CALCUTTA HIGH COURT

Union of India

Vs.

New Marine Coal Co

Appeal from Original Decree 181 of 1956

(P.B. Mukharji and Bose, JJ.)

24.12.1959

JUDGMENT

P. B. Mukharji, J.

1. This is an appeal from the judgment of G. K. Mitter, J. who decreed the plaintiff Company's suit against the Union of India for a sum of Rs. 20,343/8/- with interest and costs.

2. The suit was instituted by the New Marine Coal Co. (Bengal) Ltd. as plaintiff to recover the price of coal delivered and supplied to the Bengal Nagpur Railway Administration of which the defendant Union of India was pleaded and admitted to be the owner. The claim in the suit was based both on the agreement as well as on compensation under section 70 of the Indian Contract Act.

3. The trial court held that there was no enforceable agreement because the contract did not satisfy the requirement of section 175(3) of the Government of India Act, 1935 but it held that the goods were supplied and delivered lawfully by the plaintiff to the defendant, not intending to do so gratuitously and the defendant enjoyed the benefit thereof with the result that the defendant was liable to pay compensation under section 70 of the Contract Act. The learned trial Judge decreed compensation against the Union of India which is now appealing against the judgment.

4. The main contention of the appellant Union of India before us is that a contract which fails for want of form under section 175(3) of the Government of India Act 1935 or under the present Article 299(1) of the Constitution of India cannot be indirectly enforced on the basis of compensation by application of section 70 of the Indian Contract Act. Three main arguments are advanced by the Appellant in support of such contention.

5. The first argument is that there was a request in the facts of the present case and where there is

such a request section 70 of the Contract Act cannot be applied. Reliance for this purpose was placed on the decision of the Court of Appeal in *Union of India v. Ram Nagina Singh (1) reported in*[1] where the learned Chief Justice said:

[1]89 C.L.J. 342 at page 363

> "In my opinion section 70 clearly contemplates a case where an act has been done .or thing delivered without a request but not gratuitously. It may be that cases where a request was made but it was by a person having no authority to make it, are also included because in such cases there is really no request by the person who receives and takes the benefit."

6. The question on the facts of the present appeal then is to find out whether there was such a request. In Ramnagina's case the Court of Appeal made the observations I have just quoted after an exhaustive review of the many leading cases on the point and it will be wholly unnecessary to go over them again here. The learned trial Judge, bound as he was by the Court of Appeal holding that where there was a request, section 70 of the Contract Act did not apply, avoided its application by holding here that the person who. made the request was the Coal Superintendent, Dhanbad, who was not the defendant in the case and by saying that there was no evidence to hold that the Coal Superintendent had authority to enter into contracts on behalf of the Union of India. The learned trial Judge therefore concludes that he is not in a position to hold that the request by the Coal Superintendent is in law a request by the Union of India and therefore there was no sufficient request to take the case out of section 70 of the Contract Act.

7. Reference was made at the Bar in argument before us to the case of *Union of India v. Dhansar Coal Co. Ltd*[2]. of that report the Patna High Court observes:

> "In our opinion the present case is not covered by section 70 of the Indian Contract Act but by statutory provisions contained in Rules 8 and 10A(1) of the Colliery Control Order. The order of disposal made by the Deputy Coal Commissioner with regard to the amount of coke is an order passed by him under Rule 8 read with Rule 10A(1) of the Colliery Control Order, 1945. In other words, the order of the Deputy Coal Commissioner is an order made in the exercise of statutory powers and therefore the plaintiff cannot base its cause of action on section 70 of the Contract Act.

8. The Patna High Court, therefore, dismissed the plaintiff's suit for damages against the Union Government. The question whether the order in this appeal is an order under statutory powers outside the scope of section 70 of the Contract Act is not in issue and has not been canvassed before us by the learned counsel for the Union. The further question whether an order under the statutory powers of the Colliery Control Order can also be regarded as an order from the authority of the Union Government may have to be more fully considered in an appropriate case.

9. But this much is certain that in this appeal, the authority of the Chief Mining Engineer,'

Railway Board, who was also the Deputy Coal Commissioner, was not challenged in evidence. The relative correspondence, Ex. A. dated the 23rd December, 1948, Ex. B dated the 10th May ,1949 Ex. C dated the 13th May, 1949 and Ex. D dated the 24th June 1949 which will be discussed later in this judgment were all admitted. The authority behind Exts. A.B.C and D far from being challenged, Tie orders thereunder were fully carried out by the respondent without protest and coal was supplied as directed thereby. I am, therefore, satisfied that there was not only authority on the facts of this case but also

[2] A.I.R. 1959 Pat. 347. At page 348

respondent is estopped now from questioning that authority when the parties acted on that authority and changed their positions accordingly.

10 .In my view the learned trial Judge was in error in thinking that the Coal Superintendent in Ex. G dated the 13th May, 1949 was not proved to have the authority. The point is that the authority belonged to the Chief Mining Engineer of the Railway Board who was also the Deputy Coal Commissioner (above the Coal Superintendent) who exercised the authority in Exts. A dated the 23rd December, 1948 and B dated the 10th May, 1949 and the Coal Superintendent was only acting under his directions as by Ex. B.

11. I, therefore, hold that there was request from a proper person with proper authority namely the Chief Mining Engineer of the Railway Board in this case and I further hold following the decision of the Court of appeal in Ramnagina's case (1) that a request such as this takes this case out of the application of section 70 of the Contract Act.

12. I shall only add this that a request, in my view, must necessarily take the case out of the application of section 70 of the Contract Act. Section 70 does not deal with a case where there is a formal contract or agreement between the parties and it is precisely such a case without contract or agreement that section 70 of the Contract Act is intended to serve. If there was or is a request and a compliance there- with, the case then becomes a case either of a contract or of an agreement. It is only where there is no contract and no agreement but, in fact, delivery of goods and enjoyment there of that an obligation in the nature of a contract is created. That is why section 70 finds place in Chapter V of the Indian Contract Act which deals with "certain relations resembling those created by contract". Relations resembling a contract are not cases of contract or agreement. S. 70 of the Contract Act is statutory compensation where there is no contract or agreement and its object is to prevent unjust enrichment.

13 On the point whether the request must come from a person with proper or lawful authority, section 70 is no guide. All that this section says is that 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. Whether the request should come from a person with proper or lawful authority therefore, belongs to that branch of the law of Contract where a

contract or agreement can only be entered into by authorized persons. As the field of formal contract or of agreement between parties is completely outside the ambit of operation of section 70 of the Contract Act, a request such as would exclude the operation of section 70 of the Contract Act would naturally have to be a request valid in law.

14. The second argument is that the Union of India is not a "person" with- in the meaning of section 70 of the Contract Act which is said to deal only with natural or artificial person. In support of this argument reference is made to section 3(42) of the General Clauses Act, 1897, which defines a person to include "any company or association or body of individuals whether incorporated or not" and it is argued that such a definition cannot be made to fit the Union of India which is neither a company nor an association nor a body corporate or unincorporated. Reliance is placed on the decision in *Kapur Textile Mills v. East Punjab (3) reported in*[3] and on the decision of *Siva Prosad v. Punjab (4) reported in*[4] A contrary view, however, was taken by the Allahabad High Court in the *State of U. P. v. Kanhaialal (5) reported in*[5] where Mootham, C.J. says at page 384:

> "The word 'person' is not defined in the Indian Contract Act and unless there is anything repugnant in the context it will by virtue of S. 3(39) General Clauses Act include 'any company or association' or body of individuals, whether incorporated or not'."
> "I do not see any reason why the word 'person' should be given a restricted meaning. The greater part of modern industry or commerce is founded on contract, and unincorporated bodies habitually enter into contracts. I do not think it can be doubted that a District Board or a Municipality is a 'body of individuals' within the definition of person in the General Clauses Act and logically I see no sufficient reason for excluding the Government from the ambit of the definition the body of individuals, 'the Government' responsible for the governance of the State."

15. A similar view that the State can be a person was taken by Agarwalla, J in an earlier *Allahabad case Matilal v. U. P. (6) reported in*[6] although the decision was not on the Indian Contract Act. But this observation of Agarwalla, J. was disapproved by the Supreme Court in *R. J. Kapur v. Punjab, (7) reported in*[7] where the Supreme Court said that the views of Agarwalla, J. were "too narrow and unsupportable."

16. The learned counsel for Union of India has argued that the Union of India is not a person within the meaning of Section 70 of the Indian Contract Act not only on the ground that 'person' as defined by the General Clauses Act cannot include the State or Government of a country like the Union of India, but also on the ground that the State or Government as such does not engage in a contract but such contracts are made in the exercise of "executive power" of the State. His ground is inspired by the expression "executive power" used in Art. 299(1) of the Constitution which implicitly recognizes that 'such power' can enter into a contract. The counsel for Union of India has therefore argued that such "executive power" while entering into a contract should be

placed in the same position as it is when it exercises the Police power or the power of eminent domain.

