BOMBAY HIGH COURT

The Municipal Corporation

Vs

The Secretary of State

(Mirza, J.)

11.02.1932

JUDGMENT

Mirza, J.

1. This suit has arisen out of an unfortunate dispute between the plaintiffs who are the Municipal Corporation of the city of Bombay and as such represent the interests of the rate-payers of that city, and the defendant who is the Secretary of State for India in Council and as such represents in this case the interests of the tax-payers of the Bombay Presidency. The dispute is in respect of the liability of the Secretary of State for India in Council to contribute a certain amount annually towards defraying the expenses of primary education in the city of Bombay, under an arrangement said to have been arrived at between the Bombay Government and the plaintiff Municipality. [After referring to the efforts made to settle the dispute between the parties, his Lordship proceeded:]

2. The case for the plaintiffs is that as the result of certain negotiations in the years 1916 and 1917 a contract was eventually arrived at between the plaintiffs and the Government of Bombay by which the Government of Bombay agreed to share equally with the plaintiffs the expenses which the plaintiffs would incur on primary education in the city of Bombay over and above the plaintiffs' net budgetted expenditure for that purpose during the year 1917-18, the half share of Government being made payable at or before the end of each financial year following that in which the expenditure was incurred. In consequence of the contract so arrived at the plaintiffs incurred large expenditure in respect of primary education in the years 1918-19, 1919-20 and 1920-21, the expenditure incurred by them in each of these years being in excess of the net budgetted expenditure for the year 1917-18. The Bombay Government paid up their share of this excess expenditure in accordance with the bills submitted to them by the plaintiffs. Thereafter the Bombay Government invented excuses and made provisional payments only which were short of the bills which were submitted by the plaintiffs from time to time, with the result that an aggregate sum of Rs. 12,05,127-5-2 has remained unpaid and the plaintiffs are seeking to recover

this amount together with interest from the Secretary of State for India in Council. The plaintiffs have reserved in this suit their right to proceed against the defendant in respect of such further amounts as might become payable by him for the years subsequent to 1925-26, the present claim being in respect of the years 1922-23, 1923-24, 1924-25 and 1925-26 only. The plaintiffs have since filed a suit in this Court claiming certain amounts in respect of short payments made during such subsequent years. That suit is not placed before me for trial but the decision in the present suit, it is agreed, will govern that suit also.

3. The plaint was admitted on January 10, 1927. The defendant filed his written statement on June 6, 1927. In the written statement as originally filed the defendant did not challenge the plaintiffs' claim on some of the technical grounds which he has since pleaded but denied his liability on the ground mainly that no contract was arrived at between the parties as was alleged in the plaint. He further pleaded that if an agreement was entered into, it was without consideration, and, therefore, void. He further pleaded that Government's liability, if any, did not extend beyond an annual subvention equal to half of the additional expenditure by the plaintiffs on the expansion of primary education under a scheme which was put forward at the time by the plaintiffs. The defendant further pleaded that the plaintiffs had not spent the money for the expansion of primary education as was contemplated in their scheme, and that, assuming that there was a contract, the defendant was not bound to carry out his part of the contract as the plaintiffs have committed a breach of it. Nearly four and a half years later the defendant applied by a chamber summons for leave to amend his written statement by inserting various new grounds of defence. The learned Chamber Judge granted leave to the defendant to amend the written statement making the defendant pay the costs of the summons and to bear the costs of the amendment which he was to be at liberty to make. This order was made on December 14, 1931.

4. The defendant has accordingly amended his written statement by inserting therein the newly added paragraphs 2(a), 3(a), 3(b), 3(c), 5(a), 5(b) and 5(c) the original paragraphs being allowed to remain. By paragraph 2(a) of the amended written statement the defendant pleads that "no contract is contained in the correspondence between the parties and/or the order No. 499 dated February 10, 1919, creating rights and obligations subject to the jurisdiction of and enforceable by a municipal Court"; that the correspondence and the order referred to amounted to an administrative act of the Executive, Government of Bombay, and whatever else was done or was to be done were administrative acts of Government and as such were acts of State which could not be interfered with by a municipal Court. Mr. Coltman on behalf of the plaintiffs has vigorously attacked the language of this amendment and contends that the plain meaning to be attached to it as it stands is not that the contract if proved created rights and obligations which were not subject to the jurisdiction of a municipal Court, as is contended for by the Advocate General, but that the correspondence and order of Government to which reference is made were

acts of State which as such were not subject to the jurisdiction of or enforceable by a municipal Court. In that sense the previous clause denying that there was any contract would be mere repetition of the denial contained in paragraphs 1 and 2 of the original written statement and the second clause would be a statement which would serve no useful purpose from the point of view of the defendant. The language of paragraph 2(a) of the amended written statement is perhaps not as artistic as Mr. Coltman would have wished it to be, but the paragraph taken as a whole seems to me to be clear as to the meaning to be given to it. Mr. Justice Kania has referred to what is now paragraph 2(a) of the amended written statement in his judgment on the summons for amendment. He says that the plaintiffs' objection to the proposed amendment was that it would, if allowed, set up a new ground which was inconsistent with the pleadings then on the file. It is clear from the judgment that the plaintiffs' counsel then understood this proposed amendment to mean that assuming there was a contract it was not enforceable in a municipal Court of law. The learned Chamber Judge has in his judgment thus paraphrased the proposed amendment: "We have already denied the contract. But even if there is a contract we say it is not enforceable by the Court". In my judgment this is the proper interpretation to be put upon paragraph 2(a) of the amended written statement. By paragraph 3(a) of the amended written statement the defendant pleads that the contract is void for vagueness and uncertainty, is unenforceable on that ground, and does not constitute a consideration for any promise made by the defendant. By paragraph 3(6) the defendant pleads that the agreement not being made in accordance with the requirements of Section 30 of the Government of India Act is void and not binding on the defendant. By paragraph 3(c) the defendant pleads that the alleged contract was not in conformity with the provisions of the City of Bombay Municipal Act, 1888, and as it could not bind the plaintiffs, the plaintiffs were not entitled to enforce it. By paragraph 5(a) the defendant pleads that by reason of the passing of Section 72D of the Government of India Act, 1919, the contract became unlawful and impossible of performance, and therefore void. In paragraph 5(b) the defendant sets out certain breaches of the alleged contract on the part of the plaintiffs and gives particulars of such breaches. In paragraph 5(c) the defendant sets out certain further breaches of the alleged contract on the part of the plaintiffs, and contends that the plaintiffs having committed breaches of the alleged contract are not entitled to any relief in respect of it.

5. After Mr. Coltman had opened the case for the plaintiffs for some days, the parties agreed that they would in the first instance take the Court's decision on issues Nos. 1 to 8 and 15 only as these issues did not require the taking of any oral evidence except perhaps on the question of executed consideration which was a mixed question of fact and law. As the documentary evidence already placed before the Court seemed to contain ample materials on the subject of the executed consideration relied on by Mr. Coltman, it was left for further consideration after hearing the Advocate General in reply whether any oral evidence was required. No application

was made to me at the end of the Advocate General's reply for any oral evidence to be taken on this point. I understand, therefore, that both parties have dispensed with oral evidence so far as the preliminary issues before me are concerned.

6. In construing the correspondence on which reliance has been placed I will deal with it in the first instance as if no objection attached on the ground that the offer and acceptance said to be contained in it were not by persons who were competent in law to have bound the parties herein respectively by such acts and that the alleged contract was not otherwise in proper form. The first issue in the case is, whether the correspondence referred to in the plaint contains or discloses any contract enforceable at law. In the form in which this issue is raised it is capable of covering the technical points which are taken in the amended written statement. It might make for greater clearness if I were to approach the issue as if it was in two parts, viz., (a) whether the correspondence relied on discloses a contract apart from the question whether the parties who professed to act on behalf of the Municipality and Government respectively had authority in law to bind their respective principals in the manner they purported to do ; and (b) if it does, whether the contract is binding and enforceable at law between the parties to the suit. Mr. Coltman has objected to issue No. 3 on the ground that it has not been pleaded by the defendant. The issue' is, whether the parties were ad idem as to the terms of the alleged agreement. It seems to be covered by issue No. 1 in the case, and as it is an issue of law, there would be no hardship, in my opinion, on the plaintiffs if it were to be allowed to remain.

