

(1958) 02 MP CK 0012
Madhya Pradesh High Court
Case No: F.A. No. 90 of 1952

State of M.P.

APPELLANT

Vs

Circle Auditor and Liquidator,
Jabalpur and Another

RESPONDENT

Date of Decision: Feb. 28, 1958

Acts Referred:

- Defence of India Rules, 1962 - Rule 81(2)(a)

Citation: (1958) MPLJ 410

Hon'ble Judges: M. Hidayatullah, C.J; B.K. Choudhari, J

Bench: Division Bench

Advocate: M. Adhikari, for the Appellant; A.P. Sen, for the Respondent

Final Decision: Allowed

Judgement

This appeal is by the State Government against a decree passed by the Additional First Civil Judge, Class I, Jabalpur, in Civil Suit No. 22-B of 1950, on 31st December 1951. By that decree the State Government as principal, and the Nagpur District Rural Area Co-operative Association, Ltd. (hereinafter the Nagpur Association), as agent, have been held responsible to pay to the Plaintiff a sum of Rs. 5,253-4-0 and costs as damages for breach of a contract. Previous to this, an appeal (First Appeal No. 60 of 1952) filed by the Nagpur Association was dismissed on 30th December 1957 for want of prosecution. The result of that appeal, however, has no bearing upon the liability of the State Government, and we, therefore, allowed the appeal under judgment to be argued.

The facts of the case are as follows: In July 1947 the Central Government in the Food Department initiated a scheme for the allotment of Simla Hill potatoes of the 1946 crop for seed purposes to the various provinces. The Joint Secretary to the Government of India in the Food Department addressed a letter, which is Ex. 2 D-2, on 9th July 1946 intimating that allocation of Simla Hill potatoes had been made

by the Government, allotting to the Central Provinces and Berar a quantity of 12,000 maunds for seed purposes. It was intimated that all the potato-growers in the Punjab had been organised into three groups and sales of potatoes in the Punjab would be made ex-depot, beyond which the grower's association would take no responsibility. The Government of India nominated an association called the Kailash Association as their clearing agency on a commission of 2 per cent for the purpose of supplying Simla Hill potatoes to the recipient Provinces. The Government also intimated that rail transport was also organised to Kalka Broad Gauge Station and intimated the freight etc. chargeable on these consignments. Wagon permits, it was said, would be available to the District Magistrate of the State concerned from the Regional Food Commissioner, North-West Region. The letter goes on to say that the Punjab Government was asked to impose a district ban on the movement of potatoes by rail or road from Simla or Ambala districts without a permit signed by the District Magistrate of the district and the Food Department Officer. Similar restrictions were also imposed on the movement of potatoes from the so-called native States to British India. The Government of India, therefore, asked the Provincial Government of the Central Provinces and Berar to depute an official representative to deal with the Political Agent, Punjab Hill States, Simla, not later than 1st August 1946, with authority to complete negotiations for the purchase and dispatch of the allotted potatoes. They warned the State Government that unless this was done punctually the quota allotted to the Central Provinces and Berar might be re-allotted to some other province.

On receipt of this communication the Provincial Government on its own part took measures to implement the instructions issued by the Central Government. They communicated to the Deputy Commissioners the letter of the Government of India and informed the Deputy Commissioners that the Director of Agriculture had been asked to publish an advertisement inviting tenders for the appointment of one more commission agent for import of seed potatoes from the Punjab. The Government was to examine the tenders when received and to select the commission agent. The Deputy Commissioners were in the meantime asked to call for indents from reliable seed potato dealers in the districts containing such information in pro forma as was required. The Deputy Commissioners were asked to consolidate all the indents and communicate them to the commission agents to be selected. The Government also asked the Deputy Commissioners to inform the merchants that it was not possible for individual traders to arrange for the purchases direct from the exporting provinces. After cautioning the Deputy Commissioners concerned to see that the merchants, did not indulge in profiteering and that they should be permitted to sell the potatoes at the rates prescribed, Government intimated that the commission agents would be paid 4 annas per maund and were allowed to add their commission to the price.

