CONTRACTUAL LIABILTY OF STATE IN INDIA: A COMPARITIVE ANALYSIS

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"In the present modern world where most of the Democratic state has assumed the function of the Welfare State which lead to the change of the policy of the state from ***Laissez Faire*** to ***Dispenser of Services and benefits***, which in turn requires necessary intervention of the state and active role of the state by providing employment, free health services, Government subsidized Educational Institutions, licenses, Rights to exploit natural resources, Construction of roads etc. All of these activities require State to take services of Private Individuals or Organizations and consequently state has to enter in to contract with them. In awarding Contract by the state by those who put in Authority by the state for the purpose may misuse their power by discriminating or by violating constitutional Provisions specially fundamental rights by the use of the powers which has not been conferred on them or failing in carrying out the duties which has been entrusted on them, **here the question as to the liability of the state arises in the contractual matters.** *The basic question is therefore is to regulate, structure and discipline Government discretion to enter into contracts or confer such benefits so that it is not exercised in an arbitrary manner. It is necessary to ensure in order to ensure that injustice is not done to an individual by the state or its instrumentalities*."

INTRODUCTION

Unlike in the case of liability for torts, the state was never immune from liability for contracts because contracts were not covered by the sovereign function of the state. Contracts where one party is State and other party is private individual such Contract is popularly known as **Government Contract.** Such Contract has gain much significance in the present modern economy as in the era of welfare state, economic activities of state has expanded and

consequently state has become the biggest purchaser of goods and employer of talent.[1]Many Individuals, businessmen and corporation enjoy largess in the form of Government contracts.. A large body of individuals seeks to deal with the Government.[2] Supreme Court also observed the same in the following words:[3]

" Today with the tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the state ,the power of the executive Government to affect the lives of the people is steadily growing .The attainment of the socio-economic justice being a conscious end of the state policy, there is vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state power holders"

Additionally, Government while acting as a welfare state, it has to undertake enormous activities which alone it cannot do practically in time through its department and therefore Government has to enter into contract with the private individuals or organizations for those activities. Although Government enjoys considerable discretion and pliability in the field of such contract, yet it is not and should not be as free as a private individual in selecting the recipients of the contract. It is because regardless of the nature of activity or transactions the Government, given its unique position, cannot lay down arbitrary and capricious standards for the choice of persons for the award of a contract or grant of largess.[4] It is because, "*Government is always a Government whether it is dealing with matters of administration or contract and thus Government ought to be held subject to some public law discipline in the contractual area*"[5]The principle of article 14 (i.e. the rule of reason, rules against arbitrariness and discrimination , and rules of fair play and natural justice) govern every action of the Government or public authority in dealings with private parties ,even though the rights are contractual in nature.[6]

[1] MP Jain & SN Jain, Principles of Administrative Law, (Edn. 6th, Vol. 2, Wadhwa Nagpur, 2007) at P. No. 1485.
[2] Ibid.
[3] *Ramana Dayaram shetty v. International Airport Authority of Union of India*, AIR 1979 SC 1628.
[4] RK SINGH, 'Adjudicating the Public-Private Law Divide: The Case of Government Contracts in India', Law and Politics in Africa/Asia/Latin America (Verfassung und Recht in Ubersee, VRU), Nomos, 1/2017. [ISSN: 0506-7286]
[5] MP Jain & SN Jain, Principles of Administrative Law, Edn. 6th, Vol. 2, Wadhwa Nagpur, P. No. 1487.
[6] RK SINGH, 'Adjudicating the Public-Private Law Divide: The Case of Government Contracts in India', Law and Politics in Africa/Asia/Latin America (Verfassung und Recht in Ubersee, VRU), Nomos, 1/2017. [ISSN: 0506-7286]

Unlike a contract between two individuals for private purposes, Government Contracts have a public character and therefore public law is superimposed over the law of contract as Government contract sub serves the public purpose.[7]

Present paper discusses the nature, history and development of contractual liability of the state in India and this discussion will further lead into discussion on legislative framework in India on contractual liability of the state and judicial pronouncement in this regard and thereby comparing the position of other similarly situated major democratic countries like UK, USA and Australia with the position of India. In this paper, the expression Government is used to signify both the Government of the Union and Government of the state whereas the expression state signify 'state' as defined under the Article 12 of the constitution of India.

1. NATURE, HISTORY AND DEVELOPMENT OF CONTRACTUAL LIABILITY OF STATE IN INDIA

- **NATURE OF LIABILTY-** Contractual liability of a state has public character and therefore Public law is applicable in matters of Government Contract. Government cannot and should not violate constitutional provisions in general and fundamental rights in particular Article 14[8], while awarding government contracts or else public law i.e. remedy under Article 32 or Article 226 of the Indian Constitution, as the case may be will be there to rescue the Fundamental rights of the Individual In addition Government has to observe underlying basic general principles also in contractual matters.
- **HISTORICAL BACKGOUND AND LEGAL DEVELOPMENT OF CONTRACTUAL LIABILITY IN INDIA-**

  Prior to 1947, i.e. before the passing of the Crown proceedings Act 1947, crown could not be sued in a court for contract under common law in England. This privilege was traceable to the days to the feudalism when a 'Lord could not be sued in his own courts' and because of another maxim that 'king can do no wrong'.[9]

