

## GOVERNMENT CONTRACT: ISSUES AND CHALLENGES

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**Abstract:** Unlike the law in U.S and also in the most developed countries many ambiguities are there in the provisions of the Indian Constitution (Article 299) regarding the Government contract, the words and expressions of this Article are such ambiguous and confusing that the courts were also interpreted these provisions in many ways. This monograph aim is to highlight such ambiguities and find out the solutions. The state transformed into welfare state from police state, now the functions of the government enlarged and the state now is a protector, provider, entrepreneur, facilitator and also economic controller. The state has to accommodate the urbanization, modernization and globalization in the competing world, the government functions are mainly based on contracts, in the day to day life in the implementation of several policies the contracts are playing important role. If specific provisions in the constitution or a specific law in this area is provided it would be a great help for the government authorities as well as to the contractors.

**Key words:** Constitution, Contract, Interpretation, welfare state

**Introduction:** The purpose of the government is to regulate the life of the community to avoid conflict and promote wellbeing. The legislation by appropriate authorities gives compulsory norms of conduct for this purpose. But the entire field of activities may not be covered by such legislative norms. A large area must be left for regulation through mutual agreement, once the agreement is mutually accepted, it also become normative. This is the area of contract through which the people settle a large part of the relations. So with the government also an area should be left to settle the relations through contracts. Thus the government may obtain property or services through legislative norms or through contracts, in both the cases it will be an aspect of exercising the executive power of the state. The Constitution of India, following the provisions in the earlier Constitution(1) has made specific provision for this. Article 299 makes a specific provision for this;

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

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

The earlier section also clarifies that the executive power for the extent to the carrying on of any trade

or business and making of contracts for that purpose.(2) When the government makes the contract it is an exercise of the executive power vested in the President or the Governor. The formalities for exercising executive power were given in Article 77 and 166 of the Constitution. These articles stipulate that the exercise of the executive power should be expressed to be taken in name of the President or the Governor and authenticated by the persons specified in the rules of business. This authentication is to ensure that the authority of the President or the Governor has been validly entrusted to that person to make it known that the executive action is that of the President or the Governor. Similar requirements are provided for in Article 299. These requirements are 1. The contract shall be expressed to be made by the President or the Governor. 2. The contract shall be executed on behalf of the president or the governor by such person and in such manner as the president or governor may direct or authorize. One point may be noted here. In Article 299 there is no provision for “authenticated in such manner as may be specified” as in the case of Article 77(2) and Article 166(2) regarding the exercise of executive power. This may give rise to doubts as to the formal effects of making a contract and has been noted in the case of *Chaturbhuj Das case*

**Judicial Interpretation:** In Now we shall see how these requirements have been understood and enforced in the courts.

The contracts shall be expressed to be made by the President or the Governor.

In *Chaturbhuj Vihtal Das Jasani vs. Moreswar Parashram*,(3) the question was whether the disqualification by the Election Tribunal of Chaturbhuj Das from contesting election on the ground that there was a subsisting contract with the government was correct. S.7 (d) of Representation

Peoples Act disqualified a candidate if there was a subsisting contract with the government. The defense of Chaturbhuj was that, though there was a contract for supply of goods it was not expressed to be made by the president as required in Article 299. Therefore there was no contract and the supply of goods was also over, though there were some disputes pending. Therefore there was no contract to attract disqualification. The Election Tribunal did not accept this argument and disqualified him. So an appeal was made to the Supreme Court. Supreme Court said that though the contract was not in the proper form (expressed to be made by the president) there was ample evidence to show that the agreement was by the government the supply was received by the government and the parties had also the same understanding. On the face of these facts it was not possible to repudiate the contracts that it was not expressed to be made by the president. The government could ratify such contracts when payment on the basis of contract was necessary. Further even if the government could not be sued as there was no contract as per Article 299, the contract would subsist under Section 230(3) of the Indian Contract Act,(4) according to which a contract will be deemed exist if the principal though disclosed cannot be sued. The court also observed:

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

So the Supreme Court upheld the Election Tribunal and dismissed the appeal. It may be noted that though the validity of the contract was considered in terms of Article 299(1), the court did not enter a finding that written contract was an essential requisite.

A requirement of a contract made in the exercise of the executive power is that it should be expressed to be made by the President or the Governor. This would seem to imply that a contract has to be entered into by a duly authorized person and where the contract is a written one should be authenticated as provided in the Rules of Business to show that it is entered into in the exercise of the executive power of the government.

