**(1968) 12 CAL CK 0012**

**Calcutta High Court**

**Case No:** Appeal from Original Order No. 190, 1968

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| Regional Director (Food), Ministry of Food and Agriculture, Eastern Region, Government of India | | APPELLANT |
| | Vs | |
| Arjan Singh Bhangoo | | RESPONDENT |

**Date of Decision:** Dec. 19, 1968

**Acts Referred:**

- Constitution of India, 1950 - Article 16, 19, 226, 311
- Imports and Exports (Control) Act, 1947 - Section 3
- West Bengal Evacuee Property Act, 1951 - Section 10(2)(b)

**Citation:** 73 CWN 267

**Hon'ble Judges:** S.K. Mukherjee, J; A.N. Ray, J

**Bench:** Division Bench

**Advocate:** B. Das and B.C. Basak, for the Appellant;N. Chakrabarty and Chittatosh Mookherjee, for the Respondent

**Final Decision:** Allowed

**Judgement**

A.N. Ray, J.

This appeal is from the judgment and order of Mitra, J. dated 4 July 1968 making the Rule absolute against the appellants, the Regional Director (Food), Ministry of Food and Agriculture, Eastern Region, Government of India; the Joint Director, Ministry of Food and Agriculture, Government of India; and the Union of India through the Secretary of Food and Agriculture. The Rule was issued calling upon the said respondents to show cause why a writ of Mandamus should not be issued commanding the said respondents to cancel and rescind and withdraw all orders and notices including the telegram dated 18 October 1967 and further commanding the said respondents to forbear from giving any further effect to the said telegram and orders and notices issued on the basis thereof. The respondent Arjan Singh

Bhangoo & Company made an application under Article 226 of the Constitution against the aforementioned three respondents and Messrs. Saraf and Sons requiring them to show cause as to why a writ of Mandamus should not go to cancel and rescind the order and notices given including the telegram dated 18 October 1967. The respondent Arjan Singh Bhangoo and Company hereinafter referred to as the respondent company, alleged in the petition the following facts:- The respondent company had been appointed contractor by the appellants for transport of food-grains in the year 1955. The respondent company''s contract was from time to time the subject of fresh contracts for transport of foodgrains. The Regional Director on 17 December 1966 invited tender for the appointment of contractor. Pursuant to that tender Messrs. National Transport and Coal Syndicate were appointed transport contractors with effect from 1 March 1967. For some reason National Transport and Coal Syndicate did not act as such contractor. The appellants made an offer to the respondent company. The respondent company said that they were willing to accept the said work if the contract was extended for one year, or, in the alternative, for two years from 1 March 1967. The respondent company in its letter dated 28 February 1967 in making the offer said that the terms and conditions contained in the tender dated 17 December 1966 would remain unchanged. The appellants by a telegram dated 7 March 1967 informed the respondent company of its appointment as transport contractor on terms indicated in the respondent company''s letter and that the appointment was for two years from 1 March 1967. The appellants thereafter called upon the respondent company to furnish security deposit in accordance with the terms of the contract.

2. On 17 June 1967 the Regional Director invited tender for appointment of contractor for a period of two years. The last date of receipt of the said tender was 19 July 1967 and the tender was to be opened on 19 July 1967 at 3-30 P.M. Tenders were to remain open for acceptance upto and inclusive of 18 October 1967. On 19 July 1967 tenders were opened. On 20 July 1967 the respondent company wrote to the appellant that the tender that was handed over by the respondents M/s. Saraf and Sons at 3-15 P.M. was tendered 15 minutes later than the stipulated time which was 3.00 P.M. on 19 July 1967. It was further alleged that the tender of respondent M/s. Saraf and sons was made without deposit of earnest money.

3. On 19 August 1967 there was acceptance of the tender dated 18 January 1967 of the respodnent company as modified by the letter dated 28 February 1967 for two years from 1 March 1967 to 28 February 1969. On 18 October 1967 there was a telegram from the appellant to the respondent company terminating the appointment of the respondent company as transport contractor in terms of clause IX (ii) with effect from 18 November 1967. On 6 November 1967 the respondent company called upon the appellant to withdraw the notice of termination of contract. On 14 November 1967 a Rule Nisi was issued.

