I doubt whether this is a correct, though it may be a convenient name to apply. It differs essentially from the doctrine embodied in section 115\(^{57}\) of the Evidence Act, which is not a rule of equity, but is a rule of evidence that was formulated and applied in Courts of law; while the doctrine, with which I am now dealing, takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent fraud."

\(^{57}\) Estoppel. —When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. Illustration A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.