17. On a review of the decisions and on a consideration of these arguments I am of the opinion that the State or Government has the capacity to make and can be a party to a contract because of the wide definition and concept of a promiser or promisee in section 2 of Indian Contract Act as including the person making and accepting a proposal. Reference to different sections of Indian Contract Act such as sections 54, 57, 62, 64-65, 68-72, 74, 132, 148, 182-184, where word "person" or "party" is used and the context and purpose of those sections do not appear to me to be repugnant to the notion that a State or Government can enter into contracts. Secondly, Art. 299(1) of the Constitution implicitly recognizes the State or the Government as a contracting party and therefore lays down the form of the contract. If the State or the Government has no power to enter into a contract, there is no point in the Constitution solemnly laying down in what form the contract should be made in order to bind the State or the Government. In that connection it may be

[3] A.I.R. 1954 Pun 49 at Page 50
[4] A.I.R, 1957 Pun 150
[5] A.I.R. 1956 All.383
[6] A.I.R. 1951 All.257 (F.B.) at page 324
[7]1955 S.C.A. 577 at page 586

added that the expression "executing power" in Art. 299(1) of the Constitution only indicates that the State enters into a contract in the exercise of its "executive power" and not in the exercise of its legislative or judicial power. Power cannot be separated from the source of power. The State cannot be separated from its various powers and if in the exercise of one of its powers it has capacity to enter into a contract, it must follow that the State has the capacity to enter into the contract.

18. It is now too late in the day in my view to give a construction which does not recognize the capacity of a State or a Government to enter into a contract under the Indian Constitution or in the modern concept of the service or a welfare State engaging in diverse contracts. It will be a retrograde step to say so when in the various fields of service and welfare, the State is engaging in diverse fields of business and commerce in competition with the citizens and therefore entering and being required to enter into agreements and contracts. I am therefore motioned to take the view that the word 'promiser' or 'promisee' in the Indian Contract Act can be interpreted to include a State or a Government and it should be so done unless in any particular or special context or statute such interpretation is excluded either expressly or by necessary implication. Courts in my opinion should not attempt to take a universal and doctrinaire view that State can or cannot be a person. That in my view should depend on the particular law or statute and its application to the facts of each particular case . In some statute or law the State may well be regarded as person in some cases while in some other law or other Statute the State may not be regarded as person in certain cases.

19. But this does not completely dispose of the argument made by the Union Counsel on Section 70 of the Indian Contract Act. His second submission on Section 70 of the Indian Contract Act is

that the 'person' in that case must be the very person who enjoys the benefit of the delivery of goods. He contends that Section 70 of the Indian Contract Act does not recognise any vicarious enjoyment or benefit through any agent. While they may be true in case of a natural person, I do not quite see how it can be applied to the case of artificial persons or to a State or a Government. It is well known that a Corporation or a State has no body to be kicked and no soul to be damned and in such a situation and in such a concept, there can only be a vicarious enjoyment of the delivery of the goods within the meaning of Section 70 of the Contract Act.

20. His third argument on this branch is that Section 70 of the Contract Act, if applied to a case where the contract fails under Section 175(3) of the Government of India Act 1935 or Art. 299(1) of the Constitution will make this constitutional provision a dead letter, because in many such cases then inspite of the absence of a formal contract, the Union could be made liable. On this point, there has been divergence of opinion not only in this Court but in ether Courts in India.

21. The reason against making an inroad on the constitutional protection under Section 175(3) of the Government of India Act or under Art. 299(1) of the Constitution through the backdoor of the doctrine of compensation under Section 70 of the Contract Act, is that to do so will make this constitutional immunity or protection largely and substantially meaningless for all practical purposes and specially in commercial contracts or cases of supply or delivery of goods. Then in all cases where goods under unenforceable contract are supplied to the Government and the benefits thereof are enjoyed by the Government this course will allow the contracting party to do indirectly what cannot be done directly. If the constitutional protection was intended for the safety of public revenue, then payment of compensation under Section 70 of the Contract Act does not achieve that protection or safety. I have not been able to understand how the doctrine of statutory compensation against unjust enrichment as in s. 70 of the Contract Act can at all be applied to the State whose constitution prohibits contracts to bind it unless the contracts answer 8 form prescribed by the Constitution. The basic rationale of this doctrine is founded on the equitable principle, that a person, otherwise capable and competent, if enjoys the benefit of a non-gratuitous delivery of goods, must compensate for the goods and thus be prevented from unjustly enriching himself. But this whole foundation falls in the case of State where the Constitution in order to protect public funds revenue and treasury provides that the public treasury will not be liable unless the contract is in a form which the Constitution imposes. Here the form of contract is a matter of substance. Here the absence of form incapacitates the State as such to bind itself. I expressed the same view earlier in the case of *Anath Bandhu Deb v. Dominion of India*[7]*, (8) in* This was also the view, I find, Singh, J. took in the Patna case in *Dominion of India v. Bhikhraj Jaipuria.* In Anath Bandhu's case I expressed the opinion that unless there was a formal contract, as required. the delivery and the acceptance and the enjoyment of the benefit of the goods could not be said to be lawful within the meaning of Section 70 of the Contract Act. Dissentient views were expressed in some other decisions of the Court including one of my learned brother and a decision of Division Bench in reported case of *State of West Bengal v. B.K. Mondal & Ors*[8]*.* from whose decision an appeal we understand is

now pending in Supreme Court. It will be therefore unnecessary to say anything further on the point at the present stage.

22. This appeal can be disposed of on the shorter grounds of ratification and payment. For this purpose it will be necessary to state briefly some relevant facts.

23. The Chief Mining Engineer or Railway Board, who was also the Chief Deputy Coal Commissioner (Production), wrote to the plaintiff on 23rd December 1948:

> "I have to inform you that the following coal has been allotted to your colliery or collieries for the supply per month from January to June, 1949 of the railways shown against the same. The Railway receipts, dispatching documents and bills should be made out as usual and submitted direct to the railway. Your Colliery Manager should be instructed to load the coal up to the standard specification. He should indent for wagons in the usual way and keep to the loading programme issued by the Regional Coal Controller, Bengal & Behar, Dhanbad."

24. The letter thereafter specified the colliery and the G.I.P. Railway as well as the amount of tons and the class and grade of coals to be supplied.

25. Subsequently, on the 10th May, 1949 the same Chief Mining Engineer wrote to the Coal Superintendent, Dhanbad to transfer the order from G.I.P. to B. N. Railway till June, 1949 and a copy of this was sent also to the plaintiff company. In pursuance of that order, the Coal Superintendent informed the plaintiff company on the 13th May, 1949 which

[7]97 C.L.J. 9

[8](10)Appeal No. 155 of 1953

was also followed by the letter of 24th June, 1949.

26 .The plaintiff duly supplied the coal and thereafter submitted the bills for the coal. These bills were checked by the railway and duly passed for the full amount of Rs. 20,34318/- as claimed in the plaint. In fact a cheque dated 18th August, 1949 for the said amount was made in favor of the plaintiff company by the Financial Adviser and the Chief Accounts Officer of the Railway upon the Reserve Bank of India. It was a cheque which was crossed and made payable, "Account Payee". Indeed, written intimation dated 10th October, 1949 was sent by the Cashier of the Railway addressed duly to the plaintiff company at its correct and proper address stating that the amount would be paid on the presentation of the proper receipt and authority. This has been called the intimation card, marked Ex. F.

27. Something peculiar and strange happened thereafter. The plaintiff's case is that he had not received this intimation card although the name of the plaintiff company as well as its address duly appeared on the card. The intimation card has only one postal sorting mark but has not any postal delivery mark. Another company of the same name of the plaintiff purported to get hold of

this intimation card and on the basis thereof took delivery of this cheque for Rs. 20,343-8-0. The receipts signed on the intimation card, which included a form, contained the words:

> "Please pay the amount to Mr. Doulat Ram, the bearer there of.
> New Marine Coal Co. (Bengal) Ltd.
>
> B.N. Agarwalla
> Receiver's signature."

28. This so called New Marine Coal Co. (Bengal) Ltd. B. N. Agarwalla and Doulat Ram are fictitious persons. The Registrar of the Joint Stock Company's records show that no other company with this name except the plaintiff was a limited registered company. Therefore, the company, which purported to take the cheque was fictitious company. The cheque itself was deposited in the United Commercial Bank Ltd. with which bank the plaintiff company had no account at all. The endorsement on the cheque for this fictitious company was made by one S. N. Chatterjee as Managing Director. The said S.N. Chatterjee also remains un-traced.

