HARI CHAND MADAN GOPAL AND OTHERS

v.

STATE OF PUNJAB

October 6, 1972

[J. M. SHELAT, D. G. PALEKAR, K. K. MATHEW, S. N. DWIVEDI AND Y. V. CHANDRACHUD, JJ.]

The Indian Independence (Rights, Property and Liabilities) Order, 1947, Cl. 8(3) and Punjab Partition (Contracts) Order, 1947, cl. 2(d)—Scope of—Liability of appellant to respondent regarding contracts entered into with the Province of Punjab prior to partition—S. 63 Contract Act—Remission of a part of the promise by the promissee effective even without consideration from the promisor.

Sometime in 1944 an agreement was entered into between the appellant and the then Province of Punjab, whereby the appellant agreed to act as a Clearing Agent (Foodgrains) for the sale and purchase of foodgrains on behalf of the Province on payment of a commission. The appellant obtained stock of rice from the Rationing Controllers .

On August 14, 1947, the Governor-General issued, in exercise of his power under s.9(1)(b) of the Indian Independence Act, 1947, the Indian Independence (Rights, Property and Liabilities) Order, 1947. Clause 8(3) of the Order provided that any contract made on behalf of the Province of Punjab, if it was not exclusively for the purpose of the Province of East Punjab in India, was deemed to have been made on behalf of the Province of West Punjab in Pakistan. On the same day, the Governor of the Province of Punjab also issued the Punjab Partition (Contracts) Order, 1947. Clause 2(d) of the Governor's Order provided that every contract entered into on behalf of the Governor in accordance with s.175 of the Government of India Act, 1935, shall, in so far as it relates to services to be rendered for the benefit of areas within the two new Provinces of East Punjab and West Punjab, be deemed to have been entered into with the two Provinces as two separate contracts having effect respectively in relation to the services to be rendered in each of the Provinces. The Governor of Punjab also issued another Order, the Punjab Partition (Apportionment of Assets and Liabilities) Order, 1947, for a general financial settlement between the two new Provinces. As the two new Provinces did not arrive at any agreement, the Chief Justice of the Federal Court gave his award according to which 60% of the total assets were to go to the Province of West Punjab in Pakistan and 40% thereof to the Province of East Punjab in India.

With respect to the stock supplied to the appellant, the appellant made certain payments to the respondent, and the respondent, State of Punjab, sued the appellant for the balance. The appellant, while denying liability, also contended that the liability if any, was to the extent of 40% only of the amount due. The trial court substantially decreed the suit. On appeal, the High Court reduced the amount payable by the appellant to the respondent.

In appeal to this Court.

HELD : (1) It could not be contended by the appellant that the respondent had no right to sue on the basis that the rights under the contract accrued under cl. 8(3) of the Governor-General's Order, in favour

A of the Government of West Punjab in Pakistan. It is cl. 2(a) of the Governor's Order that applies to the contract. The clause deals with contracts with continuing obligations. In the period when the contract of agency was subsisting it created the relationship of principal and agent between the contracting parties, and the relationship imposed mutual obligations. The appellant was bound to render the service of acting as a clearing agent and of purchasing and selling foodgrains for the Province
B of Punjab. The contract was not a completed contract, but one which imposed the *continuing* obligation of rendering the service of an agent on the appellant. Therefore, cl. 2(d) of the Governor's Order applied and that clause itself provided for the bifurcation of a single and indivisible contract into two separate contracts. [588C-F; 591A]

(2) The fields of operation of the two Orders, the Governor-Gene-
C ral's Order and the Governor's Order did not overlap and therefore the question of one prevailing over the other did not arise. [589G]

(3) Clause 8(3) of the Governor'General's Order dealt with the contracts which formed the subject-matter of s.177(1) of the Government of India Act, 1935, that is, with contracts made by or on behalf of the Secretary of State in Council for the purposes of the Province of Punjab before the Government of India Act, 1935, was brought into force. It has nothing to do with the contracts made by or on behalf of the Governor
D of Punjab under s.175(3), Government of India Act, 1935, *after March* 1937. Clause 2(d) of the Governor's Order dealt with such contracts made by or on behalf of the Governor under s. 175(3). [589A-G]

State of Tripura v. *The Province of East Bengal,* [1951] S.C.R. 1, *State of West Bengal* v. *Shaikh Serajuddin Batley* [1954] S.C.R. 378, *Union of India* v. *Chaman Lal Leena,* [1957] S.C.R. 1039, *State of West*
E *Bengal* v. *Brindaban Chandra Pramanik,* A.I.R. 1957 Cal. 44 and *Scindia Steam Navigation Co. Ltd.* v. *Union of India,* [1962] 3 S.C.R. 412. explained.

