

## CALCUTTA HIGH COURT

P.K. Banerjee

Vs

L.J. Simonds

(Gentle ,J.)

09.07.1946

### JUDGMENT

#### **Gentle, J.**

1. The appellant was the petitioner in an application under Section 45, Specific Relief Act. He describes himself as carrying on business in Calcutta in hardware, machinery, mill stores and as a general order supplier. Respondent 1 is an Assistant Controller of Salvage at Head Quarters, Eastern Command; in his affidavit in opposition he states his office is at Tollygunge, a suburb of Calcutta, which is outside the Ordinary Original Civil Jurisdiction of this Court. Respondent 2 is the Regional Commissioner of Disposals of Army Salvage and his office is at No. 6 Esplanade East, Calcutta, within the jurisdiction.

2. The application relates to an alleged sale on 6-12-1945 to the appellant by one Major J. Charnock, Liaison Officer (Disposals) H.Q. 202 L. of C. area, Gauhati, Assam, of 497 tons of unserviceable ferrous scrap, including M.T. parts, lying at No. 103 Salvage Depot 404 area, Chittagong, Bengal, (outside the Court's jurisdiction) at the price of Rs. 7150, delivery of which was refused to the appellant.

3. The relief sought in the petition is for orders of this Court directing the respondents (a) to deliver the stores lying at 103 Salvage Depot Chittagong to the appellant, (b) to forbear from advertising for sale or from selling the stores or from putting them up for sale, and (c) from disposing of, or transferring, or dealing with, the Stores.

4. Majumdar J. dismissed the application and this is the petitioner's appeal against the dismissal. The relevant facts are as follows : By letter dated 16-6-1945 written by the Directorate General of Disposals to the Secretary, War Department, New Delhi, it is stated that the General Officer Commanding In Chief Eastern Command would effect disposals of surpluses and salvage in areas in Assam and Bengal as agent of the Director General of Disposals and he could authorise

Commanders of Formations not lower than sub-areas to act on his behalf. The procedure is set out for local disposals to the public.

5. In his letter dated 27-6-1945 the Master General of Ordnance sent six copies of the above letter to the General Officer Commanding Eastern Command, stating that it delegated to him the powers of disposal of salvage and surplus stores in the forward areas in Assam and Bengal and detailed the procedure which it was necessary to follow in regard to sales. Order No. 9341/6A/Q1 dated 3-7-1945. by Eastern Command addressed to H.Q. 202 L. of C. area, accompanied by four copies of the letter of 16-6-1945, directed that The G.O.C.-in-C. delegates the powers given to him to Comd. 202 L. of C. Area and to sub-area Comds as considered necessary by Comd. 202 L. of C. Area.

6. By letter dated 13 11-1945, headed "Sub-Sale of Salvage under section vehicles in Assam and East Bengal" respondent 1, as Assistant Controller of Salvage Eastern Command, wrote to the appellant requesting him to visit Chittagong where he would be met by Major Charnock, Liaison Officer (Disposals), who would conduct him round the salvage depots in East Bengal after which Major Charnock would arrange for the same kind of tour in Assam.

7. It would seem the tour took place. Thereafter on 6th December the appellant wrote to Major Charnock offering Rs. 7150 for the materials "inspected by us" at 103 Salvage Depot Chittagong being all the ferrous scrap (including M.T. Scrap and all other categories of iron scrap). On the same day Major Charnock replied to the appellant; his letter states that the under section ferrous scraps, including M.T. parts, lying at 103 Sale Depot Chittagong had been sold to him in a lot for Rs. 7150 as per attached 1 A.F.A. 58 and the appellant was requested to credit that amount to the nearest Treasury, Imperial or Reserve Bank. Attached to his letter was a document, 1 A.P.A. 58, called "Sale Account No. 49", dated 6-12-1945, recording the sale to the appellant; the authority for the sale is stated therein to be Eastern Command letter No. 9341/61/Q. 1 dated 3rd July 1945, namely the delegation by the G.O.C.-in-C. of his powers of disposal of salvage and surplus stores to Comd. 202 L. of C. area and to sub-area Comds. The sale price having been duly paid into the Reserve Bank, on 21-12-1945, Major Charnock wrote to O./C. 103, Salvage Depot Chittagong to release the stores to the appellant.