7. I will consider, first, whether the correspondence discloses a contract between the parties on the assumption that those who professed to act on behalf of the Municipality and of Government respectively in the manner they did had authority in law to bind their respective principals. The correspondence on which reliance has been placed on behalf of the plaintiffs is annexed to the plaint and has been put in as Exh. A collectively. It is annexed to a Government order dated February 10, 1919. According to the plaintiffs' case the offer of Government which they are said to have accepted, is contained in Government letter dated November 29, 1918 (part of Exh. A). That letter is a reply to a letter dated December 21, 1917, (part of Exh. A), addressed by the President of the Bombay Municipality to Government. The letter of the President refers to the previous correspondence which had taken place on the subject between the Municipality and Government ending with the Municipality's letter to Government dated January 13, 1917. The letter states that by desire of the Municipal Corporation of Bombay the President was forwarding therewith a copy of the Schools Committee's letter No. 5056 dated October 5, 1917, together with a draft scheme laying down a programme of ten years preparatory to the introduction of free and compulsory primary education in Bombay. The letter proceeds:I am to request the attention of Government to the question of finance dealt with in paragraphs 6 to 10 of the letter and to express the hope of the Corporation that for the reasons given in the Schools Committee's letter

Government will be pleased to agree to share from year to year one-third of the enhanced expenditure involved in giving effect to the Scheme, as suggested by the Schools Committee.

8. This letter appears to have been in the nature of a proposal made on behalf of the Municipality to Government requesting Government to share from year to year one-third of the enhanced expenditure which would be involved in giving effect to the scheme of primary education which the Schools Committee of the Municipality had framed. Government replied to this letter on November 29, 1918. The letter states that the Governor-in-Council after giving the question his deepest consideration had arrived at the conclusions to which expression was being given in the letter. Paragraph 3 of the letter states :[Paragraphs 3-6 of the letter are reproduced in the statement of facts.]

9. It is clear from the terms of this letter that it was intended to convey a proposal to the Municipality on behalf of Government. The proposal was that all additional expenditure should be shared equally between Government and the Municipality. The consideration for the proposal as set out in the letter was that the Municipality intended to spend a large sum on bringing primary education to the highest possible pitch of efficiency. Another consideration stated in the letter was that Government shared the desire of the Municipality to secure a more rapid and complete development of primary education in the city of Bombay. A further consideration mentioned in the letter was that the liberal subvention proposed to be made by Government was with the object of assisting the Municipality to prepare for the introduction of free and compulsory education and to make every future citizen of Bombay literate in one of the vernaculars. A further consideration set out in the letter was that primary education in the city of Bombay could no longer be developed in a manner befitting the chief city of India without substantial contribution from Government's provincial revenues.

10. The learned Advocate General has forcefully argued that this letter discloses no consideration which would be regarded as valid in law. He has called attention to the provisions of Section 61(q) of the City of Bombay Municipal Act by which it is made incumbent on the corporation to make adequate provision by any means or measures which it is lawfully competent to them to use or to take, for (q) maintaining, aiding and suitably accommodating schools for primary education subject always to the grant of building grants by Government in accordance with the Government Grant-in-aid Code for the time being in force. At the date of the alleged agreement Government's liability towards primary education in the city of Bombay was to the extent only of making building grants to the Municipality for that purpose. Section 62B of the Act, as it then stood, would have extended Government liability to the extent of defraying one-third of the cost of primary education if at the instance of Government primary education were made free and compulsory for the city of Bombay. Section 62 B was not to come into operation except at the

instance of Government. The Advocate General contends, therefore, that there was no consideration for the offer made by Government.

11. The letter of Government, as I read it, seems to me to amount to more than a voluntary offer made out of charitable motives as the Advocate General contends. Government was interested in the welfare of the citizens of Bombay and recognising that the Corporation had not adequate means at its disposal to advance primary education so as eventually to make it both free and compulsory, it offered, by way of an inducement to the Municipality, to expend more moneys on primary education than it had hitherto done, to contribute one half of such extra expenditure. Section 61(q) of the City of Bombay Municipal Act must be taken with its natural limitations, viz., that the Municipality was to discharge its obligations towards primary education as far as its means permitted. Section 62B as it then stood had by implication recognised that the Municipality could not be expected to bear the whole burden of primary education if it became free and compulsory at the instance of Government and that in that event Government would contribute one-third of the increased expenditure. The proposal made by the Municipality to Government at this date was to share to the extent of one-third the extra expenses which the Municipality was proposing to incur under a scheme spread over ten years at the end of which free and compulsory education would become feasible. On the examination of the scheme Government doubted whether it would be feasible under the scheme to have free and compulsory education at the end of the ten years and were desirous of co-operating with the Municipality in any attempts the Municipality might make to attain that goal as early as possible.

12. "Consideration " is defined in Section 2 of the Indian Contract Act in the following terms:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

13. By their letter Government as promisors were asking the Municipality in return for Government's promise to participate in such extra expenditure to promise to expend a large sum of money over and above what they were then doing for primary education in Bombay. If the Municipality have given the promise which they were asked to give, there would, in my judgment, be consideration for the agreement. The benefit to be derived by the expenditure was by the citizens of Bombay. Government can be said to hold a fiduciary position in respect of their subjects. The moneys at the disposal of Government are the moneys which they raise from their subjects by taxation and such monies are to be expended for the well-being of the subjects. It cannot be said, in my opinion, as the Advocate General has contended, that because there was no personal advantage to the members of Government in making this offer therefore there was no consideration, the consideration, in my opinion, being an advantage to be gained by a section of

Government's subjects, viz., the citizens of Bombay.

14. The learned Advocate General has further argued that the letter discloses a consideration on the part of the Municipality which is vague and uncertain and hence is incapable of being enforced. The proposal which the Municipality had made to Government was based upon a scheme. The scheme showed that the Municipality would be incurring a large expenditure in excess of what they were then doing. So far as the sum to be expended under the scheme was concerned it was quite definite and it could not be said that any uncertainty attached to it. Government in not agreeing to the scheme in all its details relied upon that part of the scheme in general which implied a promise on the part of the Municipality to spend a large sum of money on primary education over and above what they were then doing. Government's offer being based on that assumption it would be permissible, in my opinion, to look at the scheme which was then before Government in considering what meaning was to be attached to the expression "large sum" as used by Government. It is not alleged on behalf of the defendant that what the Municipality claims to have spent under the agreement would not amount to a " large sum ". The attempt is to rely upon a loose expression which Government have themselves used in this connection to show that the consideration promised by the Municipality was vague and uncertain and therefore unenforceable. In my opinion there is no force in this contention.

15. Another contenti6n advanced by the learned Advocate General is that the letter does not show that the parties were ad idem and, therefore, there was no agreement. The proposal of the Municipality, if accepted, would have limited Government's liability in relation to the scheme which the Municipality had put forward. Government make a reference in passing to this proposal contained in the scheme and take pride in pointing out that although the Municipality had asked for a grant of Rs. six lacs per annum at the end of their ten years' plan, the actual grant which Government would be prepared to give if their proposal were accepted and acted upon by the Municipality would amount to rupees nine lacs on the basis of the scheme which was put forward. From this statement in the letter it is contended by the Advocate General that in making their proposal Government had in mind the scheme put forward by the Municipality by which their maximum liability would amount to about rupees nine lacs only while the Municipality at the same time considered that Government's offer was not subject to such a limitation. From their letter it is clear that Government did not accept the scheme and the liability they offered to undertake had no connection with the scheme. They not only rejected the scheme but placed no limit to their future liability in respect of the contribution they offered to make. It is clear from the conduct of the parties during the first three years after the agreement between them that both of them understood Government's liability to consist of a half share in the excess expenditure whatever that expenditure might be. Government paid up the first three years' bills in full on that footing. It was only after the first three years' bills had been paid that a point was raised on their

behalf that the amount of contribution by Government should be limited with reference to the original scheme which was presented by the Municipality. It is for this reason, it seems, that Government are still paying rupees six lacs per annum as their contribution to the Municipality in respect of the excess expenditure, although free and compulsory primary education which was contemplated under the scheme at the end of the tenth year has not yet been introduced into all parts of Bombay city.

