(1926) 05 CAL CK 0001

Calcutta High Court

Case No: None

Kessoram Poddar and Co.	APPELLANT
Vs	
Secretary of State	RESPONDENT

Date of Decision: May 17, 1926

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80
- Government of India Act, 1915 - Section 20

Citation: AIR 1928 Cal 74

Hon'ble Judges: Chotzner, J

Bench: Division Bench

Judgement

Chotzner, J.

agreed upon and that these tick marks indicated that he had bought the goods so ticked. Thereafter, when he wanted delivery of the goods purchased, he would send a delivery order through his office requiring the seller to deliver the goods at the Narcaldanga depot or at such other place as might be specified in the order, but owing to the congested state of the depots months often elapsed before such delivery orders were issued. He would also purchase goods by what was popularly known as a "commandeering" order. It appears that under the rules framed under the Defence of India Act, certain classes of goods such as corrugated iron sheets, galvanized plates, barbed wire and the like, could not be sold by merchants except under license from Government and when a commandeering order was issued, the goods had to the delivered at such places as were specified therein. Such an order could only be signed by the Controller of Munitions himself. In such cases the price of such goods was agreed upon but where there was a dispute, the price was ultimately settled by reference to arbitration. The restrictions under these rules were withdrawn in December 1918. Waite had authority to buy both for stock and indent and could buy ahead for stock on the basis of the previous three months

requirements. In the exercise of these powers the plaintiff firm says that on the four dates mentioned above, he purchased the goods from it in the manner indicated. In some cases, delivery orders were issued and the goods were delivered and paid for, but in the case of the rest, no delivery orders were issued though the plaintiff firm repeatedly asked for them and it was always ready and willing, to deliver the goods. Subsequent to the 26th August, it is said, that there Were further purchases by Waite from the plaintiff firm and it is also said that in September 1918, for instance, some scrap iron was bought and paid for.

3. The Armistice was signed in November 1918 and on 13th December 1918 Mr. Keatinge Controller of Hardware, Metals and Implements, wrote to the plaintiff firm cancelling an order for seven items placed with them by Waite on 16th August 1918. The plaintiff firm replied on the 18th denying the Controller''s right to cancel the, order and giving reasons which the Controller declined in his letter to accept. To this the plaintiff firm replied on 3rd January 1919:

The order was a contract and therefore delivery or non-delivery thereunder was to be regulated by the provisions of the law.

4. On the same date, Mr. Peterson wrote:

the materials delivered at the time prior to the issue of the letter cancelling the order have been taken into account, but with regard to other materials it will be necessary for you to prove to the satisfaction of the Controller, Hardware, that these were in your possession when the letter cancelling the order was received by you.

5. The plaintiff, firm apparently succeeded in satisfying Keatinge, as, on the 15th January, he wrote a letter in which the following expression occurs:

This will, as explained by your representative to me, complete all outstanding orders-placed with you by the Deputy Controller, (that is, Waite.)

6. On 1st February 1919 the Controller in a circular letter to all English and Indian firms wrote as follows:

Would you kindly note that no deliveries should be made after the date of receipt of this-letter or of any orders placed with you by the Deputy Controller (Inspection) without first of all making a reference to me and obtaining my permission.

7. The effect of this letter was to discontinue all deliveries. The plaintiff firm''s case is that it does not affect the previous purchases made by Waite for indent although he had been forbidden on the 20th August 1918 from purchasing for stock. The plaintiff''s case further is that in November 1918 they had received Waite''s promise to take delivery of all goods purchased by him by July 1919. The question of limitation would, therefore, not arise as Waite admits that the dealers would hold the goods till he called on them for them. This he never did. The plaintiff firm through their attorneys, Messrs. Morgan & Co., wrote a letter on 26th July 1919 to

the Controller giving particulars of the goods alleged to have been purchased by Waite and threatening a suit in the event of necessary delivery orders not being issued. A copy of the letter was sent to the Financial Secretary. Government of Bengal, Secretary, Munitions Board, and Controller of Hardware. In their letter to the Financial Secretary, the plaintiff firm gave the requisite notice u/s 80, Civil P.C. Dr. Meek, the new Controller, replied, on 29th July offering an interview but this offer was not accepted.

