

# CALCUTTA HIGH COURT

Elchi Bux

Vs.

Union of India

Suit No. 2294 of 1947

(Sinha, J.)

22.03.1951

## JUDGMENT

**Sinha, J.**

1. This is a suit which was filed by the plaintiff against the Governor-General-in-Council, in or about 11-8-1947, for a decree for Rs. 62,562/- and other reliefs. The plaintiff is a military contractor and entered into a contract with the military authorities on or about 12-11-1943, for the construction of various works at Comilla, including latrines for the use of the military forces. The plaintiff executed the said contract. It is stated in the plaint that the bill was duly submitted to the Commander Royal Engineers at Chittagong on 15-12-1945. This bill has not been paid. The suit was originally filed against the Governor-General-in-Council. On 15-3-1950, the plaintiff made an application for amending the cause-title and body of the plaint by substituting the "Union of India" in the place and stead of the Governor-General-in-Council. On 27-4-1950, an order was made by Bachawat, J., ordering substitution and further directing as follows : "That this suit be placed on the peremptory list of suits after one month from the date hereof, for trial of the following preliminary issue, viz., "As to whether or not the liability, if any, of the Governor-General of India in Council, in respect of the cause of action alleged in this suit has devolved upon the Dominion of India or its successor the Union of India'."

2. This preliminary issue has now come up before me to be tried. The plaintiff has gone to the box and tried to give evidence of what happened to the constructions at Comilla. He, however, could only say about it from what he heard from others, who were not called. This is no evidence and I cannot accept it. The defendant has called no evidence. The point has therefore to be decided as a point of law. Both parties agree that the decision of the issue rests on the construction of Article 8(1) of the Indian Independence (Rights, Property and Liabilities) Order 1947, which runs as follows:

"8(1) Any contract made on behalf of the Governor-General-in-Council before the appointed day shall, as from that day -  
(a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General-in-Council, and  
(b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General-in-Council;  
and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General, be rights or liabilities of the Dominion of Pakistan or the Dominion of India as the case may be."

The "appointed day" was 15-8-1947.

3. Mr. Masud appearing on behalf of the plaintiff, argues that on the appointed day, the contract had already been executed and as such, there could not be a 'purpose' on that day. According to him, the purpose of an executed contract is the original purpose, which existed when the contract was actually being implemented. As this contract was for military purposes which, at the time of entering into the contract and during the period, it was being carried out, was not exclusively for the purposes of the Dominion of Pakistan it came under the residuary liability under Article 8 (1) (b) and the Union of India was liable.

4. I am unable to accept the argument that Article 8 (1) does not apply to an executed contract. There might have been some scope for such an argument if we did not have the concluding para of Article 8 (1). This para makes it quite clear that rights and liabilities which have already accrued under a contract, are to be taken into consideration. This is also clear from a perusal of Article 8 (5). This aspect of the question was considered by Sinha, J., in '*Serajuddin Batley v. Province Of West Bengal*', The learned Judge made the following observation :

"Paragraph 8 (2) provides that if the contract was entered into on behalf of the Province of Bengal for purposes which are exclusively purposes of the Province of West Bengal (as from the appointed day) the following consequences ensue :  
(a) the Contract (which was originally entered into on behalf of the Province of Bengal) shall be DEEMED TO HAVE BEEN ENTERED INTO on behalf of the province of West Bengal;  
(b) the rights and liabilities which have accrued or may accrue under any such contract shall be rights and liabilities of the Province of West Bengal.

This clearly means that by a legal fiction the province of West Bengal is, so to say, substituted as a party to a contract from the time the contract was made on behalf of the Province of Bengal. The result, is that, if the contract is executory, the Province of Bengal becomes liable to perform

and entitled to call for performance of the contract and the rights and liabilities which may accrue under the contract become its rights and liabilities. If the contract has been executed in whole or in part and rights and liabilities have accrued under the contract before the appointed day the province of West Bengal becomes entitled to such rights and responsible for such liabilities." His Lordship then proceeded to consider Article 8 (5) and said "There is nothing in Para. 8 (2) to limit its operation to subsisting and executory contract". Although the observations related to Article 8 (2), they apply with equal force to Article 8 (1), the wordings being similar. The judgment of Sinha, J., has since been upheld by the Court of Appeal, but I am informed

<sup>1</sup>(unreported. Judgment dated 4-8-1949, suit No. 1502 of 1948)

that there has been a further appeal to the Supreme Court.