  However a subject could seek redress against the crown by moving a 'petition of a right' in which he set out his claim. If the Royal fiat was granted, then the action could be tried in a court. The Royal fiat was granted as a matter of course but not as a

[7] SP Sathe, Administrative Law (seventh edition, Lexix Nexis) p.no.-606.
[8] *The Constitution of India*, 1950
[9] D.D.BASU, commentary on constitution of India (eighth edition, 2011) p.no.-9475.

matter of right. There was no remedy available if the fiat was refused in any specific case.[10]

The crown proceedings Act 1947 abolished this procedure and permitted suits being brought against the crown in the ordinary courts to enforce contractual liability with exception of few types of contract.[11]

However, the extent of liability of Government of India is in direct succession of the liability of the East India Company in similar situations. Article 300 of the constitution of India points out the extent of the liability of the Union of India and the states will be same as that of Dominion of India and provinces under the Government of India Act, 1935.The Act of 1935 refers to the Act of 1919 which in turn refers back to Government of India Act 1858. Thus, one must refer back to the times of East India Company in order to determine the extent of liability of Government today.[12]

In India, East India Company being essentially a commercial concern never enjoyed immunity similar to the principle of sovereign immunity as enjoyed by the Crown in England. Thus, it can be said that the principle of sovereign immunity in the matters of contractual liability was never followed by the Indian Courts in India in case of East India Company as also evident in the case Bank of Bengal v. United co.[13] wherein it was held, that "East India Company has no sovereign character to prevent it from being sued for the recovery of the interest on three promissory notes on the basis of which the company borrowed money for the efficient prosecution of war for defending and extending the territories of the crown in India."

However still the position of liability in contract was doubtful until the enactment of Government of India Act 1858, 1919 and 1935 was enacted which provided clear and mandatory provisions prescribing the manner in which Government contracts are to be made and on the same line of legislation in the matters of contractual liability Constitution of India provided the mandatory legal frame work for the Government contract.

[10] MP Jain & SN Jain, Principles of Administrative Law, Edn. 6th, Vol. 2, Wadhwa Nagpur, P. No. 1488.
[11] Ibid.
[12] I.P.Massey,Administrative Law (sixth edition 2005) at p.no.-378.
[13] (1831) I Bignal's Report, 87-181.

2. LEGAL FRAMEWORK OF CONTRACTUAL LIABILTY OF STATE IN INDIA

- **Pre constitutional legal framework-**

Before the commencement of the constitution of India main legal provisions with regard to the liability of the state in Government contract may be found under the Government of India Act 1858,1919 and 1935 Act which dealt with the subject matter are as follows:-

Government of India Act 1858 provided , "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said – purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Government of India Act, 1919, Section 30 of the Government of India Act 1919, provided as follows:-

" (1) The Government General in council and 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.

(2) every assurance and 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 authorizes and if so executed may be enforced by or against the secretary of state in council for the time being."

Again in 1935 British Government passed Government of India Act 1935, Section 175 (3) & (4) of which dealt with the Power of the Executive to make contracts.

Government of India Act, 1935, Section 175 (Power to Acquire Property and to Make Contracts, Etc) provides as follows:-

(1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriates Legislature, to the grant, sale, disposition or mort- gage

of any property vested in His Majesty for the purposes of the government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts:

Provided that any land or building used as an official residence of the Governor-General or a Governor shall not be sold, nor any change made in the purposes for which it is being used, except with the concurrence, in his discretion, of the Governor-General or the Governor, as the case may be].

(2) All property acquired for the purposes of the Federation or of a Province[1]or of the exercise of the functions of the Crown in its relations with Indian State], as the case may be, shall vest in His Majesty for those purposes.

(3) Subject to the provisions of this Act with respect to the Federal Railway Authority], all contracts made in the exercise of the executive authority of the Federation or of a Province shall be, expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorize.

(4) Neither the Governor-General, nor the Governor of a Province, no the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Act, or for the purposes of the Government of India Act or of any Act repealed thereby, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

Post constitutional legal framework - Article 294, 298, 299 and 300 of the Indian Constitution, 1950 altogether provides a complete picture of present constitutional legal framework of contractual liability of state in India, which are discussed separately as follows:

Article 294 makes provision for the succession by the Union Government and the states to property, assets, rights, liabilities and obligations vested in the former governments.

Article 298 lays down that for the purpose of carrying out the function of the state, government can enter into contract.

Article 299 is mandatory in nature and provides essential formalities which a Government contract ought to be complied with, it provides as follows:-

> **"Article 299 - Contracts**
>
> **(1)** All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.
>
> **(2)** Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof."

It is important to note that clause (1) of Article 299[14] reproduce the material part of the Clause (3) of the section 175 of the Government of India Act 1935 and that clause (2) of Article 299[15] reproduce the material part of the Clause (4) of the section 175 of the Government of India Act 1935.

Article 300 provides the manner in which suits and proceedings against or by the government may be instituted.

