CHAPTER-II
CONTRACTUAL LIABILITY OF THE
STATE-CONCEPTUAL CLARITY

2.0 Introduction

The subject of government contracts has assumed great importance in the modern times. Today the state is a source of wealth. In the modern era of a welfare state, government's economic activities are expanding and the government is increasingly assuming the role of the dispenser of a large number of benefits. Today a large number of individuals and business organizations enjoy largess in the form of government contracts, licenses, quotas, mineral rights, jobs, etc. This raises the possibility of exercise of power by a government to dispense largess in an arbitrary manner. It is axiomatic that the government or any of its agencies ought not to be allowed to act arbitrarily and confer benefits on whomsoever they want. Therefore there is a necessity to develop some norms to regulate and protect the individual interest and at the same time to create working environment to exercise the discretion of the Government to extend the contractual benefits to the other parties to the contract.

2.1 Contract - Meaning of the term

A contract is an agreement enforceable by law which offers personal rights, and imposes personal obligations, which the law protects and enforces against the parties to the agreement. The general law of contract is based on the conception, which the parties have, by an agreement, created legal rights and obligations, which are purely personal in their nature and are only enforceable by action against the party in default.¹

¹ Moitra, Law of Contract & Specific Relief, 5th ED, Page 4
Section 2(h) of the Indian Contract Act, 1872 defines a contract as "An agreement enforceable by law". The word 'agreement' has been defined in Section 2(e) of the Act as 'every promise and every set of promises, forming consideration for each other'

2.2 Government Contract

A contract to which the Central Government or a State Government is a party is called a 'Government Contract'.

The Indian Contract Act, 1872 does not prescribe any form for entering into contracts. A contract may be oral or in writing. It may be expressed or be implied from the circumstances of the case and the conduct of the parties.  

But the position is different in respect of Government Contracts. A contract entered into by or with the Central or State Government has to fulfill certain formalities as prescribed by Article 299 of the Indian Constitution.

2.3 'Contracts' and 'Government contracts'

It is true that in respect of Government Contracts the provisions of Article 299(1) must be complied with, but that does not mean that the provisions of the Indian Contract Act have been superceded.

In the case of *State of Bihar v Majeed*\(^3\), the Hon'ble Supreme court has held that;

"It may be noted that like other contracts, a Government Contract is also governed by the Indian Contract Act, yet it is distinct a thing apart. In addition to the requirements of the Indian Contract Act such as offer, acceptance and consideration, a Government Contract has to be complied with the provisions of Article 299. Thus subject to the formalities prescribed by Article 299 the contractual liability of the

\(^{2}\) ibid

\(^{3}\) M.P.Jain, *Indian Constitutional Law*, 5\(^{th}\) Ed;Page1801
Central or State Government is the same as that of any individual under the ordinary law of contract."

As regards the interpretation of contract, there is no distinction between the contracts to which one of the parties is the Government and between the two private parties.\(^4\)

Though there is hardly any distinction between a contract between private parties and Government contract so far as enforceability and interpretation are concerned yet some special privileges are accorded to the Government in the shape of special treatment under statutes of limitation.\(^5\)

Some privileges are also accorded to Government in respect of its ability to impose liabilities with preliminary recourse to the courts. This probably is because of doctrines of executive necessity and public interest.

2.4 Formation of Government Contracts

The executive power of the Union of India and the States to carry on any trade or business, acquire, hold and dispose property and make contracts is affirmed by Article 298 of the Constitution of India. If the formal requirements required by article 299 are complied with, the contract can be enforced against the Union or the States.\(^6\)

Article 299 provides

1. All contracts made in the exercise of executive power of the union or 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

\(^4\) ibid
\(^5\) Navrattanmal vs State of Rajasthan, AIR 1961 SC 1704
\(^6\) Pollock & Mulla, Indian Contract & Specific Relief Acts, 12th Ed, Page 312
executed on behalf of the President or the Governor by such person and in such manner as he may direct or authorize.

2. Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purpose of any enactment relating to Government of India hereto before in force, nor shall any such contract or assurance on behalf of any of them be personally liable in respect thereof”.

Thus Article 299 lays down three conditions which the contracts made in the exercise of the executive power of the Center or a State must fulfill to be valid –

a) The contract must be expressed to be made by the president or the Governor as the case may be;

b) These contracts made in the exercise of the executive power are to be executed on behalf of the President/Governor as the case may be; and

c) The execution must be by such person and in such manner as the President or the Governor of the case as the case may be, may direct or authorize.

The expression "executed" does not by itself contemplate execution of a formal contract by the executing parties. A tender for the purchase of goods in pursuance of a tender notice, notification or statement inviting tenders issued by or on behalf of the President or the Governor, as the case may be, and acceptance in writing which is expressed to be made in the name of the President or Governor and is executed on his behalf by a person authorized in that behalf would fulfill the requirements of Article 299(1). If these requirements are fulfilled, a valid contract may result from the correspondence.7

7 State of Madhya Pradesh vs Firm Gopi Chand Sarju Prasad, AIR 1972 MP 43
It has been held by the Hon’ble Supreme Court in the case of *Bhikaraj Jaipuria vs Union of India*\(^8\)

"it is clear from the words "expressed to be made" and "executed" that there must be a formal written contract…The provisions of Article 299(1) are mandatory in character and any contravention thereof nullifies the contract and makes it void. The provisions of Article 299(1) have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against the unauthorized contracts. The provisions are embodied in the constitution on the ground of public policy on the ground of protection of general public and these formalities cannot be waived or dispensed with."

Where a contract is made by tender and acceptance, the acceptance must be made by a duly authorized person and on behalf of the President, and a valid contract may result from correspondence.\(^9\)

A contract complying with the Article can be enforced by or against the government. It is subject to the general provisions of the contract law, and its terms cannot be changed by resorting to Article 14 of the constitution. A contract not complying with any of the conditions of Article 299(1) of the Constitution is not binding on or enforceable by the Government, and is absolutely void, though not so for collateral purposes, and cannot be ratified. No damages can be claimed for breach unless the contract is complete under this article.\(^10\)

The provisions have been embodied to protect the general public as represented by the government. The terms of the Article have therefore been held to be mandatory and not merely directory. This means that a contract not couched in the

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\(^8\) AIR 1962 SC 113: (1962)2 SCR 880, see also *State of West Bengal vs B.K. Mondal & Sons*, AIR 1962 SC 779

\(^9\) *Union of India vs Rallia Ram*, AIR 1963 SC 1685

\(^10\) *State of Uttar Pradesh vs Kishori Lal*, AIR 1980 SC 680
particular form stipulated by Article 299(1) cannot be enforced at the instance of any of the contracting parties. Neither the government can be sued and held liable for the breach of such a contract nor can the government enforce such a contract against the other contracting party.\textsuperscript{11}

2.5 Implied Contract with the Government

In view of Article 299(1) there can be no implied contract between the government and another person, the reason being that if such implied contracts between the government and another person were allowed, they would in effect make Article 299(1) useless, for then a person who had a contract with the government which was not executed at all in the manner provided under Article 299(1) could get away by saying that an implied contract may be inferred on the facts and the circumstances of the particular case.\textsuperscript{12}

It was held by the Hon'ble Supreme Court in the case of \textit{K.P. Chowdhary vs State of Madhya Pradesh}\textsuperscript{13} that,

"In view of the provisions of Article 299(1) there is no scope for any implied contract. Thus no contract can be implied under this Article. If the contract between the Government and a person is not incompliance with Article 299(1), it would be no contract at all and would not be enforceable as a contract either by the Government or by the person."

The Court justified this strict view by saying that if implied contracts between the government and other persons were allowed, they would in effect, make Article 299(1) a dead letter, for then a person who had a contract with the government which was not executed at all in the manner provided under Article 299(1) could get away

\textsuperscript{11} \textit{Chatturbhuj vs Moreshwar}, AIR 1954 SC 236  
\textsuperscript{13} AIR 1967 SC 203: (1966)3 SCR 919 see also \textit{Chandra Bhan Singh vs State of Bihar}, AIR 1967 Pat 15
by pleading that an implied contract be inferred from the facts and circumstances of
the case.

However, the Courts have also realized that insistence on too rigid observance
of all the conditions stipulated in Article 299 may not always be practicable. Hundreds of government officers daily enter into a variety of contracts, often of a
petty nature, with private parties. At times, contracts are entered through
correspondence or even orally. It would be extremely inconvenient from an
administrative point of view if it were insisted that each and every contract must be
effected by a ponderous legal document couched in a particular form.\footnote{ibid}

The judicial attitude to Article 299 has sought to balance two motivations:

On the one hand, to protect the Government from unauthorized contracts; and

On the other hand, to safeguard the interests of unsuspecting and unwary
parties who enter into contracts with government officials without fulfilling all the
formalities laid down in the Constitution.