16. A further contention taken by the Advocate General is that Clause (4) of this letter constituted a condition which the plaintiffs did not accept when they accepted the offer. As I read Clause (4) of this letter, it does not seem to me to form part of the offer which was made. It seems to point to an omission in the scheme of the Schools Committee, and expresses Government's wish that the system which was then being followed of Municipal Schools' teachers being trained at the Government Training Colleges free of charge should be maintained. The letter does not call upon the Municipality expressly or by necessary implication to give its assent to it as part of the offer made. In the absence of a term to the contrary it would be assumed that the practice which prevailed at the date of the agreement of Municipal Schools' teachers being sent up for training to Government Training Colleges would be continued.

17. Exhibit B (collectively) shows that the offer of Government contained in this letter was placed before a meeting of the Corporation held on December 5, 1918, when a resolution was passed, which was as follows:

> ...2. That the President be requested to convey to Lord Willingdon's Government the warm appreciation, on the part of the Corporation, of the liberal offer of Government to contribute one half of the additional expenditure over the net budgetted expenditure for primary education for the year 1917-18 that may be incurred by the Corporation in subsequent years in giving effect to any scheme of a substantial extension of primary education leading up to the introduction of free and compulsory education in the City of Bombay within a definite period, which offer the Corporation gratefully accept.

18. On December 6, 1918, the President of the Municipality wrote his letter (part of Exh. A) of that date to Government accepting in terms of the Corporation resolution the offer made by Government in respect of their contribution towards the extra expenditure to be incurred for primary education. Paragraph 2 of this letter states:

2. I am also to inform Government that the Corporation approve of the legislation proposed in the latter part of paragraph 3 of your letter, and to suggest that the arrangement now arrived at about Government contributing one half of the additional expenditure be embodied in the City of Bombay Municipal Act in place of the first paragraph of Section 62B of the Act, the second

paragraph being retained.

3. With regard to the proposed amendment of section 39 of the Act, referred to in paragraph 5 of your letter, I am to state that Government will be addressed on the subject hereafter.

19. The Advocate General has contended that this letter does not amount to an acceptance of the Government offer because it does not accept all the terms of that offer, but makes a counter-proposal in respect of one term and asks for time to give a reply with regard to another term. The two points raised in the Government's letter dated November 29, 1918, on which reliance is being placed, do not seem to me to form part of the offer contained in that letter. With regard to the deletion of Section 62 B from the City of Bombay Municipal Act, Government merely intimated that the section was no longer necessary in view of their altered policy of contributing one half of the excess expenditure. Government were entitled to pass whatever legislation they pleased. The consent of the Municipality was neither asked for nor required by Government to enable them to delete Section 62B. In paragraph 2 of the President's reply the Municipality approved of the proposed deletion of Section 62B, and merely suggested that the arrangement which had been arrived at by Government promising to contribute one-half of the additional expenditure might be embodied in the Municipal Act in. place of the first paragraph of Section 62B, the second paragraph being retained. The suggestion does not seem to me to be in the nature of a counterproposal. The offer is accepted unconditionally in the previous paragraph and what follows is merely a suggestion that the agreement arrived at may find a place in the Municipal Act. With regard to the second suggestion contained in the Government letter to amend Section 39 by increasing the number of members of the Schools Committee, that again, in my opinion, is no part of the offer but is merely an expression of intention on the part of Government in view of the coming expansion of primary education in Bombay under their agreement with the Municipality to increase by legislation the number of members to sixteen of whom twelve were to continue to be elected by the Corporation from among the Municipal councillors and the remaining four were to be selected by the Corporation irrespective of such qualification. Government asked for the views of the Municipality on this proposal. This was merely a matter of detail as to the working of the Schools Committee in future and formed no part of the offer made by Government in respect of their contribution.

20. The Advocate General has relied upon Government reply, dated February 10, 1919, (Exh. C), as showing, according to his contention, that the matter had not yet been concluded in an agreement but was kept open between the parties. By this letter Government replied that they were unable to accept the suggestion made on behalf of the Municipality that the arrangement should be incorporated in Section 62B when amended as proposed, as it would be tantamount to a preferential treatment of the Bombay Municipality as compared with the District

Municipalities. The letter further states that Government considered that, as in the case of the District Municipalities, an administrative undertaking on their part should be regarded as sufficient. " The Advocate General contends that Government's proposal regarding the deleting of Section 62B was kept open by the Municipality until March 13, 1919, when by a resolution (Exh. 7) passed at a meeting of the Corporation it was resolved to record the Government letter dated February 10, 1919. The letter dated February 10, 1919, is not a part of Exh. A collectively and is not recited or printed as an accompaniment to the Government order dated February 10, 1919. It does not appear, as contended for by the Advocate General, that the plaintiffs have by their pleadings relied upon this letter as forming part of the correspondence which discloses the agreement arrived at between them and Government.

21. Apart from certain considerations which arise from the plaintiffs being a statutory corporation governed by the City of Bombay Municipal Act in respect of their contracts, and the defendant being a corporation solely governed by the Government of India Act in respect of his contracts, it would seem that an agreement was arrived at between the President of the Bombay Municipal Corporation professing to act on plaintiffs' behalf and the Secretary to the Government of Bombay in the Educational Department professing to act on behalf of the Bombay Government, who in their turn seemed to be acting on behalf of the Secretary of State for India in Council, which would have the effect of binding the parties as a concluded contract if those who professed to act respectively on behalf of the parties were vested in law with the power to bind their respective principals by the acts they purported to do on behalf of their respective principals.

22. I will now proceed to consider whether the agreement arrived at is binding upon the defendant.

23. It is conceded by Mr. Coltman that the contract which has been arrived at could not be enforced against the Bombay Municipality as it is not made on behalf of the Municipality by its Commissioner as required by Section 69A of the City of Bombay Municipal Act, the President of the Corporation having no such authority by law to bind the plaintiffs. It is pointed out by the Advocate General that the alleged contract contravenes also the provisions of Section 69C and Section 70 (1)(b) of the City of Bombay Municipal Act. These sections are mandatory and not merely directory. While conceding that the contract would not be enforceable against the plaintiffs, Mr. Coltman relies upon Section 71 of the City of Bombay Municipal Act which provides that a contract which has not been executed in accordance with the provisions of the Municipal Act shall not bind the Corporation. Mr. Coltman contends that in such a case the contract would not be void but voidable at the option of the plaintiffs, Such an agreement, he argues, would be a unilateral or voidable contract enforceable only at the instance of the Municipality. He relies upon the definition of a voidable contract given in Section 2(i) of the

Indian Contract Act, which is as follows:An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

24. The only instances of voidable contracts which are to be found in the Indian Contract Act are under Sections 14, 15, 16, 17 and 18 which are made voidable under Sections 19 and 19A. Another instance of a voidable contract is to be found in Section 30 of the Guardians and Wards Act where a minor on attaining majority might, on grounds similar to those set out under Sections 19 and 19A of the Indian Contract Act, avoid contracts entered into on his behalf during his minority. No such grounds are here pleaded against the defendant, but it is argued on general principles that voidable contracts should not be restricted to those contracts only which are set out in the Indian Contract Act, but a contract of the nature now before the Court should also be regarded as a voidable contract coming under the definition of that term given in Section 2(i) of the Indian Contract Act. I do not agree with this view.