8. On 14th January 1946 the appellant's representative went to 103 Depot at Chittagong to take delivery, which was refused. On 21st January the appellant's solicitor wrote to Eastern Command setting out the appellant's case and demanding delivery. On 23rd January 1946 an advertisement appeared in the "Statesman" news, paper inviting tenders for the purchase of military salvage, including ferrous scrap and M.T. parts lying, amongst other places, in and near Chittagong, intending purchasers to make personal application not later than 7-2 1946 to Head Quarters 404

Area Chittagong. On 29-1-1946 the appellant's solicitors again wrote to Eastern Command inviting attention to their previous letter of 21st January and stating the appellant had seen the advertisement in the "Statesman" and took it that the tenders invited relates to goods not purchased by their client. On 29th January respondent 1 wrote to the Solicitors stating that: The Commander 404 Area was authorised some time ago to effect sales of salvages in his area; it was understood that Major Charnock effected certain sales without the authority of the Commander 404 area which were not valid and had been cancelled; and instructions would be issued to refund the monies deposited.

9. Further correspondence and a discussion followed to which reference is not required. On 14th April an advertisement appeared in the "Statesman" stating that, under instructions of respondent 2, the sale by public auction would take place on 24th April of salvage at Chittagong. Whereupon the appellant instituted his application under Section 45. A rule nisi and an interim injunction were granted on 20th April in respect of 497 tons of ferrous scrap which the appellant alleged to have been sold to him.

10. Meanwhile, on 18 2-1946, the appellant wrote to Major Charnock that he had been informed the sale was not valid as he (Major Charnock) had no authority to sell in 404 area and requesting him to give a letter confirming his authority. On 19th February Major Charnock replied that at the time the sale took place he had authority to sell salvage in 404 area on the instruction of the Director General of Supplies (Disposals) and on the instruction of Brigadier Beresford, Controller of Salvage. On the same day, 19th February, Major Charnock wrote also to a Mr. Kitchener, Director (Disposals)(Vehicles) that he had been given to understand he had no longer any authority to conduct sales in 404 Chittagong Area and in fact he never did have; in order to regularise any tours or negotiations that had taken place in 404 area "could you possibly forward to me copies of any letter which authorised me to conduct sales in that area." No reply to this letter has been exhibited.

11. In the appellant's affidavit in reply he attached copies of some documents, which copies he must have obtained from Major Charnock. According to those copies, in December 1945, Major Charnock gave consent, as Liaison Officer, 202 area, to the sale of some vehicles in 404 area. Amongst the copy documents is that of the letter dated 18-12-1945 from Eastern Command to Head Quarter 404 area stating that the Disposal Liaison Officer 202 area was authorised to sign release orders for salvage sold in 404 area.

12. It is convenient, in the first instance, to consider the question of Major Charnock's authority to sell the surplus and salvage to the appellant. According to the appellant, the contract for sale is the offer in his letter of 6-12-1945 addressed to Major Charnock and the latter's acceptance in his

letter of the same date. The reply letter states that the under section ferrous scrap including M.T. parts lying at 103 sale depot Chittagong had been sold to the appellant for Rs. 7150 as per attached I.A.F.A. 58 together with receivable order.

13. The attached document is the "Sale Account No. 49" and is dated 6th December 1945. The material part states "Account Sale of Government stores sold by order of East Comd. (Eastern Command) letter No. 9341/61/Q1" which is followed by the nomenclature of the articles sold (as expressed in Major Charnock's letter), the quantity as 497 tons, at the rate of Rs. 7150. On the reverse side of the document two signatures are required : (a) that of an officer of the unit to which the stores belong and (b) of the person superintending the sale. Major Charnock signed in both places. The document appears to be the record of the actual sale, without which it could not be effected. The authority given for the sale, Eastern Command's letter No. 9341/61/Q1, is the order by the General Officer Commanding-in-Chief of that Command dated 3-7-1945 by which he delegated his powers of sale to the Commander of 202 Area and to Sub-Area Commands, as considered necessary by the Commander of 202 Area. It is, therefore, the appellant's case that this order was Major Charnock's authorisation; it was the authority upon which that officer purported to act. The materials sold were in 404 Area and must have belonged to that Command or to a Unit in the Command. Major Charnock belonged to 202 Area and did not belong to any Unit in 404 area, nevertheless he signed the document as an officer of the Unit to which the materials belonged.

14. On behalf of the appellant, Mr. P.B. Mookerji contended that Order No. 9341/61/Q1 delegated to the Commander of 202 Area powers to sell surpluses and salvage in 404 Area as well as in 202 Area, and that, by virtue of being the Disposals Liaison Officer in 202 Area, Major Charnock had authority to effect the sale of the materials in 404 Area to the appellant.