A strict compliance with these conditions may be inequitable to private
parties, and at the same time, make government operations extremely difficult and
inconvenient in practice. Consequently, in the context of the facts of some cases, the
courts have somewhat mitigated the rigours of the formalities contained in Article
299(1), and have enforced contracts even when there have not been full, but
substantial, compliance with the requirements of Article 299(1). In effect, it may be
true to say that the judicial view has oscillated between the liberal and rigid
interpretation of Article 299.

A contract to be valid under Article 299(1) has to be in writing. It does not,
however, mean that there should always be a formal legal document between the

\footnote{ibid}
Government and the other contracting party for the purpose. A valid contract could emerge through correspondence, or through offer and acceptance, if all conditions of Article 299(1) are fulfilled.

Under Article 299(1), a contract can be entered into on behalf of the Government by a person authorized for the purpose by the President, or the Governor, as the case may be. The authority to execute the contract on behalf of the government may be granted by rules, formal notifications, or special orders; such authority may also be given in respect of a particular contract or contracts by the President/Governor to an officer other than the one notified under the rules. Article 299(1) does not prescribe any particular mode in which authority must be conferred; authorization may be conferred ad hoc on any person.\footnote{State of Bihar vs Karam Chand Thapur, AIR 1962 SC 110}

\section{2.6 Whether State Is Bound By Statutes?}

\subsection*{1. General}

State performs not only the ‘law and order’ functions, but as a ‘Welfare State’, it performs many non-sovereign and commercial activities. The important question therefore arises, whether the state is subject to same rights and liabilities which the statute has imposed on other individuals. In others words whether the state is bound by a statute and if it is, to what extent the provision of statute can be enforced against the state.

\subsection*{2. English law}

The general principles of common law, ‘no statute binds the Crown unless the Crown was expressly named. In England the Crown enjoys the common law privilege and it is not bound by a statute, unless ‘a clear intention from statute itself or from the express terms of the Crown Proceedings Act, 1947. The maxim ‘King can do no
wrong’. In theory, it is inconvincible that the statute made by the crown for its subjects could bind the Crown itself.

3. Indian law

The principle of common law was accepted in India and applied in some cases. In Provinces of Bombay vs Municipal Corp. of the city of Bombay\textsuperscript{16} is the leading case before independence. The Corporation of Bombay wanted to lay water mains through land which belonged to the Government. The land was acquired by the Crown under the provision of Municipal Act. The municipality had power ‘to carry water mains within or without the city.’ The question was whether the Crown was bound by the statute held that the Government was not bound by the statute.

In Superintendent and Remembrance of Legal affairs W.B vs Corp. Of Calcutta (Corporation of Calcutta II),\textsuperscript{17} the state was carrying on the trade of a daily market without obtaining a license as required by the relevant statute. The Corporation filed a complaint against the state. The Supreme Court was called to decide the correctness or aforesaid decision in Corporation of Calcutta I. By a majority of 8:1, the decision in Corporation of Calcutta I was overruled and it was held that the state was bound by the Statute.

4. Requirement of Government Contract

In England, the Government was never considered as an ‘honest man.’ It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the latter part of the nineteenth century onwards made it intolerable for the Government, in the name of the Crown, to enjoy exemption from the ordinary law. English law has always clung to the theory

\textsuperscript{16} (1947) 49 BOMLR 257
\textsuperscript{17} (1967) AIR 997
that the King is subject to law and, accordingly, can commit breach thereof. As far as 700 years ago, *Bracton* had observed: “The King is not under man, but under God and under the law, because it is the law that makes the King.” Though theoretically there was no difficulty in holding the King liable for any illegal act, there were practical problems. Rights depend upon remedies and there was no human agency to enforce law against the King. All the courts in the country were his courts and he could not be sued in his own courts without his consent. He could be plaintiff but never be made defendant. No writ could be issued nor could any order be enforced against him. As ‘the King can do no wrong’.

Whenever the administration was badly conducted, it was not the King who was at fault but his Ministers, who must have given him faulty advice. But after the Crown Proceedings Act, 1947, the Crown can now be placed in the position of an ordinary litigant. In India, history has traced different path. The maxim ‘the King can do no wrong’ has never been accepted in India. The Union and the States are legal persons and they can be held liable for breach of contract and in tort. They can file suits and suits can be filed against them.

2.7 Contractual Liability

2.7.1 Constitutional Provisions

Contractual liability of the Union of India and States is recognized by the Constitution itself. Article 298 expressly provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and the acquisition, holding and disposal of property and the making of contracts for any purpose.

Article 299(1) prescribes the mode or manner of execution of such contracts. It reads:
“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 authorize.”

2.7.2 Requirements of the Contract

Reading the aforesaid provision, it becomes clear that Article 299 lays down the following conditions and requirements which must be fulfilled in contracts made by or with the Union or a State:

a) Every contract must be expressed to be made by the President or the Governor (as the case may be);

b) Every contract must be executed on behalf of the President or the Governor (as the case may be).

c) Every contract must be executed by a person authorized by the President or the Governor (as the case may be);

The use of the word “executed” in proportions (2) and (3) above, indicates that the contract between the government and any person must be in writing. A mere oral agreement is not valid for the purpose of Article 299(1).

Article 299(1) is mandatory

The courts have generally taken the view that Article 299(1) in the Constitution is based on public policy and for the protection of the general public. In number of cases, the Supreme Court has adopted a strict view of Article 299(1) and has held that the terms of Article 299(1) are mandatory and not directory, that these formalities cannot be waived or dispensed with. Therefore a contract not meeting the conditions stipulated in Article 299(1) becomes nullified and void. Such a contract
cannot be enforced at the instance of any of the contracting parties. Neither can the government be sued and held liable for damages for breach of such a contract, nor can the government enforce such a contract against the other contracting party.

In the case of *K.P. Chowdhary vs State of Madhya Pradesh*,\(^{18}\) at the auction for forest contracts, the appellant signed the sale notice agreeing to abide by the terms of the notice. One of the terms was that if the bidder failed to complete the formalities after the acceptance of the bid, his earnest money would be forfeited, the contract re-auctioned at his risk and any deficiency occurring was to be recoverable from him as arrears of land revenue. In the meantime, a dispute arose between the bidder and the forest department regarding the marking of the trees auctioned. As the dispute was not settled to the satisfaction of the bidder, he refused to complete the contract.

In this case, the admitted position was that a contract complying with Article 299(1) has never been signed. The High Court dismissed the petition as it took the view that an implied contract has arisen as a result of the appellant’s accepting the conditions of auction and that such an implied contract was not hit by Article 299(1) which applied only to written contracts. On appeal, the Supreme Court reversed the High Court. The Apex Court thus ruled that there was no contract between the bidder and state government. The Court reasoned that Article 299(1) being in “mandatory terms”, no implied contract could be spelled out between the government and appellant.

Thus, since *K.P. Chowdhary’s Case*,\(^{19}\) the view has come to be accepted that Article 299(1) is mandatory and that a contract not complying with formalities of Article 299(1) is no contract at all and so is unenforceable in a court of law. But then, at times, the Supreme Court has taken a somewhat relaxed view of compliance with

\(^{18}\) AIR 1967 SC 203

\(^{19}\) ibid
Article 299(1). Insistence on a strict compliance with these conditions may inequitable to private parties, and at the same time, make government operations extremely difficult and inconvenient in practice.

2.7.3 Written Contract

A contract to be valid under Article 299(1), must be in writing. The words ‘expressed to be made’ and ‘executed’ in this article clearly go to show that the must be a formal written contract executed by a duly authorized person. Consequently, if there is an oral contract, the same is not binding on the Government. This is not a mere formality but a substantial requirement of law and must be fulfilled. It, however, does not mean that there must be a formal agreement properly signed by a duly authorized officer of the Government and the second party. The words ‘expressed’ and ‘executed’ have not been literally and technically construed.

In *Chatturbhuj Vithaldas vs Moreshwar Parashram*,20 speaking for the Supreme Court, Bose, J. observed:

“It would, in our opinion, be 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……”

In *Union of India vs A.L. Rallia Ram*,21 tenders were invited by the Chief Director of Purchases, Government of India. R’s tender was accepted. The letter of acceptance was signed by the Director. The question before the Supreme Court was whether the provisions of Section 175(3) of the Government of India Act, 1935 (which were in parimateria with Article 299(l) of the Constitution of India) were

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20 AIR 1954 SC 236
21 AIR 1963 SC 1685
complied with. The Court held that the Act did not expressly provide for execution of a formal contract. In absence of any specific direction by the Governor-General, prescribing the manner or mode of entering into contracts, a valid contract may result from the correspondence between the parties.