(4) (a) The arbitration award which brought about a financial adjustment between East Punjab and West Punjab did not deal with the liabilities of third parties, like the appellant, to one or the other of the Provinces. It did not direct that any amount due by a third party could be recovered only to the extent of 40% of his liability. [591F-G]

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(b) There was no settlement between the appellant and the respondent that the former should recover only 40% of the amount due from the appellant. No such settlement could be spelt out from the correspondence between the parties. There was only a proposal to the appellant for settlement of the claims of the respondent and the sellers but the appellant, instead of unconditionally accepting the proposal, made an alternative proposal, with the result that there was no settlement between
G the parties. There was no progress beyond he stage of proposal and counter-proposal. [591G-H; 592G; 593A-F]

(c) The appellant could not raise the pleas that the respondent had represented to the appellant that it would recover only 40% of the amount debited to the account of the erstwhile Province of Punjab, and hence was estopped from claiming a higher amount because no such plea was raised in the written statement nor was an issue framed, nor were argu-
H ments advanced in the trial court and High Court. The plea was not raised even in the statement of case in this Court. [593F-H; 594C-D]

(d) But the minutes of meeting held between the representatives of the appellant and the respondent showed that the respondent had decided

to claim only 40% of the amount debited to the account of Province of Punjab before March 1948. The respondent could not contend that the decision to recover only 40% was subject to the condition that the appellant should pay the sellers. The minutes of the meeting can be split into two parts: (1) limiting the appellants' liability to 40%, and (ii) payment of the amounts due to the sellers by the appellant; but the first part is not dependent on the performance of the second part. The letters and subsequent conduct indicate that in spite of the absence of consent by the appellants the respondent was paying the sellers from the amount with it to the credit of the appellant, showing, that instead of insisting upon payment to the sellers, the respondent was acting according to the appellant's proposal that the sellers should be paid by the respondent from the money with it to the credit of the appellant. Therefore, the respondent had decided to recover only 40% and no more. It amounted to a remission of a part of the debt due by the appellant under s.63 of the Contract Act, 1872 and it is not necessary that such remission should be supported by consideration. Since, admittedly more than 40% of the total liability had already been paid to the respondent, nothing was due from the appellant and hence the appeal should be allowed.

[595A-B, G-H; 596A-C, F-H; 597A–B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 909 of 1967.

Appeal by certificate from the judgment and decree dated April 1, 1966 of the Punjab High Court at Chandigarh in Regular First Appeal No. 216 of 1960.

D. V. Patel, P. C. Bhartari, J. B. Dadachanji, O. C. Mathur, and *Ravinder Narain,* for the appellant.

V. M. Tarkunde, Harbans Singh and *R. N. Sachthey,* for the respondents.

The Judgment of the Court was delivered by

DWIVEDI, J. The factual framework of this appeal is set spatically in the undivided geography of India during the British period and temporarily during 1944 to June 1947. There are three appellants :

(1) Messrs Hari Chand Madan Gopal and Co., (2) Hari Chand and (3) Sri Ram. The first appellant is a partnership firm, of which the other two appellants are partners. Some time in 1944 there was concluded an agreement between the first appellant and the Government of the Province of Punjab (hereinafter called the Undivided Punjab). By that agreement, the first appellant agreed to act as a Clearing Agent (Foodgrains) for the sale and purchase of foodgrains on behalf of the Undivided Punjab on payment of a commission. The first appellant obtained stock of rice from the Rationing Controllers of the districts which were after the Partition of India in August 1947 included in the State of East Punjab and are now included in the State of Punjab. According to the State of Punjab (the plaintiff-respondent) the

A price of the stock supplied by the said Rationing Controllers was Rs. 12,15,178/4/11. The stock was supplied in May and June, 1947. The first appellant sold the said stock to persons in Delhi and the United Provinces (now called Uttar Pradesh). The plaint admits the receipt of three amounts : (1) a sum of Rs. 2,91,817/13/11½, (2) a sum of Rs. 2,67,963/10/1, collected B from various purchasers in Delhi and Uttar Pradesh to whom the first appellant had sold the stock, and (3) a sum of Rs. 20,000/- paid by the first appellant. The aggregate of receipts thus comes to Rs. 5,79,841/8/½. Deducting the aggregate amount from the total sum due, there still remains an outstanding of Rs. 6,03,897/-/9. It is alleged in paragraph 9 of the plaint that on July 29, C 1953, the appellants admitted their liability to pay the said amount.