8. On the 22nd December 1919 the premises of the plaintiff firm were searched by the police, apparently with a view to prosecution, and all books and papers were seized. The documents were scrutinized by the authorities and Ghaznavi was asked for answers to certain inquiries which he gave. In the end no prosecution was launched. The papers were returned to the plaintiff firm in March 1922 and in the following June this suit was filed. The plaintiffs'' case is that during all this time Government never repudiated their claim.

9. The Secretary of State in his written statement denies that Waite was his agent or was competent to bind him by the alleged purchases or that there was any contract between him and the plaintiff firm in fact or in law. He denies the purchases by Waite and the plaintiff''s loss by reason of the breach of contract. He avers that in February 1919 the Munitions Board declined to receive goods or orders placed by Waite without reference to the Controller. Thereafter, the plaintiff firm had notice and the cause of action, if any, is barred by limitation.

10. In para. 10, he says that the transactions alleged can give rise to no cause of action against the defendant inasmuch as the same relate to the exercise of sovereign powers, namely, the purchase of munitions for the purposes of war, and do not relate to trade. In para. 11, he says that the formalities required by law to create a contract binding on the defendant have not been complied with. In para. 12, he says that for a considerable period prior to the transaction alleged in the plaint the plaintiff firm had been systematically defrauding the Government of India by supplying goods at exaggerated prices under false weights and measures and quantities and that the quotations put forward by the plaintiff firm as amounting to a contract were part and parcel of the same scheme of fraud and can give rise to no cause of action.

11. With regard to the allegations contained in this paragraph, they are further explained in the particulars furnished by the defendant in February 1925 as meaning that the plaintiff firm and Waite entered into a conspiracy to defraud Government in various ways by antedating the orders showing purchases by Waite purporting to have been made be fore his authority had been withdrawn and by short delivery.

12. The following issues were framed:

(I) Was the purchase of munitions for the war an act of State? Can any legal liability arise in relation to such purchase?

(II)Was there any legal and binding contract operating u/s 20, Government of India Act? If not, is there any liability on the defendant?

(III) Did Waite in fact enter into any agreement to buy the goods in the plaint mentioned?

(IV) If so, has such agreement any legal effect to bind the defendant?

(V) Did the said Waite agree also that delivery should be made when called for?

(VI) Did Mr. Waite, or any successor of his, promise that orders would be given in due course as alleged in paras 3 and 4 of the plaint?

(VII) If issues 5 and 6 be answered in the affirmative, is defendant in any way affected thereby?

(VIII) Was there refusal to take any more goods, and if so, on what date or dates?

(IX) Is the suit barred by limitation?

(X) Was the statutory notice duly served?

(XI) Was the plaintiff ready and willing to perform?

(XII) Was there a fraudulent conspiracy to defraud the Munitions Board?

(XIII) To what damages, if any, is the plaintiff entitled?

13. The original lists upon which the present claim is based consists of 11 sheets of paper marked at Waite''s examination on commission in London (Exs. 1A to K.) No. 1 is on a plain piece of paper in Ghaznavi''s handwriting and the remainder are typewritten on the office paper of Kessoram Poddar and Co., 15, Clive Row. Nos. 1, 3, 5, 6, 7, 9 and 11 bear tick marks or pencil lines indicating, according to the plaintiff''s case, that all the goods so marked were purchased by Waite. Nos. 1, 2, 3, 4, 5 and 11 have various endorsements in Waite''s handwriting which according to the plaintiff''s case are his orders to the office how to deal with the goods thus purchased. (After dealing with evidence, his Lordship proceeded). I have given the evidence very close and careful attention, and in my judgment it discloses so incredible a state of things as not to be worthy of acceptance. Had it been a true account I have no doubt that the plaintiff firm could have produced many witnesses, respectable merchants, who had dealt with the Munitions Board during the time when it was in existence and who would unhesitatingly have come forward to say that goods were purchased in large quantities by Waite by no other means than by ticking lists and that there were no formal contracts or anything of the kind. It is plain that what the Munitions Board looked to by way of check upon purchases made were the delivery orders issued. They did not accept nor is there any record in