The same view was reiterated by the Supreme Court in another case Union of Indian vs N.K.(P) Ltd\textsuperscript{22} wherein the court observed:

“It is now settled by this court that though the words ‘expressed’ and ‘executed’ in Article 299(l) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India.”

From the above observations, it can safely be said that the Constitution does not require any formal document to be executed on behalf of the Government and only then it would constitute a binding agreement. Any form of ‘offer and acceptance’ complying with Article 299 of the Constitution would be a valid and binding contract.

\textbf{2.7.4 Execution by authorized person}

The next requirement is that such a contract can be entered into on behalf of the Government by a person authorized for that purpose by the President or the Governor as the case may be. If it is signed by an officer who is not authorized by the President or Governor, the said contract is not binding on the Government and cannot be enforced against it.

In Union of India vs N.K. (P) Ltd\textsuperscript{23} the Director was authorized to enter into a contract on behalf of the President. But the contract was in fact entered into by the Secretary, Railway Board. The Supreme Court held that the contract was entered into

\textsuperscript{22} (1973) 3 SCC 388

\textsuperscript{23} ibid
by an officer not authorized for the said purpose and it was not a valid and binding contract.

In *Bhikraj Jaipuria vs Union of India*,\(^\text{24}\) certain contracts were entered into between the Government and the plaintiff-firm. No specific authority had been conferred on the Divisional Superintendent, East India Railway to enter into such contracts. In pursuance of the contracts, the firm tendered a large quantity of food grains and the same was accepted by the Railway Administration. But after some time, the Railway Administration refused to take delivery of goods. It was contended that the contract was not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 and, therefore, it was not valid and not binding on the Government.

The Supreme Court, after appreciating the evidence – oral as well as documentary – held that the Divisional Superintendent acting under the authority granted to him could enter into the contracts. The Court rightly held that it was not necessary that such authority could be given ‘only by rules expressly framed or by formal notifications issued in that behalf.’

In *State of Bihar vs Karam Chand Thapar*,\(^\text{25}\) the plaintiff entered into a contract with the Government of Bihar for construction of an aerodrome and other works. After some work, a dispute arose with regard to payment of certain bills. It was ultimately agreed to refer the matter for arbitration. The said agreement was expressed to have been made in the name of the Governor and was signed by the Executive Engineer. After the award was made, the Government contended in civil court that the Executive Engineer was not a person authorised to enter into contract under the notification issued by the Government, and therefore, the agreement was

\(^{24}\) Supra note 1
\(^{25}\) Supra note 16

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void. On a consideration of the correspondence produced in the case, the Supreme Court held that the Executive Engineer had been ‘specially authorised’ by the Governor to execute the agreement for reference to arbitration.

### 2.7.5 Expression in the name of President (Governor):-

The last requirement is that such a contract must be expressed in the name of the President or the Governor, as the case may be. Thus, even though such a contract is made by an officer authorized by the Government in this behalf, it is still not enforceable against the Government if it is not expressed to be made on behalf of the President or the Governor.

*In Bhikraj Jaipuri*, the contracts entered into by the Divisional Superintendent were not expressed to be made on behalf of the Governor-General. Hence, the Court held that they were not enforceable even though they were entered into by an authorized person.

*In Karamshi Jethabhai vs State of Bombay*, the plaintiff was in possession of a cane farm. An agreement was entered into between the plaintiff and the Government for supply of canal water to the land of the former. No formal contract was entered into in the name of the Governor but two letters were written by the Superintending Engineer. The Supreme Court held that the agreement was not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 and, consequently, it was void.

Similarly in *D.G. Factory vs State of Rajasthan*, a contract was entered into by a contractor and the Government. The agreement was signed by the Inspector General of Police, in his official status without stating that the agreement was executed ‘on behalf of the Governor’. In a suit for damages filed by the contractor for

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26 Supra note 1
27 AIR 1964 SC 1714
28 (1970) 3 SCC 874
breach of contract, the Supreme Court held that the provisions of Article 299(1) were not complied with and the contract was not enforceable.

In *State of Punjab vs Om Prakash*, the Executive Engineer, PWD, who was authorised under the PWD Manual to enter into a contract accepted the tender of the contractor for construction of a bridge. The letter of acceptance was signed by the Executive Engineer but was not expressed in the name of Governor. The Supreme Court held that there was no valid contract.

Reiterating the principles laid down in earlier decisions and holding the provisions of Article 299 mandatory and in public interest, the Court ruled that the said formalities could not be waived or dispensed with.

### 2.7.6 Non-Compliance: Effect

The provisions of Article 299(1) are mandatory and not directory and they must be complied with. They are not inserted merely for the sake of form, but to protect the Government against unauthorized contracts. If, a contract is unauthorized or in excess of authority, the Government must be protected from being saddled with liability to avoid public funds being wasted. Therefore, if any of the aforesaid conditions is not complied with, the contract is not in accordance with law and the same is not enforceable by or against the Government.

Formerly, the view taken by the Supreme Court was that in case of non-compliance with the provisions of Article 299(1), a suit could not be filed against the Government as the contract was not enforceable, but the Government could accept the liability by ratifying it.

But in *Mulamchand vs State of M.P.*, the Supreme Court held that if the contract was not in accordance with the constitutional provisions, in the eye of the

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29 AIR 1988 SC 2149  
30 (1968) 3 SCR 214
law, there was no contract at all and the question of ratification did not arise. Therefore, even the provisions of S. 230(3) of the Indian Contract Act, 1872 would not apply to such a contract and it could not be enforced against the government officer in his personal capacity.

2.7.7 Valid Contract: Effect

If the provisions of Article 299(1) are complied with, the contract is valid and it can be enforced by or against the Government and the same is binding on the parties thereto. Once a legal and valid contract is entered into between the parties, i.e. Government, each a private party, the relations between the contracting parties are no longer governed by the provisions of the Constitution but by the terms and conditions of the contract. Article 299(2) provides that neither the President nor the Governor shall be personally liable in respect of any contract executed for the purpose of the Constitution or for the purpose of any enactment relating to the Government of India. It also grants immunity in favour of a person making or executing any such contract on behalf of the President or the Governor from personal liability.

2.7.8 Quasi-Contractual Liability

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 complied 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 provisions 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 any subsisting contract between the parties, but on the basis of the fact that 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.’ Before Section 70 of the Contract Act is invoked, the following conditions must be fulfilled:

a) A person must have lawfully done something for another person or deliver something to him;

b) He must not have intended to do such act gratuitously; and

c) The other person must have accepted the act or enjoyed the benefit.

If these three conditions are fulfilled the section enjoins on the person receiving benefit to pay compensation to the other party.

Before 1947, in common law, the crown could not be sued in a court on a contract. The Crown Proceedings Act, 1947 abolished this procedure and permitted suits being brought against the crown in ordinary courts to enforce contractual liability barring a few types of contracts.

However in India, this view was never accepted and government was liable as an ordinary litigants in court. Section 175(3) of the Government of India Act, 1935 prescribes the requirements for the government liability in contractual obligations, which is reincorporated in Article 299(1) of the Constitution of India.

To bind the government in contractual liability the three requisites must be there, which includes i.e. written contract, execution by authorised person and expression in the name of President. Earlier the Apex Court took the rigid view that these requirements are mandatory and must be complied with. However, in recent times the Court has taken a lenient view in respect of mandatory requirements of Article 299(1).
The doctrine of vicarious liability is based on two maxims

i. Respondent superior (let the principal be liable) and

ii. Qui facit per alium facit per se (he who does an act through another does it himself).

As early as in 1839, Lord Brougham observed: “The reason that I am liable is this, by employing him I set the whole thing in motion and what he does, being done before my benefit and under my direction, I am responsible for the consequences of doing it.”

The Doctrine of Vicarious Liability is based on ‘social convenience and rough justice’.

English law: – in England, under common law, absolute immunity of the Crown was accepted could not be sued in tort for wrongs committed by its servants in their employment. The rule was based upon the well known maxim “the King can do no wrong”. In 1863, in Tobin vs R., the court observed “if the Crown were liable in tort, the principle (the King can do no wrong) would have seemed meaningless”. But with the increase of governmental functions, the immunity afforded to the Crown in tortuous liability proved to be incompatible with the demands of justice.

