Advanced Contracts, Tendering and Public Procurement
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Government Contracts-Part 02

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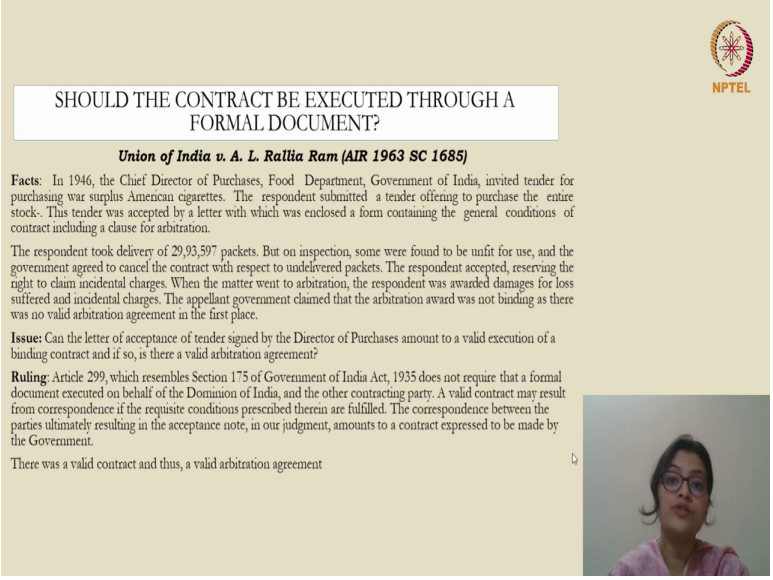
Should the contract be executed through a Formal Document?



In the previous case that we discussed, State of MP v. KP Chowdhury, we learned that the term executed in Article 299 (1) specifically means that a government contract must be expressed in writing, but should the contract be executed in the form of a formal document? So, is there any particular form that the contract should adhere to? We will try and answer this question with the help of this case, Union of India v. A.L. Rallia Ram. This was decided in 1963 by the Supreme Court.

So, the case dates back to 1946, when the chief director of purchases, the Food Department, Government of India, invited tender for purchasing war, surplus American cigarettes. So, whatever was there leftover as a result of a surplus was auctioned out. So, the respondent Rallia Ram, submitted a tender offer to purchase the entire stock. So, the tender was accepted by a letter signed by the Chief Director, which was enclosed with a form containing the general conditions of the contract, including a clause of arbitration.

This tender was accepted via a letter and the letter had another form, which had the general terms and conditions of the contract, including an arbitration clause. Rallia Ram took delivery of nearly 30 lakh packets of American cigarettes and on inspection, he found that some were

unfit for use and the government agreed to cancel the contract with respect to the undelivered packets. Rallia Ram accepted, but he also reserved the right to claim incidental charges; so, anything that he could have incurred as a result of this contract. When the matter went to arbitration Rallia Ram was awarded damages for loss suffered, and also the other incidental charges that he had incurred. And the government claimed that the arbitration award was not binding, as there was no valid arbitration agreement in the first place. The question before the Supreme Court was whether the letter of acceptance of tender which was signed by the Director of Purchase could amount to a valid execution of a binding contract and if so, whether there was a valid arbitration agreement.

The court ruled that Article 299, which resembles Section 175 of the Government of India Act, does not require that a formal document executed on behalf of the dominion of India and the other contracting party should be executed. A valid contract may result from correspondence. So any kind of correspondence that happens between a government-authorized official and the party which is entering into the contract with the government.

And if the requisite conditions prescribed therein are fulfilled, the correspondence between the parties ultimately resulting in the acceptance note, in our judgment, amounts to a contract expressed to be made by the government. The Supreme Court ultimately ruled that since there was a valid contract, there was a valid arbitration agreement, and the government could not shirk its responsibilities of being bound by, the arbitration agreement.