In pursuance of this communication the Nagpur Association was chosen as the commission agent for the purchase of Simla Hill potatoes for the Central Provinces

and Berar, and the appointment order is Ex. 2 D-I. A security of Rs. 5,000 was ordered to be furnished by the Nagpur Association as a guarantee that it would "import the said quantity of potatoes by the specified dates and distribute them at a price not in excess of four annas per maund over the loaded costs". The Nagpur Association was further warned that it was expected to serve the people with great care and caution and that in case Government found any allegations of malpractices in its dealings the security of Rs. 5,000 would be liable to forfeiture at the discretion of Government. On 14th September 1946 an agreement was executed by the Provincial Government and the Nagpur Association to implement the appointment of the commission agent. Ex. 1D-4 lays down the conditions under which the commission agent was to work. Paragraph 4 of that agreement provided that the Commissioner would take from every merchant to whom seed potatoes were to be supplied a guarantee through a recognized bank for the payment of bills to the commission agent for the price, including the cost of transport of seed potatoes against railway receipts for the consignments, and that the agent would not be bound to supply the seed potatoes to any merchant who had not given such a guarantee. It was also provided that the commission agent would be responsible for any short delivery of seed potatoes on certification by the Station Master concerned. In so far as the merchants were concerned it was provided that if any merchant to whom the seed potatoes were to be supplied offered to send his representative to help the agent in the purchase, the agent should purchase the seed potatoes for that merchant with the approval of the representative so offered. The agreement also contained a provision with regard to the security deposit by the commission agent and the conditions on which forfeiture was likely to result and further provided for an arbitration clause if any dispute on this account arose between the Provincial Government and the commission agent. The agreement is Ex. ID-4. In the meantime the Jabalpur District Co-operative Agricultural Association Ltd. (hereinafter the Jabalpur Association) came to the forefront to look after the needs of the public in regard to agriculture and agricultural implements. The District Magistrate, Jabalpur, authorised the Jabalpur Association to purchase seed potatoes and sell them to cultivators and other persons within the area of their jurisdiction. The Jabalpur Association thereupon placed its indent for its requirements of seed potatoes through the Deputy Commissioner, Jabalpur. The Jabalpur Association also decided that its representative would attend the purchase of seed potatoes in Simla, where the commission agent was purchasing them for supply to the Jabalpur Association and others. Some telegrams were exchanged between the representatives of the Nagpur Association and the Jabalpur Association, the one asking that the representative of the Jabalpur Association should come immediately and the other informing the representative of the Nagpur Association at Simla that the representative of the Jabalpur Association was on his way. We need not refer to these telegrams, which have very little bearing upon this, matter, because the seed potatoes which are the subject-matter of the controversy in this suit were in fact

purchased before the representative of the Jabalpur Association reached Simla and were in transit before that time.

When the seed potatoes were received at Jabalpur it was found that the bulk of the potatoes had rotted in transit. This was described as being due to the fact that wet potatoes were loaded in the wagons and the wagons were attached to a goods train instead of a passenger train and had arrived after a long lapse of time. The present suit was therefore filed by the Jabalpur Association for damages for breach of contract against the Nagpur Association as commission agent and the State Government as principal.

The trial Court held both the Defendants responsible and decreed the claim against both. The two Defendants filed their separate appeals, one of which, as has already been stated above, was dismissed for want of prosecution, and we are thus left only with the appeal of the State Government, which we now proceed to decide.

The State Government naturally absolved itself from all responsibility in the matter, claiming that its act was in the exercise of sovereign powers and inter alia that it was not a contracting party and was thus not liable. The claim of the State Government to the exercise of sovereign powers was negatived in the Court below and was abandoned by the learned Advocate-General in the appeal before us. The learned Advocate-General however substituted the immunity of the State Government arising from Section 17 of the Defense of India Act for the immunity claimed on the ground of exercise of sovereign power. The learned -Advocate-General frankly conceded that this immunity was not specifically claimed in the written statement made by the State Government, and he sought permission from us to urge this as a pure point of law. The Learned Counsel for the Respondent (Jabalpur Association) contested the permission and stated that it was a mixed question of law and fact and could not be urged at this late stage. Section 17 of the Defense of India Act reads as follows:

(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made there under.

(2) Save as otherwise expressly provided under this Act, no suit or other legal proceeding shall lie against the Crown for any damage caused or likely to be caused by anything in good faith, done or intended to be done in pursuance of this Act or any rules made there under.