In Adams vs Naylor,\(^{31}\) the Dicey gave an absurd example. “If the Queen were herself to shoot the P.M through the head, no court in England could take cognizance of act”. The meaning of maxim would mean “king has no legal power to do wrongs.” But the English Law never succeeded in distinguishing between the King’s two capacities- personal political. The time had come to abolish the general immunity of the crown in tort and in 1947 the Crown Proceeding Act was enacted. This Act placed the Government in the same position as a private individual.

\(^{31}\) (1946) 2 All ER 241
2.8 Indian Law

a. General

So far as Indian law is concerned, the maxim ‘the king can do no wrong’ was never fully accepted. Absolute immunity of the Government was not recognised in the Indian legal system prior to the commencement of Constitution and in a number of cases the Government was held liable for tortuous acts of its servants.

b. Constitutional Provision

Under Article 294 (4) of the constitution, the liability of Union Government or a state Government may arise ‘out of any contract or otherwise. The word otherwise suggests that the said liability may arise in respect of tortuous acts also. Under article 300 (1), the extent of such liability is fixed. It provides that the liability of the Union of India or State Government will be same as that of Dominion of India and the Provision before the commencement of the Constitution.

c. Sovereign and Non-sovereign functions

(i) Before Commencement of Constitution

The English law with regard to immunity of the Government for tortuous acts of its servants is partly accepted in India. The High Court observed: as a general rule this is true, for it is an attribute of sovereignty and universal law that a state cannot be used in its own courts without its consent.’ Thus a distinction is sought to be made between ‘sovereign functions’ and ‘non-sovereign functions’ of the state. The State is not liable in tort.

(ii) After Commencement of Constitution

In state of Rajasthan vs Vidhyawati,\textsuperscript{32} a jeep was owned by the Rajasthan for the official use of the collector of a district. The jeep driver bringing back the

\textsuperscript{32} (1962) AIR 933
workshop after repairs. By negligent driving of jeep a pedestrian was knocked down. He died and his wife sued the driver and the state for damages. A constitution Bench of Supreme Court held the State vicariously liable for the rash and negligent act of the driver.

The court held that the rule of immunity based on the English law had no validity in India. After the establishment of the Republican form of Government under the Constitution there was no justification in principle or in public interests that the state should not vicariously be held liable for vicariously for the tortuous acts of its servants.

In *Kasturi lal vs State of U.P.*, a certainly of gold and silver was attached by police authorities from one R on suspicion that was stolen property. It was kept in Government malkhana which was in the custody of Head Constable. The Head constable misappropriated the court. A suit for damages was filed by R against the state for the loss caused to him by the negligence of police authorities of the state. The Supreme Court held that the state was not liable and that police authorities were exercising ‘sovereign functions’. The Constitution Bench of the Supreme Court headed by Gajendragadkar, C.J has observed:

“If a tortuous act is committed by the public servant and it gives rise to claim for damages, the question to ask is: Was the tortuous act committed by the Public servant in discharge of statutory functions or the delegation of sovereign powers of the state to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortuous act will not lie. On the other hand, if tortuous act has been committed by a public servant in discharging of duties assigned to him not by virtue of the delegation of any sovereign power an action for damages would lie.”

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33 (1965) AIR 1039
Distinguishing *Vidyawati*, the court held that: ‘the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of state at all. It appears that the Supreme Court itself was satisfied that *Kasturi Lal* did not lay down correct proposition of law and in these circumstances, in subsequent case either the court did not refer *Kasturi Lal* at all or describing it as ‘not relevant’.

The Court also stated that distinction between sovereign and non-sovereign power no more exists. It all depends on the nature of the power and manner of its exercise. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The functions of state as “sovereign and non-sovereign” or ‘governmental and non-governmental’ is not sound. It is contrary to modern jurisprudence thinking. Since the doctrine has become outdated and sovereignty now vests in the people, the state cannot claim any immunity and if a suit is maintainable against the officer personally, there is no reason to hold that it would not be maintainable against the state.

**2.9 Position Around The World**

The Latin maxim “*Rex non potest peccare*”, meaning the king can do no wrong was very instrumental in the past in various countries around the world especially in the country we derive our legal legacy from, i.e. Britain. But with the development of legal theories and the increasing popularity of the Doctrine of Rule of Law given by *A.V. Dicey*, this maxim was started to be condemned. The rule of law is fundamental to the western democratic order. *Aristotle* said more than two thousand years ago, "The rule of law is better than that of any individual." *Lord Chief Justice Coke* quoting *Bracton* said in the case of Proclamations: “The King himself ought not to be subject to man, but subject to God and the law, because the law makes him King.”
Before the advent of Crown Proceedings Act, 1947 the Crown could not be sued in a court in Britain. This privilege was traceable to the days of feudalism when the lord could not be sued in his own courts which had arisen out of the theory of irresponsibility of the state as propounded by Roman law. But the Crown Proceedings Act, 1947 abolished this procedure and permitted suits being brought against the Crown in the ordinary courts to enforce contractual liability, except a few types of contracts. Hence it is clear now that regular proceedings now lie against the crown for breach of contract, in those cases in which the petition of right earlier lay.

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

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

**2.10 Government Contracts in India**

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

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34 (182 F.Supp 264 E.D. La 959)
individuals. The reflection of the mentioned can be seen in Section 299 of the Constitution of India, 1947.

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

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

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

Article 299 lays down the manner of formation of government contract.

Article 299(1) lays down various conditions for making valid contracts in exercising the executive power of the centre or a state.

The contract must be expressed:

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

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

3. Such contracts made in exercise of the executive power are to be ‘executed’ on behalf of the President/ Governor as the case may be. The word ‘executed’ indicates that a contract with the Government will be valid only when it is in writing. An oral contract is not valid. However it is not mandated to have formal documentation between the Government and the other party. If the requisites under Article 299(1) are fulfilled, a valid contract may be created through correspondence or through offer and acceptance. The word ‘executed’ does not by itself contemplate the execution of formal document in the creation of a valid contract with the Government.
4. The contracts are to be ‘executed’ by such persons and in such manner as the President/Governor may direct or authorise. The contract must be executed on behalf of the Government by a person authorised for this purpose by the President or the Governor, as the case may be. If it is made by a person not authorised by the president or the Governor, the contract will be invalid. Where the Director was authorised to execute contract on behalf of the President, but the contract was entered into by the secretary, the contract was declared invalid as it was entered into by an officer not authorised for the purpose. Article 299 does not prescribe any particular mode in which authority may be conferred; authorisation may be conferred adhoc on any person. Further, the Apex Court made it clear that it is not necessary that authority should be given by rules expressly framed or by formal notification.

2.12 Effect of Non-Compliance

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

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

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

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

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

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

The governmental liability is practically the same as that of a private person, subject, of course, to any statutory provision to the contrary. If the government derives any benefit under a contract which is void for non compliance with the requirement of Article 299(1), the contract will be void and unenforceable but it will
be held liable to compensate the other party under Section 70 of the Indian Contract Act. Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution. Article 299 does not exclude the quasi contractual liability of the state. It does not deprive a person of compensation of the work actually done or services rendered under Section 70 of the Indian Contract Act.

It is a liability that arises on equitable grounds even though express agreement or contract may not be proved. If Sec. 70 were to be held inapplicable, it would lead to extremely unreasonable consequences and may even hamper the working of the Government.

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

It is to be noted that for the purpose of Sec. 70 the services or delivery must not be imposed on the other party. The other party has option to accept or reject it. The acceptance and enjoyment of the thing done or delivered must be voluntary. If the agreement with the government is void as the requirement of the Article 299(1) have not been complied with, the party receiving the advantage is bound to restore it or to make compensation for it to the person from whom he has received it. Thus, if a contractor enters into an agreement with the Government for some work and receives payment thereof and the agreement is found to be void as the requirement of the Article 299(1) have not been complied with, the Government can recover the amount advanced to the contractor under Sec. 65 of the Indian Contract Act.
2.13 Doctrine of Public Accountability

The concept of public accountability is a matter of vital public concern. All the three organs of the government- legislature, executive and judiciary are subject to public accountability.

a. Doctrine Explained

It is settled law that all discretionary powers must be exercised reasonably and in larger public interest. In *Henley vs Lyme Corporation*\(^{35}\) Best C.J stated: – “Now I take it to be perfectly clear, that if a public officer, abuses his office, either by an act of omission or commission and the consequence of that is an injury to an individual an action may be maintained against such public officer.”