> Article 300 - Suits and proceedings
>
> **(1)** The Governor of India may sue or be sued by the name of the Union and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the

[14] The Constitution of India, 1950.
[15] Ibid.

corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted

(2) If at the commencement of this Constitution

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

"However, the constitutional code for public contract is not complete; therefore, it is supplemented by the provisions of Contract Act.[16]A Government Contract in order to be valid, besides satisfying the requirement of Article 299, must also fulfill the requirements of Section 10 of the Indian Contract Act, 1872 dealing with the essentials of a valid contract[17]In the same manner the principles for determining the quantum of damages contained in sections 73, 74 and 75 of contract Act[18] are also applicable in case of Government Contracts."[19]Nevertheless all the provisions of the contract Act are not applicable to Government contracts. The provisions relating to capacity as to age and mind has no relevance to such contracts.[20]

PRINCIPLES UNDERLYING CONTRACTUAL LIABILITY OF THE STATE

1. Reasonableness, fairness

2. Public interest

3. Equality, non-arbitrariness

Actions of the State and its instrumentality are bound to be fair and reasonable.-The actions are liable to be tested on the touchstone of Article 14 of the Constitution of India. The

[16] Indian Contract Act, 1872.
[17] State of Assam v. Keshab Prasad singh ,AIR 1953 SC 309.
[18] Indian Contract Act,1872.
[19] I.P.Massey, Administrative Law (sixth edition 2005) at p.no.-377.
[20] .P.Massey, Administrative Law (sixth edition 2005) at p.no.-377.

State and its instrumentality cannot be allowed to function in an arbitrary manner even in the matter of entering into contracts. The decision of the State either in entering into the contract or refusing to enter into the contract must be fair and reasonable. It cannot be allowed to pick and choose the persons and entrust the contract according to its whims and fancies. Like all its actions, the action even in the contractual field is bound to be fair. It is settled law that the rights and obligations arising out of the contract after entering into the same is regulated by terms and conditions of the contract itself. The requirement of 'fairness' implies that even administrative authority must act in good faith; and without bias; apply its mind to all relevant considerations and must not be swayed by irrelevant considerations; must not act arbitrarily or capriciously and must not come to a conclusion which is perverse or is such that no reasonable body of persons properly informed could arrive at. The duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. The Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to amend, alter or vary the express terms of the contract between the parties. In a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen and the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness and justice demand.

Public Interest

This concept of public interest is of prime importance. There are circumstances which necessitate us to depart from public interest rule but those circumstances must be fair and rational. Every public authority is required to act in the public interest.

Nothing should be done which shows biasness from their side. They must exercise their power in public interest and in public good.

State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain percepts and principles have to be observed. Public interest is the paramount consideration. There may be situations where there are compelling reasons

necessitating the departure from the rule, but there the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism

The consideration to weigh in allotting a public contract are and have to be different than in case of a private contract as it involves expenditure from the public exchequer. The actions of the public authorities thus have to be in conformity with the standards and norms which are not arbitrary, irrational or unreasonable. And whenever the authority departs from such standard or norms, the Courts intervene to uphold and safeguard the equality clause as enshrined in Article 14 of the Constitution and strike down actions which are found arbitrary, unreasonable and unfair and prone to cause a loss to the public exchequer and injury to public interest. Therefore, even when an award of contract may not be causing any loss to the public exchequer manifestly, it may still be liable to quash for being unfair, unreasonable, discriminatory and violative of the guarantee contained in Article 14.

Equality and non- arbitrariness- According to positivist equality is antithesis to arbitrariness. When an act is arbitrary it is implicit that it is unequal and violative of Article 14. The principle of reasonableness which is an essential element of equality and non-arbitrariness pervades Article 14 and its procedure is laid down in Article 21.

APPLICABILITY OF LAW IN MATTERS OF GOVERNMENT CONTRACT

Government contracts, unless challenged on the ground of non-compliance with Article 298 of the Indian constitution or on the ground that they are vitiated by the discrimination or unfavorable terms for the state, are governed by the private law and cannot be subject to public law. When the state or its instrumentality is engaged in ordinary commercial transactions, the law of contract would be applicable. A person aggrieved by any of the terms of the contract is not entitled to seek redress under article 226 of the constitution.[21]It is because of the reason that seriously disputed questions or rival claims of the parties with

[21] SP Sathe, Administrative Law (seventh edition, Lexis Nexis, 2007) p.no.-612.

regard to the breach of the contract are to be investigated and determined on the basis of evidence which may be led by the parties in properly instituted suit, rather than by a court exercising prerogative of issuing writs.[22] Likewise, in Banchanidhi Rath v. The state of Orissa[23], the court observed that, if a right is claimed in terms of a contract such a right cannot be enforced in a writ petition.

Where parties to a contract have agreed to settle their disputes by arbitration and if there is an agreement in that regard, the court would not allow recourse to any other remedy without invoking for remedy by way of 'arbitration' unless, of course, both the parties to the dispute agree on another mode of dispute resolution.[24]

Where there is dispute of question of facts, the writ petition under Article 32 or 226 is neither an occasion, nor an appropriate remedy.

In B.D.A. v. Ajai Pal Singh[25] Where a development authority undertook construction of dwelling houses and in its brochure gave estimate of the cost but warned that costs might increase or decrease, it was held that the increase in the costs could not be challenged under article 226 as being unreasonable or arbitrary.

In Karnataka v. Rameshwar rice mills[26] when an instrumentality of the state buys share of a private company, it acts as a shareholder and it was held that such an instrumentality was not bound to give reasons when it sought to get the management of the company charged by the resolution of the company.