The third appellant did not enter appearance. The case proceeded ex-parte against him in the trial court.

The appellants Nos. 1 and 2 filed their first joint written state- D ment on June 15, 1957. They pleaded that all rights and liabilities under the agreement of 1944 have accrued in favour of the Government of West Punjab which forms part of Pakistan and the respondent has no right to sue. They also pleaded that in the meeting held on July 28 and 29, 1953 between the representatives of the respondent and the first appellant, it was admitted on be- E half of the respondent that the first appellant, was liable to pay only 40% of the total amount. It is alleged that according to the respondent the 40% of the total liability was Rs. 5,00,085/12 but according to the first appellant it was only Rs. 47,327/6/9. As the plaintiff has admitted in the plaint to have received Rs. 5,79,841/8/½ from and on behalf of them, there was in credit in favour of the first appellant a sum of Rs. 59,695/12/½. The F written statement adds that according to the first appellant the credit amount would be Rs. 86,510/1/3. It is asserted in the written statement that nothing was due by the appellants. The written statement denies that the appellants Nos. 1 and 2 admitted their liability to pay any amount in the meeting held on July 29, 1953.

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The appellants Nos. 1 and 2 filed another written statement on June 2, 1959. In this written statement they reiterated their pleas in the first written statement. They also added that the Award of the Chairman of the Arbitration Tribunal, dated March 17, 1944 determined the ratio of financial adjustment between H East Punjab and West Punjab in respect of assets and liabilities of the Undivided Punjab as 40 : 60 and that accordingly the respondent was entitled only to 40% of the amount due by the appellants.

The trial court decreed the suit of the respondent for a sum of Rs. 5,53,897/-/9. On appeal the High Court of Punjab reduced the decretal amount to Rs. 3,23,897/-/9. Not feeling satisfied with the judgment and decree of the High Court the appellants Nos. 1 and 2 have preferred this appeal.

It is now necessary to set out the legal background against which two of the appellants' arguments need to be examined. On July 18, 1947, the British Parliament enacted the Indian Independence Act, 1947. Section 1(2) defines the expression "appointed day" as the 15th of August, 1947. On the said date there were born two independent Dominions, the Dominion of India and the Dominion of Pakistan. The Undivided India was partitioned between the two Dominions. Consequently, the Undivided Punjab was split up into two Provinces, one called the Province of West Punjab and the other the Province of East Punjab. Section 9(1)(b) enabled the Governor-General to make Orders for dividing between the new Dominions, and between the new Provinces rights and liabilities of the Governor-General in Council and the relevant Provinces which were to cease to exist." Sub-section (2) of s. 9 provided that the power conferred on the Governor-General by s. 9(1)(b) could, in relation to their respective provinces, be exercised also by the Governors of the provinces which would cease to exist on the appointed date.

On August 14, 1947, the Governor-General issued, in exercise of his power under s. 9(1)(b), an Order called the Indian Independence (Rights, Property and Liabilities) Order, 1947 (hereinafter called the Governor-General's Order). It came into force at once. Clause 3(1) of the Order provided that the provisions of the Order related to the initial distribution of rights, property and liabilities consequential on the setting up of the Dominions of India and Pakistan. The Order would have effect subject to any award that might be made by the Arbitration Tribunal. Clauses 8(3) is important for our purposes and is reproduced *in* extenso :

> "8(3) Any contract made on behalf of the Province of the Punjab before the appointed day shall, as from that day—
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> (a) if the contract is for purposes which as from that day are exclusively purposes of the Province of East Punjab, be deemed to have been made on behalf of that Province instead of the Province of the Punjab, and
>
> (b) in any other case be deemed to have been made on behalf of the Province of West Punjab instead of the Province of the Punjab;

A and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Province of East Punjab or the Province of West Punjab, as the case may be."