In various cases, the Supreme Court has applied the above principle by granting appropriate relief to aggrieved parties or by directing the defaulter to pay damages, compensation or costs to the person who has suffered. Very recently in *Arvind Datttaraya vs State of Maharashtra*,\(^{36}\) the Supreme Court set aside an order of transfer of a public officer observing that the action was not taken in public interests but was a case of victimization of an honest officer. ‘it is most unfortunate that the Government demoralize the officers who discharge their honestly and diligently and brings the persons indulging in black marketing and contra banding liquor.”

b. Personal Liability

A breach of duty gives rise in public law to liability which is known as “misfeasance in public office”. Exercise of power by minister and public officers must be for public goods and to achieve welfare of public at large. Wherever there is abuse of power by an individual, he can be held liable.

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\(^{35}\) (1828) EngR NG 701
\(^{36}\) (1997) 6 SCC 169
In *Common Cause A Registered Society vs Union of India*\(^{37}\) the petroleum Minister made allotment of petrol pumps arbitrarily in favour of his relatives and friends. Quashing the action, the Supreme Court directed the Minister to pay fifty lakh rupees as exemplary damages to public exchequer and fifty thousand rupees towards costs.

In *Lucknow Development Authority vs M.K Gupta*,\(^{38}\) the Supreme Court rightly stated: – When the court directs the payment of damages or compensation against the state the ultimate sufferer is the common man. It is the ‘tax payers’ money which is paid for inaction of those who are entrusted under the act to discharge those who are under the act to discharge their duties in accordance with law. It is therefore necessary that the Commission when it is satisfied that a complaint is entitled to compensation mental agony or oppression, which finding should be recorded carefully on material and convincing circumstance and not lightly, it further direct the department concerned to pay the amount to the complaint from the public fund immediately. But at the same time, personal liability should be imposed on erring officers only after giving notice and affording reasonable opportunity of being heard.

C. Judicial Accountability

The doctrine of public accountability applies to judiciary as well. An essential requirement of justice is that it should be dispensed as quickly as possible. It has been rightly said: “Justice delayed is justice is justice denied.” Delay in disposal of cases can be recommended. Whereas comments and criticism of judicial functioning on matters of principles, healthy aids for interpretation and improvement, the functioning of the court in relation to a particular proceeding is not permissible.

\(^{37}\) (2205) Insc.512)

\(^{38}\) (1994) 1 SCC 243
2.14 Doctrine of Estoppel

a. Meaning

The doctrine of promissory or equitable estoppels is well settled in administrative law. Wade states that: “The basic principle of estoppels is that a person who by some statement or representation of facts causes another to act his detriment in reliance on the earth of it is not allowed to deny, even though it is wrong. “Justice here prevails over truth.” Garner states that: “A person may be precluded (estoppel) in legal proceedings from denying the existence of some state of facts the existence of which he has previously asserted, intending the other party to the proceedings to rely on the assertion.

b. Nature and Scope

Estoppel is often described a rule of evidence, but more correctly it is a principle of law. Though commonly named as promissory estoppels, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is equity. It is invoked and applied to aid the law in administration of justice. But for it great many injustices may have been perpetrated.

c. Illustration

The above principle is embodied in section 115 of the Indian Evidence Act, 1872. It provides: “when one person 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.”

The illustration section read as under:

“A, intentionally and falsely leads B to believe that certain lands belong 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 time of sale he had no title. He must not allow prove his want of his title.”

d. Leading Cases

In Robertson vs Minister of Pension,\(^39\) an army officer claimed a disablement on account of war injury. The War Officer accepted his disability as attributable to military service. Relying on this assurance R did not take any steps which otherwise he would have taken to support his claim. The Ministry refused to grant the pension. The court held the Ministry liable.

In Union of India vs Anglo Afghan Agencies,\(^40\) the historic case, ‘Export Promotion Scheme was published by the Textile Commissioner. It was provided in the said scheme that the exporters will be entitled to import raw material up to 100 percent of the value of goods the exports. Relying on this representation, the petitioner exported goods worth about rupees 5 lakhs. The Textile commissioner did not grant the import certificate for the full amount of goods exported. No opportunity of being heard was given to the petitioner. The Supreme Court held that the Government was bound to carry out the obligations undertaken in the Scheme. Even though the scheme was merely executive in nature and even though the promise was not recorded in the form of formal contract as required by the article 299(1) of the Constitution, still it was open to a party who had acted on a representation made by the Government to claim that the Government was bound to carry out the promise made by it.

In Motilal Padampat Sugar Mills vs State of U.P,\(^41\) the Government of Uttar Pradesh announced that new industrial units in the State would be granted exemption

\(^39\) (1949) 1 K.B. 227
\(^40\) (1968) AIR 718
\(^41\) (1979) AIR 61
from payment of sales tax for a period of three years. The petitioner approached to the High Court but failed. On appeal, the Supreme Court said (Bhagwati, J):

“It is elementary that in a republic governed by the rule of law, no one high or low, is above law. Every one is the subjects to the law as fully and completely any other or the Government is no exception. It indeed the pride of constitutional democracy and rule of law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law claim immunity from the doctrine of promissory estoppel.”

In *Jit Ram vs State of Haryana the Municipal Committee of Bahadurgarh,* it was resolved by the municipality in 1916 to purchase plot in mandi. The municipality decided to levy octori duty and the said action was challenged inter alia on the ground of estoppel. Virtually dissenting Motilal Sugar Mills’ case, the court rejected the contention holding that the doctrine of estoppel could not be invoked.

Regarding *Jit Ram*, Bhagwati, and C.J. rightly observed: “we find it difficult to understand how a Bench of two Judges in *Jit Ram* Case could possibly overturn or disagree with what was said by another bench of two judges in Motilal Sugar Mills case. If two judges in *Jit Ram* case found themselves unable to agree with the law laid down in Motilal Sugar case, they could have referred *Jit Ram* case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of law laid down by a coordinate Bench of the same court in Motilal Sugar Mills.”

The court further observed that the law laid down in Motilal Sugar Mills was correct and did not approve the observations of *Jit Ram* to the extent that they were contrary to earlier decision.

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42 1980 AIR 1285
e. Estoppel against Statute

The doctrine cannot be used against or in favour of the administration so as to
give de facto validity to ultra vires administrative acts.

In *Howell vs Falmouth Boat Construction Co*, the relevant statute required a
license to do ship repair work. An assurance was given by the designated official that
no such license was necessary. The plaintiff sued for payment of work done by him. It
was argued that the work days illegal as no written license was obtained by him. The
Court of Appeal decided in favour of the plaintiff on the basis of the doctrine
estoppels. Reversing the judgment of Lord Denning and dismissing the claim of the
plaintiff, the House of Lords pronounced:

“It is certain that neither a Minister nor any subordinate officer of the Crown
can by any conduct or representation bar the Crown from enforcing a statutory
prohibition or from prosecuting for its breach.”

In *Excise Commissioner vs Ram Kumar*, the Supreme Court held that sale of
country liquor which had been exempted from sales tax at the time auction license
could not operate as estoppels against the Government. The Supreme Court observed:

“It is now well settled by a certain catena of decision that there can be no
question of estoppels against the Government in the exercise of its legislative,
sovereign or executive powers.”

f. Estoppel and Public Policy

The doctrine is equitable and, therefore, it must yield to equity and can be
invoked in the larger public interest. If a promise or agreement is opposed to public
policy, it cannot be enforced. Example, a right to reservation to promote interests of
certain backward classes. If a person who does not belong to that class obtains false

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43 (1948) 82 LIL 904
44 (1976) AIR 2237
certificate and gets an employment, and on coming to know about the true facts, has been removed from service, he cannot invoke this doctrine.

g. Estoppel and Public Interest

The doctrine of promissory estoppel is equitable and it cannot be invoked against public interest. It does not apply if the results to be achieved are against public goods. The doctrine must yield to equity.

In Kaniska Trading Co. vs Union of India,\textsuperscript{45} a notification was issued under the Customs Act, 1962 granting exemption from payment of customs duty on certain raw material imported from foreign country. The notification was issued in public interest and it was to remain in force for two years. However, the exemption was withdrawn before the expiry of period again in public interest. The Supreme Court upheld the action.

In Shrijee Sales Corpn. vs Union of India,\textsuperscript{46} the Supreme Court has observed that:- “Once public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases a period has been indicated.”