29. This account with the United Commercial Bank Ltd. is a strange account. The account opening form is dated 27th October, 1949 and is signed by the said S. N. Chatterjee for this fictitious company. The evidence of the United Commercial Bank Ltd., of its Assistant Accountant Mahadab Das, is that before opening the account he had inspected the articles of association as well as the certificate for incorporation of this fictitious company. But he says that he returned the alleged certificate for incorporation to this fictitious company's representative without keeping even a copy of it. This account with the United Commercial Bank Ltd. was opened on the 27th October, 1949 with a cash deposit of Rs. 500/-. Thereafter the only deposit was this railway cheque. The whole account was cleared by this fictitious company with great speed and within the short period of hardly a month. Withdrawals show Rs. 775/- withdrawn on 28.10.49, Rs. 500/- withdrawn on 29.10.49, Rs. 600/- withdrawn on 29.10.49, Rs. 4,600/- withdrawn on 31.10. 49, Rs. 9500/- withdrawn on 31.10.49 and Rs. 300/- withdrawn on 1.11.49. Records show that there was some kind of inconclusive criminal investigation out of which nothing transpired.

30. The plaintiff company's whole case however is that it had nothing to do with receipt of the cheque or the payment thereof. It had nothing to do with the fictitious company with the same name. Its case is that it did not receive either the cheque or the money thereunder for the coal it had supplied. Its contention is that if the Railway has failed to pay the cheque to the plaintiff company who supplied the coal, then the fact that it actually made out a cheque but a wrong person got the value of it does not absolve the Union of India from the responsibility of paying again to the right person.

31. The Union of India contends on the other hand that it followed the usual course of business in

dealing with the plaintiff company. It duly made out a cheque in favour of the plaintiff company's name, crossed it and made it "account payee" and sent the intimation card to the proper address of the plaintiff company. The cheque was made as safe as possible, being crossed and 'account payee' where the plaintiff company was the only company with that name on the register of the Registrar of Joint Stock Companies. If therefore the plaintiff company did not get the value of the cheque, the fault was of the plaintiff in not arranging for the due receipt and due protection for its letters. The Union of India further contends that the plaintiff company has not produced the best proof from its side to show that Doulat Ram Agarwala and S.N. Chatterjee were in no way connected with the plaintiff company. It contends that the Attendance Registrar, the pay sheet of the plaintiff company and the Mess Account book of the plaintiff company have not been produced. What have been produced are the records of a company - K. Wara Ltd. which is the Managing Agent, managing the plaintiff company and many other companies. It may be recorded here that there is no managing agency agreement, or in fact any agreement in writing from which it can be seen how and under what terms K-Ware Ltd. manages the plaintiff company. In any event the agents' books cannot be a substitute for the principal's books, where the principal alone is the party to the suit.

32. The Union of India also contends that the plaintiff company has not produced the best proof to show that it did not receive the intimation card which was properly addressed and sent to it. No inward letter register of the plaintiff company was produced and Director Parekh's evidence that no Inward Register is kept seems incredible. If K. Wara Ltd. manages so many different companies, there would be so many letters received by it on behalf of different companies, that it is inconceivable how any business could be conducted without any register or record entering and allocating them. It is also contended by the Union of India that the person who introduced the fictitious company to the United Commercial Bank Ltd., one Mr. Khetri, has also not been called. It also contends that the alleged office peon, who is supposed to carry letters to Mr. Parekh, has also not been called. From these various reasons, we are asked to conclude that it was due to the negligence of the plaintiff company and not Union of India that the plaintiff company did not get the value of the cheque.

33. Another main argument of the Union of India emphasizes the peculiar conduct of the plaintiff company in respect of this bill. It is argued that the plaintiff company allowed too long a time to pass before taking steps to realize this bill. The bill was dated 30th June 1949. No reminder of the bill was sent until 24th September 1949, which was a period of about 3 months. The cheque had been drawn in the meantime on the 18th August, 1949. Reminder followed more than a month after the date of the cheque. Even after the reminder on 24th September 1949, the disputed intimation card was sent on 10th October, 1949. The cheque was handed over to the fictitious company's representative on the 14th October, 1949. When all these things were happening, the plaintiff company took no steps. After the reminder was sent on 24th September 1949, the plaintiff company became silent again. Even when on the 7th November, 1949 the Chief Mechanical Engineer wrote to the plaintiff that the bills in suit had been passed on to the

Chief Cashier of the Railways for arranging payment, there was no written response from the plaintiff company on record. It is curious however that the Chief Mechanical Engineer should be writing a letter on 7th November 1949 in those terms while in fact the cheque had already been taken delivery of on the 14th October 1949. The only explanation seems to be that this letter of 7th November from Chief Mechanical Engineer had been written from Kharagpur in answer to plaintiff's reminder of 24th September, 1949 and apparently the office of the Chief Mechanical Engineer was not aware of what happened in the mean time in Calcutta between the 24th September, 1949 and 7th November, 1949. But what is more strange is that it was not until the 5th June, 1950 that the plaintiff company wrote to say that it had not yet received payment for those bills. The net result therefore is that really for the whole period from 30th June, 1949 when the plaintiff submitted the bill and until the 5th June, 1950 the plaintiff hardly took any steps to call for the payment of the bill except sending the reminder on 24th September, 1949 and subsequent to which a payment had already been made. On these facts it is contended by Union of India that the plaintiff's conduct has been most suspicious which taken with the fact of non-disclosure of the plaintiff's material witnesses and books to remove all suspicions about the person who cashed cheque being associated with the plaintiff company in any manner, should relieve the Union of India from paying over again.

34. This completes the account of facts and the respective contention of the parties thereupon.

35. The short point on which the appeal can be disposed of is ratification and payment as I have said before.

36. The Supreme Court in *Chaturbhuj Vitlialdas Jasani v. Moreshwar Para-shram & Ors*[9]*.,* lays down the proposition that a contract which fails for want of form under Art. 299(1) of the Constitution, whose previous counterpart was Section 175(3) of the Government of India Act, 1938, is not a void contract but is not enforceable as against the Union of India although under Section 2(g) of the Contract Act an agreement not enforceable by law is said to be void.

37. It thereafter proceeds to lay down that in such a case the Union of India can always ratify the act. Ratification is an express issue in this suit. It is true that it was not argued but it is equally true that the issue was expressly raised and it was expressly recorded in the judgment that the issue was to be argued only on the evidence on record without any further or fresh evidence because time for that purpose was given but not availed of.

[9](11) 1954 S.C.A. 373

38. Now ratification in this case is based on the following facts:

(1) Presentation of the bill and no objection thereat by the Union of India.
(2) Checking of the bill and passing of the bill in the usual manner.
(3) Preparation of the cheque which is drawn in the name of the plaintiff company.
(4) Intimation to the plaintiff company in the usual manner that the bill has been passed

and that the cheque was ready to be handed over against receipt.

(5) A clear assertion and admission in para 11 of the written statement of the Union of India that the plaintiff had received full payment and is not entitled to further payment.

39. Not one of these five acts has been or can be challenged by the Union of India as having been done by persons not duly authorized by the Union of Indian In Chaturbhuj's case, the Supreme Court clearly speaks of the possibility of ratification by the Union of India. At p. 390 of the report, Bose, J. of the Supreme Court observed:

> "It only means that the principal cannot be sued but we take it that there would be nothing to prevent ratification, especially if that was for the benefit of the Government. There is authority for the view that when a Government officer acts in excess of authority, the Government is bound if it ratifies the excess. See Collector of *Masulipatnam v. Cavaly Venkate Narayanpati*[10], "

40. The Supreme Court does not, however, say whether that ratification by the Union of India has also been in any particular form or any form akin to the form of a contract laid down under Article 299 (1) of the Constitution but it is nevertheless clear from its citation and approval of the Moore's Privy Council decisions that there can be implied ratification by conduct and act. Section 196 of the Indian Contract Act clearly lays down that where acts are done by one person on behalf of another, but without his knowledge and authority, he may elect to ratify such acts and if he ratifies them, the same effects will follow as if they had been performed by his authority. It is no doubt true that if the transaction is void ab initio, the acts thereunder cannot be ratified. But I have already said, the Supreme Court has decided that the transactions in such cases are not void but only unenforceable against the Union.

41. Then again section 197 of the Indian Contract Act lays down clearly that ratification may be express or may be implied in the conduct of the person on whose behalf the acts are done. It is, therefore, clear that ratification can be implied or implicit in the conduct and need not be express or formal. The authorities in support of implied ratification are the observations of Lord Justice Turner in (12) 8 Moo. I.A. 529 at p. 554; see also (13) 7 Moo. I.A. 476 at p. 513 and 539.

42. It was contended on behalf of the Union of India that ratification should also be in the form laid down under Article 299(1) of the Constitution or section 175(3) of the Government of India Act, 1935. These constitutional provisions do not speak of ratification but of contract. As the ratification under the Contract Act can be implied from conduct, there will be no justification to import the formal requirements of a contract into the law of ratification.