4. Before the learned Judge the rival contentions were these. On behalf of the respondent company it was contended that the respondent company was in the employment of the Government and the termination was unlaw because it was for a stipulated period of two years. The appointment of M/s. Saraf and sons was impeached. The termination of the appointment was also contended by the respondent company to be in violation of principles of natural justice and also to be violative of Articles 16 and 19 of the Constitution. On behalf of the Government and the other respondents it was contended that the relationship between the appellants and the respondent company was contractual and termination of contract was lawfully made by one of the terms of the contract and there was no question of violation of Article 16 of the Constitution because there was no employment by appellants of the respondent company.

5. The learned Judge was pleased to arrive at the conclusion that the respondent company was rendering services and if any injustice was meted to the respondent company the latter had the right to complain because that latter had the right to render service to the appellants in return for appointment on certain terms and conditions and one of the terms was that the service was to be for a fixed term of two years. The other conclusion that the learned Judge arrived at was that the respondent company had a right to question the validity of the termination as it violated Article 16 of the Constitution. The learned Judge was further pleased to hold that the appointment of M/s. Saraf and Sons was made in a furtive manner and inasmuch as the respondent company was appointed for a public purpose namely, transportation of food, mandatory conditions of tender were to be followed and it could not be said that there was any relaxation of the terms of the payment of the earnest money as far as M/s. Saraf and Sons were concerned. It was also held by the learned Judge that was a case of employment for rendering a particular kind of service namely, transport of food and the right of the respondent company to receive remuneration was upon rendering service and the termination of employment was a destruction of such right and therefore, the respondent company had locus standi to make an application under Article 226 of the Constitution.

6. At the hearing of this appeal Counsel for the appellant reiterated the contentions which had been advanced in the trial Court. First, the relationship between the appellants and the respondent company was purely one of contractual rights and obligations which could not be enforced under Article 226 of the Constitution. Secondly, the termination of the contract was by clause 9 and it was within the power and the right of the appellants to terminate the contract in that manner. Thirdly, if the contract was not lawfully determined as the respondent company alleged the remedy was in damages. Fourthly, the service which the respondent company alleged to render to the appellants was not an employment within the meaning of Article 311 of the Constitution and therefore, there was no occasion for giving any opportunity to the respondent company before termination of the

contract or giving them an opportunity to show cause against such termination. Fifthly, there was no fundamental right or any statutory right which was the subject-matter of this application under Article 226 of the Constitution. Sixthly, there was no question of violation of Article 16 of the Constitution because it was a contract for service and not a contract of service. Seventhly, if there was any contract between the appellants and Messrs. Saraf and Sons and if such a contract was said to be not received within the stipulated time or not to be accompanied by any earnest money, there was no Rule absolute against Messrs. Saraf and Sons and the result would be that according to the judgment, two contracts would subsist, one in respect of the respondent company and the other in respect of Messrs. Saraf and Sons. Eighthly, there might be alleged infirmities with regard to tender of Messrs. Saraf and Sons but the same would not be a statutory illegality. Ninthly, the respondent company was guilty of suppression of facts, namely, that the respondent company kept away form the Court and did not disclose to the Court that the respondent company submitted a tender along with Messrs. Saraf and Sons on 19 July 1967 and that the respondent company participated at that tender.

7. On behalf of the respondent company it was contended first that the reliefs which were asked for were cancellation of telegram terminating the contract and that the Court under Article 226 of the Constitution could interfere in cases of contract and there was no restriction on the power and jurisdiction of the Court to do so and there existed jurisdiction of the Court to interfere with cases of contract but if the Court did not exercise such jurisdiction that would be in the facts and circumstances of a case. Secondly, it was said that the power of the Court was to grant writs of Mandamus or writs in the nature of Mandamus or to make appropriate orders to give directions not only on the Government but on any authority, and, therefore, there was jurisdiction to interfere in cases of contract. Thirdly, it was said that the learned Judge in the trial court exercised his discretion and unless and until it was said that it was a perverse exercise of discretion there should not be any interference with the decision. Fourthly, it was said that the Court had jurisdiction to interfere in cases where there was representation made by the executive Government and if pursuant to such promise on behalf of the Government the respondent acted, namely, that the appointment was for two years, the Court would interfere and strike down such termination as a breach of such executive representation. Fifthly, it was said that it was a contract of service because the terms of the contract indicated that the respondent company was to render service. Finally it was said that the acceptance of the tender of Messrs. Saraf and Sons was bad, and therefore, the tender of the respondent company should be held to be valid.