25. The learned Advocate General has contended that if the contract is not binding upon the plaintiffs on the ground above stated, it cannot be binding on the defendant either for want of mutuality. He relies upon a ruling of this High Court in *Ahmedabad Municipality v. Sulemanji*[1] where in a suit for damages for breach of an executory contract, a division bench has held that it was open to the defendant in that: suit to show that the contract was not binding on him inasmuch as it was not binding on the plaintiff. The learned Chief Justice in his judgment observes that the executory contract sued upon was not binding upon the plaintiff Municipality before him because certain formalities prescribed by Section 30 of the Bombay District Municipal (Amendment) Act, 1884, had not been complied with and therefore it was open to the defendant: before him to show that it was not binding on him inasmuch as it was not binding upon the plaintiff. Mr. Coltman contends that this ruling is not applicable to the present case because here the Court is concerned not. with an executory but with an executed contract. He relies upon Leake on Contracts, 8th Edn., pp. 6-7, where it is stated:An executed consideration is some act performed or some value given at the time of making the promise and in return for the promise then made: as where goods are delivered, or services rendered, upon credit, that is, upon a promise to pay for them at a future time; or where money is paid in advance for a promise given.An executory consideration is a promise to do or give something in return for the promise then made:. The contract with an executory consideration thus comprises two promises commonly described as mutual promises; the one promise forming the consideration for the other, and conversely. Consequently, contracts of this kind must be binding on both parties, otherwise the consideration for one of the promises fails, and the contract is then described as being void for want of mutuality;.

26. Mr. Coltman has argued that because the Municipality has expended moneys the consideration is an executed one. The moneys expended by the Municipality, on the Municipality's own case, seem to have been expended by way of part performance after the contract and not by way of executed consideration at the date of the contract. Pollock and Mulla in their Commentary on Section 2 of the Indian Contract Act, 6th Edn., p. 30, have thus stated the difference between the two kinds of consideration:A consideration which consists in performance (or so far as it consists in performance) is said to be executed. If and so far as it consists in promise, it is said to be executory.

27. The consideration here relied on, on behalf of the plaintiffs, is a promise to expend large sums of money and not a performance. The consideration in my judgment would be executory and not executed.

28. Mr. Coltman has relied on *Abaji Sitaram v. Trimbak Municipality*[2] where our Appeal Court has held that though a contract by a corporation must ordinarily be made under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed. In that case the Trimbak Municipality, who were the plaintiffs, had granted to the defendants a right of collecting tolls and taxes for a period of fourteen months for a sum of Rs. 15,001, out of which the defendants had paid Rs. 1,500 in advance. The plaintiff Municipality had agreed to give a certain remission to the defendants and had sued the defendants for the balance due after making allowance for the remission which was allowed and the part payment which was made. The defendants relied upon an earlier resolution of the Municipality by which Rs. 7,000 out of the contract amount was proposed to be remitted. The remission proposed at the earlier meeting was held to be invalid on the ground that the meeting of the Municipality had not been properly convened. Whether this earlier resolution was or was not binding seems to have been the only point raised in the pleadings and decided by the lower Court in favour of the Municipality. The learned Chief Justice in confirming the decision of the lower Court made some observations on a point outside the pleadings which was taken for the first time by appellants' counsel before the Appeal Court. These observations appear in the judgment at p. 72 of the report and are as follows:This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigation made in the course of the hearing before us. It appears that the contract under which defendant 1 became entitled to levy and collect the tolls was not under seal, and so failed to comply with section 30 (of the District Municipal Act II of 1884) to which I have already alluded. The Advocate General, relying for this purpose on section 23 of the Indian Contract Act, has asked us to hold that there was no contract at all under which the plaintiff Municipality can claim. Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention. It is well recognized law in England that though a

contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed. Notwithstanding section 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here. For we think when, regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of section 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract. And on the facts of this case we hold that there has been an executed consideration. It is, however, at the same time manifest that the doctrine we have here applied would on the facts in no way assist the defendant's contention that the performance of his promise has been legally dispensed with or remitted.

29. This case has been considered by another division bench of our High Court in the case of *Municipality of Sholapur v. Abdul Wahab*[3] where Mr. Justice Shah refused to make any comment on the case, as apparently it was not necessary for him to do so for purposes of the appeal before the division bench. But Mr. Justice Crump in his judgment has made the following comment (p. 804):In this view of the case, it is unnecessary to consider whether the decision in Abaji Sitaram v. Trimbak Municipality applies here or not. But in view of the remarks of the lower Court and in deference to the arguments advanced here it is, I think, desirable to point out that so far as the judgment in that case applies the rule of common law as to contracts under seal, it is to some extent obiter. For the learned Chief Justice says that to consider the point it is necessary to travel outside the pleadings. Further, it must be remembered that it is a decision on a Statute which is no longer in force. It is difficult to say, even if it were applied here, that it fits the facts of this case. The facts of that case lay down that a corporation can sue on a contract which should have been under seal in spite of the omission of that formality where there is executed consideration. That is not exactly the case before us, and it is, therefore, not necessary to consider how far that decision can be reconciled with the decision of the House of Lords in *Young and Co. v. Mayor and c. of Royal Leamington Spa*[4] and how far the rule of English common law can prevail either in England or in India against Statutes containing restrictive provisions as to the form of corporate contracts. These are questions which will require consideration when a proper case arises.

30. The above observations made by Mr. Justice Crump regarding Abaji Sitaram v. Trimbak Municipality were not necessary as the learned Judge himself recognises for deciding the appeal before the division bench and were obiter. The object with which the observations were made was to draw attention to the ruling of the House of Lords in Young & Co. v. Mayor and c of Royal Leamington Spa with which the remarks of the learned Chief Justice seem to be in conflict and to suggest that the remarks of the learned Chief Justice were in the nature of obiter. A further point seems to be thrown out for consideration in an appropriate case when it arises, viz., whether

a contrary ruling of the Appeal Court should be allowed to override the clear provisions of a statute. With great respect it seems to me that Mr. Justice Crump was right, sitting in the Appeal Court as he did, to throw doubt on the validity of the observations made by the learned Chief Justice in Abaji Sitaram v. Trimbak Municipality. With great respect I agree with Mr. Justice Crump that these observations of the learned Chief Justice are in the nature of obiter and hence not binding on this Court. On the facts of the case before him the learned Chief Justice considered that it was a case of an executed consideration. These facts were similar to the facts of the present case. The executed consideration which was relied on in that case consisted in the Municipality giving the right to collect the tolls and taxes to the defendant. The executed consideration on the part of the Municipality in the present case is said to be moneys they have expended under the contract with Government. As the judgment of the Appeal Court on this point is, in my opinion, obiter, I am at liberty, with great respect, not to follow the view which has been expressed by the learned Chief Justice.

31. that consideration in such cases should be regarded as being executed. The case before the learned Chief Justice seems to have been one of part performance and not of executed consideration. The present case, in my opinion, is of a similar nature.

32. Mr. Coltman has relied next upon the case of *Mahomed Musa v. Aghore Kumar Ganguli*[5] In that case a compromise had been arrived at in 1873 by which it was agreed that a certain mortgaged property should be released from two mortgages, and the mortgagors should execute deeds of absolute sale of certain portions which were allotted to the respective mortgagees. A decree was made in pursuance of the compromise, but the compromise agreement was not registered, nor were the transfers executed. All parties had thenceforward acted in every respect as if the transfers had been made, and there had been dealings, both by the mortgagors and the mortgagees, with the shares which were allotted to them under the agreement. In 1908 a suit was instituted to redeem the mortgages. The Judicial Committee, in confirming the judgment of the Calcutta High Court, held that whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished. This case related to mortgages prior to the Transfer of Property Act. Reliance is placed by Mr. Coltman upon the observations of Lord Shaw in regard to *Maddison v. Alderson*[6]. Those observations are as follows (p. 8):Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in Maddison v. Alderson founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such

equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds,' the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded'. Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange (1 Ves. Sen. 441) may be here repeated: 'if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity '. Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.

33. This decision has been explained in the later case of *Ariff v. Jadunath Majumdar*[7] Lord Russell of Killowen, in delivering the judgment of the Judicial Committee of the Privy Council, observes (p. 100):It was stated in Maddison v. Alderson that the equitable doctrine of part performance did not rest upon the view that equity will relieve against a public statute in cases which fall within it; but, as Lord Selborne expressed it, the Statute of Frauds only contemplates the case of a person being charged upon the contract only; it has not in view the case of a person being charged upon the contract, coupled with acts done in pursuance of the contract.Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible. Whether any such authority exists will be considered later.