B On the same day, the Governor of the Undivided Punjab issued an Order under s. 9(2). The Order is called the Punjab Partition (Contracts) Order, 1947 (hereinafter called the Governor's Order). The second paragraph in the preamble to the Order recited that "whereas it was necessary to make provision for division between the two new Provinces of the rights and obli-
C gations of the Governor of the Punjab in respect of contract, deeds, covenants and all other matters hereinafter referred to", accordingly the Governor was making the Order. The material part of Clause 2(d) of the Order, which is important for this case is set out here :

"2. With effect from the appointed day every con-
D tract made, deed executed or covenant entered into, by or on behalf of the Governor of the Punjab in accordance with section 175 of the Government of India Act, 1935, shall, for all purposes, in so far as it relates to :

(d) services to be rendered, in or for the benefit of
E areas situated, within both the new Provinces, be deemed to have been made, executed or entered into with the West Punjab Province and the East Punjab Province, as two separate contracts, deeds or covenants having effect respectively only in relation to such services as are to
F be rendered in, or for the benefit, of the West Punjab Province or the East Punjab Province; and ....."

The Governor of the Undivided Punjab issued another Order called the Punjab Partition (Apportionment of Assets and Liabilities) Order, 1947. Clause 6 of the Order provided that there
G would be a general financial settlement between the two new Provinces, West Punjab and East Punjab in regard to all assets and liabilities of the Undivided Punjab as they stood immediately before the appointed day. It further provided that any award of the Arbitrator given under Cl. 3 or Cl. 4 of the Order would be taken into account in making general financial settlement. The
H two new Provinces did not arrive at any agreement regarding financial settlement. So the Chief Justice of the Federal Court was appointed the Arbitrator. He gave his Award on March 17, 1948. According to the Award, 60% of the total assets were to

go to the Province of West Punjab and 40% thereof to the Province of East Punjab. A

The first argument of counsel for the appellants is developed in this way : Clause 2(d) of the Governor's Order deals with a contract with a continuing obligation and not with a completed contract. The contract of agency between the appellants and the Undivided Punjab was a completed contract. Accordingly it was not governed by the Governor's Order. It was governed by cl. 8(3) of the Governor-General's Order. Clause 2(d) of the Governor's Order dealt with any contract made for "services to be rendered". Obviously clause 2(d) dealt with contracts with continuing obligations. The written contract in the present case is not on record, but it is admitted that the contract was subsisting during May and June, 1947 when the appellants took stock of rice from the Rationing Controllers of the districts which fell into the new Province of East Punjab and are now comprised in the Province of Punjab. In the period when the contract of agency was subsisting it created the relationship of principal and agent between the contracting parties. That relationship imposed mutual obligations on them. The appellants were bound to render the service of acting as a clearing agent and of purchasing and selling foodgrains for the Undivided Punjab. The services were to be performed as long as the contract remained in force. It cannot accordingly be said that the contract between the appellants and the Undivided Punjab was a completed contract. On the other hand, it was a contract which imposed a continuing obligation of rendering the services of an agent on the appellants. In the result, cl. 2(d) of the Governor's Order would apply to the contract. B C D E

The next argument is that Governor-General's Order and the Governor's Order occupied the same field. On the analogy of s. 107 of the Government of India Act, 1935, the former Order would prevail over the latter Order. Counsel has cited a number of cases in support of this argument. But it is not necessary to refer to them as we are of opinion that the two Orders did not over-lap. They operated in different fields. Clauses 8(2), (3) and (4) of the Governor-General's Order dealt with any contract made "on behalf of the Province of West Bengal", "the Province of Punjab" and the "Province of Assam" before the appointed day. Clauses 2, 3, 4 and 7 of the Governor's order dealt with various contracts "made by or on behalf of the Governor of Punjab in accordance with s. 175 of the Government of India Act, 1935", or rights and obligations of the Governor arising under those contracts. The aforesaid difference in the phraseology of the two Orders is purposive. The phrase "on behalf of the Province of Punjab" in Cl. 8(3) of the Governor-General's Order F G H