[10]8 Moore's Indian Appeals 529. at p. 584

43. Mr. G.P. Kar, learned counsel for the Union of India, has, however, relied on the recent decision of the Patna High Court in *Dominion of India v. Bhikhraj Jaipuria (9) reported in*[11] to urge that even ratification should be visited with the same formality of a contract as in Article

299(1) of the Constitution or section 175(3) of the Government of India Act. The observations in the Patna High Co ait were based on the facts of that case which I shall presently analyse to show how different they were from those of the present appeal before us. I need only say here that in this Patna cast there was no formal admission in the written statement as here on behalf of the Union of India. Mr. Kar also relied on the unreported decision in the Court of Appeal here in Associated Livestock case (14) being Appeal No. 93 of 1951 decided on the 29th April, 1954, but in that case ratification was neither pleaded nor even raised as an issue; nor again did it lay down that ratification should be in the same manner as in the case of a binding contract on the Union of India.

44. Now the Patna decision in *Dominion of India v. Bhikhraj Jaipuria* (Supra)was not really concerned with any fact of ratification at all. In the Patna case the plaintiff's whole suit was that goods not being accepted by the Government were resold by the plaintiff and the plaintiff's claim was for re-sale loss and damage, because the re-sale price was lower than the price under the agreement The plaintiff in the Patna case contended that the Railway had accepted the goods by allowing them to be stored in the Railway godown, although the Government had written to say that they would not accept such goods, because they were supplied after the time stipulated by the agreement. In fact, the Patna case held that there was no acceptance at all and the Government did not allow the plaintiff's goods to be stored in the Railway godown and, in fact, held that the plaintiff did so in spite of Government's protests. The Patna decision held that there was no acceptance. Therefore, it is quite clear that acceptance of goods and enjoyment of the benefit thereof, which are fundamental for the application of section 70 of the Indian Contract Act, were totally absent in the Patna case. Therefore, the observations of the Patna decision that ratification should also be in conformity with section 175(3) of the Government of India Act or Article 299(1) of the Constitution are at best only obiter.

45. I am also unable to follow such obiter because sections 198 and 197 of the Indian Contract Act speak of the ratification of the acts done and not of the contracts entered. The two Moore Privy Council decision on implied ratification by the Government cited with approval by the Supreme Court in *Chaturbhuj's case*[12]are against this Patna High Court obiter. Formalities of the contract cannot be introduced, therefore,, to apply to ratification of acts under the contract. The acts under this contract, like presentation of the bill, checking and passing of the same, and drawing of the cheque itself in the name of the plaintiff-company and the intimation card informing the plaintiff-company at its correct address to come and receive payment against receipt, cannot possibly be made in the name of the President as required under Article 299(1) of the Constitution. I have also emphasized the significant fact of clear admission in this case in the Union's written statement that the plaintiff had received full payment and is not entitled to further payment. That means on the facts of this case, the Union of India is admitting and not disputing that the persons who received the bill, passed the bill, made out the cheque and sent the intimation cards were all persons with authority and were not unauthorized

[11] A.I.R, 1957 Pat. 586 at pp. 603-604 and 610

[12]121954 S.C.A. 373

persons or officious agents of the Government. In that Patna case the Union's case was that there was no ratification by authorized person, but here in the instant appeal that is or cannot be the contention of the Union, regard being had to its own admission in the written statement.

46. I am, therefore, satisfied on the facts of this case that there has been ratification by the Union of India of the acts done under this unenforceable contract.

47. The question even then remains whether the payment as alleged by the Union of India is a discharge of its liability to the plaintiff for the supply of coal. It is common case that the usual procedure was followed by the Railway in receiving the bill, in preparing the cheque, and in sending the intimation card. That procedure is implicit in and accepted by the conduct and consent of parties to a long course of dealing in respect also of other bills for supply of coal. The plaintiff's charge of negligence against the Union, therefore, cannot, in any view, succeed in the facts of this appeal. The Union duly made out the cheque in the name of the plaintiff-company. It had no intention not to pay. It duly passed the full amount of the plaintiff's bill. It duly sent the intimation card in the manner and method always accepted by and assented to by the plaintiff. The intimation card was duly addressed and the postal mark of sorting at any rate indicates that the card had gone through the post. The absence of delivery mark in the Post Office is not the fault of the Union. In fact, throughout the long course of dealing between the parties, except the card in suit, no other single intimation card sent in this manner has gone wrong. From this procedure of always sending the intimation card in every case and in this manner, the conclusion can be certainly and reasonably drawn that there was implicit request by the plaintiff to send such intimation card by the post. In that view of the matter, the Post Office becomes the agent of the plaintiff according to the decision of the Supreme Court in *Commissioner of Income Tax v. Ogale Glass Works Ltd*[13]*.,* and also *Income Tax Commissioner v. Patney & Co*[14]*.,* and on which the learned counsel for the Union relied. I must, however, add here to emphasize that there was no loss of cheque by the post in the present appeal. The Union did not even take the risk of sending the cheque by post. It only sent the intimation card by post calling the plaintiff-company to take the cheque on the appointed time "on presentation of a proper receipt and authority" with the intimation that "the subjoined form of receipt may be used."

48. The negligence on the part of the Union of India which the plaintiff alleges in argument is that the Union should have handed over the cheque against a stamped receipt. In support of this argument the plaintiff relied on the evidence of Parekh in answer to Q. 182-183 and also on the evidence of Bhatt in answer to Q. 17 to say that usually a stamped receipt was given by the plaintiff company. But the fact remains that the receipt form which is used on the intimation card does not mention or contain any space for stamp and it was therefore not for the Union to insist on the stamp. What is a proper receipt depends on the facts of each case and on the procedure followed in each case. As the cheque was crossed Account payee on the Reserve Bank of India, the stamped receipt, if any could even follow after the cashing of the cheque and not before. If

the fraud was perpetrated by some one other than the plaintiff company getting hold of the cheque, then

[13](15) (1955) 1 S.C.R. 185 : A.I.R. 1954 S.C. 429 at p. 435-436 and at p. 504

[14](16) A.I.R. 1959 S.C. 1070

I do not see how the presence of a stamp in the receipt would have avoided it. It is, therefore, not possible to find any such negligence on this score as to make the Union of India liable to pay over again, A further point was made that the Union of India should have satisfied itself whether the bearer who came with the intimation card was a person with proper authority from the plaintiff. It is suggested that the Union of India should have satisfied itself that B.L. Agarwalla was the Manager of the plaintiff-company and that Daulatram had his authority. I do not quite appreciate what exactly that satisfaction can amount to in the facts of this appeal. The Union sent the intimation card to the plaintiff-company at its proper address. There was no other company on the register of the Joint Stock Companies with this name. Some one comes and produces the intimation card which had gone through the post. Is it the duty then on the part of the Union of India even thereafter to find out that the person who was coming and producing the receipt was not coming from the plaintiff-company? How would the Union know of change in the personnel of the plaintiff company's administration when the plaintiff company never kept the Union informed about such change. It was also said that a portion of the endorsement show that at first the name of the Company was not properly written by B. L. Agarwalla which was crossed out, but then the name of the company was finally written accurately. I do not find that on those facts the charge of negligence is brought home to the Union of India. I do not think it is any part of its duty any more on those facts to keep on enquiring who was the Manager of a particular company or was the' Director of a company at the particular time when it had followed perfectly normal course of business dealings accepted by and assented to by all concerned.

49. On the contrary, it appears, that the plaintiff company should have brought evidence to show how letters addressed to it are received and dealt with. As I have already said, such material, crucial and relevant, has not been produced by the plaintiff company's office. If after the intimation card had reached the plaintiff company's office and if therefore some employee of the plaintiff company did something by which the plaintiff company lost the value of the cheque, then I do not think that the Union should be made to pay over again. From the facts, the conclusion seems inescapable that it was not the Union but the plaintiff who was negligent in receiving arranging, recording and dealing with the letters addressed to it.

50. But even assuming that both the Union of India as well as the plaintiff were free from negligence and were innocent, I do not see why then in that case the principle that if a loss must fall upon one or the other of the two innocent parties, the maxim melio est conditio possidentis should not be applied. Ashhurst, J. in *Lickbarrow v. Mason*[15] laid down the classical proposition:

> "As a broad general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it."

51. If both the Government and the plaintiff are regarded as innocent parties, then the person practicing the fraud in stealing the cheque and then encashing it should not be allowed to make the party, namely, the Union of India to pay over again as the possibility of that fraud could only be occasioned by the negligence of the plaintiff respondent. The

[15](17) 2 T.R. 63 at page 70

principle was applied by the *House of Lords in Scholfield v. The Earl of Londesborough*[16], and *Colonial Bank of Australasia Ltd. v. Marshall and anr*[17]. and the Privy Council in *Commonwealth Trust Ltd. v. Akotey*[18]

52. I, therefore, hold that there was no formal contract in this case between the Union of India and the plaintiff respondent satisfying the requirements of section 175(3) of the Government of India Act, 1935 or Article 299(1) of the Constitution of India. Therefore there was no contract enforceable as such against the Union of India and I uphold the learned Trial Judge's finding on that point. I also hold that there was subsequent ratification by the Government of the acts done under the said unenforceable contract by receiving the bill without protest, by checking and allowing the said bill and by drawing a cheque in payment of the plaintiff and by sending the intimation card to the plaintiff at its address asking it to receive payment and finally stating in paragraph 11 of the written statement of the Union of India that payment has been made. This admission in the written statement in my opinion proves that the persons who ratified the acts were all authorized persons of the Union of India. I hold further that ratification of the acts under section 196 and 197 of the Contract Act can be implied and need not be express and does not require the formalities of a binding contract necessary under section 175 of the Government of India Act, 1935, or Article 299(1) of the Constitution. Finally I hold that the Union of India made the payment in accordance with the agreed practice and procedure uniformly followed and assented to by the parties in the usual course of their business dealing and in doing so the Union of India was not negligent and on the facts of the case if the plaintiff respondent company did not get the cheque, it was due to its own negligence and fault in not ensuring the safety of letters duly addressed to it. Following therefore the principle of *Lickbarrow v. Mason*[19] and applied in *Scholfield v. Earl of 20(1896) A.C. 51A(Supra), (Bank of Australasia v. Marshall*[20], and *Commonwealth Trust Ltd. v. Akotey*[21], I hold that the Union of India is not liable to pay over again.