15. The head quarters of 202 Area is at Gauhati in Assam, the head quarters of 404 Area is at Chittatong in East Bengal, where the salvage of that area was lying. It is most improbable, to say the least, that one area Commander would be authorised to sell salvage in the area of another Commander. A Commander is responsible for all affairs, including Government stores, in his command and the disposal of stores, whether by sale or otherwise, is a matter for his concern. Ordinarily, an order issued to a Commander relates and is restricted to matters in and under his command. The General Officer Commanding in Chief had powers to sell salvage in Assam, 202 Area and in East Bengal, 404 Area; when he delegated his powers to 202 Area by Order No. 9341/61/Q1 it was unnecessary to state therein that the delegation related to materials in that area since it would follow as a matter of course that the delegated powers related solely to those materials unless the order otherwise provided. There is nothing in the order by which the General Officer's powers to sell salvage in East Bengal, 404 Area, were also delegated to the Commander

of 202 Area; the order is silent regarding 404 Area. There was nothing expressed in the order and there is nothing contained in it from which an implied delegation can arise. If it had been intended that the order was to relate to 404 Area as well as to 202 Area, the order would have expressly so provided; a copy of the order would have been sent to the latter area and a note or direction for that to be done would appear at the foot of the order. There is no such direction at the foot of Order No. 9341/61/Q1. The order does not expressly delegate to 202 Area the General Officer's powers of sale of 404 Area material and there is nothing from which such delegation can be implied. In any event nothing has been forthcoming vesting authority in Major Charnock, to sell material in 404 Area.

16. Major Charnock, it would seem, effected sales of surplus and salvage in 202 Area, which have been recognised and accepted. Reliance was sought to be placed upon those sales as reflecting his authority to sell the materials in 404 Area to the appellant. I am unable to accede to this argument. Action by a person within his authority does not, in the present instance, give a mandate to him to act outside his authority.

17. Mr. P.B. Mookerji contended further that the statement in Major Charnock's letter to the appellant, dated 19-2-1946, that at the time the sale took place he had authority to sell salvage in 404 Area, is evidence that he had authority in that respect and is an admission upon which the appellant can rely as substantiating Major Charnock's authority. No authorisation to Major Charnock from either of the officials mentioned in the letter has been forthcoming. Further, on the date when that letter was written Major Charnock also wrote to Mr. Kitchener requesting to be forwarded copies of any letters which authorised him to conduct Bales in 404 Area. It must follow that, when he wrote to the appellant, Major Charnock had not himself, any written authorisation. A statement by a person, who has acted outside his authority, that he was acting within it, does not give an authorisation to his unauthorised acts. As above mentioned, Major Charnock quoted the order of delegation to 202 Area Commander as authority for the sale of salvage in 404 Area which order, as already pointed out, did not authorise sales in 404 Area. Authority for Major Charnock to effect a sale of salvage in 404 Area is not found in any document or elsewhere.

18. As above stated, in his affidavit in reply, the appellant exhibited some copy documents; evidently they were supplied to him by Major Charnock, but the circumstances and reasons have not been disclosed. These are copies of a telegram and letters, in December 1943, passing between the Commander of 404 Area and Eastern Command, Major Charnock and 404 area and 202 area and include the Eastern Command's letter to H.Q. 404 area dated 18th December 1945. In a telegram from 404 area to Eastern Command, marked "INFO DLO 202 Area", permission was asked to sell two trucks to the civil postal authorities. Major Charnock, as Disposals Liaison

Officer 202 area, wrote to 404 area that the trucks could be sold, and apparently they were sold. No authority for him so to act has been disclosed. Eastern Command's letter to 404 area of 18th December confirmed that Major Charnock was authorised to sign release orders for salvage sold in 404 area. It was argued that he must, therefore, also have had authority to sell. In my view if there had been such authority there would have been no need to confirm he had authority to release. These communications do not establish that either 202 area had been delegated powers to sell 404 area stores or that Major Charneok had such powers. In my opinion order 9341/61/Q1 did not delegate to 202 area authority to sell surplus and salvage in 404 area and did not authorise Major Charnock to sell such surplus and salvage, and there is no authorisation to that officer to make the contract with the appellant.

19. It has now to be considered whether the procedure under Section 45, Specific Belief Act, can be invoked in the circumstances of this case. In the Court below some reliance was placed upon Section 11 of the Act but no contention with regard to that section has been raised here and reference to it is not required. The relevant provisions of Section 45 are as follows:

Any of the High Courts of judicature at Fort William, Madras, Bombay and Rangoon may make an order requiring any specific Act to be done or foreborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office whether of a permanent or a temporary nature.... Provided:

- (a) that an application for such order be made by some person whose property...would be injured by the forbearing or doing (as the case may be) of the said specified act;
- (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such, person...in his...public character....
- (d) that the applicant has no other specific and adequate legal remedy;

Nothing in this section shall be deemed to authorise, any High Court

- (g) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown.