A shows that the contracts dealt with in that clause were the contracts which formed the subject-matter of s. 177(1) of the Government of India Act, 1935. Section 177(1) provided that any contract made before the commencement of Part III of the said Act by or on behalf of the Secretary of State in Council, would B from that date, if made for purposes which would after the commencement of Part III of the Act be purposes of the Government of a Province, have effect as if it had been made "on behalf of that Province" and reference in any such contract to the Secretary of State in Council would be construed accordingly. According C to s. 179(1) of that Act, such a contract could be enforced in a suit against the province concerned. So clause 8(3) of the Governor-General's Order dealt with contracts made by or on behalf of the Secretary of State in Council for purposes of the Punjab Province before March 1937 when Part III of the Government of India Act, 1935 was brought into force. Clause 8(3) has noth- D ing to do with the contracts made by or on behalf of the Governnor of Punjab under s. 175(3) of the Government of India Act, 1935, after March 1937. Clause 2(d) of the Governor's Order dealt with the contracts made by or on behalf of the Governor under s. 175(3). It would thus appear that the fields of opera- E tion of clause 8(3) of the Governor-General's Order and cl. 2(d) of the Governor's Order were distinct and discrete. They did not overlap and there was no conflict between them.

In the *State of Tripura* v. *The Province of East Bengal*(1), this Court construed the phrase "any liability in respect of any F actionable wrong other than breach of contract" in cl. (1) of the Governor-General's Order as including a liability to be restrained by injunction from completing what was a wrongful or unauthorised act already commenced. The question that we are called upon to decide in this case was not considered in that case. G Counsel laid stress on the Court's remark that "a wide and liberal construction, as far as the language used would admit, should be placed upon the terms of the order so as to leave no gap or lacuna in relation to the matters sought to be provided for." It is difficult to understand how this remark helps the appellants on account of the construction that we are putting on the language H of clause 8(3) of the Governor-General's Order. In the *State of West Bengal* v. *Shaikh Serajuddin Batley*(2), the Province of

(1) [1951] S. C. R. 1. (2) [1954] S. C. R. 378.

Bengal took certain premises on lease on February 6, 1947. It agreed to pay a monthly rent of Rs. 1800/-. The purposes for which the lease was entered into were exclusively the purposes of West Bengal after August 15, 1947. It was held that the liability to pay the amount was not a "financial obligation" contemplated by cl. 9 of the Governor-General's Order and the Government of West Bengal was liable under cl. 8(2)(a) of the said Order to pay the rent which had accrued upto August 15, 1947. It does not appear that the Governor of the Province of Bengal had made an order of the nature of the Governor's Order in the present case. At any rate, the Court was not referred to any such order. On the contrary, at page 382 of the Report it is said that the Advocate-General of West Bengal fairly and frankly conceded that in the absence of anything else that case would be wholly covered by article 8(2)(a), but contended that by virtue of article 8(6) that article was to have effect subject to the provisions of article 9. It is thus clear that the case was decided on the concession made by the Advocate-General and the question that has arisen before us did not arise there. In *Union of India* v. *Chaman Lal Loona*(1), the contract was made on behalf of the Governor-General in Council and the question arising before us could not arise there. In *State of West Bengal* v. *Brindaban Chandra Pramanik*(2), certain paddy was requisitioned under the Defence of India Rules during the Second World War by the Province of West Bengal. The amount of compensation was assessed under rule 75-A of the Defence of India Rules. That amount was not paid by the Province of Bengal. After partition a suit was instituted against the Province of West Bengal. The High Court of Calcutta held that by virtue of cl. 10(2) of the Governor-General's Order, the Province of West Bengal was liable to pay the amount to the plaintiff whose paddy had been requisitioned. In that case also the High Court was not called upon to decide the question that arises before us. In the judgment there is no reference to any Order made by the Governor of the Province of Bengal. In *Scindia Steam Navigation Co. Ltd.* v. *Union of India*(3), the contract was made by the Governor-General in

A B C D E F G H

(1) (1957) S. C. R. 1039. (2) A.I. R. 1957 Cal. 44.

(3) [1962] 3 S. C. R. 412.

A Council. There the question that faces us could not arise. None of the aforesaid decisions assist the appellants in this case.

It is then submitted that the contract of agency between the appellants and the respondent was a single and indivisible contract and could not be split up at the will of the Government for
B the purpose of instituting a suit against the appellants. This argument is completely negatived by cl. 2(d) of the Governor's Order. Clause 2(d) provided that any contract made by the Governor of Punjab in accordance with s. 175 of the Government of India Act, 1935, in so far as it related, *inter alia,* to services to be rendered "in or for the benefit of areas situated within both the new Provinces, would be deemed to have been made, executed
C or entered into with the West Punjab Province and the East Punjab Province, as two separate contracts". Each such separate contract would have effect only in relation to "such services as are to be rendered in or for the benefit of the West Punjab or East Punjab Province". Obviously cl. 2(d) itself provided for the bifurcation of a single and indivisible contract into two sepa-
D rate contracts.