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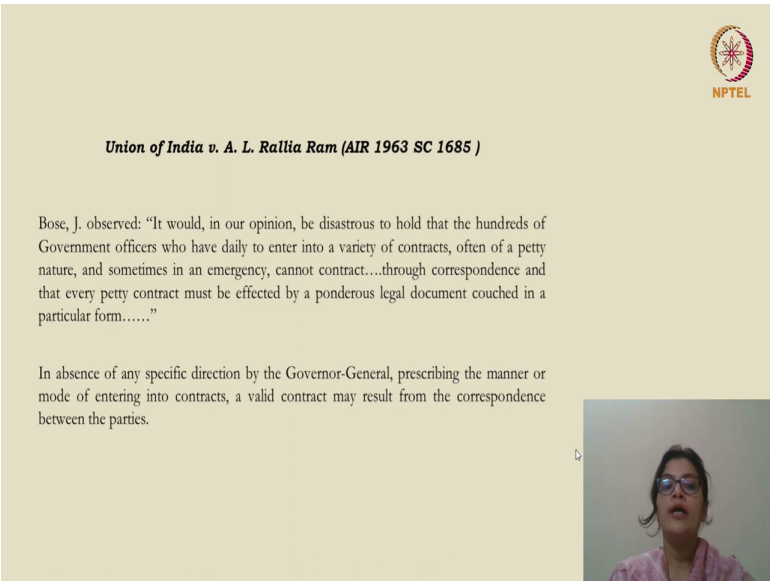

The observation of Justice Bose is particularly relevant in the context of our discussion, and he noted that: "it would, in our opinion, be disastrous to hold that the hundreds of government officers who have daily to enter into a variety of contracts often of a petty nature and sometimes in an emergency cannot contract through correspondence and that every petty contract must be affected by a ponderous legal document couched in a particular form…"

In the absence of any specific direction by the Governor General, prescribing the manner or mode of entering into contracts, a valid contract may result from the correspondence between the parties. So, through this case, what we learn is that the emphasis of the Supreme Court has been more on the content of the contract and the form of the contract.

Justice Bose has very rightly observed that, if every time a government contract has to be entered into, all the legal formalities of a particular form would have to be adhered to, it could lead to a lot of cumbersome formalities that would have to be abided by, and this in a way would lead to a loss of valuable time of the government in fulfilling its public functions. So, the emphasis here has been more on the content of the contract, the purpose for which the contract is being entered into and not so much on the form in which the contract is being entered into.

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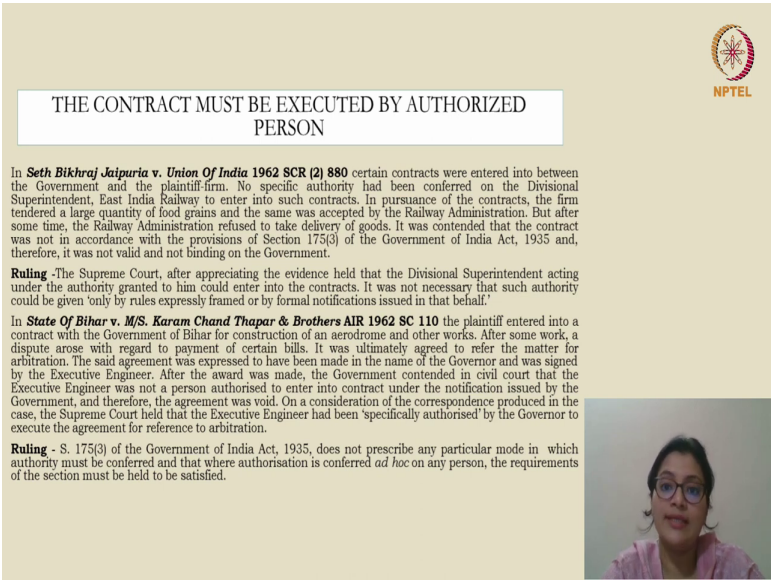
The contract must be executed by authorized person



We have learned that an important requirement of a government contract is that the contract must be executed by a person and in such manner, as has been authorized by the president or the governor of the state, as the case may be. So, with the help of two cases, we will try and

see how exactly this authorization is done or rather, in what manner is a particular official authorized to act on behalf of the President or the governor.