20. Mr. S.B. Sinha, for the respondents, raised objection to the jurisdiction of the Court to entertain the application under Section 45. He pointed out that : The goods are at Chittagong, outside the Court's ordinary original civil jurisdiction, where delivery under the contract was required to be given; the orders of Court sought by the application are for the acts of delivery of the goods, of forbearance from selling or otherwise disposing of them and of forbearance from

advertising them for sale; since, under Section 45-the Court is empowered only to make an order requiring a specific act to be done or forbore-within its territory, the Court has no jurisdiction to make an order in the present instance. Mr. Sinha further contended that respondent 1 is-outside the Court's territory and so far as he is-concerned, that is an additional ground showing want of jurisdiction.

21. Section 45 does not empower the Court to make an order requiring an act to be done or foreborne outside its local jurisdiction. Before an order can be made it must be established that it is incumbent upon the person, against whom the order is sought, to do or to forbear from doing the act, within the jurisdiction; the Court can make an order only with respect to such act. Assuming the appellant's contract to be binding, it required delivery to be given at Chittagong, outside the Court's territory, the appellant has no right to demand, and no one is required to do, the act of delivery at any other place. Since the act to be done is not one within the, jurisdiction, the Court cannot order its doing even when the person against whom the order is sought is within the jurisdiction : vide *Inspector of Municipal Councils v. Venkatanarasimham* 21 A.I.R. 1934 Mad. 140 and the observations of Reilly J. at p. 237. Further, since the Court can only order an act to be done within its jurisdiction, if it made an order requiring delivery to be given to the appellant, the act of delivery would have to be directed to be done within the territory where the appellant has no right of delivery being given to him; he has no personal right of delivery within the jurisdiction which can be the subject of an order of Court requiring an act to be done with regard to it. The Court cannot order the act of delivery to be done at all; it cannot order delivery in Chittagong, as that is an act which is outside its jurisdiction, and it cannot order delivery to be given within its jurisdiction, as the appellant has no right by which he can require such delivery.

22. An order for the doing of the act of deli" very is the main and substantial relief sought in the application. The act of selling, disposing, transferring or dealing with the goods, which is sought to be forbore will take place at Chittagong, and an order with respect thereto is subsidiary to the relief. Since that act, also, is outside the jurisdiction, the same observations apply as have been made with regard to delivery at Chittagong. If the goods were within the territory, where it was intended to sell them, the Court could order forbearance from selling etc. but that order would be effective only within the jurisdiction; but the Court could make a further order forbidding removal, which would prevent a sale taking place elsewhere, as delivery could not then be given to an outside buyer and, thus, complete effectiveness would be afforded to the order forbidding a sale. Even if, in the present case, there were an intention to sell within the territory, which is not apparent, an order forbearing from selling would relate only to a sale within the jurisdiction and it would not be effective as the goods are outside and an order could not be made, as in the ease of goods inside, so as to prevent delivery and thereby give effect to an order prohibiting a sale; in its

discretion the Court would refuse such order.

23. Advertising the goods for sale is merely incidental to selling and to which the same observations apply as have been made in regard to selling. If the Court cannot order delivery of the goods to the appellant, which, as mentioned above, is the main and substantive relief sought by the application, it would, in its discretion, refuse to order forbearance from advertising the goods for sale.

24. In my opinion the Court has no jurisdiction to order the act of delivery to be done or to order the act of selling or advertising for sale in Chittagong to be forborne; it has jurisdiction to make orders of forbearance, so far as its territory is concerned, but since the main and substantive relief of delivery cannot be ordered the Court will not, in exercise of its discretion, order the subsidiary and ancillary acts of selling and advertising to be forborne.

25. As to the question regarding respondent, 1 whether he is within the jurisdiction by reason of the situation of his office. The petition alleges it is at "12 A.B.P.O." which is stated to be at No. 22, Chittaranjan Avenue, an address within the territory. 12 A.B.P.O. is an army post office and is the postal address of units and organisations within its area. In his affidavit respondent 1 states his office is at Tollygunge, which is outside the territory. There is no reason why this statement should not be accepted.

26. Save as to area the jurisdiction of the Court under Section 45, Specific Relief Act, is separate and distinct from that conferred by Clause 12 of the Charter. Clause 12, so far as material, empowers the Court to entertain suits when the cause of action arises or the defendant resides, carries on business or works for gain, within the territorial limits. Mr. Sinha referred to *Ryots of Garabandho v. Zamindar of Parlakimedi* where it was held that, in the circumstances of that case, the Court could not order a writ of certiorari to issue against the Board of Revenue, located in the Court's territorial limits, to bring up an order made by the Board to be quashed. The principles relating to certiorari and mandamus (or an order in the nature of mandamus) are the same, but the above decision does not support the argument that a Court cannot make an order under Section 45 against a person outside its territory. The jurisdiction under Section 45 is with respect to an act to be done or forborne within the territory, the section does not require that the person, against whom an order is sought, should be likewise situated. But, even by analogy, even if the two jurisdictions are the same, Clause 12 does not require the defendant, which position, in effect, corresponds to a respondent in an application under Section 45, to be within the territory when the cause of action therein arises; the need for an act of doing forbearing, under the section, can be said to be comparable to the cause of action in a suit. In my view the Court can make an order under Section 45 against a person holding a public office, irrespective of whether he resides or

carries on business within the jurisdiction provided the act to be done or forborne by him is one which it is incumbent on him in his public character to perform within the Court's territorial limits.