Lastly, it is submitted that the Government could recover only 40% of the total liability from the appellants. This argument had been put in several ways. Firstly, it is pointed out that the arbitration award of the Chief Justice of India, dated March 7,
E 1948 had distributed the total assets of the Undivided Punjab between the West Punjab and East Punjab in the ratio of 60 : 40. Consequently, the Government can recover from the appellants only 40% of the total dues found due by them. As admittedly the Government has recovered more than 40%, nothing remains due by the appellants. The trial court and the High Court did not accept this argument. We are also unable to accept it. The
F arbitration award brought about a financial adjustment between the West Punjab and East Punjab. It did not deal with the liabilities of third parties like the appellants to one or the other Province. It did not direct that an amount due by a third party could be recovered only to the extent of 40% of his total liability. According to the award, if more than 40% is recovered from the
G appellants, the excess over 40% would become payable by the Government to the West Punjab. Secondly, it is said that by virtue of a settlement between the Government and the appellants, the former can recover only 40% of the amount found due by the latter. The trial court and the High Court have found that there was no settlement between the parties, and we agree with them.
H The so-called settlement, is spelt out by the appellants from two letters, dated January 17, 1951. One of the letters was written by the Director of Food, Civil Supplies, Punjab to the first appellant and the other was a reply to it by the second appellant on

behalf of the first appellant. The subject-matter of the Director's letter is "settlement of accounts". The letter opens with the statement that "the question of settlement of claims of Government and all sellers against your agency has been discussed at length", in the presence of certain Government representatives and Hari Chand, the second appellant. The second paragraph of the letter pertinently states : "It appears that a settlement of these claims will be possible in the following manner :

(a) This Government should realise only 40% of the amount debited to the Joint Punjab account prior to March 1948 and the sellers on whose behalf the amounts have been realised by Government should be paid by the Clearing Agents through the Controller of Food Accounts and the balance amount adjudged by the Committee against the Clearing Agents may be paid by the Clearing Agents direct."

Paragraph 3 requests : "kindly confirm if you are agreeable to this method of settlement". It is stated that the actual details of the amounts due to the Government and to the sellers would be supplied to the appellants later "on receiving your acceptance as above". The second appellant in his reply letter said : "We hereby confirm the arrangements embodied in your letter..... subject to the following amendments .....(1) you shall be entitled to a realisation on the basis of 40% out of the amount realised by us on account of rice supplied by Rationing Controllers; (2) after disbursing the balance to sellers for whose supplies the amounts have been realised by you in our account, the balance shall be utilised for the settlement of the claims of other sellers against our agency."

It may be noted that in paragraph 3 of the written statement the appellants had taken the plea that the settlement of January 17, 1951 was "without prejudice". The phrase "without prejudice" suggests that they had accepted the settlement without prejudice to their rights. It is not a pleading that there was a firm settlement between the parties. It is evident from the Director's letter that he had only made a proposal to the appellants for the settlement of the claims of the Government and sellers. The proposal contained two essential and inseverable terms. The inference that the letter made a proposal to the appellant is supported by such phrases in the letter as "kindly confirm if you are agreeable to this method of settlement", and "on receiving your acceptance as above". The inseverable character of the two terms follows from such expressions as "the question of settlement of claims of Government and of sellers against your agency has been discussed," "and" a settlement of these claims will

A be possible in the following manner". Hari Chand's reply letter did not unconditionally accept the Director's proposal. Instead, he made an alternative proposal. According to the Director's letter, the Government could recover 40% of the amount debited to the Joint Punjab account prior to March 1948 : according to Hari Chand's reply the Government could recover 40% of the B amounts realised by the appellants on account of rice supplied by the Rationing Controllers. According to the Director's proposal, the appellants should pay the sellers on whose behalf certain amounts had been realised from purchasers by the Government. They should also pay the sellers to whom payments were to be made according to the decision of the Delhi Committee. Hari C Chand, on the other hand, suggested that excess over 40% recovered by the Government should be paid to the sellers for whom the Government has recovered the amounts and that the balance, if any, should be utilised in paying the remaining sellers. There is plainly substantial difference between the terms proposed by the Director and the alternative term proposed by Hari Chand. It has not been argued that the Government accepted the alter- D native proposal of Hari Chand. In the result, we are of opinion, that there was no settlement between the parties. The things did not move beyond the stage of proposal and counter-proposal. This inference is supported by three letters sent to the appellants by the Director, Food and Civil Supplies, the Controller of Food Accounts and the Director General, Food and Civil Supplies, E dated September 22, 1951, November 22, 1951 and September 18, 1952 respectively. In all these letters it is insisted upon that the appellants should settle the claims of the sellers. The appellants can derive no advantage from the word "settlement" in those letters. We are satisfied that the said word has been loosely used therein.