The first case that we will be looking at is Seth Bikhraj Jaipuria vs Union of India. In this particular case, certain contracts were entered into between the government and the firm of Seth Bikhraj. No specific authority had been conferred on the divisional superintendent of the East India Railway, to enter into such contracts. And in pursuance of the contract, Seth Bikhraj's firm had basically supplied a large quantity of food grains and this was accepted by the railway administration.

But after some time, the railway administration refused to take delivery of the goods. And it was contended by the government that the contract was not in accordance with the provisions of Section 175 (3) of the Government of India Act which is basically similar to Article 299 of the Indian constitution, and therefore it was not valid and binding on the government. The ruling of the Supreme Court was that it appreciated the evidence and held that the divisional superintendent acting under the authority that was granted to him could enter into contracts.

And it was not necessary that such authority could be given only by rules, expressly framed or by formal notifications, issued on that behalf. The other case is that of State of Bihar v. Messrs Karam Chand Thapar and Brothers which was decided in 1962, the same year as the previous case. So basically, the plaintiff had entered into a contract with the government of Bihar for the construction of an aerodrome, and other work.

After some work, a dispute arose with regard to the payment of certain bills, and it was ultimately agreed to refer the matter for arbitration. So, the agreement was expressed to have been made in the name of the governor and was signed by the executive engineer. After the award was made, basically after the arbitration award was made, the government contended before the civil court that the Executive Engineer was not a person who was authorized to enter into a contract under the notification issued by the government, and therefore the agreement was void.

The matter went up in appeal before the Supreme Court and after considering the correspondence produced in the case, the Court held that the executive engineer had been specifically authorized by the government to execute the agreement for reference to arbitration and the court again ruled that section 175 (3) of the government of India Act does not prescribe any particular mode in which authority must be conferred.

And that where authorization is conferred ad hoc on any person, the requirements of the section must be held to be satisfied. Just to reiterate, most of these cases were filed or the facts of these cases arose before the Indian Constitution was drafted and adopted. And therefore, you will see that in these cases, a reference has been made to Section 175 (3) of the Government of India Act, but as we have already learned, that Section 175 (3) of the Government of India Act is pari materia to Article 299. So basically, the contract can be executed by the authorized person. And we have learned through these cases, that there is no express form in which this authorization has to be given.

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The contract must be expressed in the name of the President or the Governor

The last requirement of forming a government contract is that the contract must be expressed in the name of the President or the Governor. Now, this is an extremely important provision, because even if the contract is executed by an official, who has been authorized by the government, it would not be a valid and enforceable government contract, if it is not expressed in the name of the president or the governor.

Now, let us look at a case law which helps us to further understand this. So, Mulamchand v. State of MP decided in the year 1968. In this case, Mulamchand had basically purchased the right to pluck, collect and remove forests produce like the tendu leaves, and lac from different Malguzari jungles.

So, Malguzari jungles or Malguzari land was a kind of land tenure system that existed during the time of the Marathas, and people who were in charge of these lands were called

Malguzars. It was similar to the Mahalwaris, the Rayatwari system, and the old revenue collection systems that had continued to be during the British period.

So, in this case, the deputy commissioner of Bhalaghat had issued a written permit, requiring Mulamchand to deposit rupees 3000 to prevent the leaves from being sold to others. And Mulamchand paid the deposit, but later he claimed that the deposit should be refunded to him because he felt that there was no valid contract under Article 299 (1) of the constitution. So, the question was whether or not there was a valid government contract.

And the court ruled that no, the contract was not valid, because it was neither expressed to be made by the Governor, nor was it executed on his behalf. So, the contract, the court laid down had to be expressed explicitly to be made in the name of the Governor of the state. It was held by the court that the provisions of Article 299 are mandatory and the contract was therefore void and not binding on the union, which was not liable to pay any kind of damages for the breach of the contract. So again, if a contract is not expressed in the name of the President or the Governor, then it cannot be held to be a binding government contract.