27. It has now to be considered whether the respondents can be subject to the orders sought by the application. Section 45 can be invoked against a person holding a public office only when the doing or forbearing of an act is clearly incumbent upon him in his public character, as required by proviso (b) of the Section. There must be a duty or an obligation, in his public character, on the part of the person against whom an order is sought, to do or to forbear from doing an act in favour of the applicant. The remedy under the section is in substitution for the high prerogative writ of mandamus, which, by Section 50 of the Act, is no longer available; but the provisions of Section 45, in substance, give statutory effect to the principles governing mandamus. The decisions of the Courts in England, reference to some of which will be made, relate to mandamus and are applicable to Section 45.

28. No point was made with regard to his letter of 13-11-1945 and respondent 1's connection with the applicant's contract, was the letter which he wrote to the solicitors on 29-1-1946 stating that the Commander of 404 Area was authorised to effect sales of salvage accumulations in that Area and the sales effected by Major Charnock, without that Commander's authority, were not valid and had been cancelled. Respondent 1 saw the appellant shortly before 1-3-1946, when the latter called to see a Brigadier Gordan; nothing arises out of that interview. The only connection alleged against respondent 2 is that the advertisement, dated 14th April, of the auction sale, is stated therein to be under his instructions.

29. Section 175(2), Government of India Act, provides that all property acquired for the purpose of the Federation shall vest in His Majesty; by Sub-section (3) of the same section, all contracts made in the exercise of the executive authority of the Federation shall be expressed to be made by the Governor-General and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General in such manner as he may direct or authorise; Sub-section (4) enacts that any person making or executing any contract or assurance made or executed for the purpose of the Act shall not be personally liable in respect thereof. By Section 313(3) of the Act, so far as material, any reference to the Federation shall be construed as a reference to British India, the Governor-General in Council or the Governor-General, as the context may require.

30. The goods, which were the subject of the appellant's contract, were surplus stores acquired for use in the prosecution of the war and were acquired for the purpose of the Federation and their disposal is regulated by Sub-section. In para. 8 of respondent 1's affidavit it is stated that by

notification dated 16-7-1943, as amended by notification dated 20-4-1944, the Governor, General in Council declared that all contracts and assurances of property belonging to the Government might be executed on his behalf by the several authorities mentioned in para. 8 of the affidavit. There is no reason to doubt the correctness of the above averment. Even if either of the respondents is one of those authorities, he did not make and was not a party to the appellant's contract and reference to the effect of Sub-section (4) of Section 175, Constitution Act, is not required.

31. Any rights, which the appellant may have, arise out of the contract made with Major Charnock. Mr. P.B. Mookerji contended that those rights can be enforced against the respondents by the reason of their action with regard to the goods, namely respondent 1's letter notifying that the contract had been cancelled and respondent 2's instructions to sell by auction, as stated in the advertisement. It was argued that a duty under a contract can be the subject of mandamus and, consequently, of an application under Section 45, Specific Relief Act.

32. In support of the contention that rights under a contract can be the subject of a mandamus, reference was made to *Ex parte Napier* (1852) 18 Q.B. 692 in which, at p. 695, Lord Campbell C.J. observed "a legal obligation, which is the substratum of a mandamus, can only arise from Common Law, from statute, or from contract." In that case it was pointed out that the obligation there contended for was not rested on contract and no authority was cited in support of the statement as to mandamus on a contract. The above observation was cited in *Reg v. Secretary of State for War* (1891) 2 Q.B. 326 by Charles J. There, mandamus was sought to compel the Secretary of State for war to carry out the terms of a royal warrant regulating the pay and allowances of officers and soldiers of the army; it was held that no legal duty was imposed on the Secretary of State, either by statute or by Common Law, to the applicant; he was the agent of the Crown to whom, alone he was responsible; no question there arose of the applicant's alleged right being under a contract. In *Ex parte Pering* (1873) 4 Ad. & Clause 949 Patterson J. observed at p. 950 "we cannot grant a mandamus to a public board, ordering them to carry a contract into effect." At first sight, it would seem that a contrary view was taken in 3 Bail Cases *Reg. v. Bristol and Exeter Railway Co.* 3 Rail Cases 777; there, under its statute a railway company was obliged to summon a jury to assess compensation payable by the company for damage sustained by a firm through water pollution; the firm obtained a rule nisi for a mandamus against the company to summon the jury; thereupon, an agreement was signed by the company's secretary by which certain sums were payable to the firm in liquidation of their claim, whereupon the rule nisi was discharged; the company failed to make all the payments and the firm obtained another rule nisi commanding the company to pay the monies due under the agreement or to summon a jury pursuant to their Statute; the agreement was not under seal and, consequently, was not

enforceable against the company; the report of the decision is expressed thus:

Per Curiam - This rule must be made absolute. *Regina v. Stamford Corporation* (1871) 6 Q.B. 433 is a distinct authority that such agreement by a company should be under seal.