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Thirdly, it is said that as the Government had represented to the appellants that it would recover only 40% of the amount debited to the Joint Punjab account, it is now estopped from claiming any higher amount. This argument cannot be raised at this stage. The plea of estoppel was not taken by the appellants G in their two written statements filed on January 15, 1957 and June 2, 1959. No issue was framed on estoppel. No argument founded on estoppel was advanced by the appellants in the trial court and the High Court. The argument is not raised even in the statement of case filed by the appellants in this Court. As we are not allowing the appellants to raise the plea of estoppel at the stage of hearing, it is not necessary to deal with *Union of* H *India and others* v. *M/s Indo-Afghan Agencies Ltd.*(1) and

(1) [1968] 2 S. C. R. 366.

Century Spinning & Manufacturing Company Ltd. and another v. The Ulhasnagar Municipal Council and another(1). A

Fourthly, it is said that as the Government had decided to claim only 40% of the amount debited to the Joint Punjab account before March 1948, the Government cannot now recover more than that amount. While dealing with this argument, the B trial court said : "These letters and other letters on the file which have been referred to by the learned counsel for the defendants do show that the Government had taken such a decision". However, the trial court did not accept the argument that the Government could not claim more than 40%. It does not appear from the judgment of the High Court that this argument was recanvassed before it, for the judgment of the High Court does not C expressly deal with it. The argument is founded on the proceedings of the meeting held on July 28 and 29, 1953 in the office of the Controller, Food Accounts, at Simla. In the meeting the second appellant and the other partner Sri Ram were present on behalf of the first appellant. The other three persons who attended the D meeting were the Government representatives. One of them was the Deputy Controller, Food Accounts. The Deputy Controller, Food Accounts, explained the history of the controversy to the meeting. He said that the Government had been claiming 40% of the amount actually debited to the Joint Punjab account before March, 1948 and payment by the appellants of the claims of sellers for whom the Government had recovered certain E amounts from the consignees. Thereafter he stated the case of the appellants which was set forth in their reply letter of January 17, 1951. Then he stated that 40% of the amount actually debited to the Joint Punjab account came to Rs. 5,85,000/12/- according to the Government and Rs. 4,73,271/6/9 according to the appellants. He admitted that the Government has re- F covered two sums of Rs. 2,92,102/11/9 and Rs. 2,67,963/10/1 from and on behalf of the appellants. Thus the total recovery was admitted to be Rs. 5,59,781/8/½. Then he said that the net credit in favour of the Clearing Agents came to Rs. 59,695/12/1½ according to the Government and according to the Clearing Agents it was Rs. 86,510/1/3½. Thereafter he added that they G have "to settle all the accounts of all the sellers on whose behalf the Punjab Government has recovered the money from the consignees and the amounts found due to different sellers as per Delhi Committee proceedings by making cash payment to Government of the amount found short". He ended by saying that the appellants stated that they had settled the amounts of certain sellers and that they promised to settle the accounts of more H

(1) 1970] 3 S. C. R. 854.

A sellers by the third week of August, 1953. They were asked by him to bring the payees' receipts with them in support of payments made to sellers.