34. At p. 104, Lord Russell of Killowen, in referring to the cases of Mahomed Musa v. Aghore Kumar Ganguli and *Mdlraju Lakshmi Venkayamma v. Venkata Narasimha Appa Rao*[8] observes:Neither of these cases, as a decision, affects the case now under consideration by the Board. The matter which was relied upon by the respondent consisted of certain obiter dicta in the course of which English doctrines of equity were described in terms of the law of Scotland and stated to be applicable in India.In the former case the appeal was dismissed upon the grounds that the contract to convey had been made and that at the relevant date no written conveyance was required, the Transfer of Property Act, 1882, not having been passed. In the latter case the decision rested entirely on the fact that a valid contract had been made and was enforceable by the appellant.In each case, however, the judgment contains statements to the effect that even if

the contract, in question had been incomplete, the acts of the parties had been such that equity would in some way have bound the parties. Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient, in some requirement as to form, is nevertheless an existing contract. Equity does this, as before stated, in the case of a verbal contract for the sale of land which has been partly performed. Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed, where no contract was in fact made; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.

35. It is clear from the later pronouncement of the Privy Council that the observations in the earlier cases of Mahomed Musa v. Aghore Kumar Ganguli and Malraju Lakshmi Venkayamma v. Venkata Narasimha Appa Rao were mere obiter and can have no application to the facts of the present case.

36. Mr. Coltman has relied also on the case of The Fishmonger's Company v. Robertson (1916) L.R. 43 I.A. 138 : S.C. 18 Bom. L.R. 651(Supra), where it was held that the contract sued upon having been executed on the part of the corporation and the defendants in that suit having received full consideration, they were bound by the contract and the plaintiffs were entitled to sue on the contract although the contract was not executed under seal as required by a statutory provision. That case may be distinguished from the present case on the ground that there the consideration given by the corporation was executed and not executory. In the present case the consideration appears to be executory and a mere part performance of the contract by the Municipality would not convert the consideration into executed consideration so as to condone non-compliance with the provisions of a statute in respect of the formalities which are to be observed in entering into a contract on behalf. of the corporation. The analogy to be drawn from this case in favour of the plaintiffs in respect of the defective contract so far as it affects the defendant would, in my opinion, not apply.

37. The objection taken on the ground of want of mutuality is, in my opinion, fatal to the plaintiffs' case and should be allowed.

38. I will next consider whether, apart from the initial defect that the contract relied on has not been properly executed on behalf of the plaintiffs, inasmuch as the party who has purported to act on behalf of the Municipality was the President of the Municipality and not the Commissioner as required by the Municipal. Act, the contract can be said to be properly executed on behalf of the Secretary of State for India in Council who is sought to be made liable. For a contract made on behalf of the Secretary of State for India in Council to be binding on him it is necessary to show

that it conforms to the provisions of the Government of India Act (5 & 6 Geo. V. c. 61; 6 & 7 Geo. V. c. 37; and 9 & 10 Geo. V. c. 101), Section 30. The substantial provisions of this section were in force at the date of the contract relied upon. Section 30(1) of this Act provides that:

any local Government may on behalf and in the name of the Secretary of State in Council...make any contract for the purposes of this Act.

39. Sub-section (2) of Section 30 requires that Every...contract made for the purposes of Sub-section (1) of this section shall-be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being.

40. It is conceded by Mr. Coltman that the terms of this section are mandatory and not merely directory. It will be observed that a paramount condition laid down in this section for such a contract is that the contract should be on behalf and in the name of the Secretary of State in Council. In the correspondence on which reliance has been placed, it nowhere appears that the Bombay Government were purporting to act on behalf and in the name of the Secretary of State in Council so as to make the contract binding upon him and incidentally upon the revenues of India. Section 30, in my judgment, seems to contemplate a formal deed or instrument in which the contract is set out as being on behalf and in the name of the Secretary of State in Council. Mr. Coltman has argued that a contract with the Secretary of State in Council need not be contained in an indenture or a single instrument but may be gathered as in the case of other contracts from correspondence. He contends that an instrument is nothing more than a writing and as long as the contract with the Secretary of State is evidenced by a writing, it is immaterial whether there is a single writing or numerous writings which have to be read together to ascertain the contract between the parties.

41. Mr. Coltman has relied on the case of The Queen v. Riley1 where the Court of Crown Cases Reserved, in construing Section 38 of the Forgery Act, 1861, (24 & 25 Vic. c. 98), held that a telegram which had been forged came within the meaning of a forged instrument under that Act. Hawkins J. in his judgment observes (p. 314):I am not aware of any authority for saying that in law the term 'instrument' has ever been confined to any definite class of legal documents. In the absence of such authority, I cannot but think the term ought to be interpreted according to its generally understood and ordinary meaning, as stated in the dictionaries of Dr. Johnson and of Webster.... When applied to a writing, Dr. Johnson defines it as 'a writing- a writing containing any contract or order.' Webster's definition is 'a writing expressive of some act, contract, process or proceeding.' When used generally, Dr. Johnson speaks of it as 'that by means whereof something is done'. Webster," as 'one who, or that which, is made a means, or caused to serve a purpose'. These definitions cover an infinite variety of writings, whether penned for the purpose

of creating binding obligations or as records of business or other transactions.

42. Section 30 of the Government of India Act does not expressly lay down that the contract is to be by a formal document. But the provision in this section requiring the contract to be not only on behalf but also in the name of the Secretary of State in Council seems to me to make it necessary that the contract should be evidenced by a formal document in the nature of an indenture or deed to which the Secretary of State in Council is made a party and not merely by correspondence. In my opinion it would be forcing the language of the section too far to say that a contract could be entered into on behalf and in the name of the Secretary of State in Council by means of correspondence. Apart from this consideration, the contract, as disclosed in the correspondence, cannot bind the Secretary " of State in Council as it would appear it has not been entered into on behalf and in the name of the Secretary of State in Council.

43. In pursuance of Section 30, Sub-section (2), of the Government of India Act, the Governor General in Council has by resolution directed and authorised certain officers of Government holding such capacity to execute contracts on behalf and in the name of the Secretary of State in Council. The resolution which was in force at the date of the contract relied on is to be found in the Supplement to" the Gazette of India for 1913, at p. 1195, and is made in the exercise of the powers conferred by Section 2 of the East India Contracts Act, 1870, (33 & 34 Vic. c. 59), which provisions are confirmed by the later Government of India Acts. In dealing with the execution of contracts and deeds on behalf of the Secretary of State in Council, the resolution by clause N provides that in the territories under the administration of the Government of Bombay, as regards contracts, etc, not hereinbefore specified:1. All deeds and instruments relating to matters, other than those specified in heads 2 to 15 and 17 to 24 are to be executed by a Secretary to Government. Sub-clause 18 provides that agreements and deeds entered into with managers of educational institutions in respect of Government grants-in-aid the contract is to be executed by the Director of Public Instruction, Bombay. The correspondence on which reliance is placed in this case was carried on by the Secretary to Government in the Educational Department, Bombay. It must be shown, therefore, that the contract disclosed is not of a nature which would fall under Sub-clause 18 of Clause N, and would come, therefore, under Sub-clause X. The subsidy which Government undertook to pay to the Municipality is described in various parts of the correspondence as grant-in-aid which in this connection has a technical meaning. In one place it has been called a subvention. It is clear that what Government were proposing to give was in the nature of a bounty or contribution in order to help the Municipality to carry out on an extensive scale the duty which the law had imposed upon it of imparting primary education to Bombay citizens.