But it does not appear whether the rule absolute required payment to be made under the agreement or the company to summon a jury and, in that respect the report is not satisfactory; both acts could not have been ordered to be done. Even assuming a right under a contract can be the subject of an application for a writ of mandamus, or under Section 45, it can be asserted only when the person, against whom a writ or order is to issue, is a party to the contract; that is not the position with regard to the respondents in the present instance.

33. In India the question of rights under the Common Law and under a Royal Warrant do not arise. In *Commissioner of Income-tax Bombay Presidency and Aden v. Bombay Trust Corporation Ltd.* an application was made under Section 45 for an order directing the Commissioner to set aside an assessment to income tax and to repay the tax paid by the applicant; the Bombay High Court made the order asked but their decision was set aside by their Lordships of the Judicial Committee. At p. 427 of the report it was observed by the Board Before Mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal.

Their Lordships make no reference to a right under contract being enforceable by Mandamus; they clearly enunciate that the duty imposed upon a public servant, which can be the subject of Mandamus is a statutory duty. With respect, I prefer to follow the decision expressed in *Ex parte Pering* (1873) 4 Ad. & Cl. 949 rather than to give effect to the other English cases, which is in accord with the judgment of the Board by which I am bound. Even if the respondents had been parties to the appellant's contract, any duty or obligation falling upon them out of the contract cannot be enforced by the machinery of Section 45.

34. Now as regards duties imposed upon a public servant by a statute. In *Reg v. Secretary of State for War* (1891) 2 Q.B. 326 the judgment of the Divisional Court was affirmed in the Court of appeal; Charles J., delivering the judgment of the Divisional Court, observed at p. 334.

Now there are no doubt cases where servants of the Crown have been constituted by statute agents to do a particular act, and in those cases a mandamus would lie against them as individuals designated to do those acts. But it is also beyond question that a mandamus cannot be directed against the Crown or to any servant of the Crown simply acting in his capacity of servant.

In *Reg v. Treasury Commissioners* (1872) 7 Q.B. 387, Lord Campbell C.J. observed at p. 394.

With reference to that jurisdiction" (Mandamus) "we must start with this unquestionable principle, when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we have no power. In like manner where the parties are acting as servants of the Crown and are amenable to the Crown whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

In the present case, the respondents, admittedly, are the servants of the Crown but, subject to what is said in the three succeeding paragraphs, there is no statute by which they were constituted agents of the Crown to do any act with regard either to selling the goods to the appellant or to the contract which the appellant asserts was made with him; everything done by them was done in their capacities as servants of the Crown and was not done with respect to any duty imposed by a statute which raised any relation between them and the appellant. As pointed out in *Commissioner of Income-tax Bombay Presidency and Aden v. Bombay Trust Corporation Ltd.* , it must be shewn that, independent of the duty as servant to the Crown, there must be a statutory duty towards the applicant.

35. It was contended by Mr. Mookerji that Section 31, Sale of Goods Act, and Section 299(1), Government of India Act, 1935, impose statutory duties on the respondents to the appellant for the performance of which he can invoke Section 45, Specific Relief Act.

36. Section 31, Sale of Goods Act enacts that it is the duty of the seller to deliver to the buyer the goods in accordance with the terms of a contract for the sale of goods. There are two answers to this contention. Firstly, the respondents were not parties to the appellant's contract and therefore there was no duty cast upon them to deliver to the appellant. Secondly, although a statute may constitute a public servant an agent of the Crown to carry out a particular duty so that he is under a legal obligation towards the subject, e.g. upon the Commissioner of Police to grant licences for public Conveyances : vide *Gell v. Taja Noora* ('03) 27 Bom. 307 and when mandamus will lie to enforce the duty being carried out; nevertheless that is not the nature of the duty under Section 31 (supra). The duty in Section 31, is not a duty imposed upon a person holding a public office which it is incumbent upon him to perform in his public character, but that is a private duty to be carried out by a person in his character as a seller in a contract for sale. Mandamus or an order in the nature of mandamus will not issue for the enforcement of a private right : vide *Reg v. Bank of England* (1819) 2 B. & Aid. 620.