53. On these findings, the plaintiff's action must fail. The appeal therefore is allowed with costs and certified for two counsel.

54. **Bose, J.** - This appeal is against the judgment and decree of G. K. Mitter, J. dated 16th April, 1956 and raises certain interesting questions of law.

55. The appellant is the owner of Bengal Nagpur Railway. In June, 1949 the respondent company supplied to the Bengal Nagpur Railway Administration certain quantities of coal of the

value of Rs. 20,033/8/-. The case of the respondent company is that the said coal was sold to the appellant under an agreement that the appellant would pay for the said coal including sales tax at the Esplanade Mansions Office of the Bengal Nagpur Railway Administration in Calcutta. On 15th July 1949 the respondent company submitted its bill for Rs. 20,34318/- on account of the price of the coal including sales tax. But as the appellant did not pay the amount of the bill the respondent filed the suit, out of which this appeal arises, on 16th December, 1950, for recovery of the amount due. In the plaint (paragraph 5) the respondent company claimed the value of the coal also on the basis of an alternative case that inasmuch as the respondent had lawfully delivered the said coal to the appellant not intending to do so gratuitously and the appellant had e

[16]1896 A.C. 51 [18](20) 1926 A.C. 73 [20] (1906) A.C. 559
171906 A.C. 559 [19](17) 2 T.R. 63 at p. 70 [21] (20) 1926 A.C. 73

njoyed the benefit thereof the appellant was bound to make compensation to the respondent for the coal so delivered. In the Written Statement filed on behalf of the appellant it was denied that there was any valid or enforceable contract or agreement between the parties in conformity with the provisions of section 175(3) of the Government of India Act, 1935, but the supply of the coal to the Bengal Nagpur Railway was admitted in the Written Statement and it was asserted that the appellant had paid to the respondent Rs. 20,343J8/- by an Account payee cheque dated the l8th August, 1949 drawn on the Reserve Bank of India in favor of the respondent company.

56. Several issues were raised at the trial before G. K. Mitter, J. The learned Judge has found that the respondent company did not receive payment in respect of the coal supplied by it to the appellant. He has also found that no valid or enforceable contract or agreement binding on the appellant had been proved or established but the appellant was bound to pay compensation under section 70 of the Indian Contract Act on the basis of the alternative case pleaded in paragraph 5 of the plaint. The learned judge therefore passed a decree in favor of the respondent company for Rs. 23,030/8/- with interim interest and interest on judgment at 6 per cent, per annum, and costs. Hence this appeal.

57. The main contention of the appellant before us is that the learned trial judge is wrong in applying the provisions of section 70 to the facts and circumstances of this case. In the first place it was submitted that as the delivery or supply of the coal to the Bengal Nagpur Railway Administration was made pursuant to a request made on behalf of or by the defendant appellant the applicability of section 70 of the Indian Contract Act is excluded.

58. It is convenient to set out at this stage section 70 of the Indian Contract 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."

59. There are two illustrations appended to this section. They are as follows

(a) A, a tradesman leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
(b) A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

60. Mr. G.P. Kar has placed strong reliance on the decision of this court in the case of *Union of India v. Ram Nagina Singh*[22] in support of his argument' that section 70 is not applicable to the facts of this case. In this case Chakravarti, J. (as he then was) has observed that section 70 contemplates a case where initially, at the time of the doing of the act or the delivery of the thing there is no proposal or promise as defined in Section 2 of the Indian Contract Act and therefore no agreement, but an obligation to make compensation to the person doing the act or delivering the thing nevertheless arises out of the fact that the person for whom the act was done or to whom the thing was delivered, accepted and enjoyed its benefit although initially there was no request for the act or the thing on his part. The elements of the section in the case of delivery of a thing are (1)

[22](89 Cal. L.J. 342)

delivery (2) delivery without an intention to deliver gratuitously and (3) enjoyment of the benefit of the thing delivered. They do not comprise a further element viz., a request in response to which the thing was delivered, though it may be, that case where a request was made but it was by a person having no authority to make it, are also included, because in such cases there is really no request by the person who receives or takes the benefit..

61. Now Section 70 finds place in chapter V of the Indian Contract Act which is headed "Of Certain Relations Resembling Those Created by Contract". So the obligation created under Section 70 should be considered as not based on contract. The section embodies a part of the doctrine of unjust enrichment, which Lord Wright has described in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*[23]. in the following words

> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category or Common Law which has been called quasi contract or restriction.

62. The Supreme Court of India in the case of *Chaturbhuj Vithaldas v. Moreshwar Parasram* [24]has decided that contracts not entered into in conformity with the provisions of section 175(3) of the Government of India Act 1935 or Article 299(1) of the Constitution of India are not rendered void by reason of non-compliance with such provisions but the effect is that in so far as the Government is concerned, it is not bound by such contract and the contract is not enforceable

against the Government. The Supreme Court has pointed out that the provisions of Article 299(1) were not inserted for the sake of mere form. They are there to safeguard Government against unauthorized contracts. If in fact a con- 65 tract is unauthorized or in excess of authority it is right that the Government should be safeguarded. On the other hand an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. It is however 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.

63. So, according to the Supreme Court, the effect is that the agreement is not binding on the Government for want of, proper form, or authority (See also *A.I.R. (1955) S.C. 468 Thawardas v. Union of India* (22) paragraph 25 of the judgment).

64. Mookherjee J. in the case of *Shib Kishore Ghosh v. Manick Chandra Nath*[25] and Chakravarti, J. in the case of *Union of India v. Ramnogina Singh* (1) already referred to, have observed that if there is a request followed by an acceptance of the request then the elements necessary to constitute an agreement viz. proposal and

[23](1943) A.C. 32 [25]21 Cal. L.J. 618

[24](1954) S.C.A. 373: A.I.R. (1954) S.C. 236

acceptance as defined in section 2 of the Contract Act are present and a binding agreement is concluded. The actual words of Chakravarti, J. are as follows:

> "Indeed if there is a request and a thing is delivered in compliance therewith, there would be an agreement and the person delivering the thing would be entitled to recover his dues under the agreement itself without being required to fall back on the doctrine of compensation."

65. This being the scope and implication of section 70 let us now examine the facts of the present case.

66. It appears that on the 23rd December 1948 one Mr. Fairfield, the Chief Mining Engineer, Railway Board who was also the Deputy Coal Commissioner had written a letter to the plaintiff respondent intimating that 1170 tons of coal had been allotted to their colliery for supply to the G.I.P. Railway and instructions were also given in this letter as to how the supply should be made to that Railway. (Ex. A.) On or about the 10th May 1949 the Chief Mining Engineer, Railway Board wrote to the Coal Superintendent, Dhanbad to transfer the basic loco order on Messrs. Marine Coal Co. Ltd. for 1170 tons, account G.I.P. Railway, to B. N. Railway, till June 1949 (Ex. B). A copy of this letter was duly forwarded to the respondent company and others. On 13th May, 1949 the Coal Superintendent, Dhanbad wrote to the respondent company asking them to divert the delivery of the said coal to B. N. Railway and gave the dispatching instructions in that letter (Ex. C). It is pursuant to these instructions that the delivery of the coal to the B. N. Railway

Administration was made. The learned trial Judge is wrong in thinking that that the request was that of the Coal Superintendent alone who had no authority to make the request on behalf of the defendant.