However, public law comes in picture where the terms of the contract vest arbitrary power in the state.[27]

ANALYSIS OF THE PROVISIONS OF CONTRACTUAL LIABILITY OF STATE IN INDIA

[22] State of Bihar V. Jain Plastics & Chemicals Ltd.,AIR 2002 SC 206.
[23] AIR 1972 SC 843
[24] ABL International ltd. V. Export credit Guarantee Corporation ,(2004) 3 SSC 553.
[25] Bareilly Development Authority v. Ajai Pal Singh (1989) 2 SCC 116, AIR 1989 SC 1076.
[26] LIC of India v. Escorts ltd. AIR 1986 SC 1370,(1986)
[27] Karnataka v. Rameshwar rice mills, Thirthathali AIR 1987SC 1359.

Provisions under Article 299 (1) are Mandatory- Provisions under Article 299 (1) of Indian Constitution are mandatory in nature and a Government contract must be made in accordance with the provisions of Article 299 (1). Non-conformity would render the contract void. The object of Article 299 is to enhance the public interest by protecting the Government from being saddled with the liability for entering into unauthorized contracts; so as to save the Government from spurious claims made on account of such unauthorized contracts.[28] Likewise there cannot be no implied contract betweenthe Government and another person. In K.P. Choudhary v. state of M.P.[29] Supreme Court held, that "in view of Article 299(1) there could be no implied contract with the Government because if such implied contracts with the Government were allowed, it would in effect make Article 299 (1) meaningless.

However, In M.Mohammad v. U.O.I.[30], Hon'ble Court has taken the view that " a contract not complying with the requirements of article 299 (1) is only relatively void but not void for all the purposes. It means that while the contract is not enforceable by the parties thereto, it can still subsist for some collateral purposes"

Since Article 299 (1) provides for certain mandatory requirements only, therefore subject to the essential requirements of this provision the general contract law applies even to a Government Contract in the same manner as to any other contract for the purposes other issues pertaining to contract, such as, discharge of contract, damages and other remedies in the event of breach of contract etc[31]

The judicial attitude to Article 299 has sought to balance two motivations:-A strict compliance with these conditions may be inequitable to private parties, and at the same time, make government operations extremely difficult and inconvenient in practice. Consequently, in the context of the facts of some cases, the courts have somewhat mitigated the rigors of the formalities contained in Article 299(1), and have enforced contracts even when there have not been full, but substantial, compliance with the requirements of Article 299(1). In effect, it may be true to say that the judicial view has oscillated between the liberal and rigid

[28] Seth Bhikraj jaipuria v. Union of India, AIR 1962 SC 113.
[29] AIR 1967 SC 203
[30] M.Mohammad v. Union of India, AIR 1982 BOMB 443.
[31] RK SINGH, 'Adjudicating the Public-Private Law Divide: The Case of Government Contracts in India', Law and Politics in Africa/Asia/Latin America (Verfassung und Recht in Ubersee, VRU), Nomos, 1/2017. [ISSN: 0506-7286]

interpretation of Article 299.A contract to be valid under Article 299(1) has to be in writing. It does not, however, mean that there should always be a formal legal document between the Government and the other contracting party for the purpose. A valid contract could emerge through correspondence, or through offer and acceptance. Under Article 299(1), a contract can be entered into on behalf of the Government by a person authorized for the purpose by the President, or the Governor, as the case may be. The authority to execute the contract on behalf of the government may be granted by rules, formal notifications, or special orders; such authority may also be given in respect of a particular contract or contracts by the President/Governor to an officer other than the one notified under the rules. Article 299(1) does not prescribe any particular mode in which authority must be conferred; authorization may be conferred ad hoc on any person.

Written Contract:- A contract to be valid under Article 299(1), must be in writing. The words 'expressed to be made' and 'executed 'in this article clearly go to show that the must be a formal written contract executed by a duly authorized person. Consequently, if there is an oral contract, the same is not binding on the Government. This is not a mere formality but a substantial requirement of law and must be fulfilled. It, however, does not mean that there must be a formal agreement properly signed by a duly authorized officer of the Government and the second party. The words 'expressed' and 'executed' have not been literally and technically construed.

In *Chatturbhuj Vithaldas v. Moreshwar Parashram*, speaking for the Supreme Court, Bose, J. observed:

"It would, in our opinion, be 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……"

In *Union of India v. A.L. Rallia Ram***,** tenders were invited by the Chief Director of Purchases, Government of India. R's tender was accepted. The letter of acceptance was signed by the Director. The question before the Supreme Court was whether the provisions of Section 175(3) of the Government of India Act, 1935 (which were in *parimateria* with Article 299(l) of the Constitution of India) were complied with. The Court held that the Act did not

expressly provide for execution of a formal contract. In absence of any specific direction by the Governor-General, prescribing the manner or mode of entering into contracts, a valid contract may result from the correspondence between the parties.

The same view was reiterated by the Supreme Court in another case, wherein the court observed:

"It is now settled by this court that though the words 'expressed' and 'executed' in Article 299(l) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorized on this behalf by the President of India."

From the above observations, it can safely be said that the Constitution does not require any formal document to be executed on behalf of the Government and only then it would constitute a binding agreement. Any form of 'offer and acceptance' complying with Article 299 of the Constitution would be a valid and binding contract.