44. Mr. Coltman has argued that the Bombay Municipality cannot be ' described as managers of

any educational institution. He contends that the Schools Committee which is a statutory body are the managers of all Municipal Schools, and the function of the Municipality is only to provide the joint Schools Committee with the necessary funds for the purpose of primary education in the city. He relies upon Section 3 of the Elementary Education Act, 1870 (33 & 34 Vic. c. 75), for the meaning that should be attached to the term ' managers'. According to that Act the term "managers" is said to include all persons who have the management of any elementary schools whether the legal interest in the school house is or is not vested in them. Mr. Coltman has argued that the interest of the Municipality in the primary schools in Bombay is to the extent only of the school houses being legally vested in the Municipality and the Municipality being under a duty to provide the Schools Committee with funds to defray the expenses of primary education. This argument seems to lose sight of certain considerations which arise on an interpretation of the several provisions of the City of Bombay Municipal Act. Under Section 61(q) a statutory duty is cast upon the Municipality of maintaining, aiding and suitably accommodating schools for primary education subject always to the grant of building grants by Government in accordance with the Government Grant-in-aid Code for the time being in force. Under Section 39 of the same Act a statutory duty is cast upon the Municipality to appoint a Schools Committee of sixteen members for the purpose of giving effect to the provisions regarding primary education. By Section 4 of the same Act, it is provided that the Municipal authorities charged with carrying out the provisions of this Act are : (a) a Corporation; (b) a Standing Committee; (c) a Municipal Commissioner. The Schools Committee is not included in this list. The effect of Section 4 of the City of Bombay Municipal Act seems to be that the whole duty in respect of primary education is imposed upon the Municipality. The Schools Committee no doubt are a statutory body under the Municipal Act, but twelve out of sixteen of the members are Municipal Councillors appointed by the Municipality and the remaining four who need not be Councillors are co-opted by these twelve Councillors. The Schools Committee is subject to and under the Municipality and is not an independent body in whom the statute has vested the management of primary schools in Bombay irrespective of the Municipality. The schools being vested in the Municipality and there being a statutory duty on the Municipality to maintain, aid and accommodate institutions for primary education, and appoint a Schools Committee for the purpose, it must, in my opinion, follow that the plaintiffs are managers of the municipal primary schools which they own. The point which Section 3 of the Elementary Education Act, 1870, contemplates does not seem to arise here, as the Municipality are the owners of their school houses, and wherever they are not the owners they have rented the premises for purposes of primary education. It would not, in my opinion, follow that because the Municipality owns in many instances the school houses where primary education is being conducted on their behalf that they cannot on that account be regarded as managers of such institutions. The primary schools are conducted in the name of the Municipality and not of the Schools Committee. The Municipality provides all the funds and

buildings for the purpose. The Schools Committee manage these schools only as nominees and on behalf of the Municipality.

45. Mr. Coltman has further argued that the Bombay Municipality has no direct control over the details of the management of its primary schools, these details being managed entirely by the Schools Committee. Details such as employment, dismissal and promotion of teachers are said to be under the control of the Schools Committee who entirely administer the primary schools. Mr. Coltman has argued that in dealing with a body like the Municipality the Government could not be said to have been dealing with mere managers of an educational institution, but with a public body which occupied a much higher position than that of mere managers. In my judgment no odium need attach to the Bombay Municipality by being called managers of educational institutions within the meaning of Sub-clause (18) of Clause N. The Municipality, in my judgment, must be regarded with reference to their primary schools to be " managers " of such schools. The contract relied on would, therefore, come under Sub-clause (18) of Clause N, and Sub-clause (1) of clause N would not be applicable.

46. Mr. Coltman has argued that Government by their conduct throughout the correspondence have indicated that the matter was one of considerable importance which could not be dealt with by a subordinate officer like the Director of Public Instruction, but required the weight and prestige which attaches to the position of a Secretary to Government. The Municipality too according to this contention indicated by their conduct that they in their turn attached considerable importance to the proposal which Government had made and thought it to be more in keeping with the dignity of the situation that the proposal should not be accepted by the Municipal Commissioner in the ordinary course, but by the President on behalf of the Corporation. In my judgment by such conduct neither the Municipality nor Government could waive a statutory provision which is intended for their respective benefit and protection. The case for the plaintiffs, in my judgment, fails also on the ground that the contract on which they have relied has not been entered into on behalf of the Secretary of State in Council by the Director of Public Instruction who alone was competent to have signed such a contract.

47. On the assumption that no valid contract has been entered into on behalf of the Secretary of State in Council, Mr. Coltman has argued that the contract has become binding upon the Secretary of State because of executed consideration on the part of the plaintiffs. He has relied very strongly for this part of his argument upon Abaji Sitaram v. Trimbak Municipality. I have already dealt with this authority in the earlier part of this judgment and have ventured to express an opinion with great respect that the observations of the learned Chief Justice, on which Mr. Coltman has relied, are obiter and not binding on me. I have also called attention to the observations of Mr. Justice Crump regarding this case in *Municipality of Sholapur v. Abdul*

Wahab (1920)I.L.R. 45 Bom. 797, 804 : S.C. Bom. L.R. 244(Supra). The observations of the learned Chief Justice have been dissented from by the Allahabad High Court in Radha *Krishna Das v. The Municipal Board of Benares (1905) I.L.R. All. 592(Supra). In Ramaswamy Chetty v. The Municipal Council, Tanjore (1906) I.L.R. 29 Mad. 360 (Supra),* on a similar point having come up for decision before the Madras High Court, that Court has followed *Radha Krishna Das v. The Municipal Board of Benares (1905) I.L.R. All. 592(Supra)* and has dissented from Abaji Sitaram v. Trimbak Municipality on the ground that it does not refer to or consider the authorities on which the Allahabad case has proceeded. The observations of the learned Chief Justice have also come in for adverse criticism by Sir Frederick Pollock and Sir Dinshah Mulla in their learned Commentary on the Indian Contract Act, 6th Edn., at pp. 375-377. The observations of the learned Chief Justice are, in my opinion, impliedly overruled by the Judicial Committee of the *Privy Council in Ariff v. Jadunath Majumdar (1931) L.R. 58 I.A. 91 : S.C. 33 Bom. L.R. 913(supra)* and are irreconcilable with the judgment of the House of Lords in Young & Co. v. Mayor, &c, of Royal Leamington Spa as well as with the decision of the Court of Appeal in *Hunt v. Wimbledon Local Board*[9]

48. The other case on which Mr. Coltman strongly relied for this part of his argument is the case of Mahomed Musa v. Aghore Kumar Ganguli. I have had occasion in the earlier part of this judgment to state that this case has been dissented from in Ariff v. Jadunath Majumdar : see the observations of Lord Russell of Killowen at pp. 103 and 104 of his judgment.

49. Having regard to all these considerations, with great respect, the observations of the learned Chief Justice do not seem to be the correct law, and, as they are merely obiter, in my judgment, I am not bound to give effect to them in the present suit.

50. Mr. Coltman has next relied on the case of *Kedar Nath Bhattacharji v. Gorie Mahomed*[10] where it was held that a suit would lie to recover a subscription promised, the subscriber knowing that on the faith of his and other subscriptions, an obligation was to be incurred to a contractor for the purpose of erecting a building to be paid for out of the moneys subscribed. Pollock and Mulla in their Commentary on the Indian Contract Act, 6th Edn., p. 18, have thus analysed this case :Questions may sometimes arise whether the thing done by the plaintiff claiming under a promise was in fact done at the desire of the promisor. The Commissioners of the Howrah Municipality created themselves by deed trustees for the purpose of building a town hall in Howrah and inviting and collecting subscriptions for that purpose. The defendant was a subscriber to this fund of Rs. 100, having signed his name in the subscription book for that amount. As soon as the subscriptions allowed, the Commissioners, including the plaintiff, who was also vice-chairman of the municipality, entered into a contract with a contractor for the purpose of building the town hall. The defendant not having paid his subscription, a suit was

brought against him by the plaintiff on behalf of himself and all the other Commissioners who had rendered them-selves liable to the contractor. It was held that the suit would lie, as there was a contract for good consideration. It was stated in the course of the judgment that the subscriber knew the purpose to which the subscriptions were to be applied, and also knew that on the faith of their subscription an obligation was to be incurred to pay the contractor for the work. In fact, the act of the plaintiff (promisee) in entering into the contract with the contractor may be said in this case to have been done at the desire of the defendant (promisor), so as to constitute a consideration within the meaning of the section for the promise to pay the subscription. If there were no contract with the contractor, or if no liability had been incurred and nothing substantial had been done on the faith of the defendant's promise, the promise to pay the subscription would have been without consideration, and therefore void. No similar decision is known to have been given in England, and it seems doubtful whether there was really a sufficient request by the defendant to the plaintiff and those whom he represented. It would seem to follow that in the opinion of the Calcutta High Court every promise of a subscription to a public or charitable object becomes a legal promise, and enforceable by the promoters, as soon as any definite steps have been taken by them in furtherance of the object and on the faith of the promised subscriptions. Such is certainly not the general understanding of the profession in England.