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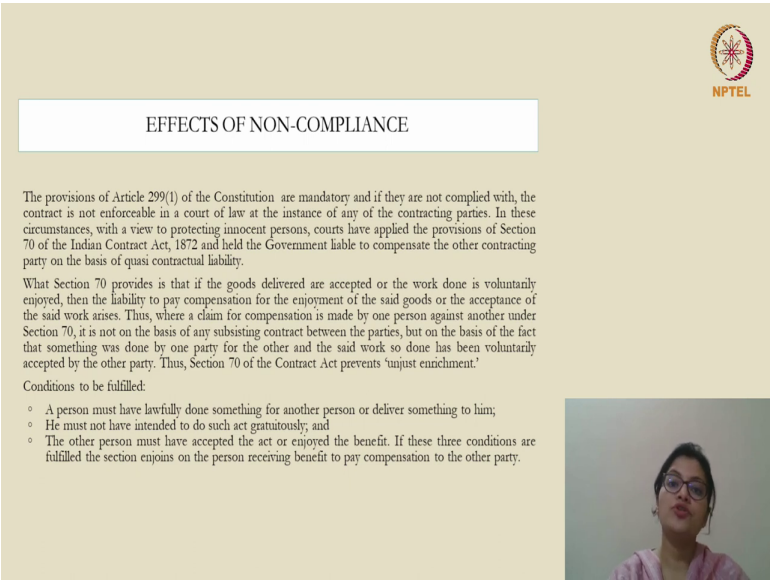
Effects of Non-Compliance



When questions about the validity or enforceability of contracts under Article 299 of the Constitution come before the judiciary, the judicial attitude has generally been to balance two different kinds of motivations. On the one hand, the effort of the judiciary is to ensure that the government is not made liable for any unauthorized contracts and on the other hand, the

judiciary is also responsible to safeguard the interests of those persons who were unwary, or who were unsuspecting of the government officials who may have acted unauthorizedly or who may have entered into a government contract without fulfilling all the formalities laid down in the constitution.

So, these are the two different interests that the courts always try to balance. But what happens when the different conditions that we have spoken of are not complied with? What could be the effect of the non-compliance on the two different parties? So, the effect is pretty clear as laid down under Article 299 (1). The contract would not be legally binding and a legally enforceable contract.

But in such circumstances, to protect innocent persons, who were not aware of any kind of unscrupulous motives that government officials may have had when they were entering into the contract, courts have applied the provisions of Section 70 of the Indian Contract Act, and have held that the government would be liable to compensate the other contracting party on the basis of quasi-contractual liability.

So, what section 70 essentially provides is that if goods delivered or accepted or the work which has been done, is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the same goods or the acceptance of the work arises. So, a claim for compensation is made by one person against the other under Section 70, not on the basis of any subsisting contract between the parties, but on the basis of the very fact that something was done by one party and the other party had enjoyed the benefits of that particular work and accepted the service which was rendered.

Section 70 tries to prevent any kind of unjust enrichment. So even if in cases, the courts hold that the contract is not a legally binding or a legally enforceable contract, they may give remedy under Section 70 of the Indian contract act to prevent any kind of unjust enrichment. But there are a few conditions that need to be fulfilled, before section 70 can be applied. And they are, the person must have lawfully done something for another person or delivered something to him, he must not have intended to do such act gratuitously, that is he should not have intended to do that work free of cost.

And the other person must have accepted the act or enjoyed the benefit of the service rendered, or the act done. And if all these three conditions are fulfilled then section 70 enjoins

the person who has received the benefit to pay compensation to the other party. And this provision could also be applied against any government in a government contract.