2.15 Need for Legislation

a) The Present State of The Law

The present state of the law relating to liability of the State in tort in India, it is apparent that the law is neither just in its substance, nor satisfactory in its form. It denies relief to citizens injured by a wrongful act of the State, on the basis of the exercise of sovereign functions – a concept which itself carries a flavour of autocracy and high-handedness. One would have thought that if the State exists for the people, this ought not to be the position in law. A political organisation which is set up to

\textsuperscript{45} (1995) AIR 87
\textsuperscript{46} (1997) 3 SCC 398
protect its citizens and to promote their welfare, should, as a rule, accept legal liability
for its wrongful acts, rather than denounce such liability. Exceptions can be made for
exceptional cases – but the exceptions should be confined to genuinely extraordinary
situations.

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

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

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

Further it was observed in *Ramana Dayaram Shetty vs International Airport Authority*,\(^{47}\) that where the Government is dealing with the public, whether by giving of jobs or entering into contracts or issuing quotas or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

The main principles that emerged out of the above said case are:

a) The Government does not have an open and unrestricted choice in the matter of awarding contracts to whom so ever it likes.

b) The Government is to exercise its discretion in conformity with some reasonable non-discriminatory standards or principles.

c) The Government is bound by the standards laid down by it.

d) The Government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle which in itself is not “irrational, unreasonable or discriminatory”.

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

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

\(^{47}\) (1979) AIR 1628
The government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

g) The government must adhere to, and must not deviate from, the standard laid down by it.

h) The Government ought not to be award the contract to someone not fulfilling the prescribed conditions of eligibility. If the authority does so, its action becomes discriminatory since it excludes other persons similarly situate from tendering for the contract and that would be plainly arbitrary and without reason.

i) The terms and conditions issued in the advertisement inviting tenders cannot be altered to the advantage of a particular person having regard to the fact that if such favourable terms and conditions were known to all other participants, they would have participated in the tender.

j) For execution of any work, tenders must be invited. The contract must be awarded to one of with the lowest tender except when, in a specific case, there are some rational and reasonable grounds.

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

a) Illegality

b) Irrationality

c) Procedural Impropriety

2.16 Writs in Matters of Government Contracts

When it comes to exercise of contractual powers by governmental authorities, the function of the courts is to prevent arbitrariness and favouritism and to ensure that the power is exercised in public interest and not for a collateral purpose.
This has been a question of debate whether one could resort to the writ jurisdiction for imposing contractual obligations on a public authority. The question of breach of contract is one which primarily falls within private law under contract Act, and that the remedy therefore lays in a civil court and not under writ jurisdiction. The implementation and interpretation of a clause in a contract cannot be the subject matter of a writ petition. The contracting parties are not governed by any constitutional provision but by the provisions of the contract act which would determine the rights and obligations of the concerned parties. No question arises regarding the violation of Art.14 or any of the other constitutional provision, when the government acts within the contractual field. The Supreme Court ruled that a party could not claim under Art.226 enforcement of contractual obligation and recover damages. Proper relief for the part would lie to seek specific performance of contract or damages in a civil court. One of the main reasons for this judicial stance was that question of breach of contract would depend on facts and evidence, such seriously disputed question regarding breach of contract ought to be investigated and determined on the basis of evidence which may be led by contesting parties. This can be done in a properly instituted civil suit rather than in a writ petition.

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

The position now is that where the dispute lies within the contractual field pure and simple a writ petition is not maintainable. The relation between the parties is governed by the contract. But contractual obligations may fall under judicial review if there is some public law involved therein. The action of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or

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48 (1991) AIR 537
public character are amenable to judicial review and validity of such an action would be tested on the avail of Art.14.

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

2.17 Force Majeure Based Upon Actions of the State

A party’s obligations under a contract may be discharged where "performance is made impracticable without their fault by the occurrence of an event the non-occurrence of which was a basic assumption" at the time the parties entered into the agreement. A force majeure (or Act of God) is the contract term for such an event. Contracts often contain a force majeure clause in order to specify the parties’ obligations in the case of such an event. A force majeure clause is "a contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. In terms of international law, this may lead to a situation where a state owned company is discharged from its obligations under a contract with a private entity because an action of the controlling state has brought about the event. If a government

49 Restatement (Second) of Contracts, 261 (1996)
50 Black's Law Dictionary, 657 (7th ed.1999)
regulation or order, foreign or domestic, whose non occurrence was an assumption underlying the contract, makes performance impracticable because of compliance, then it will discharge the parties.51

The general understanding is that a state enterprise should be treated in the same manner as a private enterprise being neither privileged nor disadvantaged by its relation to the state.52 However, the aforementioned contract law leads to an inequitable result as applied to a situation where a state enterprise has induced the state into actions that make performance impossible. As a result, arbitration panels will scrutinize the actions of the state closely in order to see whether or not they were taken to benefit the state enterprise. In other words, the state cannot purposefully enact laws and regulations that will allow a state enterprise to be released from an unfavorable contract without consequences. There is no strict definition for state enterprise, but it is often described as "any commercial enterprise predominantly owned or controlled by the state or by state institutions, with or without separate legal personality.53 Generally, the starting point for whether a state enterprise may claim force majeure from public actions of the state is the contract itself.54 If there is an explicit provision regarding situations in which the force majeure clause may be invoked, then the state enterprise will be bound by it. The question of whether a state enterprise may invoke a force majeure clause based upon actions of the state is one that has arisen infrequently. However, certain factors may be extrapolated from the courts’ and arbitration panels’ rationales in the few cases that have discussed the issue. There are three criteria that an arbitration panel may weigh when deciding whether a state enterprise can justifiably invoke the force majeure clause in a contract

51 Supra note 51
52 ibid
54 Ibid
based upon actions of the state that brought about the circumstances that precipitated the force majeure. The three factors are: (1) the state enterprise must possess a legal identity distinct from that of the state in commercial transactions; (2) the state enterprise must not be in collusion with the host state to bring about the action that precipitated the force majeure; and (3) the action of the host state must be either an act of state or a political decision of national sovereignty outside of the state’s purely pecuniary interest in the commercial transaction.55

In order to declare force majeure regarding an action of the state, the state enterprise must first show that it possesses a legal identity separate from the state and that its day-to-day operations are not directly controlled by the state. In other words, the state enterprise must have the ability to unilaterally make binding decisions in commercial transactions. If under the national law of the host country, the state enterprise has a separate legal identity, then it will generally be accepted as an entity separate from the state.56 In Czarnikow Ltd. vs Centrala Handlu Zagranicznego,57 the House of Lords ruled that a force majeure clause in a contract could be invoked where the state enterprise possessed a legal identity separate from the state under its domestic law.58 In 1974, Rolimpex, a Polish state enterprise, entered into a contract with Czarnikow, an English company, for the sale of 11,000 tons of sugar. Only 6,000 tons of sugar were delivered prior to the breach of contract by Rolimpex.59 The contract defined force majeure regarding state actions pursuant to Rule 18(a) of the rules promulgated by the Refined Sugar Association.60 The relevant part of the definition provided for release from contract obligations if delivery was "prevented or delayed directly or indirectly by government intervention . . . beyond the seller’s

55 See K.H. Bockstiegel, The Legal Rules Applicable in International Arbitration Involving States or State-controlled Entities, in 60 years of ICC arbitration, 117 (1984)
56 ibid
57 (1979) AC 351
59 ibid
60 supra note 3
control . . .". In late 1974, the Polish Minister of Foreign Trade and Shipping signed a resolution banning all exports of sugar due to projected shortfalls. Rolimpex was held to be independent from the state enough that it could rely on the ban as a force majeure. The House of Lords noted that, under Polish law, Rolimpex had its own legal personality. Although its actions generally were subject to the Polish Ministers’ abilities to "tell [it] ‘what to do and how to do it,’" Rolimpex unilaterally made decisions regarding its commercial transactions. The company, acting as any private enterprise, obtained sugar from the Sugar Industry Enterprises represented by the Union of Sugar Industries in Poland, and then sold it on the world market for a commission. In another case, the Foreign Trade Arbitration Commission of the Soviet Union heard a dispute over a contract entered into in July 1956, by Jordan Investments, Ltd. (hereinafter "Jordan Inv.") of Israel and All-Union Foreign Trade Corporation (hereinafter "All-Union") to provide 650 tons of heavy fuel oil to Israel.61 In November 1956, the Soviet Ministry of Foreign Trade denied the necessary export license and further barred performance of the contract altogether. The force majeure clause was, in turn, invoked by All-Union. In that case, All-Union possessed a separate legal identity under the laws of the Soviet Union. Article 19 of the Soviet Civil Code and All-Union’s corporate bylaws stated that it was independent of the state and served as a legal person in commercial transactions. However, All-Union was also unconditionally subject to the authority of the Ministry of Foreign Trade. The panel, relying on All-Union’s status under Soviet law, dismissed the complaint because the identification of the corporation with the state lacked foundation. As a result of the dismissal, both the denial of the export licenses and the explicit prohibition against executing the contract were satisfactory to release All-Union from any liability in accordance with the force majeure clause. The state