37. Section 299(1), Constitution Act provides that no person shall be deprived of his property in

British India save by Authority of Law. Section 299 legislates with respect to the compulsory acquisition for public purposes of land, any commercial or industrial undertaking, or 'any interest in, or in any company owning such undertaking. There is nothing in the facts from which it has been shewn that the respondents have deprived the appellant of his property. I am unable to see that the section has any application to the present case any more than it has with respect to a charge of theft under Section 378, Penal Code. I can find no justification for the suggestion that it imposes a duty upon the respondents, as public servants, which it is incumbent upon them to carry out in that capacity.

38. The next question is whether the appellant has any other specific and adequate legal remedy. If he has such remedy, proviso (d) disentitles him to relief under Section 45. The appellant's grievance and complaint is that he has been refused or, at any rate, has not been given, delivery of the goods which, as buyer, he is entitled to receive.

39. The ordinary remedy for non-delivery under a contract for the sale of goods is under Section 57, Sale of Goods Act, by which the buyer can sue the seller for damages. Further, under Section 58, in a suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, direct that the contract shall be performed specifically without giving the buyer the option of retaining the goods on payment of damages. Both these remedies are given to a buyer by a statute and are specific.

40. In argument it was suggested that the nature and quality of the goods in the present instance are such that damages for their non-delivery would not be adequate as the appellant required those exact or identical goods for use in his business. The goods are scrap iron and the appellant, according to the petition, is a dealer in hardware, machinery, mill stores and is a general order supplier. It is difficult to understand how the scrap goods can be specially and pecuniary fitted for that business. However, be that as it may, neither the petition nor the appellant's affidavit in reply state that the goods, have some special pecuniary or other value. What is alleged, in para. 9 of the petition, is that the goods are not available in the ordinary market, it would be impossible to ascertain the nature of the damage caused by their loss and compensation in money could not afford adequate relief. In para. 17 of respondent 1's affidavit it is stated that plenty of similar materials scrapped by the army are being sold and are going to be sold ail over India. It is part of the appellant's case that his goods were included with goods which were the subject of advertisements inviting tenders for their purchase and of sales by auction; he could attend the auction, bid and buy his goods, and if the price were higher than in his contract, sue for the difference. The appellant must have made a list of the goods in his contract, and the prices realised for them at auction would enable him to ascertain the amount of damages. In the allegations in the petition it is not manifested why damages would not be adequate

compensation. It has not been established that the appellant is entitled to an order for specific delivery, instead of damages, either under Section 58, Sale of Goods Act, in a suit or under Section 45, Specific Relief Act.

41. It was argued for the appellant that it was essential, in the protection of his goods, to commence proceedings directly the advertisement appeared, on 14-4-1946, of the auction sale to be held on 24th April; a suit could not have been instituted until the expiration of two months after notice under Section 80, Civil P.C. had been given; consequently no adequate remedy was available to the appellant save under Section 45. The relevant facts in this connection are the following.

42. 14-1-1946, the appellant's representative was refused delivery; 23rd January, advertisement in the "Statesman" newspaper inviting tenders for the purchase of salvage at Chittagong, application for tender forms to be made by 7th February; 29th January, the appellant's solicitors wrote to Eastern Command stating their client assumed the tenders related to goods not purchased by him and asked for confirmation of this again, 29th January, respondent 1 informed the solicitors that the sale effected by Major Charnock had been cancelled and the Commander of 404 Area was inviting offers for the purchase of salvage in that area. Notice under Section 80, Civil P.C., could have been given at that time but it was not done, nor were proceedings taken under Section 45. If the notice had been given, two months would have expired before the auction sale advertisement appeared on 14th April when there would have been no impediment to a suit forthwith being instituted and an application made immediately for an injunction with regard to the appellant's goods. The advertisement of the auction sale was not published until more than two months had elapsed after the appellant was informed his contract was cancelled and that the Commander of 404 Area was inviting offers to purchase salvage in his area. The sole cause of inability to proceed by way of suit in April 1946 was the failure by the appellant to give the appropriate notice either when delivery was refused or when he knew it was the intention to sell the goods claimed by him. The appellant must take all proper steps in his own interest and he cannot avail himself of his own failure in that respect. There would have been an adequate remedy available had not the appellant, by his failure, prevented himself from proceeding by way of suit at the time when he wished to assert the contract made, by Major Charnock.