We have first to decide whether this plea can be allowed to be raised at this stage and then whether the immunity guaranteed by this section can be availed of in this suit. The Learned Counsel for the Respondent (No. 1) argued that the application of this section was conditioned on three things, viz. (1) that the act was bona fide, and (2) that it was in pursuance of the Act, or (3) in pursuance of any rules made there under. He contended that all that was shown in the case was a letter from the

Central Government in the Food Department to the Provincial Government asking them to take their supplies of seed potatoes from a clearing agency on payment of 2 per cent commission to the clearing agents. This, according to the Learned Counsel for Respondent No. 1, was not an act done in pursuance of the Defense of India Act or any rules made there under. He also contested that the question whether it was done in good faith was still open because neither the good faith of the Provincial Government nor that of the Central Government had been the subject-matter of any issue. He pointed out further that the action of the Provincial Government in appointing its own commission agents was a commercial venture and was not any act done or intended to be done in pursuance of the Act or the rules made there under. He, therefore, submitted that this point could not be allowed to be urged, and that the plea must be taken by an amendment of the written statement, to which the Respondent (No. 1) was entitled to file a reply.

The history of the transaction with regard to the purchase and supply of seed potatoes from the Punjab to the Central Provinces and Berar clearly shows that it was in the nature of a control of food articles. The Central Government had intimated to all Provincial Governments that the Punjab Government was being asked to put a ban upon the export of seed potatoes. The Central Government also informed the Provincial Government that in so far as the legitimate requirements of a Province for seed purposes were concerned there would be a relaxing of this control, provided all purchases were made through the agency of a purchasing agent to be appointed by the State Government and all orders were consolidated and placed with the clearing agents. We must not forget that these instructions and letters were issued at a time when the Defense of India Act and the rules were still in force. The emergency undoubtedly had come to an end in March 1946, but the life of the Defense of India Act and Rules had been prolonged till the 30th September 1946. Even after the lapse of the Defense of India Act, the Essential Supplies (Temporary Powers) Ordinance was promulgated on the 1st October 1946, which provided that all actions taken under the Defense of India Act should be deemed to be taken under the Essential Supplies (Temporary Powers) Ordinance. Immediately afterwards the Central Legislature also passed the Essential Supplies (Temporary Powers) Act, and in this way, the authority to act under the Defense of India Act, along with the protection granted by that Act was continued. We are therefore of the opinion that the action of the Central Government was in the nature of a control, which was clearly warranted by the generality of the powers granted by Rule 81 (2) (a). That rule reads as follows:

The Central Government or the Provincial Government, so far as appears to it to be necessary or expedient for securing the defense of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide For regulating or prohibiting the production, treatment, keeping, storage, movement transport, distribution, disposal, acquisition, use or consumption of articles or things of any description

whatsoever and in particular for prohibiting the withholding from sale, either generally or to specified persons or classes of persons, of articles or things kept for sale, and for requiring articles or things kept for sale to be sold either generally or to specified persons or classes of persons or in specified circumstances.

This envisages a degree of control which leaves nothing out. A direction to the Provincial Government during the time of emergency, even though it might not have been described as made under Rule 81 (2) (a), must be referred to the powers then exercisable by the Central Government, and it was so understood by the Provincial Government also. Similarly, the action of the Provincial Government itself was under the same rule. The power under that rule was conferred not only on the Central Government but also on the Provincial Government, and it may thus be assumed that the control over the purchase and distribution of Simla Hill potatoes was a measure directly taken under the authority conferred by that rule. This being the case, the question arises whether the acts of the Provincial Government and those of the Central Government were protected or not. Before we deal with this aspect of the matter, we need to answer the objection raised on behalf of Respondent No. 1 with regard to the lack of a finding on the good faith of the Provincial Government.

The expression "good faith" is defined in the General Clauses Act in Section 3 (22). It reads as follows:

A thing shall be deemed to be done in "good faith" where it is in fact done honestly whether it is done negligently or not.

There is no doubt whatever that the Government of India and the Provincial Government were acting honestly in trying to introduce seed potato in a controlled measure into the province for seed purposes. Of course, the good faith of any person can be challenged even in the most honest of dealings. It is, however, not expected that the good faith of a Government would be lightly challenged by a party, where all that Government has done is to impose a control on an essential commodity and to provide for its distribution in a very clear manner so as to avoid profiteering and black-marketing. We do not know on what ground the good faith of the Provincial Government was going to be challenged. Counsel for Respondent No. 1 when questioned stated that they might have charged Government with breach of its obligations and neglect in the performance of its contractual duty, but that it was not intended to charge Government with dishonesty. Since the definition of "good faith" includes only honesty and not acting negligently, we are satisfied that no issue of fact would have arisen on the score of good faith in these proceedings. The definition of "good faith" in the Penal Code is different but that definition cannot be used for this purpose, and it was not relied upon. In view of this the plea must be regarded as one of law and can be raised at any time.