8. In order to appreciate the rival contentions it is necessary to refer to two features of the tender and the terms which were embodied in the contract between the appellants on the one hand and the respondent company on the other. The tender that the respondent company submitted contained inter alia the term to be found at page 10 of Part II of the paper book and described as condition No. IX of the terms

and conditions governing the contract for transport of foodgrain in and around Calcutta. Clause IX states that "the contract shall remain in force for a period of two years from such date as may be decided by the Regional Director (Food) but the Regional Director (Food) reserved the right (i) to extend the period of contract for a further period up to one year at the same rates and other terms and conditions as therein mentioned (ii) to terminate the contract at any time during its currency without assigning any reason therefor, any giving 30 days'' notice in writing to the contractor at their last known place of residence business and the contractor shall not be entitled to any compensation by reason of such termination. The action of the Regional Director (Food) under this clause shall be final, conclusive and binding on the contractor and shall not be called into question."

9. The other feature to which reference is needed is the definition section which defines contract, contractors, services, contract rates. Contract rates are defined to mean the rates of payment accepted by the Regional Director (Food) for and on behalf of the President of India. The word services means the performance of any of the items of work enumerated in the schedule of services and as elaborated in clause XX therein including the auxiliary and incidental duties, services and operations as may be indicated by the Regional Director (Food).

10. There are certain principles in regard to the issue of a writ of Mandamus. First, a writ of Mandamus is issued to any person, Corporation or tribunal requiring him or them to do some particular thing appertaining to the office as in the nature of public duties. The purpose is to supply defects of justice and in all cases where there is a specific legal right and no specific legal remedy for enforcing that right. Mandamus may issue where although there is an appropriate remedy yet that redress is not convenient, beneficial and effectual. (See Halsbury''s Laws of England, third edition, volume 11, paragraph 159, page 84). Secondly, an order of Mandamus will be granted ordering that to be done which the statute requires to be done and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body. In order that Mandamus may issue for the enforcement of a statutory right it must appear that the statute in question imposes a duty the performance or non-performance of which is not a matter of discretion. (See Halsbury''s Laws of England, third edition, volume 11, paragraph 170, page 90). Thirdly, the applicant for an order of Mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the Mandamus is sought. In order, therefore, that a Mandamus may issue to compel something to be done under a statute must be shown that the statute imposes a legal duty. It is in respect of a legal right that Mandamus will lie. Therefore, the Court will not enforce an equitable right by this remedy. (See Halsbury''s Laws of England, third edition, Volume 11, paragraph 194, page 104). Fourthly, the order is only granted to compel the performance of duties of a public nature and it will not issue for the enforcement of a merely private right. (See Halsbury''s Laws of England, third edition, Vol. 11,

paragraph 195, page 105).

11. In the present case the preeminent question is whether the Court will exercise jurisdiction when as I hold in the first place there is a contractual relationship between the appellant and the respondent company and secondly, there is termination of contract. Counsel for the respondent company did not deny that there was a contract. What was said was that the contract was such that the respondent company was in the employment of the appellant namely, the Government. It was, therefore, said that even though it was a contract for employment the termination could be impeached as violative of right and duties by statutory authorities and therefore, the Court should exercise its discretion. It is true that jurisdiction under Article 226 of the Constitution is wide but the Supreme Court has expressed the opinion that in cases of contractual rights and liablities there should not be any interference under Article 226 of the Constitution. In the case of Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, the question for consideration by the Supreme Court was whether the power of appointment conferred upon the Custodian u/s 10(2) (b) of the Evacuee Property Act of 1950 conferred by implication upon the Custodian the power to suspend or dismiss any person appointed as Manager and whether a person who was appointed as Manager was entitled to move the Court for grant of a writ in the nature of Mandamus in relation to such appointment. The Deputy Custodian in that case informed the Manager that the services of the Manager were terminated and he was required to hand over immediate possession of the premises. The Manager filed a petition in the High Court of Kerala for quashing the order and for a writ of Mandamus requiring the respondents to hand over possession of the business concerned and also directing the respondents to comply with other reliefs mentioned in the petition. The Supreme Court observed, "but even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal, the appellant is not entitled to move the High Court for grant of the writ in the nature of Mandamus under Article 226 of the Constitution. The reason is that a writ of Mandamus may be granted only in a case where there is statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdiction. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power u/s 10 (2) (b) of the 1950 Act is contractual in its nature and there is no statutory obligation as between him and the appellant. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under article 226 of the Constitution." The Supreme Court thereafter referred to the observation of the Judicial Committee in the case of Commissioner of Income Tax Bombay Presidency and Aden v. Bombay Trust