67. The evidence of Mulchand Parekh, a director of the respondent company, also makes it quite clear that it was pursuant to 'the directions of the Chief Mining Engineer, Railway Board and other authorities that the delivery of the coal to the Railways was made (ParekhQuestions 20-37, 188-190 and Q. 408-413). Another witness Amritlal Asaram Bhatt called on behalf of the respondent company had deposed to the same effect. (Q. 10-13, 47-50). Now it is clear that the directions of the said officers were given in pursuance of the Colliery Control Order then in force and also by the Chief Mining Engineer, Railway Board as such and as representing the Railway Board of the Government of India ,and the supply was made in compliance with these directions. The specific case of the respondent company before the trial court has been that the delivery of the coal to the B. N. Railway was according to the directions of those officers who were officers of the Government of India, and the respondent company duly received payment in respect of the supplies from the Railway Administration except the supply made in June 1949. At no point of time did the respondent challenge the authority of these officers to give directions for supply of coal to the B. N. Railway. In the plaint the respondent company found its cause of action on an agreement with the appellant, and relies on the correspondence as the basis of such agreement. The correspondence obviously has reference to the letters Exhibits A, B and C. But it is clear that no contract can be spelt out of this correspondence. In giving these directions as are contained in the letters Exhibits A and B the Chief Mining Engineer was purporting to act on behalf of the Railway Board of the Union of India and he and the other officers were also giving the directions and instructions in exercise of the statutory powers conferred on them and in the discharge of the duties imposed upon them by the Colliery Control Order 1945.

68. R. 8 of the Colliery Control Order provided as follows:

> "The Central Government may from time to time issue such directions as it thinks fit to any colliery owner regulating the disposal of his stocks of coal or for the expected output of coal in the colliery during any period including directions as to the grade, size, quantity of coal which may be disposed of, and person or class or description of persons to whom coal shall or shall not be disposed, the order of priority to be observed in such disposal and the stacking of coal on Government account."

69. It is obvious that the letter of the Deputy Coal Commissioner was written in exercise of the power conferred by this Rule 8 of the Colliery Control Order, after the Railway Authorities or some other Authority had communicated to the Colliery Control Authorities their requirements as to the quantity of the coal by way of an application or otherwise. Mr. Fairfield in his capacity of Chief Mining Engineer, Railway Board was also calling upon the plaintiff company by the letters dated 23rd December, 1948 and 10th May, 1949 to supply the coal to the G.I.P. Railway

and B. N. Railway. As the two officers were combined in the same person the direction given by Mr. Fairfield can be construed as having been given in exercise of his statutory power and also as a request of the Railway Board of the Government of India. In a case decided by the Patna High Court and reported in *(Union of India v. Dhansar Ooal Co.[26]),* (2) Ramaswami C.J. has held that when coal was supplied pursuant to an order of the Deputy Coal Commissioner issued under the Colliery Control Order, section 70 of the Contract Act had no application, and it has been held by this Court in the case already referred to that if delivery of a thing is made in compliance with a request the applicability of section 70 is excluded. For all these reasons it must be held that the plaintiff company cannot take advantage of section 70 of the Contract Act.

70. This contention of Mr. Kar having been acceded to, it is not really necessary to deal with the other contentions raised by him but as this matter is likely to go higher up and the higher Court may take a different view on this point it is proper that we should briefly express our views on the other points raised.

71. The next contention of Mr. Kar is that the Union of India cannot be considered as a "person" within the meaning of section 70 of the Contract Act and so the fact that coal was delivered or supplied to the B. N. Railway Administration or that the Union of India enjoyed the benefit of the coal delivered, does not attract the provisions of section 70 and the respondent cannot take advantage of that section. I am unable to accede to this contention of Mr. Kar.

72. Section 175 of the Government of India Act, 1935 and Article 299(1) of the Constitution of India make it abundantly clear that it is open to the Government to enter into contracts in exercise of the executive authority of the Union of India or the State, but such contracts will have to be entered into in a particular form. Besides this limitation or

[26] A.I.R. (1959) Pat 347

restriction as to form which has been imposed to safeguard the Government against unauthorized contracts there is no other limitation put by the Constitution or the Government of India Act, 1935. The Constitution has not stated that the Government will not be subject to the provisions of the Indian Contract Act which is the general law of the land relating to contracts nor is it provided in the Constitution or the Government of India Act, 1935 that the Government will not be subject to or incur the obligations created by the provisions of the Contract Act and flowing from the contracts entered into by the Government. Section 2 of the Contract Act which deals with definition of "Proposal", "Acceptance", "Agreement", "Contract" and other expression provides that it is a "Person" who can make a proposal and can be a promiser and it is again a "Person" who can accept a proposal and become a promisee. I do not think it can be suggested that the Government cannot be a promiser or promisee within the meaning of section 2 of the Contract Act. Under the Government of India Act or the Constitution it is only the full-fledged contracts resulting from the negotiations which have to be executed in a particular form. The Supreme Court has pointed out that contracts entered into on behalf of the Union of India or the State which are not in conformity with the provisions of Article 299(1) are not void but they are

enforceable or binding on the Government and they can be ratified by the Government if the Government so chooses. Now can it be suggested that sections 196 to 199 of the Contract Act which uses the word "person" do not apply to Government? I do not think so. The Allahabad High Court has held that the Government is a "person" within the meaning of section 72 of the Indian Contract Act and that section applies to the case of a Government (*State of Uttar Pradesh v. Kanhaiya Lal*[27] *(5)*, I see no justifiable reason for exempting the Government from the operation of section 70 of the Act. The attention of this Court was drawn to (24) A.I.R. (1959) Cal. 281, (4) A.I.R. (1957) Punjab 150, (25) A.I.R. (1956) Patna 91. (6) A.I.R. (1951) All. 257, (26) A.I.R. (1954) S.C. 728, (7) (1955) S.C.A. 577, and other cases but in those cases provisions of other statutes were considered. So these decisions cannot be called in aid of interpretation of the provisions of the Indian Contract Act. In my view the. Union of India can be regarded as a "person" within the meaning of section 70 of the Indian Contract Act, although it does not satisfy the definition of the word "person" as given in the General Clauses Act. If a Government engages in a commercial undertaking, trade or business such as is carried on by a private individual or corporation and enters into contracts, it must subject itself to the same obligations and place itself in the same position as a private individual or Corporation and should be considered as falling within the category of "person" in an extended sense.

73. The further contention of Mr. Kar is that if a contract becomes unenforceable against the Government by reason of non-compliance with the provisions of section 175(3) of the Government of India Act 1935 or Article 299(1) of the Constitution, the Government cannot be sought to be made liable by resorting to section 70 of the Contract Act and thus render the protection afforded by section 175(3) or Article 299(1) illusory or nugatory. Because then in every case the party disregarding the prescribed form contemplated by section 175(3) or Article 299(1) can fall back on the provisions of section 70 and if the conditions laid down in that section are fulfilled, make the Government liable for the work done or the thing delivered. To give effect to this contention of Mr. Kar will be to strike at the very roof of the principles of justice and equity. As I have pointed out already the object of section 70 is to provide a remedy against unjust enrichment. If the

[27] A.I.R. (1956) All. 383)

Government has enjoyed the benefit of the work done or of the thing delivered by another person, it is only just and proper that the Government should either compensate the person doing the work or delivering the thing, or restore the thing delivered, where such restitution is possible. There is nothing in section 175(3) of the Government of India Act 1935 or in Article 299(1) of the Constitution to suggest that without entering into a formal contract as contemplated in section 175(3) or Article 299(1) the Government cannot take delivery of a thing from another person and enjoy the benefit of that thing so delivered or cannot enjoy the benefit of any work done or services rendered by another. The liability under section 70 is a statutory liability, independent of any contract. The section embodies an equitable principle and imports an obligation to compensate provided the circumstances mentioned in the section exist. The cause of action based on section 70 is different from the cause of action based on a contract. This point has been

considered by S. R. Das Gupta, J. and Bachawat, J. after reviewing most of the relevant cases on the point and I do not see any reason to differ from the conclusion arrived at by that Bench. (Unreported decision in Appeal from Original Decree No. 155 of 1953, *State of West Bengal v. B. K. Mondal & Sons (10)*[28], See also (27) *(Dominion of India v. Preety Kumar Ghosh*[29]*)*.

74. It was also argued by Mr. Kar that if a contract is invalid or unenforceable by reason of non-compliance with the requirements of section 175(3) of the Government of India Act 1935 or Article 299(1) of the Constitution, the supply of the goods under such a contract cannot be said to have been made "lawfully" within the meaning of section 70 of the Contract Act. Reliance was placed on a decision of my learned brother Mukharji, J. reported in (6) 97 C.L.J. 9. But this decision has not been followed in the Bench decision of this Court in the case of *State of West Bengal v. B.K. Mondal*[30] *(10),* already referred to. I have also expressed my inability to agree with Mukharji, J. in my judgment delivered in *(Sitaram Jiswal v. Union of India*[31]*)* I understand that this point is now pending decision by the Supreme Court and so I leave the matter to be finally decided by the Court.