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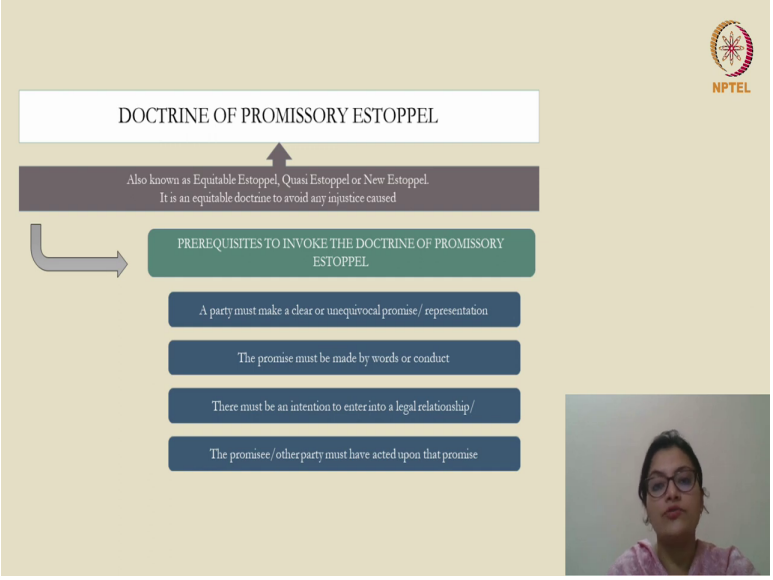
Doctrine of Promissory Estoppel



When we are talking about different kinds of remedies that are available to persons who fulfill their part of the obligations in a contract, one doctrine of contract law, which deserves a mention more than any other doctrine would be the doctrine of promissory estoppel. So, it is also known as equitable estoppel, quasi estoppel or new estoppel. And it is an equitable doctrine to avoid any kind of injustice caused.

So, there are certain prerequisites to invoke this doctrine and what are they? First, a party to a contract must make a clear or unequivocal promise or representation. The promise must be made by words or conduct. There must be an intention to enter into a legal relationship and the promise or the other party must have acted upon that promise.

Here we are talking about two contracting parties. One of them has made every intention to fulfill his part of the obligation, and he has acted on the promise based on the representation that the other contracting party has made. So whether in such a circumstance any kind of remedy would be made available to the contracting party who has acted justly and has tried to fulfill the obligations under the contract.

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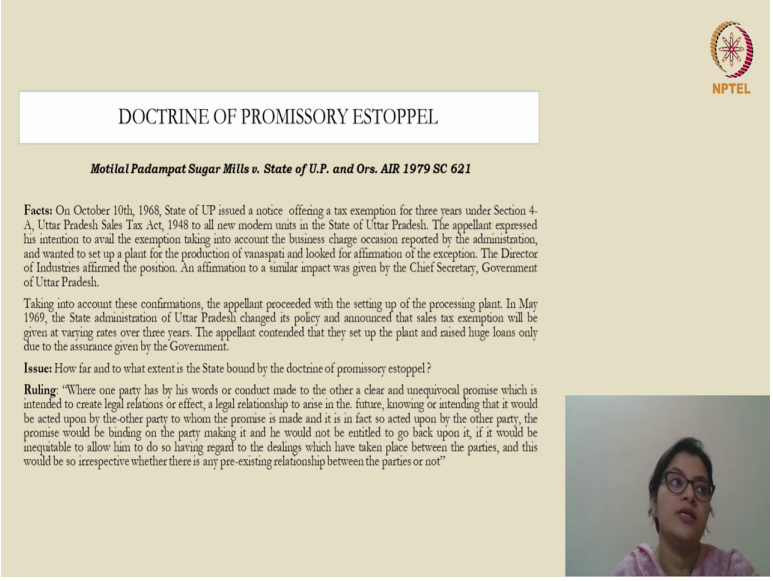

Now, we will try and see whether this doctrine has any application to government contracts. Motilal Padampat Sugar Mills v. State of UP and others is a landmark case in the field of contractual law or contractual liabilities. And the facts of this case very briefly are - In October 1968, the State of UP issued a notice which offered tax exemption for 3 years under section 4A of the Uttar Pradesh Sales Tax Act to all new modern units in the state.

So, MP sugar mills expressed their intention to avail of the exemption taking into account the business charge occasion reported by the administration. And they wanted to set up a plant for the production of Vanaspati, which is a kind of a ghee and looked for affirmation of the exception. So, the Director of Industries of the state of UP, affirmed the position and an affirmation of similar impact was also given by the Chief Secretary of the Government of UP.