61 See Jordan Investments, Ltd. vs All-Union Foreign Trade Corp., 27 I.L.R. 631 (1958)
cannot be brought in as a party to the Agreement merely because it approved the project.\textsuperscript{62} The Egyptian General Organization for Tourism and Hotels (hereinafter "EGOTH") and Southern Pacific Properties (hereinafter "SPP") entered into an agreement for the construction of two tourist centers, one of which would be located near the Giza pyramids. Due to a worldwide campaign against the Agreement, the Egyptian government cancelled the project, and declared the area around the pyramids public property. A French appellate court reviewing the decision of the arbitration panel, the International Center for settlement of Investment Disputes (hereinafter "ICSID"), held that the counter-signature of the Agreement by the Minister of Tourism, preceded by the words "approved, agreed and ratified," did not bind Egypt as a party. The Egyptian law governing EGOTH explicitly gave it a separate legal personality regarding commercial transactions. EGOTH also possessed an independent organization, budget, and was subject to the same tax laws as governed private companies. Thus, where a state enterprise has a separate legal identity that may allow it to declare \textit{force majeure} in light of actions by the state, the corporate veil may not be pierced simply because the state approved the contract. Therefore, for the state enterprise to be able to declare \textit{force majeure} regarding an action of the state, it must first have a separate legal identity. That is, it must have the ability to unilaterally enter into binding contracts in commercial transactions. Secondly, the state enterprise must not be in collusion with the state to bring about the action that precipitated the \textit{force majeure}. Under such circumstances, to claim \textit{force majeure} would be an abuse of the machinery of the state. A French appellate court observed that: 'It would be extremely shocking if a national company like Air France or, \textit{a fortiori}, a public organization, were allowed to protect itself behind its public law status in order to evade its contractual obligations . . . If such a solution were accepted, it would

become all too easy for enterprises with a special (public) status to be excused from performing their contracts. It would suffice for them to provoke a withdrawal from authorization and thereafter to rely on force majeure. There would then be no longer any balance nor security in juridical relations.  

In other words, the state enterprise cannot request that the government undertake official actions that will allow them to cancel what may become an unfavorable contract and avoid liability by invoking the force majeure clause. The House of Lords relied heavily on the fact that there was no collusion between the state and its enterprise in holding that Rolimpex could rely on the sugar ban as force majeure. Rolimpex did not induce the sugar ban, and the director and general manager of Rolimpex actually protested the ban when first informed of it by the Ministry. The ban was an action of the state wholly separate from the interests of Rolimpex under the contract.

There was also no collusion between the state and EGOTH in Southern Pacific. On May 28, 1978, the General Investment Authority (hereinafter "GIA"), by resolution, withdrew its prior approval of the Pyramids Oasis Project. The following month, a presidential decree was issued, invalidating a previous decree that had allowed the land on the Pyramids Plateau to be used for "tourist utilization." These actions were taken at the behest of other state agencies. In May 1978, the Ministry of Information and Culture, along with the President of the Egyptian Antiquities Authority, urged the Ministry of Tourism to protect the pyramid site in accordance with the Antiquities Protection Law of 1951. Thus, the actions of the state were pursuant to existing Egyptian law, and were not undertaken at the behest of EGOTH. Thus, as these cases show, the state enterprise must not pressure or work with the

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63 Pierre Lalive, Arbitration with Foreign States or State-controlled Entities: Some Practical Questions
64 See Bockstiegel, Arbitration, supra note 55
65 See Czarnikow, 1978 Lloyd's Rep. at 307
66 See S. Pac. Prop. (Middle East), Ltd. vs Arab Rep., Supra 68
government to obtain state actions that will allow it to cancel an unfavorable contract without liability.

Finally, the actions of the state that prevent the fulfillment of the contract must be a political act of national sovereignty. The government cannot make policy choices that are intended to directly undermine the status of the contract. In other words, the actions taken by the state must be pursuant to its own objectives; they must be outside of its pecuniary interest in the commercial transaction in question. Rolimpex provides an example. In August 1974, Poland suffered heavy rainfall and flooding that destroyed much of its sugar beet crops. Only 1,432,000 tons were actually produced, resulting in a shortfall in the domestic market. In response, the Council of Ministers passed a non-binding resolution to ban all exports and cancel all licenses. Afterwards, the Minister of Foreign Trade issued a similar decision with the force of law. Clearly, the state had independent reason, besides its interest in Rolimpex’s commercial transaction, to ban the export of sugar. In Egypt’s case, ICSID stated that "as a matter of international law, [Egypt] was entitled to cancel a tourist development situated on its own territory for the purpose of protecting antiquities." The right of eminent domain was exercised for a public purpose. The Egyptian Government did not attempt to negotiate a more favorable deal with another company. It was a decision by the state pursuant to its interest in preserving national artifacts and antiquities. Furthermore, the decision by the Soviet Union to ban the implementation of All-Union’s agreement with Israel, although not ruled upon by the arbitration panel as a legitimate state action, had political undertones nonetheless. On October 29, 1956, Britain, France, and Israel invaded Egypt in response to Gamal Abdal Nasser’s nationalization of the Suez Canal, a vital waterway to the West

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67 See Bockstiegel, *Arbitration*, supra note 5, at 46
68 See Czarnikow, 1978 Lloyd’s Rep. at 307
69 S. Pac. Prop., Ltd., 32 I.L.M. at 967
especially in regards to oil imports. The Soviet Union openly opposed the invasion. The ban on oil exports to Israel reflected more the Soviet Union’s interests in the Cold War aspects of the Suez Crisis than its interests in All-Union’s transaction. Thus, a state enterprise cannot avoid liability under the terms of the contract unless the state’s actions, resulting in the force majeure, serve a political purposes, separate from the state enterprise’s transaction. Put another way, the state must have been acting according to its powers of national sovereignty. The policy choices of the state must have been pursuant to its own objectives outside the commercial transaction in question.

2.18 Principles Underlying Contractual Liability of State Reasonableness, fairness

The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterize every State Action, whether it be under the authority of law or in exercise of executive power without making of law.

It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

In the case of Y. Konda Reddy vs StateofA.P, it was held that like all its actions, the action even in the contractual field is bound to be fair. It is settled law that the rights and obligations arising out of the contract after entering into the same is

70 See Bockstiegel, Arbitration, supra note 5, at 46
71 Supra note 46
72 MANU/AP/0018/1997 : AIR 1997 AP 121
regulated by terms and conditions of the contract itself. It is settled principle of law that the Court would strike down an administrative action which violates any foregoing conditions.\textsuperscript{73}

In a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen and the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness and justice demand.\textsuperscript{74}

(2) Public Interest: Public interest is the paramount consideration. There may be situations where there are compelling reasons necessitating the departure from the rule, but there the reasons for the departure must be rational and should not be suggestive of discrimination. Every action of the public authority or of the person acting in public interest or any act that gives rise to public element, should be guided by public interest.\textsuperscript{75} If actions bear insignia of public law element or public character they are amenable to judicial review and the validity of such action would be tested on the anvil of Article 14. Distinction between public law and private law remedy is now narrowed down.\textsuperscript{76} Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.\textsuperscript{77} Person holding public office must exercise his power in public interest and for public good.\textsuperscript{78}

(3) Contractual Liability: Article 299(2) immunises the President, or the Governor, or the person executing any contract on his behalf, from any personal liability in respect of any contract executed for the purposes of the Constitution, or for

\textsuperscript{73} M/Section Pyrites, Phosphates & Chemicals Ltd. vs Bihar Electricity Board, AIR 1996 Pat 1
\textsuperscript{74} (M/Section) Hindustan Sugar Mills vs State of Rajasthan, MANU/SC/0442/1979 : AIR 1981 SC 1681
\textsuperscript{75} ibid
\textsuperscript{76} LIC vs Consumer Education and Research Centre, MANU/SC/0772/1995 : (1995) 5 SCC 482
\textsuperscript{77} Shri Sachidanand Pandey vs State of W.B., MANU/SC/0136/1987 : AIR 1987 SC 1109
\textsuperscript{78} State vs P.C. Mishra, 1995 Supp (4) SCC 139
the purposes of any enactment relating to Government of India in force. This immunity is purely personal and does not immunise the government, as such, from a contractual liability arising under a contract which fulfills the requirements under Article 299(1). The governmental liability is practically the same as that of a private person, subject, of course, to any contract to the contrary.