Corporation Ltd. reported in 63 I.A. 408 and the observations of a Bench decision of this Court in the case of P.K. Banerjee Vs. L.J. Simonds and Another, and expressed the opinion that both those cases laid down the correct Daw on the point. The Judicial Committee said that before Mandamus could issue to a public servant it had to be shown that the duty towards the appellant had been imposed by the statute so that he could be charged thereon.

12. In the case of P.K. Banerjee Vs. L.J. Simonds and Another, the petitioner asked for orders requiring the respondents to deliver certain stores lying at a salvage depot and to forbear from advertising for sale or from selling the stores and from disposing of or dealing with the stores. The petitioner in that case alleged that certain goods had been sold by the military authority to the petitioner but delivery thereof was refused. Several contentions were raised. It was held that the ordinary remedy for non-delivery under a contract for sale of goods under the Sale of Goods Act was that the buyer could sue the seller for damages and it was therefore, not open to ask for any relief of Mandamus u/s 45 of the Specific Relief Act, Counsel for the respondent company contended that section 45 of the Specific Relief Act had a distinctive feature in sub-section (2) thereof which forbade the Court from making any order upon an officer of the Crown and secondly, that the jurisdiction under Article 226 of the Constitution was much wider than the jurisdiction u/s 45 of the Specific Relief Act. The decision in P. K. Banerjee''s case has been approved by the Supreme Court to be correct law. The principle enunciated in P. K. Banerjee''s case is that in the case of a contract for sale of goods if damages are adequate remedy, a Mandamus will not go in aid of such contractual rights of sale. As the Supreme Court observed in the case of Lekhraj to which I have already referred, the jurisdiction under Article 226 of the Constitution is not to be exercised in cases of violation of contractual right and obligation. Counsel for the respondent company distinguished the case of Lekhraj by saying that there was no concluded contract in that case and, therefore the Supreme Court did not interfere in that case. The question of concluded contract arose in the case of concluded contract arose in the case of Lekhraj because it was contended on behalf of the appellant that there was a final allotment of business in favour of the appellant there. But irrespective of that consideration which was advanced the Supreme Court held that the appellant could not move the High Court for the grant of a writ of Mandamus because there was no statutory obligation and the appointment was contractual. In my opinion, the decision of the Supreme Court is an authority for the proposition that the respondent company is not entitled to invoke the jurisdiction under Article 226 of the Constitution.

13. The contention on behalf of the respondent company that there was a definite contract for the period of two years and therefore, there could not be any termination is answered by the terms of the tender which stated that it could be extended for another year and that it could also be terminated on notice. Both the rights of extension and termination were open to the Government and the term

stipulated that the decision of the Government is final. Whether such a termination is lawful or unlawful it is always open to the party aggrieved thereby to take recourse to properly constituted proceedings for appropriate reliefs by way of damages. It is not the subject matter of an application under Article 226 of the Constitution.