In *Union of India vs. A.L.Ralia Ram*,(5) the Chief Director of Purchase (disposal) Food Department government of India had invited tenders for the purchase of certain articles. Ralia Ram submitted a tender and an agreement proving for arbitration in case of disputes. Since the government did not accept the arbitration award on the ground that the provision in the contract which provided for arbitration was not in proper form and therefore the government was not bound. The Supreme Court found that on the scrutiny of the papers it could be inferred that the contract was entered into by an authorized person and in the proper form. The government was therefore held liable.

However, the trend of the above decisions has been changed and the courts tended to reach a decision that a contract not in the form according to Article 299(1) would always be void.

In *K.P.Chowadary vs. Madhya Pradesh*,(6) K.P.Chowadary participated in a forest auction. He was successful he signed some initial papers, such as auction notices etc. and made some payment. When some difference came up regarding the marking of trees which was not accepted by the department, he did not execute a contract in the prescribed manner. A re auction was conducted and steps were taken to recover the loss caused to the government. Against the attempt for recovery of money under the Revenue Recovery Act, Chowadary filed a writ petition in the High Court. The High Court held that though a contract was not entered in due form there was an implied contract and Chowadary was bound to pay. Chowadary appealed to the Supreme Court. The Supreme Court held that there was no contract between Chowadary and the government before the auction or after the auction, as required by the Article 299(1) of the Constitution. In view of the mandatory provisions of the Article 299(1) the M.P. Land Revenue Court, s.155 (b), which provided for the recovery of the money falling due to government under any grant or lease or contract, was not applicable. Since there was no contract recovery under the Land Revenue Code was possible.

In *State of U.P vs. Murari Lal*,(6) Murari Lal reserved storage space in his cold storage for keeping potato as negotiated and decided by the U.P. Government officials. When the space was not used, Murari Lal filed a suit to recover rent and for damages. The Trial Court dismissed the suit on the ground that there was no contract under Article 299(1) as against the state; but upheld the claim against some officials. In the High Court, it was held that though the government could not be held liable under s. 230(3) of the Indian Contract Act the government could ratify the contract as mentioned in *Chaturbhuj case*. So government was held liable. On appeal to the Supreme Court it, was held that a contract not

entered into according to Article 299(1) was void and could not be ratified to make the government liable. So the appeal was allowed.

In an earlier case also, *Karamshi Jethabhai Somayya vs. State of Bombay*,<sup>(7)</sup> the Supreme Court came to a conclusion that a contract not in the form of Article 299(1) would not attract any liability for the government. In this case, certain persons were getting water for irrigation under the Bombay Canal Rules under the Bombay Irrigation Act. The supply of water was being made in according to certain instructions issued by the Minister. When the land in respect of which water was being supplied was transferred and the Canal Officer refused to recognize the rights accruing to the transferee, a civil suit was filed. The government of Bombay in their affidavit clarified that no contract had been entered into between the parties and the governor as contemplated in s.175 (3) of the Government of India Act, 1935 (similar to Article 299). On this the District Judge decided that there were no contractual rights which could be enforced in a suit. This was upheld by the Bombay High Court. On appeal the Supreme Court also held that it could not be, hold that either the contract was entered into by the person legally authorized by the Government to do so or expressed to be made in the name of the Governor and that the agreement was void, as it had not complied with the provisions of s. 175(3) of the Government of India Act, 1935.

It is difficult to infer from the above that there should always a written contract to bind the government. All that Article 299 requires is that the contract should be made by the President or the Governor and expressed to so be made and should be executed (performed or carried into effect) by such authorized person. The requirements for making a contract are given in the Contract Act; the only problem when it comes to the government is to make sure that the person who makes the contract should have the executive power properly delegated to him and he should express that the contract is made by the President or Governor. Though a written contract may be desirable for many reasons, it would appear that such a requirement cannot be inferred from Article 299.