Execution by authorized person:-The next requirement is that such a contract can be entered into on behalf of the Government by a person authorized for that purpose by the President or the Governor as the case may be. If it is signed by an officer who is not authorized by the President or Governor, the said contract is not binding on the Government and cannot be enforced against it.

In *Union of India v. N.K. (P) Ltd.*, the Director was authorized to enter into a contract on behalf of the President. The contract was entered into by the Secretary, Railway Board. The Supreme Court held that the contract was entered into by an officer not authorized for the said purpose and it was not a valid and binding contract.

In *Bhikraj Jaipuria v. Union of India,* certain contracts were entered into between the Government and the plaintiff-firm. No specific authority had been conferred on the Divisional Superintendent, East India Railway to enter into such contracts. In pursuance of the contracts, the firm tendered a largequantity of food grains and the same was accepted by the Railway Administration. But after some time, the Railway Administration refused to take delivery of goods. It was contended that the contract was not in accordance with the

provisions of Section 175(3) of the Government of India Act, 1935 and, therefore, it was not valid and not binding on the Government.

The Supreme Court, after appreciating the evidence – oral as well as documentary – held that the Divisional Superintendent acting under the authority granted to him could enter into the contracts. The Court rightly held that it was not necessary that such authority could be given 'only by rules expressly framed or by formal notifications issued in that behalf.'

In *State of Bihar v. Karam Chand Thapar,* the plaintiff entered into a contract with the Government of Bihar for construction of an aerodrome and other works. After some work, a dispute arose with regard to payment of certain bills. It was ultimately agreed to refer the matter for arbitration. The said agreement was expressed to have been made in the name of the Governor and was signed by the Executive Engineer. After the award was made, the Government contended in civil court that the Executive Engineer was not a person authorised to enter into contract under the notification issued by the Government, and therefore, the agreement was void. On a consideration of the correspondence produced in the case, the Supreme Court held that the Executive Engineer had been 'specially authorized' by the Governor to execute the agreement for reference to arbitration.

Expression in the name of President (Governor):-The last requirement is that such a contract must be expressed in the name of the President or the Governor, as the case may be. Thus, even though such a contract is made by an officer authorized by the Government in this behalf, it is still not enforceable against the Government if it is not expressed to be made on behalf of the President or the Governor.

In *Bhikraj Jaipuria],*the contracts entered into by the Divisional Superintendent were not expressed to be made on behalf of the Governor-General. Hence, the Court held that they were not enforceable even though they were entered into by an authorized person.

In *Karamshi Jethabhai v. State of Bombay,* the plaintiff was in. possession of a cane farm. An agreement was entered into between the plaintiff and the Government for supply of canal water to the land of the former. No formal contract was entered into in the name of the Governor but two letters were written by the Superintending Engineer. The Supreme Court held that the agreement was not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 and, consequently, it was void.

Similarly in *D.G. Factory v. State of Rajasthan*, a contract was entered into by a contractor and the Government. The agreement was signed by the Inspector General of Police, in his official status without stating that the agreement was executed 'on behalf of the Governor'. In a suit for damages filed by the contractor for breach of contract, the Supreme Court held that the provisions of Article 299(l) were not complied with and the contract was not enforceable.

In *State of Punjab v. Om Prakash*, the Executive Engineer, PWD, who was authorized under the PWD Manual to enter into a contract accepted the tender of the contractor for construction of a bridge. The letter of acceptance was signed by the Executive Engineer but was not expressed in the name of Governor. The Supreme Court held that there was no valid contract.

Reiterating the principles laid down in earlier decisions and holding the provisions of Article 299 mandatory and in public interest, the Court ruled that the said formalities could not be waived or dispensed with.

No personal liability to the President/Governor and Government officials- As per the article 299 (2) President or Governor or Government Officials cannot be held liable personally under the Government contracts. It is because these executives do not act in their personal capacity but acts on behalf of the Government and thus it is the Government which becomes party to the contract after complying all the formalities and not these officials, accordingly Government Contracts are enforced by and against the Government.[32]

Applicability of Doctrine of Estoppels-It is a very well established principle that there can be no estoppels against the express provision of statutes, Article 299 (1) is mandatory provision, and it cannot be by-passed by invoking the doctrine of estoppel.[33] In Mulamchand v. state of Madhya Pradesh [34], Supreme Court held that, there is no question of estoppels or ratification in such a case. However, Estoppels can apply in cases of statutory contract, or contracts by statutory bodies ,as such contracts do not fall under the purview of Article 299 (1) as held in Gujarat State Financial corporation v. Lotus Hotels Pvt. Ltd.[35]

[32] 'Adjudicating the Public-Private Law Divide: The Case of Government Contracts in India', Law and Politics in Africa/Asia/Latin America (Verfassung und Recht in Ubersee, VRU), Nomos, 1/2017. [ISSN: 0506-7286]
[33] M.P.JAIN, Indian Constitutional Law (seventh edition, Lexis Nexis, 2016) at p.no.-1587.
[34] AIR 1968 SC 1218.
[35] AIR 1983 SC 848.