14. It was contended on behalf of the respondent company relying on the decision of the Supreme Court in the case of the Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., that the authorities in the present case made a promise for appointment for two years and therefore, there was an executive representation and breach of such executive representation was justiciable under Article 226. In the case of Angle Afghan Agencies the Textile Commissioner published a scheme called the Export Promotion Scheme. By the scheme the exporters were invited to get themselves registered and it was represented that the exporters would be entitled to import raw materials of a certain amount equal to 100 per cent of the F.O.B. value of exports. Under the scheme the Textile Commissioner had authority to reduce the import certificate if it was found that a fraudulent attempt was made to secure an import certificate in excess of the true value of the goods exported. The respondent firm in that case took advantage of that scheme and the Deputy Director issued to that firm an import entitlement certificate. Representations were made by the respondents that they should be granted import certificate for the full F.O.B. value but they did not get any response. The Supreme Court came to the conclusion that the firm in that case was entitled to relief. The ratio of the Supreme Court decision is to be found in the genesis of the Scheme. The Scheme was made under the Imports and Exports (Control) Act, 18 of 1947 which enabled the Government to continue to exercise the power to prohibit, restrict or otherwise control imports and exports which had till then been controlled by Rule 84 of the Defence of India Rules, 1939. u/s 3 of the 1947 Act the Imports Control Order 1955 was issued. It was contended in the Anglo Afghan Agencies case that the import scheme was administrative in character. The firm on the other hand, contended that the scheme was statutory in character. The Supreme Court observed that the Imports Control Order 1955 was legislative in character and the import trade policy was evolved to fecilitate the mechanism of the Act and the orders issued thereunder. The Supreme Court further observed that the import trade policy notifications were issued in exercise of the power under sec. 3 of the Imports and Exports (Control) Act of 1947. The Imports Control Order 1955 authorised the making of executive or administrative instructions as well as legislative directions, in that context the Supreme Court observed that it was not the form of the order, the method of its publication of the source of its authority, but its substance, which determined its true character. The Supreme Court came to the conclusion that the firm in that case was not seeking to enforce any contractual right but they were seeking to enforce compliance with the obligation which was laid upon the Textile Commissioner by the terms of the Scheme and even if the Scheme was executive in character, the firm was aggrieved

because of the failure to carry out the Scheme and was entitled to seek resort to the Court and claim that the obligation imposed upon the Textile Commissioner was to be carried out. The decision illustrates that statutory orders and notifications which may be executive or administrative or legislative in character and content are justiciable by reason of the fact that they emanate under the statute and the rights and obligations are statutory in character and, therefore, infraction of such right and obligation is justiciable under Article 226. In the present case there is no statutory right which is the subject-matter of enforcement. It is a pure contractual relationship between the appellant on the one hand and the respondent company on the other. The export scheme as in the Anglo Afghan Agency case was being enforced and the terms of that scheme which were held by the Supreme Court to be in the nature of statutory rights and obligations were given effect to when the party aggrieved by non-fulfilment of statutory obligation came to Court in aid of such rights.

15. Counsel for the respondent company relied on the decision of the Supreme Court in the case of Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, in support of the proposition that the jurisdiction under Article 226 of the Constitution was wide and the Court in the present case could exercise such jurisdiction. In Dwarkanath''s case the question was whether the Court would issue a writ of Certiorari in relation to an order passed by the Revenue Authorities under the income tax Act. The appellant in that case filed an application before the Revenue Authorities for reviewing an order of the income tax Officer. The Commissioner dismissed that revision petition on inter alia the grounds that it was not clear whether the revision petition was maintainable and also on merits. It was contended that the order of the Revenue Authorities was administrative and, therefore, writ of Certiorari would not lie. The Supreme Court did not accept contention and held that the High Court could issue directions, orders and writs other than the prerogative writs to reach injustice whenever it was found. The Supreme Court held that the orders in that case were of such a character that the writ of Certiorari would lie. The fact that an order emanated from an administrative tribunal would not prevent it from being a quasi-judicial act, if the persons had legal authority to act and determine question affecting the right of subjects. This decision does not aid the respondent company for the obvious reason that the duties in that case were exercised under the statute and violation was also in respect of powers and duties under the statute.