2. The contract shall be executed on behalf of the president or the governor: The second requirement mentioned in the Constitution is that the contract shall be executed on behalf of the president or the governor by such persons and in such manner as he may direct or authorize. Here the word 'execute' as given raise to some ambiguity. Normally executing a contract should mean only performing the contract and not making the contract. Thus execution of a decree, execution of an arrest warrant, execution of a will, execution of a plan would refer to the

performance or carrying into effect and not making the instrument involved. But in considering this requirement in the case of a contract some judgments would seem to have taken a position that executing the contract means signing the contract deed by an authorized person. From this it has also been inferred that the contract with the government should be in writing and otherwise it would be void. This stand would be against the stand taken by the Supreme Court in *Chaturbhuj case*. But in cases, where a contract could not be inferred because a written deed was not there, the courts have shown willingness to adopt quasi contractual principles in the interest of justice. We shall now consider some illustrative cases.

In *State of West Bengal vs. B.K.Mondal*<sup>(8)</sup>, Mondal executed certain works for the West Bengal government as requested by the government officials. But a formal contract as required under section 175(3) (corresponding to Article 299) was not entered into. When the disputes arose about the payment, the government repudiated the liability on the ground that no formal contract had been entered into. The High Court also accepted the same stand but held that the government was liable under s. 70 of the Indian Contract Act;<sup>(9)</sup> the Supreme Court also accepted the same stand and dismissed the appeal.

In *Bhikraji Jaipura vs. Union of India*,<sup>(10)</sup> the Bhikraji Jaipuria entered into contract with Divisional Superintendent Eastern Railway and supplied food grains which were accepted by the Railway administration. When the Railways refused to take further delivery, the government took the stand that there was no contract according to S. 175(3) of the Government of India Act, 1935. It also had found that no specific authority had been given to the Superintendent to enter into the contract. When the matter reached the Supreme Court after considering the evidence, it was held that the superintendent was acting under authority granted to him. It was not necessary that the authority could be granted only by express rules or by a formal notification. However since the contract was not expressed to be made on behalf of the Governor General it was not enforceable even though the superintendent was authorized. It may be noted that the words 'executed by such person ...' in Article 299(1) has been taken to mean signing a contractual instrument and not performing the contract as would appear from a reading of the provision.

In a similar strain in *Union of India vs. N.K.(P) Ltd*,<sup>(11)</sup> where the Director of the Railway Board was authorized to enter into a contract but one was entered into by the Secretary of the Railway Board the court held the contract was not valid and binding. In *New Marine Coal Company vs. Union of India*,<sup>(12)</sup> the coal company supplied the coal to the

government under a contract, but the contract was not executed as per Article 299. When some dispute broke out about nonpayment, the government took the stand that it was due to the negligence of the company and in any case since, there was no contract, according to the form in Article 299 the government was not liable. In a suit claiming the amount due, the trial judge favored the coal company but on appeal the High Court reversed the Trial Court. Then the coal company filed an appeal in the Supreme Court. The Supreme Court accepted that since there was no contract in the prescribed manner there was no liability for government. However since the government had accepted the supplies the

liability of the government under s.70 of the Indian Contract Act should be accepted. So the High Court was reversed and the Trial Court was upheld.

**Conclusion:** Though the Constitutional provisions regarding the government contracts has given some guidance regarding the making of government contracts, their application has not given definite guidance as in the case of the formalities in the exercise of executive power in other respects. The principles developed in case law are not clear enough to strike a just balance between public interest and the claims of those who enter into contract with government. Therefore suitable statutory clarifications would seem to be desirable.

### References:

1. The Government of India Act, 1935, Section 175 (3) "Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of
2. the Province, as the case may be, and all such contracts and all assurances of property made in the exercise
3. of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in
4. such manner as he may direct or authorize.
5. Article 298. Power to carry on trade, etc The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose: Provided that (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and (b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament
6. AIR 1954 SC 236.
7. 230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.- In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Presumption of contract to contrary. Such a contract shall be presumed to exist in the following cases: (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; (2) where the agent does not disclose the name of his principal (3) where the principal, though disclosed, cannot be sued.
8. AIR 1963 SC 1685.
9. AIR 1967 SC 203
10. (1971) 2 SCC 449.
11. AIR 1964 SC 1714
12. AIR 1962 SC 779.
13. Sec.70 Where a person lawfully does anything for another person, or delivers anything to him, not intending to do gratuitously, hence such other person enjoys the benefit there of, the later is bound to make compensation to the former in respect of, or restore, the thing so done or delivered.
14. AIR 1962 SC 113.
15. (1973) 3SCC 338; AIR 1972 SC 915.
16. AIR 1964 SC 152.

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