Ratification- Before 1968, i.e. before passing of the judgment in the case Mulamchand v. state of M.P.[36], Indian judiciary was of the view that,' ordinarily the Government could not be sued on informal contracts, yet the Government could accept the responsibility for them by ratifying them'.[37] For example, as MP Jain has cited in his book[38] that in a case, namely State of West Bengal v. B.K.Mondal[39] wherein it was held that, "a contract not conforming to Article 299 (1) was not void in the technical sense, that it could not be ratified."Likewise, in Karam Chand Thapar case,[40]wherein Supreme court held that, "when a contract was entered into by an unauthorized person,it could be ratified by the Government, especially when the contract was for its benefit."

However, after the passing of the judgment in the case Mulamchand v. state of M.P[41], we may easily notice the reversal of the trend in the attitude of the Indian Judiciary with regard to the, Doctrine of ratification. In Mulamchand v. state of M.P[42], Supreme Court adopted a rigid view and held that "there is no question of ratification or estoppels by or against the Government in case of a contract not conforming to Article 299 (1)."The court reiterated the view that Article 299 (1) has not been enacted for the sake of mere form and, therefore, the formalities, prescribed by it can not be dispensed with. If plea of estoppels or ratification is admitted against the Government, that would mean repeal of an important constitutional provision intended for the protection of the general public.[43]

Service Contracts- Article 299 (1) has no application on a contract of service and therefore such contract cannot be struck down on the basis of non-compliance of the mandatory provision of Article 299.[44]The reason being that, once appointed, the Government servant acquires a status and his rights and obligations are no longer determined by the consent of the two parties, but by statutory rules framed by the government under Article 309 of Indian constitution.[45]A service contract with the Government is subject to 'Doctrine of Pleasure' envisaged under Article 310(1) and can be terminated at the will of the head of the executive,

[36] Mulamchand v. state of M.P., AIR 1968 SC 1218.
[37] N.Purkayashtha v. Union Of India, AIR 1955,Ass 33.
[38] M.P.JAIN, Indian Constitutional Law (seventh edition, Lexis Nexis, 2016) at p.no.-1587.
[39] West Bengal v. B.K.Mondal, AIR 1962, SC 779.
[40] Bihar v. Karam chand thapar Bros Ltd, AIR 1962 SC 110.
[41] Mulamchand v. state of M.P., AIR 1968 SC 1218.
[42] Ibid.
[43] M.P.JAIN, Indian Constitutional Law (seventh edition, Lexis Nexis, 2016) at p.no.-1587.
[44] Ranjit Kumar v. state of West Bengal, AIR 1958 Cal 551.
[45] M.P.JAIN, Indian Constitutional Law (seventh edition, Lexis Nexis, 2016) at p.no.-1587.

despite an express condition to the contrary, it cannot be regarded as a contract in the usual sense of the term and ,as such, it should not be brought within the purview of Article 299 (1).[46]

Statutory contracts- Article 299 (1) do not have any application on the statutory contract as the statutory contracts are governed by their parent act under which they are made and not by the Article 299 (1), e.g. Grant of license or exclusive privilege of liquor vending in the exercise of statutory powers. Government contracts are executed under the executive powers and the statutory contracts are executed under the ordinary statutory powers.

Quasi-contractual Liability of Government- The provisions of Article 299(1) of the Constitution [Section 175(3) of the Government of India Act, 1935] are mandatory and if they are not complied with, the contract is not enforceable in a court of law at the instance of any of the contracting parties. In these circumstances, with a view to protecting innocent persons, courts have applied the provisions of Section 70 of the Indian Contract Act, 1872 and held the Government liable to compensate the other contracting party on the basis of quasi-contractual liability. What Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, but on the basis of the fact that something was done by one party for the other and the said work so done has been voluntarily accepted by the other party. Thus, Section 70 of the Contract Act prevents 'unjust enrichment.' Before Section 70 of the Contract Act is invoked, the following conditions must be fulfilled:

- A person must have lawfully done something for another person or deliver something to him;
- He must not have intended to do such act gratuitously; and
- The other person must have accepted the act or enjoyed the benefit.

[46] M.P.JAIN, Indian Constitutional Law (seventh edition, Lexis Nexis, 2016) at p.no.-1587.

If these three conditions are fulfilled the section enjoins on the person receiving benefit to pay compensation to the other party

CONTRACTUAL LIABILITY OF STATE IN 'UNITED KINGDOM'

Before 1947 i.e. before passing of Crown Proceedings Act, 1947 crown could not be sued in contracts because of the then prevailing legal maxims 'King can do no wrong' and 'crown cannot be sued in its own court.' However, as it was seen to be desirable that crown contractors could obtain redress, they would otherwise be inhibited from taking on such work, so a petition of right came to be used in such situations, especially after the petitions of Right Act, 1860 simplified the process. Before the petition could be heard by the courts, it had to be endorsed with the words ***fiat justicia*** on the advice of the Home secretary and Attorney General i.e. prior approval of the Government was required to initiate an action against the Government in contract then only court could hear the 'Petition of Right.'

The Crown Proceedings Act, 1947, abolished this procedure and permitted suits being brought against the Crown in the ordinary courts to enforce contractual liability, a few types of contracts being however excepted.[47] Such Exceptions and limitations can easily be understood by the bare reading of section 1 of the Crown Proceedings Act, 1947.

Section 1 of 'The Crown Proceedings Act, 1947' provides as follows : "Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.' Proceedings by way of petition of right are abolished by section 13 of the Act."