We are satisfied that the action of both the Governments in imposing these restrictions on the purchase and distribution of Simla Hill potatoes was done in the exercise of the powers conferred on the two Governments by Rule 81 (2) (a) of the Defense of India Rules and was done in good faith. The question is whether that affords a sufficient answer to the claim for damages which the Jabalpur Association has brought against the Provincial Government.

We may point out here that no question of fact is involved in finding out the liability. The State Government, represented by the learned Advocate-General did not question the allegations of the Plaintiff in the case that the seed potatoes which were sent from Kalka to Jabalpur were loaded in the wagons in wet condition and were sent by goods train, resulting in their complete deterioration for purposes of seed before they reached Jabalpur. We, therefore, assume for the purposes of the decision of this case that there was a supply of rotten potatoes contrary to the purchaser's idea of the goods they were intending for. We also assume that whoever was responsible had been guilty of a breach of the agreement to purchase seed potatoes of the approved quality. The question is whether both or which of the two Defendants would be responsible.

In so far as the Nagpur Association is concerned, there is a decree against that Association and its appeal has failed. No doubt, we have powers under Order 41, Rule 33 of the CPC to pronounce a complete judgment in the case, but in view of the fact that the Nagpur Association was being paid a commission of 4 annas per maund and its appeal has failed for want of prosecution, we do not see any reason to import those powers into the consideration of the case. We accordingly leave the Nagpur Association out of the picture and now confine our attention only to the liability of the Provincial Government.

Before dealing with the statutory immunity which is claimed on behalf of the State Government, we find it necessary to give a finding whether the Provincial Government was a contracting party or not. The Learned Counsel for the Jabalpur Association characterized the Provincial Government as the principal and the Nagpur Association as its agent. We have to find a privity of contract between the Provincial Government and the Jabalpur Association. This privity, according to the Learned Counsel for Respondent No. 1, is spelled out from the following circumstances: (a) that the purchase of seed potatoes was entirely according to the scheme of the Provincial Government; (b) that only a commission agent appointed by the Provincial Government was to effect purchases in Simla; (c) that the Provincial Government was collecting orders or indents from merchants and arranging for the supply of potatoes to them; (d) that the Provincial Government had obtained security from the commission agent for the due fulfillment of their obligations; and (e) that the Provincial Government had obtained the guarantee of a Bank from the indenting merchants to see that the commission agent would be paid.

From these circumstances, the Respondent (No. 1) contends that the main contracting party was the Provincial Government and not the commission agent. The commission agent, according to Respondent No. 1, was the agent of the Provincial Government and the Provincial Government was liable as principal.

We have to see not the arrangements but the gist of the transaction and with whom did the merchants deal. It is obvious that the Government had clearly stated to the commission agent that it would not be responsible for the breaches of the commission agent. The Government was making no profit out of this transaction at all. All that it did was to provide for a consolidated purchase of seed potatoes from the Punjab and had designated a commission agent for this purpose. The commission agent was not left free to choose the merchants on whose behalf he would act. The Deputy Commissioner was asked to collect indents from the merchants, and those merchants were to be reliable, as the instructions say. The Provincial Government, therefore, was collecting orders for the commission agent, and in the exercise of its powers of control over distribution it was weeding out those who were suspected of a propensity either for black-marketing or profiteering. The collected orders were placed in the hands of the commission agent for fulfillment. It is to be seen, however, that the merchants were allowed permission to send their own representative to select the potatoes and to advise the representative of the purchasing agent. The consignment was also between the commission agent and the merchants, that is to say, the Jabalpur Association. The wagons were consigned to the Jabalpur Association and the payment also was to be made direct between the Jabalpur Association and the Nagpur Association. It cannot, therefore, be said that there was any privity of contract between the Provincial Government and the merchants. The Provincial Government did not take the orders for itself. It only collected the orders on behalf of the commission agent and in furtherance of the scheme of purchase. To hold the Provincial Government liable as a contracting party it would have to be shown that the Provincial Government as a contracting party was to receive the price and was responsible for the delivery. This was a transaction of sale of goods, and under the Indian Sale of Goods Act the delivery has to be by the seller and not by anybody else. The price also has to be paid to the seller. The Provincial Government cannot be described either as the seller or as the recipient of the price. Indeed, as we have shown above, the Provincial Government was not to retain even an iota of the money, which was to be paid by the Jabalpur Association direct to the Nagpur Association. The Provincial Government in furtherance of its scheme of control kept to itself certain powers to see that the contracting parties, such as they were, were in the event of breach, indemnified. It had taken security from the commission agent and it had also taken guarantee from the purchasers of a reliable Bank. This it had done to further the contract of the parties and not safeguard itself. Indeed there was no liability of the Provincial Government if the indents were passed on to the commission agent and the commission agent was, in consultation with the