43. It is unnecessary to express a decision whether the appellant's contract fulfils the requirements of Sub-sections (1) and (2), Section 175, Government of India Act, and is an enforceable contract. If it does not fulfil those requirements then there is no legal agreement which the appellant can enforce or sue upon and the contract has not conferred upon him any rights in respect of which the doing or forbearing of an act is, under any law for the time being in force, incumbent on a person (including each respondent) in his public character; and the

provisions of Section 45 are not fulfilled so as to justify the Court making the orders sought by the application. Again, if the contract complied with Section 175, is enforceable land confers rights upon the appellant, it is a contract with the Crown and an enforcement of it must be against the Crown; the seeking of an order for delivery of the goods clearly is a claim under the contract and the other orders which are sought in the application are subsidiary methods of enforcing the contract. If the orders sought in the application were made, they would be made on servants of the Crown, as such, to enforce satisfaction of the appellant's claim against the Crown. Proviso (g) Section 45, prohibits such order being made.

44. In either of the above two events and whether the appellant's contract is or is not a legal and binding agreement, the orders which are sought against the respondents, cannot be made. It seems to me that the principle which the appellant wishes to establish is that, whenever a contract is made with regard to the purchase or sale of goods by the Government or by some accredited agent on its behalf, the other party can enforce its performance either for payment of the price, if the seller, or by delivery, if a buyer, by means of the machinery of Section 45, Specific Relief Act. If that principle is correct, then no proceedings by way of suit need ever be utilised by a disappointed contractor. It is novel and no authority for it has been forthcoming.

45. Mr. Sinha questioned the maintainability of the application on the ground that the statutory requirements of the Specific Relief Act, have not been observed. Section 46 enacts that every application under Section 45 must be founded on an affidavit of the person injured. In this case the appellant is the person injured. The petition is solemnly affirmed and in that respect, it is an affidavit as required by Section 46. But it is not an affidavit of the person injured since the affirmation is by one, Kali Prosad, who describes himself as the appellant's manager. The appellant affirmed the affidavit in reply, wherein he states, in respect of 7 of 22 paragraphs of the petition, that he repeats and reiterates the statements made in those 7 paragraphs. Even if the affidavit in reply had referred to all the paragraphs in the petition in the same way as it does to 7 of them, that would not fulfil the requirements of the section. The remedy in Section 45 is of a prerogative nature and it is given by a statute which, in mandatory and unambiguous terms, by the use of the word "must" in Section 46, prescribes the condition to be fulfilled by an applicant who seeks to utilise Section 45. The person injured being the applicant, he must fulfil the condition precedent to his application by making the affidavit upon which alone his application can be made. Unless this statutory condition is observed by the applicant, he has no right to, or to apply for, the statutory remedy. There may be an instance when an applicant cannot himself make the affidavit, e.g. a company, but that position does not arise in the present case. No explanation and no reason were forthcoming why the appellant did not affirm the petition but left it to, and may be directed, his manager to make an oath for him. It is to be regretted that one

frequently finds affidavits, which should be affirmed by parties in proceedings, are made by their employees. It would seem that some persons consider that, when they employ others, those others must do everything for them, including the affirmation of their affidavits. This practice calls for extreme condemnation. I do not say that the appellant is such an employee but, whatever the reason may have been for his failure and for his manager to affirm the affidavit in support of the application, there has not been compliance with the statutory condition. Since the application does not conform with the statute the appellant has not brought himself within its provisions so as to invoke Section 45 and the Court cannot make an order pursuant to the section.

46. Other contentions raised against the maintainability of the application were : (a) The right of the appellant to the goods is disputed and questions relating to property will not be tried in mandamus proceedings; Mazumdar J. found in the respondent's favour upon this contention, basing his conclusion upon the opinion expressed in the judgments at p. 557 in *Kesho Prasad Singh v. Board of Revenue* ('12) 38 Cal. 553 and at p. 527 in *In the matter of Abdul Rasul* 2 A.I.R. 1915 Cal. 91 The respondents being servants of the Crown, Section 270(1), Government of India Act, prohibits the institution of proceedings against them in respect of any act done or purported to be done in the execution of their duty, except with the consent of the Governor-General in his discretion; such consent not having been obtained, the application cannot prevail, (c) Rule 5, Chap. XXIX of the Rules of this Court, made pursuant to Section 51, Specific Relief Act, requires that, unless otherwise ordered, a rule under Section 46 calling upon a public servant shall also call upon any person to shew cause who may be affected by the act to be done or foreborne; the Governor-General is such a person and he has not been called upon or served with the rule nisi ordered in this application and the omission is fatal, vide *Kesho Prasad Singh's case Kesho Prasad Singh v. Board of Revenue* ('12) 38 Cal. 553 at p. 555. In light of the conclusions which have already been stated I do not consider it is necessary to canvass these three contentions nor to express an opinion with regard to them. In my opinion, for the reasons given, the dismissal by Mazumdar J. of the application under Section 45, Specific Relief Act, was correct and that this appeal fails and should be dismissed with costs. Certified for two counsel.

Clough, J.

I agree.