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GOVERNMENT CONTRACTS

Government contracts have become relevant in the light of increased Government's economic activities. The definition of contract in general has been provided under Section 2(h) of the Indian Contract Act, 1827. But when we talk about government contract, it has not been specifically dealt with under any of the provisions of the Contract Act.

Government contract can be defined as any contract where one party is either Central Government or State Government. This contract requires the same conditions to be fulfilled as is required for any other contract, with additional requirement of Article 299(1), Constitution of India. It was affirmed in the case of *State of Bihar v. Majeed*¹, wherein Hon'ble Supreme Court held that, government contracts are also governed by the provisions of Indian Contract Act with respect to offer, acceptance and consideration. But such contracts must comply with Article 299 (1) also. And subject to Article 299 (1), the contractual liability of Central or State Government is same as that of any individual under the ordinary law of contract.

Example, 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). Some privilege is given to the Government on account of doctrines of executive necessity and public interest.

A. Legal Provisions

To trace legal provisions relating to Government contract, Article 298 and 299 becomes relevant. Article 298 deals with the executive power of the Union and of State to carry on trade and business and same has been provided below.

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

¹ AIR 1954 SC 786.

(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.

Next relevant Article is Article 299:

Article 299- Contracts- (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.

It can be briefly summed up as:

Article 299(1) lays down that, a contract to bind the Government must satisfy the following requirements:

- a) Contract must be **expressed** to be made by the President or by the Governor of the State, as the case maybe,
- b) It must be **executed** on behalf of the President or by the Governor of the State, as the case maybe,
- c) It must be **executed** by such person and in such manner as the President or the Governor may direct or authorize.

B. Objective

In *Chatturbhuj v. Moreshawar*², it was held that “in order to bind a Government there should be a specific procedure enabling the agents of the Government to make contracts. The public funds cannot be placed in jeopardy by contracts made by unspecified public servants without express sanction of the law.” Article 299 is therefore, based on the ground of protection of the general public.³

Article 299 (1) does not prescribe any particular mode in which authority must be conferred on a person to execute a contract on behalf of the President/ the Governor. Generally, it is done by Notification in the Official Gazette. It can also be conferred *ad hoc* on any person [*State of Haryana v. State of Punjab*, AIR 2002 SC 685]. Grant of government contract, without publishing advertisement in newspaper having wide circulation, was held to be arbitrary in the case of *Shakti Narain Singh v. Anoop Singh*, AIR 2004 NOC 386 (All.).

² AIR 1954 SC 236.

³ *Mahabir Auto v. I.O.C.*, AIR 1990 SC 1031.

C. Effect of non-compliance of Article 299(1)

The provision of Article 299 (1) is mandatory in nature and any contravention will nullify the contract rendering them void and unenforceable. [*Usha v. Govt. of A.P.*, AIR 2013 SC 132]

It can therefore be said that such requirement cannot be waived by any of the parties. And if there is waiver by either of the party, it will not confer validity upon the invalid agreement. [*Bishandayal v. State of Orissa*, AIR 2001 SC 544]. Therefore, there can be no question of estoppel or ratification also in such cases. Also, in such cases, *doctrine of indoor management* cannot be applied. [*U.P.R.N. Nigam v. Indure Pvt. Ltd.*, AIR 1996 SC 2373].

If a contract is void by reason of non-compliance with the provisions of Article 299(1), the rights of the parties are determined under Section 70 of the Contract Act, 1872. [*Laliteshwar Prasad v. Baleshwar Prasad*, AIR 1966 SC 580].

D. Benefit derived by the Government under the Contract: Application of section 70 of the Contract Act

Many times, the contract is entered into either 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.

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 conform to Article 299. If the Government has made any void contracts it can recover the same under Section 65 of the Act.

E. Judicial review

In *S.P. Communication (P) Ltd. v. Union Of India*⁴, a three-judge bench of the Apex Court ruled that judicial review “to prevent arbitrariness or favoritism and to ensure that the power of awarding contracts is exercised in large public interest and not for any collateral purpose”, cannot be denied.

F. Relevant case

*State of Haryana v. Lal Chand*⁵, the Supreme Court distinguished between contracts made in the exercise of the executive power of the Union or the State and contracts made in the exercise of statutory power. It was held that Article 299(1) applies in the former case and would have no application where a particular statutory authority as distinguished from the Union or the State, entered into a contract which was statutory in nature.

⁴ AIR 2009 SC 1204.

⁵ AIR 1984 SC 1326.

G. Article 299(2)

This clause 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.

In *Subhash R. Acharya v. State of Maharashtra*⁶, it was held that in case the power is exercised arbitrarily by the Minister, the principle of public accountability would apply, making him liable to compensate the State, in case of any loss.

H. Conclusion

It is necessary to establish a balance between two things here: first is to protect the Government from unauthorized contracts; and second is to safeguard the interests of innocent and imprudent parties who enter into contracts with government officials without fulfilling all the formalities laid down in the Constitution.

It has been observed that 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 rigors 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).

⁶ AIR 2008 NOC 2760 (Bom).