the office books to show that they regarded purchases by ticking as real purchases. There is one thing which is perfectly evident and that is this : that if Ghaznavi had believed that he was making contracts for the sale of very large quantities of war material, he must have made entries in his own books. It has been said that Waite was unbusinesslike. Nobody can say that Ghaznavi was unbusinesslike, and for him to pretend that orders covering large sums would be treated with so little care as not even to merit an entry in his ordinary account books seems to me preposterous. The burden of proof in this case is on the plaintiff and upon the evidence before me I am not satisfied that he has succeeded in discharging that onus.

14. At the same time I think it my duty to say that the evidence which has been adduced on the side of Government is not satisfactory. With regard to the purchase, the only material witness examined on behalf of the Government is Waite himself Keatinge''s evidence, to which I shall refer later, does not deal directly with Waite''s method of purchase although he deals with another question of importance. It seems to me that when the credit of an important branch of a Government department such as the Munitions Board, is assailed, it was the duty of Government to examine the superior officers who were in charge of that branch. Both Mr. Peterson and Dr. Meek were apparently available in Calcutta. As successive Controllers of the Board in Calcutta, they might be expected to know the procedure that obtained in the office. They could certainly have told the Court whether Waite''s alleged practice of purchasing by ticking was authorized and whether goods were delivered and paid for accordingly. More important still, Peterson could certainly have told the Court whether Ghaznavi''s interview with Waite was held in his presence and whether Waite''s alleged promises were also so made. Even though it be found that the surrounding circumstances are sufficient to refute Ghaznavi''s allegations, the position would have been rendered more certain and infinitely clearer if there was Mr. Peterson''s sworn evidence on the record that the allegations made were in fact wholly untrue. No doubt the determination not to put the controlling officers are the box was not taken without due consideration, but, in my judgment, the decision was unwise and lays Government open to charges to which it should not have been exposed.

15. As I say the only witness examined is Waite, who, according to the particulars-furnished by the Government Solicitor, "has entered into a conspiracy" with the plaintiff firm "to defraud the Government." A party to a suit presumably calls a witness to represent him to the Court as worthy of credit. What is to be said when the witness is, according to the party''s own showing, of no repute? It might perhaps be said that if he had not been called, an inference adverse to Government would have been inevitable, and it might perhaps also be said that as regards the transactions which form the subject-matter of this claim, no one else was competent to testify, but what reliance can be placed upon his evidence? Mr. Pugh intimated to the Court that he-did not propose to call evidence to prove the alleged conspiracy between Waite and the plaintiff firm but that does not rehabilitate Waite. Can it be

said, as Mr. Sircar for the plaintiff firm has put it, that on this occasion only he has spoken the truth? It is surely not open to Government to say that though he is disreputable he is still a witness of truth. At the highest his evidence can only be-considered as showing that he is not the imbecile that Ghaznavi makes him out to be. (After referring to the evidence of Waite his Lordship proceeded.) Whatever his character may be, and howsoever little worthy of credit he may be in; consequence, it is in my judgment plain that he had some sort of method in his conduct of business. He was not the incompetent fool Ghaznavi pretends. As I say, I can place no great reliance, upon his evidence from the fact that he is obviously a man of no repute. At the same-time what he says is reasonable and is, therefore, at all events more probable thana what Ghaznavi had to say.

16. I now turn to the evidence of Mr. Keatinge who was examined de bene esse on 3rd March last. He was Controller of Hardware, Implements and Materials in 1918 and on 20th August he sent a telegram to the Controller, Calcutta:

Kindly instruct Minister and Deputy Controller, Inspection; not to make any further purchases of hardware implements and materials for stock without reference to me.