16. Reliance was placed on behalf of the respondent company on the decision of the Supreme Court in the case of Calcutta Gas Company v. The State of West Bengal and others reported in (1962) Supp 3 SCR 1 and in The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, in support of the proposition that breach of a contractual obligation was justiciable in that case. In the Calcutta Gas Company case there was a firm of Managing Agents. There was a contract between Calcutta Gas Company, the Managing Agents on the one hand

and the Oriental Gas Company, on the other. The statute which was enacted to take possession of Oriental Gas Company in one of its provisions held that the contract of managing agency ceased to have any effect during the period of taking over of the management of the Oriental Gas Company. The Supreme Court held that the statute which destroyed the managing, agency agreement could be said to give rise to grievances on the part of the managing agents to complain that their legal rights had been impaired by the statute. That is why the Supreme Court said that the Managing Agents had locus standi to make an application though there was said to be determination of contract between the managing agency and the company for some time. The right arose in that case because by operation of the Statute the contract perished. The complaint was against the provisions of the statute. Therefore, the Managing Agents whose rights were affected under the statute could complain under Article 226 of the Constitution. In the present case the contract has not come into existence under a statute nor has it been terminated under any statute. It has all along been a contract between the parties and the termination of the contract is, as Counsel for the appellant rightly contended, justiciable if the respondent company has grievance in properly constituted proceedings for breach of contract.

17. I am unable to accept the contention on behalf of the respondent company that there was any employment under the Government. The contract, as I have already indicated, was for giving transport services. It was not contended that it was an employment within the meaning of Article 311 but it was said that it would be an employment within the meaning of Article 16. In order to support the contention on behalf of the respondent company there has to be employment by the government to any office under the State. In the present case the appellants entered into a contract with the respondent company for transport of foodgrains and the respondent company was to be paid for transport charges. It was said on behalf of the respondent company that the respondent company was to work according to the directions of the appellants. It is obvious that the appellants would have the right to give directions, as to where and how goods were to be carried. The terms of the contract indicate beyond any measure of doubt that it was a contract for giving service to the appellants by carrying foodgrains. There was no contract of service.

18. Counsel for the appellant relied on two decisions of the Supreme Court in the cases of C.K. Achuthan Vs. The State of Kerala and Others, and Raja Bahadur K.C. Deo Bhanj Vs. Raghunath Misra and Others, , in support of the distinction between a contract of service and a contract for serivce.

19. In Achutan''s case the petitioner held contracts for the supply of milk to the government hospital. The petitioner there submitted tender for the supply of milk, later on, the tender was accepted, eventually the contract was cancelled and another person was given a contract. The Supreme Court dealt with the contention of the petitioner in that case as to infraction of Article 16 of the Constitution with

regard to equal opportunity of employment and said that a contract for supply of goods was not a contract of employment in the sense in which it has been used in that Article. In the present case the contract was for transport of goods from one place to another and a fortiori it was not a contract of employment as contemplated in Article 16. As the Supreme Court said in Achutan''s case the petitioner was not employed as a servant but was a contractor for supplying articles on payment of price. That is exactly what happened in the present case, and, therefore, it cannot be said that there was any contract of service or of employment between the appellant on the one hand and the respondent on the other.

20. In the other case of Raja Bahadur K. C. Deo Bhanj the question was whether certain persons under the Gram Panchayat Act could be said to be in the employment of the State. A contention was advanced before the Supreme Court that the Sarpanch of the Gram Panchayat was in the service of the Government. The Sarpartch was the executive head of the Gram Panchayat. The Supreme Court said that the Sarpanch did not exercise the function as one in the service of the State. The Supreme Court referred to the provisions of the Gram Panchayat Act and expressed the opinion that the Sarpanch was not in the service of the Government but gave services to and rendered services for the Government. The Supreme Court in noticing the distinction between the words "serving under the government" and the words "in the service of the government" said that while one might serve under the government one might not necessarily be in the service of the government, because the expression in the service of the government'' would import the relation of master and servant.