The effect of section 1 is that a subject cannot sue the Crown in contract always, but only when he could previously have proceeded by petition of right. This retention of the former limitations on the right to sue for breach of contract is unfortunate not merely because the

[47] WADE AND PHILIPS.CONSTITUTIONAL LAW, 1977 at p.no.-623.

limitations are substantial, but also because they are all of uncertain extent.[48] "These limitations affect the following matters as follows:-

(a) The right of a servant of the Crown to enforce a contract of service against the Crown .A member of the armed forces cannot sue for breach of contract of service nor can he recover arrears of pay, because control of the armed forces is a royal prerogative. A civil servant cannot ordinarily sue for wrongful dismissal because there is an implied term in his contract that he is dismissible at pleasure.
(b) All contracts made by the Crown are subject to an implied condition, that the necessary funds are granted by Parliament.
(c) The Crown cannot by contract hamper its future executive actions.
(d) Quasi-contract.

In Brochle bank, Ltd. v. R[49], the Crown denied that a petition of right was available when the plaintiffs, instead of claiming tort for money wrongfully obtained from them by a servant of the Crown, sought to sue for money had and received."[50]

CONTRACTUAL LIABILITY OF STATE IN USA

The Constitution of USA envisaged the provision which prohibits states of USA from making law which may impair obligation of contract by inserting the contract clause in the constitution.

The **Contract Clause** appears in the United States Constitution **Article I, section 10, clause 1** reads as "No state shall enter into any treaty, alliance, or confederation; grant letters of marquee and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or ***law impairing the obligation of contracts,*** or grant any title of nobility"

The Contract Clause prohibits states from enacting any law that retroactively impairs contract rights. The Contract Clause applies only to state legislation, not federal legislation or court

[48] http://www.jstor.org/stable/1090379
[49] [1925] 1 K.B. 52.
[50] http://www.jstor.org/stable/1090379

decisions. During the 19th century the application of contract clause extended to the public contracts.

The Law of Government contracts today is a very improved and established in USA. Long ago the Congress waived sovereign immunity and established a specialized court to adjudicate contract claims against the Government. The cause of action, under certain circumstances, implies a judgment by the Government that a no-compensation rule would unduly discourage private parties from dealing with the Government and unnecessarily raise the costs of essential Government activities. But the cause of action against the Government is limited.[51]

Supreme Court of USA faced challenges in developing legal standards applicable to Government contracts and in doing so Supreme Court has sometimes enforced Government contracts where even private contracts in the similar situation would not have been enforced as evident in a famous case of Fletcher v. Peck,[52]wherein CJ, Marshall held that "the contract clause barred the state of Georgia from rescinding land grants which the court concluded were contracts made by a prior legislature as payment for alleged bribes."

Other times the court applies ordinary contract law to Government contracts. In Lynch v. US[53], the court held that a depression era attempt by the government to repudiate insurance obligations owed to World War I in case of veterans who had purchased special insurance policies was a breach of contract…..when U.S. enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals"

In USA certain powers particularly police and eminent domain powers that are inalienable and cannot be contracted away even by express grant, further doctrine of apparent authority cannot bind the Government for contracts entered into by its agents, which does not favors the implication of Governmental obligations in public contracts.

CONTRACTUAL LIABILITY OF STATE IN AUSTRALIA

[51] Daniel R.Fischel,Alan O Sykes, 'Governmental liability for Breach of Contract' (1999) 1American Law and Economics Review (313-385)
[52] (1810) 10 US (6 Cranach) 87
[53] (1934) 292 US 571

In Australia, Parliament is enabled to make laws conferring rights to proceed against the Commonwealth or State. The Commonwealth of Australia Constitution Act 1900, by Section 73, provided that the legislature of Australia "may make any laws conferring rights to proceed against the Commonwealth or State in respect of matters within the limits of the judicial power." The formula adopted in Australia is that, the rights of the parties shall be nearly as possible, be the same as in a suit between a subject and a subject.[54] It gives a wide scope for judicial interpretation, and it is difficult to say to what extent the State's liability, without distinction between sovereign and non – sovereign functions would be recognized under the Australia formula. ***Part IX of the Judiciary Act 1908, gave right to sue the Commonwealth both in contract and tort without petition of right.***

In *Baume v. Commonwealth*[55], it was held that, "the Act gave the subject the same rights of action against the State as against a subject in matters of tort as well as contract and that the Commonwealth was therefore responsible and an action was maintainable for tortuous acts of its servants in every case in which the gist of the cause of action was infringement of a legal right."

The Australian Courts have held that the Crown can be made liable in both respects for their wrongful acts or omissions. By the provisions of the Claims against the State and Crown Suits Act 1912, "any person having or deeming himself to have any just claim or demand whatsoever" was authorized to bring his claim before the Court by way of petition. On any such petition the rights of the parties were to be "as nearly as possible is the same as in an ordinary case between subject and subject."

SCOPE OF JUDICIAL REVIEW

Judicial quest in administrative matters has to find the right balance between the administrative discretion to decide matters contractual or political in nature, or issues of social policy and the need to remedy any unfairness. A State need not enter into contract with anyone, but when if does so it must do so fairly without discrimination and without unfair procedure; and its action is subject to judicial review under Article 32 or 226 of the

[54] Section 64, The Judiciary Act 1908.
[55] (1953)2 All ER, 149.