75. The next contention raised on behalf of the appellant is, that upon the facts of this case it should be held that the respondent company has received payment of the sum of Rs. 20,343/8/- and they have no outstanding claim against the defendant appellant. It is argued that it should be presumed that the intimation card dated the 10th October, 1949 by which the respondent company was informed that their dues in respect of the two bills Gated the 30th June 1949 would be paid on presentation of a proper receipt and authority (Ex. F.) had duly reached the respondent as- it has been provided that the letter was posted after being properly addressed, and it was after receiving this information that the respondent had sent a representative of the name of Daulatram to receive the payment and it was this Daulatram who had come to the office of the Railway and had received the cheque dated 18th August 1949 for Rs. 20,34318/- on behalf of the Respondent. Nor it is true that under section 16 of the Evidence Act read with section 114 of the Evidence Act and illustration (f) thereof, a presumption does arise that a letter posted with proper address had duly reached the addressee but when the addressee pledges his oath that the letter has not been delivered to him and this evidence is accepted by the Court, the presumption is rebutted. In the case before us Mulchand Parekh, the director of the

[28] Judgment dated 4th January 1957 [30](Appeal No. 155 of 1953Judg dated 4th January 1957)

[29] A.I.R. (1958) Patna 203 [31] Suit No. 978 of 1947 on the 13th June, 1956

respondent company has stated that this Intimation Card never reached the plaintiff company (Question 260-261) although other intimation post cards addressed to the office of the plaintiff had duly reached the plaintiff (Q. 262). To the same effect is the evidence of Mr. Bhatt, the assistant of K. Woora & Co. Ltd., the Manager of the affairs of the plaintiff's colliery and other collieries. (Questions 17-26 and 58-59). Furthermore this Ex. F does not bear any delivery mark of the Post Office, but only the sorting mark of the Post Office is there. This indicates that the letter had probably been intercepted before it reached the addressee. It also remains unexplained why this Ex. F was dispatched from the office of the B. N. Railway so. late as on the 10th

October 1949 although the cheque was lying ready since 18th August 1949. It appears that on previous occasions such Intimation Cards were sent out after a week or so of the drawing of the cheques. Both Mr. Parekh and Mr. Bhatt have deposed: to the effect that there was at no time any person of the name of Daulatram in the employment of the plaintiff company or K. Woora Ltd., nor has there been any person of the' name of B.L. Agarwalla in the service of these two companies.

76. The disputed Intimation Card bears the signature of Daulatram as having received the payment of the cheque and the signature of Agarwalla as having authorised Daulatram to receive the payment. It is in evidence that on other occasions the plaintiff company had received payment through other employees and never through this Daulatram. It is also on record that the practice of the plaintiff company was to grant separate stamped receipts (ParekhQ. 52, 57; Bhatt Q. 17, 36-46, 93). Apart from the acknowledgement of receipt made on the Intimation Card itself at the time of receiving the payment there is no such separate stamped receipt produced by the defendant in respect of the alleged payment of Rs. 20,34318/-. The cheque dated the 18th August 1949 appears to have been cashed through the United Commercial Bank Ltd., Calcutta where the plaintiff company had no account. The plaintiff company had banking accounts in the Bank of Bihar Ltd., Calcutta and in Birji & Co., a bank in Jharia. Certified copies of Accounts of these banks have been produced and they show that the amount in question has not found place in those accounts. The cashing of the cheque took place on 28th October 1949 through the United Commercial Bank and the account in which this amount of Rs. 20,343/8/- was deposited was opened by a company bearing the name similar to that of the plaintiff company but having its address as Grand Trunk Road, Burdwan. This account was opened on the 27th October, 1949, that is, the day previous to the cashing of the cheque, and the assistant accountant of the United Commercial Bank, Madhab Dubey, who had deposed on behalf of the plaintiff, has stated that after police investigation, it transpired that the party which opened the account was a bogus party (Q. 108). The Account Opening Form has been produced before the Court and it appears that one Surendra Nath Chatterjee and one Abinash Chandra Chatterjee professing to be directors of New Marine Coal Co. (Bengal) Ltd., signed the Account Opening Form and opened the account. Mr. Parekh and Mr. Bhatt have stated that these Chatterjees were never directors of, nor had they any connection with, the plaintiff company. The defendant appellant did not take any steps to get the records from the office of the Registrar of Joint Stock Companies produced to show that any of these Chatterjees were ever directors of the plaintiff company. The Memorandum and Articles of Association of the plaintiff company have been tendered in evidence and they do not bear the signatures of any of these Chatterjees as directors. It appears from the correspondence that have been tendered that on 24th September 1949 (Ex. H) the plaintiff company had asked for payment of this amount of Rs. 20,34318/- along with other amounts due in respect of other supplies of coal. This letter was replied to on 7th November 1949 (Ex. G) and it was stated in this letter of the Chief Mechanical Engineer that the bills for Rs. 20,34318/-along with some other bills had already been passed and the letter which was written demanding payment from the Chief Cashier and which has been produced is dated 5th June, 1960. Why was the letter written about seven

months after the 7th November, 1949 is not at all clear. The letter of the 5th June, 1950 no doubt, refers to previous reminders sent, but these reminders are not forthcoming. The long silence on the part of the plaintiff company before writing the letter of the 5th June, 1950 raises a good deal of suspicion about the truth of the plaintiff's case of not receiving the payment. The non-disclosure of any Mess Account, or any document or book of the plaintiff to show that there was no employee of the name of Daulatram or Surendra Nath Chatterjee or. Abinash Chatterjee in the service of the plaintiff company is another unsatisfactory feature of the plaintiff's case. The suggestion on the part of the plaintiff's witnesses that no register or book maintaining a record of the letters received by the plaintiff is kept, also sounds improbable. But notwithstanding these information in the case of the plaintiff the other factors to Which I have made reference lead me to hold that the plaintiff's case about not receiving payment of the amount claimed in the suit is true. I must confess however that the matter is not free from doubt and it is possible to take a different view of the matter if greater stress is laid as has been done by my learned brother on the unsatisfactory features of the plaintiff's case to which I have referred. Mr. Kar referred to certain decisions of the Supreme Court reported in (15) A.I.R. (1954), S.C. 429, (29) A.I.R. (1954) S.C. 504 and (16) A.I.R. (1959) S.C. 1070 but they do not really touch the point.

77. In the case reported in *(Income Tax Commissioner v. Ogale Glass Works Ltd*[32]*.)* (15) the assessee, a limited liability company, which used to carry on business in Aundh, an Indian State, as manufacturers of lantern and other glasswares had secured certain contracts for supply of lanterns and other glasswares to the Government of India. The price of the goods supplied under the contracts were paid by cheques drawn on the Reserve Bank of India, Bombay. The cheques used to be received by the assessee in Aundh and cashed through its Bank at Bombay. The question arose whether on the facts of the case, income profits and gains in respect of sales made to the Government of India was received in British India within the meaning of section 4(1) (a) of the Indian Income Tax Act. It was found that according to the terms of the contract the payment for delivery of the goods was to be made on submission of the bills, by cheque on a Government Treasury in India or on a Branch of the Reserve Bank of India or the Imperial Bank of India transacting Government business. The assessee, while submitting the bills, used to write on the bills the following words "Kindly remit the amount by cheque in our favour on any Bank in Bombay". The Supreme Court upon consideration of a number of English decisions and the relevant provisions of the Indian Post Office Act came to the conclusion that the word "remit" amounted to a request by the assessee to send the cheque by post, and so the post office became the agent of the assessee as soon as the cheque was posted in Delhi and thus the payment was made in Delhi and the Government had been discharged of its obligation by payment made in the prescribed manner under section 50 read with illustration (d) of the Indian Contract Act.

78. This principle has been followed and reaffirmed by the Supreme Court in the two

[32] A.I.R, (1954) S.C. 429

other cases referred to by Mr. Kar. In the latest of the said two cases reported in *(Income Tax Commissioner v. Patney & Co*[33]) (16), the Supreme Court after referring 'to the relevant

observations of Das J. in Ogale Glass Works case remarked as follows:

> "Whatever may be the position when there is an express or implied request for the cheque for the amount being sent by post or when it can be inferred from the course of conduct of the parties, the appellant in this case expressly required the amount of the commission to be paid at Secunderabad, and the rule in Ogale Glass Work's case would be inapplicable." (See also *Jagadish Mills Ltd. v. Income Tax Commissioner*[34]) (30).

79. In the case before us the evidence is that according to the course of business or dealing between the parties intimation cards in a standard form used to be sent to the respondent company by ordinary post and the respondent company never objected to intimation cards being sent in this manner. (ParekhQ. 269). Several intimation cards were sent to the respondent in this manner and the respondent had always collected the amounts mentioned in the intimation cards in due course, from the office of the Railway administration the amounts being always paid to the respondent company's representative by means of cheques drawn on the Reserve Bank of India and handed to the representative at the office of the Railway. There is no question of sending of any cheque by post in this case at the express or implied request of the respondent company, or according to the course of business between the parties. So the principle enunciated in the Supreme Court cases has no application.

80. Section 128 of the Negotiable Instruments Act however provides that where a Banker on whom a crossed cheque is drawn has paid the same in due course the banker paying the cheque and (in case such cheque has come to the hands of the payee) the drawer thereof shall be entitled to the same rights and be placed in the same position in all respects as they would respectively be entitled to and placed in if the amount of cheque had been paid to and received by the true owner thereof.