17. Waite was then the Deputy Controller, Inspection. A copy of this was sent to Mr. Nixon, the Assistant Controller, who sent it to Waite who initialed it on 22nd August (Ex. 2). Keatinge proves the correspondence which is to be found in part 3 of the brief between himself and the plaintiff firm. It begins with the letter of 13th December 1918, wherein he cancelled certain orders placed by Waite with them on 16th August and these are ?the first seven items on p 11 of the list of 26th August. This was followed by Kessoram Poddar''s protest of 18th December and their letters of 3rd and 8th January 1919 and resulted in the revocation of the cancellation. This was contained in his letter of 15th January to Messrs. Kessoram Poddar & Co.:

The Assistant Controller in charge, Narcaldanga Depot, will take over such quantities of the material as you have delivered at the depot to date and the further lot which you hope to deliver at the depot next week at latest. This will, as explained by your representative to me, complete all outstanding orders placed with you by the Deputy Controller (Inspection).

18. The representative" here mentioned...in the letter is admittedly Ghaznavi. (His Lordship dealt with the evidence of Mr. Keatinge and proceeded.) In commenting upon this evidence Mr. Sirear has referred to the entry on p. 11 of Exs. 1 A to K : "Take this lot Rs. 64" : and he says that the seven items are covered by Keatinge''s letter of 13th December 1918, and since they have been delivered and paid for by Government. Waite was, therefore, wrong when he stated that his pencil line was only against four items and had been subsequently extended to cover the remaining items on that page. As, therefore, fraud has no longer been pleaded by the Government as a defence to this suit, it must be taken to be admitted that the order for 200 tons and six other items of 160 tons is still outstanding. In reply, Mr.

Pugh pointed out that delivery order No. 2814-A. (Ex. 4) bears date 16th August 1918 though the list was not handed to Waite till the 26th August.

In his letter of 13th December Keatinge purported to cancel all outstanding orders, but on the plaintiff''s remonstrance he agreed to take delivery of the balance, not knowing that the delivery orders had been antedated and not suspecting any irregularity.

19. It is not for me to conjecture how nearly Rs. 6[illegible] lakhs of public money which was paid for these items was paid without a proper enquiry having been made, if not by Keatinge himself, then by some other competent officer. Had such enquiry been made it must have been evident that the order made on 16th August for delivery of goods which could not have been bought before the 26th August must have been antedated. Had the enquiry been pursued, it would have been discovered that Waite''s authority to buy against stock was withdrawn on 20th August. Had the register been inspected, it would have been found that the order appears at the foot of a page and that the last preceding entry was No. 2814 and the one that follows at the top of the next page was No. 2815 and that this particular order had been numbered 2814-A. Had the register been more closely examined it would have been found that there were two other similar instances, namely, 2788-A and 2819-A, where a capital letter was added to the number of the delivery order that in both of these cases the order was inserted at the foot of the page and that both of them were in favour of Kessoram Poddar. The inference to be drawn is, in my judgment, irresistible that these orders were smuggled into the register to show that Waite had ordered the goods before he had been deprived of his authority and that a huge fraud had been perpetrated by the plaintiff firm upon Government in collusion with some one in the office. The orders were, however, passed as good orders and paid for, it being recognized that Waite''s purchases by ticking were valid if they were followed by delivery orders.

20. With regard to Waite''s note on p. 5 of the list : "Have we met all demands," Mr. Sircar points out that ten tons were delivered and paid for. If the" remark meant that he would not buy till he was satisfied that he had met all demands why should ten tons be taken? Mr. Sircar''s contention has been that the market was rising daily, so Waite, whether acting honestly or dishonestly, would be likely to buy in what he did not require in anticipation of a further rise when goods were actually required. In my view the construction which these words naturally bear are simply that Waite meant:

I want tan tons now, which I take; do we want any more?

21. Similarly, in regard to the first note "Have we demands for others, but 14," Mr. Sircar points out that there was a delivery order for five tons and that this purchase was by reason of the line against it. If that is so, it must follow that Waite bought all the items and having bought all the items asked the office whether any more were

wanted. I should construe the words as meaning

I know there are demands for 14; do we want others than 14?