51. Mr. Coltman has argued that on the faith of Government's promise to contribute one-half of the extra expenses the Municipality has incurred large liabilities, and therefore applying the ruling in this case they should be held liable in respect of their promise. This authority does not seem to help the plaintiffs to meet the defendant's case on the point that the contract relied on as binding on the defendant was executed by a person who was not entitled to act on defendant's behalf in respect of a contract of the nature relied on in this suit. The authority of this case, in my opinion, is not applicable to the present suit.

52. Mr. Coltman has next relied upon the case of *Carlill v. Carbolic Smoke Ball Company*[11]. It is contended with great force that the action of Government as disclosed in their correspondence amounted to an offer, which offer by being acted upon by the Municipality has been accepted and a valid contract has been concluded. I am unable to appreciate how this case can help Mr. Coltman's argument on the point which I am, now considering. It is clear that there has been no advertisement on the part of Government inviting the public at large to fulfil certain conditions upon the fulfilment of which they would become entitled to a reward. The offer contained in the correspondence is a definite offer made to the Municipality which is a specified body. The only person or body who would be competent to accept the offer would be the Bombay Municipality and no one else. The condition which the Bombay Municipality was invited to fulfil was to expend a large sum of money over and above what they had expended in 1917-18. If they fulfilled that condition, Government were to defray half of their extra expenditure. There was no

condition as in the Carbolic Smoke Ball Co.'s case that should the Bombay Municipality feel any ill-effects against which any immunity was guaranteed the they would become entitled to a specific reward. The analogy of the Carbolic Smoke Ball Company's case to the present case, in my opinion, is very remote and the ruling there given can be of no direct help in the decision of the present suit.

53. The conclusion I have come to on a consideration of the contentions which have been urged before me is that no valid contract has been arrived at which is binding on either party in this suit, the President of the Municipality having no authority under the Municipal Act to bind the plaintiffs, and the Secretary to Government in the Educational Department, Bombay, having no authority under the Government of India Act read with the Resolution of the Government of India published in the Government of India Gazette, to which I have already referred, to bind the Secretary of State in Council.

54. It remains for me now to consider a few more points which have been urged by the Advocate General on behalf of the defendant. He contends that the acts of Government disclosed in the correspondence in this suit amount to acts of State in respect of which the plaintiff Municipality as a subject have no remedy. He has referred to 53 Geo. III, c. 155, for certain statutory privileges conferred on the East India Company which had till then been merely a commercial corporation trading in India. This statute was passed in 1813. In 1833 by 3 & 4 Will. IV. c. 85, it was enacted that the East India Company was to hold the territories it had conquered in India in trust for the Crown of England. By this statute sovereign powers were delegated to the East India Company which at the same time continued to be a commercial body. In the year 1858 by 21 & 22 Vic. c. 106, Section 65, the British Crown took over the territories in India from the East India Company. It was then enacted that the liability of the Secretary of State for India in respect of future transactions was to be the same as was that of the East India Company before its enactment. The Government of India Act of 1915 by Section 32, Clause (2), reproduces the same provisions. Relying upon these statutes, the Advocate General contends that the transaction relied on was not in the nature of a commercial transaction for which the Secretary of State in Council could be made liable as on a contract but was in the nature of an act of State. He has cited the following cases in support of the distinction which he urges the Court to draw between an act of the Secretary of State which is commercial in its nature and an act of his which is undertaken in the discharge of the sovereign or administrative functions of the State:- *P.&O.S.N. Co. v. Secy. of State for India*[12] *Nobin Chunder Dey v. The Secretary of State for India*[13]*, Mclnerny v. Secretary of State for India*[14] *Kessoram Poddar & Co. v. Secretary of State for India*[15] *The Secretary of State for India v. Hart Bhanji*[16] *The Secretary of State v. Cockecraft*[17] *Municipal Council of Vizagapatam v. Foster*[18] *and Kishen Chand v. The Secretary of State for India in Council* [19]From these authorities it would appear that, apart from commercial transactions of the Secretary of

State, there are only three exceptions in respect of which he could be made liable although the acts may be acts of State. These three exceptions are: (a) Trespass. to immoveable property, (b) an obligation imposed by a statute, and (c) where it can be shown that benefit has resulted to Government from a tort of its servants. The Advocate General has contended that the present suit will not come under any of these three exceptions and that there was no obligation on Government to expend any part of its revenue on primary education in Bombay. He has further relied upon the case of *Rederiaktiebolaget Amphitrite v. The King* [20]It will be observed that in this case the action of Government was in relation to a certain foreign company in time of war. In consequence of the intensified blockade of British ports by the Germans an arrangement had been made between the British Government and the Government of neutral countries that neutral ships in British ports should be allowed to leave only if they were replaced by other ships of the same tonnage, which arrangement was known as the " ship for ship " policy. The suppliants who were the Swedish Steamship Company had obtained an undertaking from the British Government that if they sent a particular ship to England with a particular class of cargo she should not be detained. The British Government subsequently withdrew their undertaking and refused clearance to the ship after it had come to a British port. Under these circumstances the Court held that the Government's undertaking was not enforceable in a Court of law, it not being within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future. The Advocate General has argued that it was not competent to the Government as it existed in 1919 to bind its successors by any contract that it then entered into with the plaintiffs. This argument, in my opinion, omits to consider that the contract here relied on is not one between Government on the one hand and a foreign subject on the other in time of war, but between Government and its own subject in time of peace. An act of State, as generally understood, is a term which is not applicable to an action of the Sovereign towards its own subject in its own territory in time of peace. The expression is usually applied to an action of the Sovereign towards foreign subjects whether it be in time of war or in time of peace. There can be an act of State as between the Sovereign and its own subject in time of war. It would be a misnomer, in my opinion, to call the administrative acts of a Sovereign against its own subjects in time of peace as acts of State and to claim immunity in respect of them although they may amount to a contract in the ordinary sense between the Sovereign and his subject.

55. The Advocate General has contended that all administrative acts of Government, including contracts with its subjects if they do not relate to a commercial transaction, would amount to acts of State over which the municipal Courts can have no jurisdiction. He has contended that under the Government of India Act the Secretary of State in Council can be made liable in a municipal Court only in respect of commercial transactions and that the present plaintiffs can have no remedy against the Secretary of State even though, the transaction may have resulted in a

contract between the parties, because the subject-matter of the contract is not a commercial transaction from which any monetary benefit can be expected to result to the Secretary of State. Under Section 30, Sub-section (1), of the Government of India Act, the Secretary of State in Council is empowered to make any contract for the purposes of that Act. No restriction is specified with reference to commercial transactions only. The Secretary of State in Council as representing the Sovereign holds a kind of fiduciary position with reference to the subject of the Sovereign. No doubt there is no statutory obligation on him to promote primary education in the city of Bombay beyond providing the Municipality with a grant-in-aid for the purpose of buildings where primary education is conducted by the Municipality, but the Secretary of State in Council is as such interested in the well-being of the citizens of Bombay as much as the Municipality. The promotion of primary education in the city of Bombay would be for the welfare of the citizens of Bombay. A statutory duty no doubt is cast upon the Municipality to promote primary education, but Government by their correspondence recognised that the Municipality was not able to perform that duty substantially and satisfactorily without assistance from provincial revenues at the disposal of the Bombay Government. It was the desire of Government in 1919 that primary education in Bombay should be substantially increased, and in consideration of the Bombay Municipality agreeing to expend a larger sum of money than it was hitherto doing for that purpose, Government undertook to defray one-half the excess expenditure. The promise on the part of the Municipality to expend a large sum of money over primary education in excess of what it had hitherto been doing would be a sufficient consideration in my judgment for Government to enter into a contract with the plaintiffs.