5. If we are to use the legal fiction that the contract would be deemed to have been entered into by the Union of India or Dominion of Pakistan as the case may be, then it is clear that for constructions to be built for military forces at Comilla, the contracting party must be the Dominion of Pakistan, in whose territory, it lies.

6. It has been pertinently pointed out on behalf of the Defendant that it is not strictly accurate to speak of the contract as an executed contract. A contract has two aspects. The contractor does the work and the Govt. pays. These are mutual obligations under the contract and until payment has been made, it cannot be said that the contract has been fully executed, or that it is at an end. That is why, the Article speaks of liabilities which have "accrued" under a contract. If the Union of India is to accept such a liability then it must be shown that on the appointed day the purpose was not exclusively that of the Dominion of Pakistan. It will not do to say that the liability exists but the purpose does not exist. Either of two legal fictions will have to be introduced. Either, imagine that at the time the contract was entered into, both the Union of India and the Dominion of Pakistan existed and then consider whether the purpose of the contract would have been exclusively for the Dominion of Pakistan or not, or alternatively, imagine the contract as being implemented on the appointed day and consider whether on that day it would be for the purposes exclusively of the Dominion of Pakistan or not. In the case just referred to, and in the case of *'Province Of West Bengal v. Midnapore Zemindary Co. Ltd.'*<sup>2</sup>, the dispute arose regarding the rent of properties which after the appointed day were situated in the State of West Bengal and were in their occupation. In such a case the matter is much more simple. In the latter case, Harries, C. J., said as follows:

"As I have said earlier, it was never the case of the Provincial Govt. that this hospital which was housed in the house in question (In the Murshidabad district) served any district which is now part of Eastern Pakistan.....It seems to have been assumed in the Court below that before partition this hospital was maintained exclusively for the purposes of certain districts which on partition fell to West Bengal and if that be so I think there can be no doubt whatsoever the Article 8 (2) (a) of the Indian Independence Order applies and that West Bengal would be liable....."

7. In this case, however, the facts are much more complicated. But it, is not disputed that the work was done at Comilla which is in the Dominion of Pakisthan. If by legal fiction, the Dominion of Pakistan existed at the date of the contract or the contract existed on the appointed day, when Eastern Pakistan had certainly come into existence, then in either case, only the Dominion of Pakistan would be interested in the constructions for military forces stationed at Comilla and must pay for the same.

8. An attempt was made by the Plaintiff to prove that on the appointed day these latrines etc. had been demolished or no longer existed. As I have said, he has failed to prove this. But to my mind, this is not at all relevant. The position analysed comes to this : Articles 8 (1) and (2) of the Indian Independence Order 1947 contemplate contracts entered into on behalf of the Governor General in Council which, on the appointed day, are either

<sup>285</sup> Cal LJ 202

executed, continuing or executory.

2. In the case of continuing or executory contracts, if the Dominion of Pakistan was going to be exclusively interested in it, either because the subject-matter of it was situated in its territory, or if it was to be performed for its benefit, or if it solely related to its affairs, then the liability would be of the Dominion of Pakistan. In such a case, not only the present and future liabilities would be hers but also all past liabilities as had accrued due.

3. In the case of executed contracts, the Dominion of Pakistan will be liable if :

(a) she would have been similarly interested in the subject-matter of the contract, imagining that she had come into existence as a separate State at the time the contract was entered into, and/or was being implemented, or

(b) she would have been similarly interested in the subject-matter of the contract, imagining that the subject-matter of the contract existed on the 'appointed day', whether in fact it existed or not.

9. Applying these tests, I must come to the conclusion that it is the Dominion of Pakistan and not the defendant who is liable to pay the bill of the Plaintiff which is the subject-matter of the suit. The issue is therefore answered in the negative. It is conceded that the result of the suit obviously depends upon the result of this issue and the suit accordingly fails and must be dismissed with costs.

Suit dismissed.