22. With regard to the aluminium ingots which appear on p. 6 of the list, Mr. Sircar points out that these were covered by delivery Order 2819-A (Ex. 5) and paid for which shows that if there was a contract it must have been by ticking. Waite said that he was buying for indent which authority he retained till October 1918 (Q. 225), but that though he had originally intended to buy for indent, he had changed his mind subsequently and converted the goods so purchased to stock. There can be no doubt that these articles were purchased by tick marks followed by the antedated delivery order and that is also true of the galvanized plain sheets which is covered by delivery order No. 2788-A to which I have already referred.

23. There are thus two conflicting versions to be considered; the plaintiff''s version that Waite made a purchase merely by saying "I take this" and putting a tick against the item he wanted, and Waite''s version that he ticked off on the lists what he considered of interest or of importance for future use, but when he actually wanted to buy, he issued directions to his office "Take this," "Make out delivery order or commandeering order." Despite Waite''s character I cannot, but hold that this is the more reasonable explanation and I think I may go so far as to say this that even if Waite''s evidence be ignored, Ghaznavi''s story is so improbable as to deserve no credence. That a man in charge of a Government department, however dishonest or however unbusinesslike he may be, would buy before he knew that the goods were wanted at all seems incredible. Waite could buy for stock based on three months'' previous indents and also for indents which had not been executed and that no doubt is what he meant when he noted on 26th August "put up cases relating to these demands" or in other words "let me see the indents which have come in with the necessary orders." It is proved by Keatinge that the Munitions Board took no notice of anything else, but the actual delivery orders. Ghaznavi has no books to show that he regarded tick marks as indicating concluded purchases. He says that he has his copy of the list and that is enough for him, but as Mr. Pugh has pointed out, in the list attached to Messrs. Morgan & Co.''s letter of 24th July, the tick marks do not appear while in the list annexed to the plaint all Waite''s remarks are not entered.

24. Mr. Sircar has urged that Ghaznavi''s statement that 27 lakhs worth of goods had been taken over and paid for, has not been controverted. These goods were purchased by ticking Ghaznavi''s earlier lists and the plaintiff firm has called upon the defendant to produce those lists and also Stoddart''s private books. Nothing has been produced and no one has come from the office to swear that these books could not be found. This leads to an inference adverse to the defendant: Murugesam Pillai v. Gnanasambadha Pandara Sannadhi AIR 1917 P.C. 6, Ram Prasad v. Raghunandan (1885) 7 All. 738, Partkasarathy Appa Rao v. Secretary of State (1913) 38 Mad. 620 and is in accordance with Section 114, Evidence Act.

25. I agree with Mr. Sircar that these lists were relevant to the enquiry and if in existence should have been produced. If they were not in existence there should have been some evidence on the defendant''s side to prove it, but I am not prepared to infer from their non-production that a method of purchase was then in vogue which has not been established here. As I have said before, had it been a fact, Ghaznavi could have produced some trustworthy person from the hundred firms dealing with the Munitions Board to support him. Mr. Sircar next urges that there has been no repudiation of the contract alleged in Messrs. Morgan & Co.''s letter of the 26th July 1919. On the other hand, Dr. Meek in his reply on the 29th July, says:

I cannot question your statement in any way I only want to see exactly what Mr. Waite has written.

26. It is necessary to read this letter. In your letter you state that Mr. Waite has made some definite written remarks on certain papers which your clients hold. Would you very kindly ask your clients to bring all the papers to me, so that I may see exactly what Mr. Waite has written. I am not questioning your statement in any way, but only want to see the originals in order that I may decide what action to take. I shall be in office between 11 a.m. to 1 p.m. on any date this week, but if these hours are not suitable. I shall be quite glad to make a definite appointment with your clients.

27. It is, therefore, clear that though at that time Dr. Meek could not, of course, question the statements made because he had not seen the papers he wished to see the originals to decide what action to take, and he offered to make an appointment with the plaintiff firm for the purpose at any time convenient to them. The plaintiff firm, however, took no note of the invitation, though, if the claim had been a genuine and true claim, the chance would obviously have been welcomed. That being so, to construe a courteous offer to make an appointment as being equivalent, if not to an acknowledgment of a contract or at all events to a non-repudiation, seems to me unwarrantable. The most emphatic repudiation lay in the action of Government when on the 23rd December the police seized all the plaintiff''s books and papers evidently because they intended to see whether there was evidence sufficient to prosecute the firm criminally.