Constitution of India.

Where the Government is dealing with the public, whether by way of giving jobs or by entering into contracts or issuing quotas or licenses or granting other forms of largess, it cannot arbitrarily use its power of discretion and in such matters must conform to certain standards or norms which are not arbitrary, irrational or irrelevant.

The principles of judicial review would apply to the exercise of the contractual powers by the Government bodies in order to prevent arbitrariness or favoritism. However there are certain inherent limitations on the exercise of judicial power by the court in India. The judicial power of review is exercised to rein any unbridled executive functioning. The restraint has two contemporary significances. One is the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmark of judicial control over administrative action

It is not for the Court to determine whether a particular policy particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which the decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as;

(1.) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. (2) Irrationality and (3) Procedural Impropriety.

The above are only the broad grounds but it does not rule out the addition of further grounds in course of time. With respect to the judicial review of administrative decisions and exercise of contractual powers by Government bodies, the Hon'ble Supreme Court has held, "The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in the administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the application of the ‘Wednesbury principle’ of reasonableness (including its other facts) but must be free from arbitrariness not affected by bias or actuated by malafides. While exercising the power of judicial review, in respect of contracts entered into on behalf of the

State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'.

By way of judicial review the Courts cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiries. But at the same time the Courts can certainly examine whether "decision making process" was reasonably rational, not arbitrary and violative of Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available, taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion. But once the procedure adopted by the authority for the purpose of entering into the contract is held to be against the mandate of Article 14 of the Constitution, the Court cannot ignore such action saying that the authorities concerned should have some latitude or liberty in contractual matters and any interference by the Court amounts to encroachment on the exclusive right of the executive to take such decision. The doctrine that the powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which the Parliament has appointed to take the decision.

CONCLUSION

A government contract has been given the constitutional recognition. The constitution, under Article 298, clearly lays down that the executive power of the union and of each state extends to “the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of the contracts for any purpose. “The constitution therefore, provides that a Government may sue or be sued by its own name. A similar provision is found in the code of civil procedure 1908 under section 79 thereof.

A Government contract is a privilege or largesse. Unlike a private person who has freedom to decide with whom to contract and on what terms to contract, the Government has to use its power of contracting in public interest. While deciding with whom to contract, it has to provide equal opportunities to all to complete such largesse. Government cannot select

anybody arbitrarily. Further, the Government must choose the party as well as the terms so as to maximize the public interest. There are certain fixed procedures for contracts by public bodies. They have to invite tenders or quotations and select from amongst those who have given tenders one who offers the best of the terms or services.[56]

In RD Shetty v.International Airport Authority[57], PN Bhagwati J, objected to the International Airport Authority entering into a contract for running into a contract for running a cafeteria at the airport with a person who did not fulfill the conditions mentioned in the notice inviting the tenders.

In Tata cellular v. India,[58]Mohan J speaking for the bench consisting of Venkatachaliah CJ,MM Punchhi J and himself said:

"It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the state. It is expected to protect the financial interest of the state."

In Sterling computers Ltd. V. M/s M & N Publications Ltd[59], the court once again stated the limits of the judicial review of Government contracts in the following words:

"If the contract has been entered without ignoring the procedures which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the state and the public, then the court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract."

Recent trends in the matters of public procurement

A major development occurred in 2012 when the Supreme Court of India (Supreme Court) cancelled the licenses of various telecom companies for 2G Spectrum. The Indian Government had adopted a "first come, first serve"' policy at archaic rates, to keep the new

[56] SP Sathe, Administrative Law (seventh edition, Lexis Nexis) p.no.-613.
[57] AIR 1979 SC1628, (1979) 3 SCC 489.
[58] AIR 1996 SC 11, 25.
[59] AIR 1996 SC 51 ,56

licensees at par with the old licensees and to keep public costs reasonable. The policy resulted in windfall gains of billions of rupees to the licensees and incurred losses to the public exchequer followed by serious charges of fraud and corruption levelled against the telecoms Minister.

The Supreme Court concluded that spectrum is a natural resource and as it cannot be defined universally, its value depends on its availability and demand and its distribution must promote public good against private gain. In a controversial move, the Supreme Court struck down all licenses granted under the first come, first served policy and held that an auction held fairly and impartially is the best method for the state to allocate public or natural resources. The Government's view was that it cannot be bound by a defined and specific method only for the distribution of natural resources. The case has been a stepping stone towards the Bill to introduce a specific and exclusive procurement law in India.

SUGGESTIONS

I. In view of the increasing importance and the relevant of Governments contracts, Public Procurement Bill 2012 must be enacted which envisaged regulatory framework in the procurement and tendering process. This will enable the process not only to be more transparent, but it will also help to infuse confidence and reliability in the mind of the other party. This will also expedite the process which is beneficial for the both the parties as well as the public at large. In addition, the whole some development of the economy will also follow as natural consequences of it.

II. In the methods of tendering such as the competitive Bidding Method is considered to be one of the good method of granting projects without any loopholes. As such, it is a suggestion that the government should in most of the cases to follow this procedure. It will also ensure to infuse confidence in the public and enable public growth and economic development.

III. Commissions may be formed for the purpose of awarding contracts at centre and state level.