21. The relationship of master and servant has two noticeable features. First, the servant must be under the duty of rendering personal service to the master or to others on his behalf. Secondly, the master must have the right to control the servant''s work either personally or by another servant or agent and according to him. Judged by these tests I have no doubt whatever that in the present case the employment by the government of a contractor for transport of foodgrains by a contractor by employing persons and by arranging for transport does not give rise to any relationship of master and servant between the government on the one hand and the contractor on the other. It is nothing more than a contract of transporting foodgrains and getting in consideration thereof transport charges. The Supreme Court in the case of Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, , approved of the views expressed by the Bench decision in P.K. Banerjee Vs. L.J. Simonds and Another, . In that case it was said that the grievance and complaint in regard to a contract for sale of goods would be a matter of reliefs in regard to either delivery or damages for non-delivery and in that context the provisions of section 45 of the Specific Relief Act which embodied the principles of issue of writs of Mandamus could not be invoked. A contract for services cannot be specifically enforced. Non-performance of the contract for services is, therefore, justiciable and the relief claimed is damages. On the other hand, termination of such

contract or refusal to employ a contractor will be a matter where the contractor can proceed against the person employing the contractor for damages. The relationship of a contract for transport of goods is, in my opinion not capable of enforcement of rights and obligations under Article 226 of the Constitution.

22. A contention was advanced on behalf of the respondent that there was executive representation, and, therefore, the executive should be answerable for breach of such representation. This contention is unacceptable for two reasons. First, there was no representation by the Government under any statutory obligation or under any statutory provision or rule. Secondly, there was no representation because the terms of the tender indicated that there could be termination. Counsel for the respondent relied on the decision of the House of Lords in the case of C. B. Reilly v. The King, reported in 1934 AC 176, in support of the proposition that there could not be dismissal at pleasure when there was a specific term. That decision has no relevance to the facts and circumstances of this case. In Reilly''s case there was an appointment by Letters Patent of a member of a Board of Revenue which was established by statute. The period of appointment was specified. During the currency of appointment the Parliament abolished the office by repealing the provision. It was held that the claim failed because the appellant''s rights were contractual and further performance of the contract became impossible by the statute. In the present case there is no statutory appointment. The contractual terms do not also have any definite and fixed terms of appointment. It is terminable by the Government by giving notice. Unlawful termination of contract is remedied by award of damages.

23. Counsel for the respondent also relied on the decision of the Supreme Court in the case of K.N. Guruswamy Vs. The State of Mysore and Others, , in support of the contention that the acceptance of tender in the present case was bad by reason of the tender having been submitted after 3 P.M. and secondly, by reason of non-payment of earnest money along with the tender. Reliance was placed on the terms of tender appearing at page 36 of the Paper Book, Part II, and clause No. 4 of the tender that the time of receipt was up to 3 P.M. and that each tender was to be accompanied by earnest money. It was said that the acceptance of the tender was bad. The Supreme Court case related to acceptance of bid at a public auction under the excise rules. That decision obviously has no relevance in the present case for the obvious reason that the auction under the exercise rules is under statutory provisions and such provisions are to be complied with. In the present case it was open to the government authorities to accept the tender. If they accepted such a tender, in my view, it cannot be called in question in an application under Article 226 of the Constitution. In an interlocutory application in the Appellate Court in the present case there was an affidavit affirmed by the government and in that affidavit it was said that the government waived the terms with regard to deposit of earnest money and the time with regard to deposit of the tender. Counsel on behalf of the respondent contended that this contention was not raised before the trial court. It

was open to the government to waive any term of tender. If there is any breach of terms of tender such a breach is not any infraction of any statutory provisions, or rule to invoke the jurisdiction under Article 226 of the Constitution.

24. I am, therefore, of opinion that the learned Judge erred in making the Rule absolute. The relationship between the appellant and the respondent was purely contractual. The respondent company could not resort to Article 226of the Constitution. A contention was advanced by Counsel for the respondent that M/s. Saraf and Sons did not prefer any appeal and, therefore, they could not be heard to contend that the appointment of Messrs. Saraf and Sons which had been held by the trial court to be bad was valid. The appellants are the government authorities and they have preferred appeal from the order and it is open to them to contend, as they have done, that not only was termination justified but also the appointment of M/s. Saraf and Sons was valid. There was no Rule against M/s. Saraf and Sons and therefore, they were not called upon to prefer an appeal. The Rule was made absolute only against the government authorities who were described as respondents in the order which directed a writ of Mandamus to go against them.

25. For these reasons, I am of opinion that the judgment of the trial Court should be set aside. The appeal is allowed. The Rule is discharged. Each party will pay and bear its own costs.

Stay is asked for and is refused.

S.K. Mukherjea, J.

I agree.