28. The next question is, Supposing as a fact Waite had purchased goods by ticking, had he authority to do so? Is his act binding on the Secretary of State? Mr. Pugh has referred to Section 20, Government of India Act, which deals with the revenues of India and Clause 2(e) relates to the liabilities to which these revenues are subject. He refers to Section 29 which lays down the contracts which may be made by or on behalf of the Secretary of State. Clause 5 of that section provides how these contracts are to be made and who is competent to make them:

Provided that any contract for or relating to the manufacture, sale, purchase or supply of goods, or for or relating to affreightment or the carriage, of goods or to

insurance, may, subject to such rules and restrictions, as the Secretary of State in Council prescribes, he made an signed on behalf of the Secretary of State in Council by any person upon the permanent; establishment of the Secretary of State in Council who is duly empowered by the Secretary of State in Council in this behalf. Contracts so made and sighed shall be as valid and effectual as if made as prescribed by the foregoing provisions of this section.

Particulars of all contracts so made and signed shall be laid before the Secretary of State in Council in such manner and form and within such times as the Secretary of State in Council prescribes.

29. Now, it is plain that according to this section the contract to be valid must be in writing and must be signed by a person who has been specially empowered to sign it. That person must be upon the permanent establishment of the Secretary of State. Mr. Pugh observes that Waite was not on the permanent establishment nor was he specially empowered in that behalf. Any authority that he had to deal with munitions at all was derived from Peterson who delegated certain of his own powers to him. Moreover where the statute says that the contract to be valid must be in writing, verbal contracts, even if established, have no effect. Mr. Pugh has referred to a number of cases in support of this, viz. : Shivabajan v. Secretary of State (1904) 18 Bom. 314, Srinibas v. Kesho (1911) 38 Cal. 754, Kinlock v. Secretary of State (1879) 15 Ch. D. 1, Grey v. Charusila (1910) 38 Cal. 53, Ashbury v. Ricke (1875) 7 H.L. 653, Young v. Mayor of Leamington (1883) 8 A.C. 517, Doya Narain v. Secretary of State (1886) 14 Cal. 256.

30. Mr. Sircar contends that it is not the plaintiff firm''s case that the Secretary, of State has signed the contracts or that somebody else has signed it for him. The Secretary of State is liable because he is the person to be sued when the plaintiff wants to get his money out of Indian re-venues. The plaintiff says that these were purchases by a servant of the Government of India which were in some cases paid for by the Government of/ India and for which in the present case the Government of India is liable. Here: the Government of India had decided that it would buy goods in the open market like any tradesman. Mr. Sircar relies on Section 20(2)(c), Government of India Act and Section 32(1) and (3):

There shall be charged on the revenues of India alone, all expenses, debts and liabilities lawfully contracted and incurred, on account of the Government of India.

31. Section 32(1) say3 that the Secretary of State in Council may be sued and. may sue as a body corporate and Clause (3) provides that

the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company, if the Government of India Act and this Act had not been passed.

32. Mr. Sircar contends that though there is no contractual relationship between plaintiff and the Secretary of State, yet u/s 32(1), the Secretary of State has to be sued as a body corporate and under Clause (3) he is liable in the same way that the East India Company would have been liable. He has referred to Sarat Chandra Dass v. Secretary of State (1910) 38 Cal. 378, Secretary of State v. Hari Bhanji (1881) 5 Mad. 273 and Kishen Chand v. Secretary of State (1881) 3 Ald. 829.

33. There can, I think, be no question that the Secretary of State can be sued as a body corporate as provided in Section 32(1), Government of India Act. As was pointed out in Doya Narain Tewary v. Secretary of State (1886) 14 Cal. 256:

A suit brought against the Secretary of State is not one against any person or any real body corporate but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtained the remedy secured to him by Section 65.

34. It is plain from Section 32(3) that

the property for the time being vested in His Majesty for the purpose of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company.