While examining the implications of the aforesaid minutes of the meeting, it is necessary to bear in mind three things. One, B it is clear from the letter of the Director General, Food and Civil Supplies, to the Secretary, Government of West Punjab dated March 31, 1948 that the Government of East Punjab had great sympathy for the pitiable plight of the appellants. The letter say that the Clearing Agents were unable to pay the amounts debited to the Joint account of the Punjab Government before March, C 1948, because they had been uprooted from West Punjab where they had huge property worth 27 lakhs in the shape of mills, agricultural lands and other movable and immovable properties, because large amounts were due to them from West Punjab Government on account of the supply of foodgrains by them, because there were also other dues payable to them on account of securities and shares in wholesale Pacca Ahrties Association and Syndi- D cate in West Punjab and because the commission due to them to the tune of Rs. 7 lakhs by Undivided Punjab was not being paid to them. It is said that on account of their financial difficulties the Government had decided that Rs. 12,55,214/6/3 payable by them should be debited to the Joint Account of the Undivided Punjab and that all recoveries in respect of those dues relating to E the pre-partition period and payable at Lahore should be credited to the Joint Account. Second, the Government was not legally liable to pay the sellers from whom the appellants had purchased rice. Shri H. S. Achreja, Secretary to the Governor, has deposed that there was "no legal liability of the Government to pay sellers, whose goods were supplied to the consignees through the sellers F at Shahdara. The Syndicate had filed a suit against the Government. That suit was dismissed." Third, the Government was likely to get mere 40% of the recovery from the appellants. Any recovery in excess of it was likely to benefit West Punjab. So the Government could afford to take a magnanimous decision without the likelihood of any loss to itself that only 40% of the amount debited to the Joint Punjab Account before March 1948, G should be recovered from the appellants.

According to counsel for the respondent, the minutes of the meeting would show that the decision to recover only 40% of the aforesaid amount was subject to the condition that the appellants should pay the sellers for whom the Government has already re- H covered certain amounts from the consignees. We are diffident to draw that inference from the minutes of the meeting held on July 28 and 29, 1953. It is important to notice the difference in the language of the Director's letter dated January 17, 1951 and

the minutes of the aforesaid meeting. The language of the former clearly evinces that payment to the sellers by the appellants was an essential term of the proposed settlement. The language of the minutes of the meeting does not show that payment to the sellers was a condition precedent to the limitation of recovery to 40%. The minutes of the meeting can be split up in two parts : (1) limiting the appellants' liability to 40%, and (2) payment of the amounts due to sellers by the appellants. The first part is not dependent on the performance of the second part as in the Director's letter of January 17, 1951. A B

This inference is supported by the subsequent conduct of the Government Officers. After January 17, 1951, the Government had sent letters to the appellants indicating that payment to sellers was an essential term of the proposed settlement of January 17, 1951. A similar letter was never sent to the appellant after July 28-29, 1953. On the other hand, letters of the Director, Food and Civil Supplies, dated April 21, 1954 and May 11, 1954 show that the Government was paying the sellers from the amount with it to the credit of the appellants and asking them to give their consent to such payment. The Director, Food and Civil Supplies, sent five letters to the appellants on April 21, 1954. They are exhibits D-6 to D-11. In each of them he has stated that if no reply were received within a fortnight, it would be presumed that the appellants had agreed to the payment being made to the sellers mentioned in the letters. The appellants replied to those five letters on May 3, 1954. They said that unless a detailed account of their post-partition dealings was made available to them, it would not be possible to reply to the Director's letters. The Director was requested to send a complete copy of the accounts. In his reply letter of May 11, 1954, the Director said that the appellants had already been given details of the accounts in the meeting of July 28 and 29, 1953. He concluded by saying that if no reply was received by him up to May 20, 1954, it would be presumed that they had no objection to the payment being made to the sellers and that "this office would proceed to make payment to the parties concerned." These letters indicate that in spite of the absence of consent by the appellants, the Government was paying sellers from the amount with it to the credit of the appellants. These letters show that instead of insisting upon payment to the sellers by the appellants, the Government was accepting and acting according to the appellants' proposal of January 17, 1951 that the sellers should be paid by the Government from the money with it to the credit of the appellants. C D E F G

In view of the foregoing discussion, we are of the view, that the Government had decided to recover only 40% and no more. The Government's decision would amount to remitting a part of the debt due by the appellants. Under s. 63 of the Contract Act, H

A a promisee can remit a promise in part. It is not necessary under the Contract Act that such remission should be supported by consideration. If the decision of the Government amounts to remitting a part of the debt, as we think, then the Government cannot seek to recover more than 40%. Admittedly more than 40% of the total liability has already been paid to the Government.
B Therefore nothing remains due by the appellants.

Accordingly we allow the appeal and dismiss the suit of the Government. In the peculiar circumstances of this case, the appellants shall get no costs throughout.

V.P.S. *Appeal dismissed.*