merchants, to purchase the potatoes and to supply to them. There is nothing in any of the agreements to show that the potatoes were subject to the approval of the Provincial Government or that its officer was to receive the wagons and see that the goods were in order. The wagons were to be received by the merchants; thus there was direct delivery between the purchasing agent and the merchants at Jabalpur. In these circumstances we are of the opinion that Government, though it had taken a hand in supervising and controlling the transactions with a view to seeing that seed potatoes were equitably distributed and applied for proper purposes without any profiteering or black-marketing, was not a contracting party and could not be held liable as such.

This by itself would be sufficient for the disposal of the appeal because the liability of the Government can only arise as a contracting party, and if it was not a contracting party there could be no claim for damages against it, and there would be no need to consider its immunity. But should we be found wrong in what we have stated with regard to the liability of the Government as a contracting party, we find it necessary to advert to the protection granted by Section 17 of the Defense of India Act. We have quoted that section elsewhere. It is in very general terms. It covers, not only cases in which Government acted in pursuance of the Act or Rules framed under the Act, but also those cases where the intention was to act under the authority of the Act or the Rules. A number of authorities expounding the English Public Authorities Protection Act, Section 1, was cited before us to show in what circumstances the protection can be claimed. No case, so far as we are aware, has attempted to lay down in clear terms the limits of the protection or the changing circumstances in which it can be claimed. All that has been laid down in the leading cases on the subject is to the effect that the protection is available not because the act out of which the action arises is within the power of a public authority but because the act is one which is either in direct execution of a statute or in the discharge of a public duty or the exercise of a public authority.

This was laid down by Lord Buckmaster in the leading case of *Bradford Corporation v. Myers* (1916) 1 A.C. 242 and was approved by the Privy Council in *Firestone Tyre and Rubber Company (S.W.) Ltd. v. Singapore Harbour Board* (1952) A.C. 452, per Lord Pucker. It was pointed out in these two leading cases of the House of Lords and the Privy Council that the question whether the Public Authority was performing a contract or not was indecisive of the matter. It was stated that the gist of the protection was in the fact that the Public Authority was acting either in the direct execution of a statute or in the discharge of a public duty or in the exercise of public authority. In our opinion, though the words of the Public Authorities Protection Act in England are different from the words of the Defense of India Act, the intent underlying the letter is the same. If anything, Section 17 of the Defense of India Act gives greater protection, because it covers not only cases which arise directly under the Defense of India Act or the Rules framed there under, but it also protects an act intended to be done under the Defense of India Act or the Rules. In our opinion, the

action of the Provincial Government in arranging for a commission agent and for collecting indents was in direct furtherance of the intent and purpose of control, as envisaged by Rule 81 (2) (a) of the Defense of India Rules. This being the position, even if there was something which caused a mishap to the transaction, the Provincial Government stood immune from action at the instance of the aggrieved party. The act was done in furtherance of the Defense of India Act and the Rules there under, and even if it be not so, it was at least intended to be done in pursuance of the Defense of India Act and Rules. For these reasons, we hold that even if Government could be said to be a contracting party it was immune from liability by virtue of Section 17 of the Defense of India Act.

For these reasons we are of the opinion that the decree against the State Government cannot be sustained. The Provincial Government not being a contracting party was not responsible in damages to the Jabalpur Association. Even if the Government could be shown to be a contracting party, it was acting, or at least was intending to act, in the performance of the powers granted by the Defense of India Act and Rule 81 (2) (a) of the Rules framed under the Act. We accordingly set aside the decree passed by the Court below against the State Government and dismiss the claim against the said Defendant.

In dealing with the question of costs we are satisfied that no costs either here or in the Court below should be granted to the State Government. The State Government held a security deposit of Rs. 5,000 from the commission agent, which was furnished in the shape of a cheque. The cheque was not even cashed and was allowed to lapse. The State Government was taking the security not for safeguarding itself but to see that the transactions went through according to its scheme. Those who were responsible to allow the cheque to lapse must be censured for having overlooked the elementary protection of cashing the cheque and keeping the money. As a result, the Jabalpur Association is not able to proceed against the Nagpur Association, which we understand has gone into liquidation. We think that in the circumstances of the case, regard being had to the fact that Government having itself arranged to secure a security deposit and allowed it to go out of its reach, we should make no order about costs either here or in the Court below in favour of the State Government. We accordingly disallow all costs to the State Government.