The Courts have adopted this view on practicable considerations. Modern government is a vast organization. Officers have to enter into a variety of petty contracts, many a time orally or through correspondence without strictly complying with the provisions under Article 299. In such a case, if what has been done is for the benefit of the government for its use and enjoyment, and is otherwise legitimate and proper, Section 70 of the Indian Contract Act, 1872 should step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract in question has not been made as per the requirements of Article 299. If Section 70 was to be held inapplicable, it would lead to extremely unreasonable circumstances and may even hamper the working of government. Like ordinary citizens even the government should be subject to the provisions of Section 70.

Similarly, if under a contract with a government, a person has obtained any benefit, he can be sued for the dues under Section 70 of the Act though the contract did not confirm to Article 299. If the Government has made any void contracts it can recover the same under Section 65 of the Act.

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81 Obligation of person enjoying benefit of non-gratuitous act.- 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.
82 State of West Bengal vs B.K. Mondal, AIR 1962 SC 152; see also New Marine Coal Co. vs Union of India, MANU/SC/0051/1963 : AIR 1964 SC 152
83 State of Orissa vs Rajballav, AIR 1976 Ori 79
All that Section 70 provides is that if the goods delivered are accepted, or the work done is voluntarily enjoyed, then the liability to enjoy compensation for the said work or goods arises. What Section 70 prevents is unjust enrichment and it as much to individuals as to corporations and governments. It needs to be emphasized that Section 70, Contract Act, does not deal with the rights and liabilities of parties accruing from that from relations which resemble those created by contracts.

Article 299(2) immunizes the President, or the Governor, or the person executing any contract on his behalf, from any personal liability in respect of any contract executed for the purposes of the Constitution, or for the purposes of any enactment relating to Government of India in force. This immunity is purely personal and does not immunize the government, as such, from a contractual liability arising under a contract which fulfills the requirements under Article 299(1).85

The governmental liability is practically the same as that of a private person, subject, of course, to any contract to the contrary.86

In order to protect the innocent parties, the courts have held that if government derives any benefit under an agreement not fulfilling the requisites of Article 299(1), the Government may be held liable to compensate the other contracting party under S.70 of the Act, on the basis of quasi-contractual liabilities, 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 plaintiffs for work actually done or services rendered on a reasonable basis and not on the basis of the terms of the contract.

85 *State of Bihar vs Sonabati*, AIR 1954 Pat 513
86 ibid
The Courts have adopted this view on practicable considerations. Modern government is a vast organization. Officers have to enter into a variety of petty contracts, many a time orally or through correspondence without strictly complying to the provisions under Article 299. In such a case, if what has been done is for the benefit of the government for its use and enjoyment, and is otherwise legitimate and proper, Section 70 of the Act should step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract in question has not been made as per the requirements of Article 299. If Section 70 was to be held inapplicable, it would lead to extremely unreasonable circumstances and may even hamper the working of government. Like ordinary citizens even the government should be subject to the provisions of Section 70.87

Similarly, if under a contract with a government, a person has obtained any benefit, he can be sued for the dues under Section 70 of the Act though the contract did not confirm to Article 29988 if the Government has made any void contracts it can recover the same under Section 65 of the Act.89

It needs to be emphasized that Section 70, Contract Act, does not deal with the rights and liabilities of parties accruing from that from relations which resemble those created by contracts. Thus, in cases falling under Section 70, the person doing something for another cannot sue for specific performance of the contract nor can he ask for damages for breach of the contract for a simple reason that no valid contract exists between the parties. All that Section 70 provides is that if the goods delivered are accepted, or the work done is voluntarily enjoyed, then the liability to enjoy compensation for the said work or goods arises. Section 70 deals with cases where a person does a thing not intending to act gratuitously and the other enjoys it.

87 supra note 7
88 State of Orissa vs Rajballav, AIR 1976 Ori 79
89 Pannalal vs Deputy Commissioner, AIR 1973 SC 1174; see also Union of India vs J.K Gas Plant, AIR 1980 SC 1330
Section 70, in no way detracts from the binding character of Article 299(1). The cause of action for the respondent's claim under Section 70 is not any breach of contract by the government. In fact, the claim under Section 70 is based on the assumption that the contract in pursuance of which the respondent has supplied the goods, or made the construction in question, is ineffective and, as such, amounts to no contract at all. Thus, Section 70 does not nullify Article 299(1). In fact, Section 70 may be treated as supplementing the provisions under Article 299(1). What Section 70 prevents is unjust enrichment and it as much to individuals as to corporations and governments.

2.19 Judicial Review in Contractual Matters

Judicial quest in administrative matters has to find the right balance between the administrative discretion to decide matters contractual or political in nature, or issues of social policy and the need to remedy any unfairness. A State need not enter into contract with anyone, but when if does so it must do so fairly without discrimination and without unfair procedure; and its action is subject to judicial review under Article 14 of the Constitution of India.90

Where the Government is dealing with the public, whether by way of giving jobs or by entering into contracts or issuing quotas or licenses or granting other forms of largess, it cannot arbitrarily use its power of discretion and in such matters must conform to certain standards or norms which are not arbitrary, irrational or irrelevant.

The principles of judicial review would apply to the exercise of the contractual powers by the Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of that power of judicial review.

90 Eurasian Equipment & Chemicals Ltd vs State of West Bengal, [1975]2 SCR 674, AIR 1975 SC 266
The judicial power of review is exercised to rein any unbridled executive functioning. The restraint has two contemporary significances. 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 hallmark of judicial control over administrative action. Judicial review is concerned with not reviewing the merits of the decision in support of which the application for judicial review is made, but the decision making process itself.

It is not for the Court to determine as to 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 the 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 under:

1. Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

2. Irrationality

3. Procedural impropriety

The above are only the broad grounds but it does not rule out the addition of further grounds in course of time.

With respect to the judicial review of administrative decisions and exercise of contractual powers by Government bodies, the Hon'ble Supreme Court has held,

"The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in the administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness
(including its other facts) but must be free from arbitrariness not affected by bias or actuated by malafides.\(^91\)

While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'. By way of judicial review the Courts cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiries. But at the same time the Courts can certainly examine whether "decision making process" was reasonably rational, not arbitrary and violative of Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available, taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of the selection made for entering into such contract.

But once the procedure adopted by the authority for the purpose of entering into the contract is held to be against the mandate of Article 14 of the Constitution, the Court cannot ignore such action saying that the authorities concerned should have some latitude or liberty in contractual matters and any interference by the Court amounts to encroachment on the exclusive right of the executive to take such decision.\(^92\) The doctrine that the powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which the Parliament has appointed to take the decision. Within the bounds of legal discretion is the area in which the deciding authority has genuinely free discretion. If it passes these bounds, it acts ultra vires. The decisions which are extravagant or capricious cannot be legitimate. But if the

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\(^{91}\) Tata Cellular vs Union of India, AIR 1996 SC 11

\(^{92}\) Sterling Computers Ltd vs M/s M&N Publications Ltd, AIR 1996 SC 51
decision is within the amplitude of reasonableness, it is no part of the Court's function to look further into its merits.93

2.20 Conclusion

The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. The action of the Executive Government should be informed with reason and should be free from arbitrariness. The test of liability of the State should not be the origin of the functions but the nature of the activity carried on by the State. Despite the clear mandate for legislation provided under Article 300, nothing has done in this regard. Even the Government (Liability in Tort Bill), 1967 which was introduced in the Parliament had not been passed due to the resistance of various State Governments.94 The Government was of the view that the financial burden on the State would be more than it could possibly handle. In absence of a clear and concise statute that clearly defined the contractual liability of the State, the pronouncements made by the Judiciary assume all the more importance. Judicial quest in administrative matters has to find the right balance between the administrative discretion to decide matters contractual or political in nature, or issues of social policy and the need to remedy any unfairness. A State, when it enters into a contract, must do so fairly without discrimination and without unfair procedure; and its action is subject to judicial review under Article 14 of the Constitution of India. The judicial power of review is exercised to rein any unbridled executive functioning. The restraint has two contemporary significances. 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.

93 ibid
These restraints bear the hallmark of judicial control over administrative action. Judicial review is concerned with not reviewing the merits of the decision in support of which the application for judicial review is made, but the decision making process itself and therefore judicial review can be a sufficient tool to decide the ambit of contractual liability of the State.

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