35. The position has been explained in the case of Peninsular and Oriental S.N. Co. v. Secretary of State (1861) 5 B.H.C. Appl. 1, the head note of which says:

The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. The test really is whether the contract was a Sovereign act or was one which a private individual could have entered upon in his ordinary business pursuits. If it is the former, the Secretary of State is not liable, but if it is the latter he can be sued in the same way that the East India Company could have been sued for acts done in their capacity as traders and not as the Sovereign Power.

36. Where commandeering orders are concerned, I think the position is plain. Power was taken by Government under the Defence of India (Consolidation) Act, 1915, and under Rule 11A(a) an officer specially authorized in this behalf is enabled by an order in writing to require the owner of any particular class of goods (these goods were specially notified by Government) to place them at the disposal of Government at such time and place as was specified in the order, making disobedience to the order punishable at law. Provision for payment of the price by reference to arbitration is also made. In this case, therefore, there can clearly be no ordinary commercial contract for sale and purchase, because one of the parties may be unwilling to surrender his goods and yet may be compelled under the commandeering order to do so. He has no option once the order has been made and issued. He is bound to place his goods at the disposal of Government when

called upon to do so. The only right he has is that if he does not accept the price offered by Government he can have it settled by arbitration. The arbitrator''s order is final. Plainly, therefore, a commandeering order is one which no one but Government can make, and being an act of the Sovereign Power, the Secretary of State evidently cannot be sued in respect of it.

37. It has, however, been argued by Mr. Sircar that the process of acquisition by Waite has been exactly the same whether it has been by delivery orders or by commandeering orders, and the ''contract in either case was a good contract, though the method of payment may be different. A sale is a good sale though no price may be fixed at the time of the purchase, when the arrangement is that the price will be subsequently settled by a particular agency : Valpy v. Gibson (1847) 4 C.B. 837.

38. I do not think this argument is well founded. Waite had no authority to issue a commandeering order. That could only be done by Peterson, who as Controller was specially authorized in that behalf. When, therefore, Waite wrote "Make out commandeering order" and the like, he was really giving instructions to his office to make out the order in anticipation of Peterson''s sanction. But until the order was signed by Peterson and served on the owner, it had no legal or binding effect and the owner might, if he had been so inclined, have disposed of the goods in any way he pleased. Ghaznavi says, it is true, that a person holding goods which came under the special class notified could not sell these goods without a license from the Government. That no doubt is so. But the embargo on this class of goods was withdrawn in December 1918, and it is idle to say now that after that date Ghaznavi could not have disposed of these goods in any manner that suited him.

39. A further question then arises whether contracts other than those specified in Section 29(5), Government of India Act, can be held to be binding on the Secretary of State. In my judgment they cannot. In Young v. Mayor of Royal Leamington (1883) 8 A.C. 517, where the statute provided that where the subject-matter of contract exceeds £50 in value, contracts must be under seal, and when the contract was not under seal it was held to be bad and unenforceable. Lord Bramwell said, at page 528:

The legislature has made provisions for the protection of rate-payers, share-holders, and others, who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into.

40. If these principles are applied to the present case it may be said that while there is no magic in a written contract, it is a safeguard which has been laid down by the

statute for the protection of the public revenues. When, therefore, a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions, were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that should be taken as a precedent which will be binding upon the Secretary of State in every case. In my judgment contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him.

41. I now proceed to consider the question of the sufficiency of the notice u/s 80, Civil P.C. with which the question of limitation is bound up. This section says:

No suit shall be instituted against the Secretary of State for India in Council...until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary of the Local Government...stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims.

42. In this case the notice was given to the Financial Secretary to the Government of Bengal on the 26th July. Mr. Pugh argues that if the alleged breach of contract took place, then, the notice is good. But if the plaintiff firm wishes to get out of limitation by saying they had not to deliver till called on to do so, then there was no cause of action of which they could give notice and the notice was bad.