So, taking into account these confirmations or affirmation formations, MP Sugarmill proceeded to set up the processing plant. But in May 1969, within less than a year, the state administration changed its policy and announced that the sales tax exemption will be given at varying rates over 3 years. So, MP sugar mills contended that they had set up the plant and had faced huge loans only due to the assurance which was given by the government. So, would it even be fair for the government to change their policy at this time?

So, the question was, how far and to what extent is the state bound by the doctrine of promissory estoppel? In this landmark ruling of the Supreme Court, it was held that where one party has by his words or conduct made to the other party, a clear and unequivocal promise, which is intended to create legal relations or affect, a legal relationship is to arise in

the future knowing or intending that it would be acted upon by the other party to whom the promises made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to act upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not.

So, in this case, the court held that the doctrine of promissory estoppel would also apply against the government. So, we see that unsuspecting or unwary persons or contracting parties who enter into contracts with the government do have some relief provided to them by the court. And this is evident from the different cases that we have discussed.

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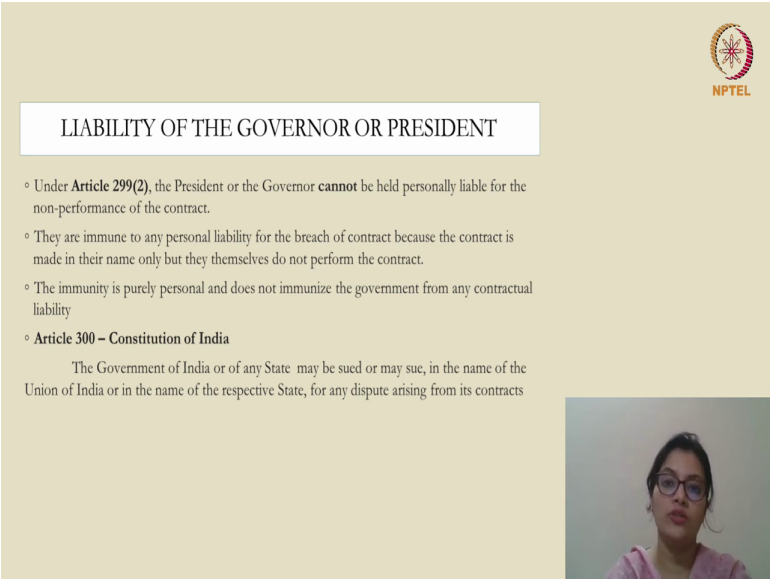
Liability of the Governor or President



Whenever there is a question of a breach of a government contract, or whenever a claim is raised by a contracting party, other than the government in a government contract, the obvious question is, what is the nature of liability of the governor or the president? Do they attract any kind of personal liability for the breach of a government contract? This is something that we had discussed right at the beginning, under Article 299 (2) of the Constitution.

Now, Article 299 (2) lays down that the President or the Governor cannot be held personally liable for the non-performance of the contract. They are immune to any personal liability for the breach of contract, because the contract is made in their name only, but they themselves

do not perform the contract. So basically, it is the Governor or the President as ex-officio members of the government, who are supposed to enter into these contracts, they do not attract any kind of personal liability.

The immunity is purely personal and does not immunize the government from any contractual liability. And here we see that Article 300 comes to our rescue because we see that Article 300 provides that the government of India or of any state may be sued or may sue in the name of the Union of India, or in the name of the respective state for any dispute arising from its contracts. So, we have also seen a number of public interest litigations that have been filed against the Union of India or the state of Bihar.

If you remember, in this very module, we have discussed how there are so many cases which have been initiated by the state of Madhya Pradesh or the state of Bihar. So, we see that it is always in the name of the government that these cases are filed. And it is never in the personal capacity of the President or the Governor or the person who is holding the position of the President or the Governor. So, to put it very simply, the answer is that the Governor or the President do not attract any kind of personal liability for the breach of a government contract.