81. Similarly section 131 of the Negotiable Instruments Act affords protection to a collecting banker and provides "that a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not in case the title to the cheque proves defective incur any liability to the true owner of the cheque by reason only of having received such payment." If however the collecting banker is negligent and does not act in good faith it may be liable to the true owner of the cheque. Whether a collecting bank is negligent depends on the particular facts of each case (*Brahma Shum Shere Jang Bahadur v. Chartered Bank of India & Others*[35] *(31)* where I have dealt with the relevant sections of the Negotiable Instruments Act). In the case before us the respondent company, which is the payee of the cheque has not chosen to proceed against the collecting banker, but it seeks to make the drawer of the cheque liable, on the original consideration namely the price of the goods supplied. There is no doubt that the cheque drawn on behalf of the defendant appellant has been cashed and the amount has been paid by the Reserve Bank of India.

[33] A.I.R. (1955) S.C. 1070
[34] A.I.R. (1959) S.C. 1160
[35] A.I.R. (1956) Cal. 399

Now the question is whether the plaintiff respondent or the defendant appellant should bear the loss. It is well settled that where two innocent parties suffer a loss, that party should suffer whose negligence was the proximate cause of the loss.

82. No case of negligence is laid in the pleadings and no issue was framed on this point nor any evidence adduced. If a specific issue has been raised on this point the parties could have adduced further evidence both oral and documentary on the point. In fact the defendant has not called any oral evidence in this case. No argument based on this case of negligence was advanced before the trial court. The question has cropped up in course of discussion before this Appeal Court. I do not therefore propose to rest my decision on this question of negligence.

83. A further point has been raised on behalf of the respondent at the hearing of this appeal although it was not pressed before the trial court. The learned counsel for the respondent company has stated before this Court that he will confine himself to the materials already on record for the purpose of his argument on this point and so we have allowed him to agitate this point before us. The point is whether the defendant appellant had ratified the transaction in suit and thereby rendered itself liable for the claim of the respondent company as laid in the plaint. It is submitted, that in the written statement it is admitted by the defendant that the coal had been supplied to the B. N. Railway Administration, that bills had been submitted by the plaintiff company to the Railway Administration, that according to the usual practice intimation card has been sent to the plaintiff requesting it to obtain payment, that the defendant had drawn an Account Payee cheque in favor of the plaintiff for Rs. 20,343/8/- and had thus paid the plaintiff the amount of the claim. The correspondence that has been exhibited in this case also shows that the Railway Administration had accepted liability for the transaction, had duly certified and passed the bills of the plaintiff dated the 30th June, 1949 for Rs. 20,34318/- and was all along ready to make the payment to the plaintiff and asserted that the defendant had in fact paid off the claim of the plaintiff.

84. It is argued that in the circumstances it should be held, that the defendant had ratified the contract which was not executed in the form required under section 175(3) of the Government of India Act 1935. It may be noted that in the case before us there is no question raised of any excess of authority or of ratification of any excess. The contract is only defective in form.

85. Now it is clear from the decision of the Judicial Committee reported in *(Collector of Masulipatam v. Cavaly Venkata Narainappa*[36]) (12) that the Government can ratify the acts of its officers done without authority or in excess of authority even by implication. The Judicial Committee observed:

> "The acts of a Government Officer bind the Government only when he is acting in discharge of a certain duty within the limits of his authority or if he exceeds that authority when the Government in fact or in law directly or by implication, ratifies

the excess."

86. Section 197 of the Indian Contract Act also provides that ratification may be express

[36]8 Moore's Indian Appeals 529 at 554

or may be implied in the conduct of the person on whose behalf the acts are done.

87. It is well known that ratification relates back to the time of inspection of the transaction and has a complete retroactive efficacy. The circumstance of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's act whatever they were or however culpable they were. There must be unqualified adoption on the part of the principal taking upon himself the responsibility for the acts done by the Agent, with full knowledge of all the facts and circumstances.

88. It is also to be noted that the Privy Council while deciding the case in 8 Moore's Indian Appeals 529 had not had to consider the effect of constitutional provisions like section 175 (3) of the Government of India Act 1935 or Article 299(1) of the Constitution.

89. The Supreme Court has in the case of *Chatturbhuj Vithaldas[37] (11)* already referred to, observed that it may be that the Government will not be bound by the contract which is not in the prescribed form, 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 there would be nothing to prevent (ratification especially if that was for the benefit of Government. The Supreme Court refers to the Privy Council case of (12) Collector of Masulipatam (3 M.I.A. 529 at 554) in support of the proposition that Government can ratify the acts of the officers which are in excess of their authority. But whether the Supreme Court meant to say that ratification by Government may be in any form and even by implication is not clear. It has been argued before us by Mr. Kar on behalf of the Union of India that ratification must have to be made if at all in the same form in which a contract has to be executed under Article 299 (1) of the Constitution or section 175(3) of the Government of Indian Act 1935, for otherwise Article 299(1) or section 175(3) will be a dead letter and the object for which these provisions were enacted will be frustrated. This argument of Mr. Kar receives support from a decision of the Patna High Court reported in (9) *(Dominion of India v. Bhikhraj Jaipuria[38]*). It was held by Ramaswami C.J. and Kanhaiya Singh J. that the acceptance by Railway Administration of the goods delivered by the plaintiff under a contract not in the prescribed form or under a contract entered into by an officer in excess of authority is not sufficient in point of law to constitute ratification so as to validate the contracts. It is pointed out that the effect of admitting a plea of ratification in such a case would be tantamount to the repeal of the constitutional provision (See paragraphs 37 (p), 38 and 51 of the judgment). Our attention was also drawn to a decision of the Bombay High Court reported in (32) *(State of Bombay v. Pannalal[39]*) but it was held in this case that the acts done by the Government in that case were not sufficient to constitute a ratification. So that case does not advance the matter any further. In a decision of this court reported in (33) *(Ghosh Singh Partners Ltd. v. Union of*

India[40]*) Chakravartti*, C.J., in dealing with Chaturbhuj Vithaldas's case observed: ;

> "With regard to the contracts before them, the Supreme Court held that although they were not altogether void, being binding on the officer who had entered into them on Government's behalf they were not binding on Government themselves,

[37](A.I.R. (1954) S.C. 236) [39] A.I.R. (1959) Bom. 56
[38] A.I.R. (1957) Patna 586 [40] A.I.R. (1959) Cal. 287

> although Government would perhaps be bound if they ratified the contracts." (Para 14 of the judgment).

90. The learned Chief Justice has also pointed out that the Supreme Court has no necessity of deciding in the case before them whether acceptance of benefit of the goods did constitute ratification and so the Supreme Court did not proceed to decide that point. It appears to me that the reasonable view to take is that ratification by Government of a contract or acts done under a contract entered into in disregard of the provisions of Article 299(1) should either conform to the provisions of Article 299(1) or should be done in some other unambiguous form by somebody duly authorized to ratify on behalf of the government be- cause in that case the protection afforded by Article 299(1) will not be illusory. The provision giving protection to the Government and the public fund will remain in full force and effect and at the same time it will enable the Government in appropriate cases to take upon itself the liability in respect of the defective contract by unequivocal acts of ratification by responsible persons of unquestionable authority. In Sanjiva Row's book on Contract (3rd Ed. 1950) it is stated relying on Willis-ton on Contracts (1936 Edition), Sections 275 and 276, that although ratification may be express or implied, an exception must be made if the transaction to be ratified is an instrument under seal. In that case the ratification must also be under seal, and so if a statute requires a written authority for a particular transaction, oral ratification will not validate an unauthorized execution of the transaction (Sanjiva Rowpage 779, 1950 Ed.).

91. It has been contended in the case before us that the Union of India by admitting and asserting the fact of payment of the claim of the plaintiff in the written statement has ratified the contract or the acts done thereunder. But it is to be noted that in this very written statement (paras 3 and 16) the Union of India has also taken up the plea that there was no valid or enforceable contract or agreement between the parties. So when in the written statement the supply of the coal and the payment of the amount of the bills in respect of the supply, are admitted and at the same time it is asserted that there is no valid or binding contract or agreement between the parties it cannot be said that there is an unqualified adoption of the contract or an unequivocal act of ratification. In the context in which the admission of payment is made it is possible to construe that such admission has reference to the fact of supply of the coal and retention of the benefit of the supply by the defendant. In other words, what the defendant has admitted in the written statement is that the plaintiff had supplied the coal to the Railway Administration and the defendant had paid for such supply there is no ratification of the contract or the agreement. In the circumstances I hold that the plaintiff cannot succeed on the basis of ratification of the defective contract. There may

have been ratification if at all of the act of supply or delivery of the coal by reason of the admissions made in the written statement of the Union of India but for that the remedy of the plaintiff is on the basis of section 70 of the Contract Act. But as already pointed out the request made on behalf of the defendant by the Chief Mining Engineer Railway Board excludes the applicability of section 70 to the facts of this case. I agree that this appeal should be allowed.

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