56. The Advocate General has pointed out that neither the plaintiffs nor Government considered at the time that they were entering into a binding contract. The language used in the letters in many places would seem to indicate that the parties were entering into a contract. But it must be observed that the plaintiffs never insisted upon a formal contract being drawn up. No suggestion was made on their behalf that the Commissioner of the Municipality and the Director of Public Instruction should meet and execute a formal agreement which would be under the seal of the Corporation and would conform to the formalities which are necessary for a contract on behalf and in the name of the Secretary of State in Council. The Municipality raised no objection to the offer on behalf of Government being signed by a Secretary to Government instead of the Director of Public Instruction. In accepting the offer the Corporation directed its President to communicate their acceptance to Government. Had the plaintiffs considered the transaction they were entering into to be in the nature of a binding contract they should have authorised the Commissioner to enter into a proper contract with Government on the lines of their offer contained in their Secretary's letter. In the course of the correspondence the plaintiffs suggested to Government that the provisions of Section 62B of the City of Bombay Municipal Act should be

so amended as to incorporate in it the arrangement which had been arrived at. No suggestion was made for having a formal contract drawn up between the parties. Government in their reply to the suggestion made on behalf of the plaintiffs declined to amend Section 62B of the City of Bombay Municipal Act on the lines which were suggested, and stated that in their opinion the administrative undertaking which they had given should be considered sufficient. Having regard to the peculiar circumstance that the plaintiffs as well as the defendant were statutory corporations governed by special laws regarding contracts which they could enter into, it is clear that both parties have shown by their conduct that neither of them considered the transaction which was being entered into ostensibly on their behalf as being in the nature of a binding contract, and each trusted the other to carry out their and his respective moral obligations under the arrangement which was arrived at. The Advocate General has argued that even if there was a binding contract, it has since become impossible of performance and therefore void. He calls attention to Section 45A, Clause (d), of the Government of India (Amendment) Act, by which it is competent to Government by rules to transfer from among the provincial subjects to the administration of the Governor acting with ministers appointed under this Act, and for the allocation of revenues or moneys for the purpose of such administration. In pursuance of a rule made in that behalf by Government Notification dated December 17, 1920, appearing in the Gazette of India of that date at p. 1135, education was made a transferred subject from January 3, 1921. The effect of this resolution is that any amount that is to be expended for education can be expended only if the Legislative Council of the province sanctions it, and it is no longer in the discretion of the executive Government to expend whatever amount it may please on education. From January 3, 1921, the Government of Bombay having lost control over revenues which can be expended for educational purposes, it is contended that the contract, if there was one, has become impossible of performance. Reference may be made in this connection to the Devolution Rules appearing at p. 107 of the Bombay Legislative Council Manual, 1926, and to the Government of India Act, Sections 49(2), 52, 72A, 72B and 72D. Section 56 of the Indian Contract Act provides that a contract to do an act which, after the contract is made, becomes impossible, becomes void when the act becomes impossible. The argument of the Advocate General seems to omit to consider that the plaintiffs are seeking to make the Secretary of State in Council liable in respect of the contract on which they are relying. The Secretary of State in Council continues as a corporate sole and his liability extends to the revenues of all India and not merely to provincial revenues. If a valid contract was entered into on behalf of the Secretary of State, it would be binding on him although the constitution of the provincial Government may have since changed. It would be presumed in such cases that the Secretary of State in Council would make all necessary arrangement to see that the successors of the Government who originally foisted liability upon him have taken over the burden from their predecessors. There is no evidence before me to show that the Bombay Government have made any effort to include the

amount which the Bombay Municipality was claiming as Government's contribution towards the expenditure for primary education in their budgets for the years in dispute. They have nowhere, prior to the amendment of their written statement, taken up this point. In my opinion the objection taken on behalf of the Secretary of State in Council on the ground of impossibility of performance is unsustainable.

57. The plaintiffs seem to have a moral justification on their side in complaining of Government's conduct in taking advantage of a legal technicality in their favour to avoid an obligation they had deliberately undertaken in regard to the spread of primary education in the city of Bombay. Unfortunately for the plaintiffs, they omitted to take a necessary precaution of binding down Government by means of a formal legal contract to the promise they had made. The Advocate General has stated that although from the correspondence it might appear that Government have not treated the Municipality fairly in this matter, there is evidence available to Government to show that the Corporation have behaved unreasonably towards Government in three matters, viz., (1) maintaining as part of primary education (a) Anglo-Vernacular Schools, and (b) religious instruction such as the Koran teaching without the previous consent or approval of Government or the educational authorities. (2) Paying higher rates of salaries to the various grades of teachers in the municipal primary schools than those prescribed by the Educational Department under the authority of Government for district Municipalities and sanctioning allowance to the Schools Committee's establishment without the previous consent or approval of Government or the educational authorities. (3) Incurring expenditure upon matters such as Scouts, Hindi and Tamil teaching, prizes and prize funds and including the same under primary education without the previous consent or approval of Government or the educational authorities. I do not consider that these matters, assuming they are proved, would morally justify Government in acting as they have done towards the Municipality. Although I sympathize with the Municipality on the moral aspects of this dispute, I must recognise that this is not a Court of morals but a Court of law. The matters complained of by Government under the three heads set out above are sufficiently dealt with, in my opinion, in the correspondence between the parties which have been put in as Exhibits before the Court. The complaints made under these heads do not appear to me to be of a sufficiently serious nature and could be easily adjusted if the parties were inclined to be reasonable. I have not considered it necessary to have further evidence on this point as the evidence already on the record appears to me to be ample and no useful purpose is to be served by going more deeply into the said subject of these undignified squabbles between Government and the Municipality on matters falling under the three heads. It was unfortunate for the plaintiffs that they came to Court without properly considering their legal position in respect of this contract and it was still more unfortunate for them that the written statement which was originally filed on behalf of Government gave no indication that the Secretary of State was relying on any

technical defences which he was entitled to take. After the written statement was amended the Municipality should have reconsidered their position and not persisted with their claim as they have done before me in this suit. They must have realised that some of the points raised by the amended written statement would be fatal to their claim. As it is, the arguments have taken up a considerable time in Court and have involved two public bodies in heavy costs.

58. The result is that the suit is dismissed with costs.

Cases Referred.

1(1903) I.L.R. 27 Bom. 618 : S.C. 5 Bom. L.R. 592
2(1903) I.L.R. 28 Bom. 66 S.C. 5 Bom. L.R. 689
3(1920) I.L.R. 45 Bom. 797 : S.C. 23 Bom. L.R. 244
4(1883) 8 App. Cas. 517
5(1914) L.R. 42 I.A. 1 : S.C. 17 Bom. L.R. 420
6(1883) 8 App. Cas. 467, 475
7(1931) L.R. 58 I.A. 91 : S.C. 33 Bom. L.R. 913
8(1916) L.R. 43 I.A. 138 : S.C. 18 Bom. L.R. 651
9(1978) 4 C.P.D. 48
10(1886) I.L.R. 14 Cal. 64
11[1893] 1 Q.B. 256
12(1861) 5 B.H.C.R. (Appx.) 1 : S.C. Borukes Rep., Part VII p. 166
13(1875) I.L.R. 1 Cal. 11
14(1911) I.L.R. 38 Cal. 797
15(1926) I.L.R. 54 Cal. 969
16(1982) I.L.R. Mad. 273
17(1914) I.L.R. 39 Mad. 351
18(1917) I.L.R. 41 Mad. 538
19(1881) I.L.R. 3 All. 829
20[1921] 3 K.B. 500