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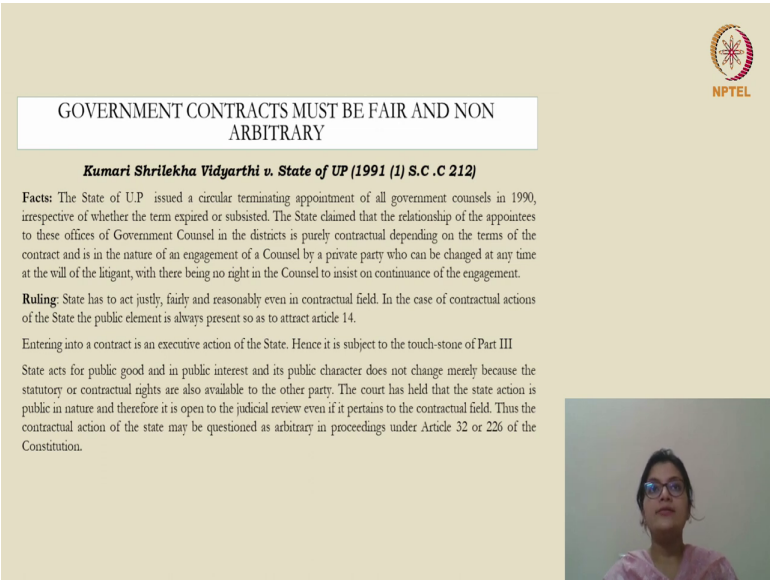

We have come to the last slide, or the last section of our discussion on the introduction to government contracts. In this part, we studied what government contracts are, the different provisions of the Constitution from where the state derives the power to enter into

government contracts, what are the essential elements of government contracts and what could be the consequences of the breach of a government contract.

Now, to wrap up this part, let's go back to the topic that we addressed right at the beginning of this module. That was the purpose for which government contracts are entered into. If we were to agree that government contracts are primarily aimed at public welfare or at the public good, should government contracts be addressed or be judged on the touchstone of fairness and non-arbitrary behavior?

So, that is to say, whether governments are expected to behave in a particular manner when they are entering into a contract, and whether the standards that apply to a private party could be applied to the government when it is entering into contracts? So, to discuss this further, I will be looking at the case of Kumari Shrilekha Vidyarthi v. State of UP. This is a 1991 decision. And in this case, the matter was with regard to the appointment of Government Counsels, or rather advocates who fight cases or who defend cases on behalf of the government.

The facts were simply that the state of UP had issued a circular terminating the appointment of all government counsels in 1990, irrespective of whether the term of the contract had expired or not. The state claimed that the relationship of the appointees to these offices of government counsels was purely contractual depending on the terms of the contract, and is in the nature of an engagement of a counsel by a private party, who can be changed at any time at the will of the litigant, with there being no right in the Counsel or the advocate to insist on the continuance of this engagement or of this contract.

So, the argument was that just like a private party or a private litigant may change their lawyers at any time, even the government reserves the right to change their lawyers or the people who are defending them in court, or the advocates who are fighting in their favor to change them if they deem fit. The ruling of the court was that the state has to act justly, fairly and reasonably even in a contractual field.

In the case of contractual actions of the state, the public element is always present, so as to attract Article 14. Article 14 of the Constitution talks about the right to equality. And the court held that whenever the state is performing any kind of public function, Article 14 would be attracted. Entering into a contract is an executive of action of the state. Hence, it is subject to the touchstone of Part III, which deals with fundamental rights.

The State acts for the public good and in the public interest and its public character do not change merely because the statutory or contractual rights are also available to the other party. The Court has held that the state action is public in nature, and therefore, it is open to judicial review, even if it pertains to the contractual field. Thus, the contractual action of the state may be questioned, as arbitrary in Proceedings under Article 32 or 226 of the constitution.

So, in this case, we see that the courts have clearly laid down that it is not only the executive functions or the administrative functions of the state, or the government that can be questioned in a court of law under Article 32 or Article 226. But it is also the contractual functions of the state that can be questioned in a court of law for violating Article 14 or any of the fundamental rights under Part 3 of the Constitution. Therefore, government contracts will have to be fair and non-arbitrary.