43. Mr. Sircar replies that there was no question of giving delivery till asked for and therefore, u/s 93, Contract Act, the plaintiff was not bound to deliver until such application was made. Further, u/s 46, Contract Act, plaintiffs had not to perform their engagements until after a reasonable time, and it is argued that the joint effect of these sections is to free the plaintiffs from liability to deliver at any time, reasonable or otherwise, until they were called upon to do so. It was for Waite to indicate when and where the delivery was to, be made, and until he did so, the plaintiff firm had not to move, and limitation had not begun at all. The delay of seven months, therefore, could not be held to be, unreasonable in view of the congestion which prevailed in all the Government depots. Further, Mr. Sircar has urged that the words "cause of action" as used in Section 80 should not be too strictly eons-trued. He relies on Secretary of State v. Perumal Pillai (1900) 24 Mad. 279, Jehangir v. Secretary of State (1902) 27 Bom. 189, Jones v. Bird (1822) 5 B. & Ald. 837, Manindra Chandra Nandi v. Secretary of State (1906) 34 Cal. 257. He points out that in the letter of 26th July the plaintiffs had stated their grounds of complaint and as the object of the section is merely to intimate to the Secretary of State the details of the complaint and to give him two months within which to make amends Perumal''s case (1900) 24 Mad. 279 is directly in point as the claim had arisen after the notice was given.

44. It is quite true, as was explained in Perumal''s case (1900) 24 Mad. 279, at p. 282, that the cause of action should not be taken in a narrow sense, the object of the section heing merely to inform the defendant substantially of the ground for complaint. But it is, in my judgment, equally true to say that the section requires the cause of action to be stated with some precision. Now, what is the cause of action stated in the attorney''s letter of the 26th July? In the third para, it is said no instructions have been given to our client for delivery of the goods, and lower down:

Unless our clients are given the requisite orders to deliver the materials, which Capt. S.C. Waite agreed on behalf of the Munitions Board to take over, they will have no course but to adopt legal proceedings.

45. The letter does not say the cause of action is a breach of the contract between the Board and the plaintiff firm. The breach is still in future, and depends upon the definite refusal of the Government to issue the delivery order. That being so, the cause of action does not appear to have arisen at the time of the notice and the notice must, therefore, be invalid. If on the other hand, the plaintiff''s case that there was a stipulation that the goods were not to be delivered till called for is true, a term must be inferred from the contract or read into it, but there is in fact no such term. If such a term is to be inferred it must be a reasonable term, i.e., it must be within a reasonable time of the receipt of the last order of the 26th August 1918. It is plain from Keatinge''s letter of 15th January 1919 that he regarded "all outstanding orders" placed with the plaintiff firm as finished. ''This was followed by Peterson''s notification of the 2nd February stopping all further deliveries. The suit was not filed till June 1922. It was, therefore, plainly the duty of the plaintiff firm to show that there was a term in the contract by which delivery was not to be called for up to July 1919, that is to say, ten months after the contract. This, in my judgment, he has failed to do and Ghaznavi''s statement that Waite promised to take delivery in July is falsified by the fact that the suggestion neither appears in his attorney''s letter threatening the suit nor in the plaint itself. There is also the undoubted fact that Waite went on leave in January 1919 to Ghaznavi''s knowledge, and that his services were dispensed with in February following. Ghaznavi was perfectly aware of that too, and if his claim had been well founded he, must have pressed it as soon as he heard that Waite was no longer in a position to issue the delivery orders which Ghaznavi says he promised him the previous November.

46. In my judgment, the breach of alleged contract should be held to have occurred on 1st February 1919 when Peterson issued his circular letter and limitation began to run from then, and as the suit was not filed within three years from that date it is barred by limitation.

47. I therefore answer the issues as follows:

Issue 1. - First part, Yes, in so far as commandeering orders were concerned, Second part, No.

Issues 2, 3 and 4. - No.

Issues 5, 6, 7. - No.

Issues 8. - Yes, 15th January 1919 and 2nd February 1919.

Issues 9 and 10. - Yes.

Issue 11. - -No evidence was led by the defendant. I answer this issue in the affirmative.

Issue 12. - -No evidence was led by the defendant. I answer this issue in the negative.

Issue 13. - None.

48. The result, therefore, is that the ''suit will stand dismissed with costs on scale 2, including costs of the commission and reserved costs, if any.