
(1972) 04 MP CK 0004
In the Madhya Pradesh High Court
Case No : M.P. No. 122 of 1972

C.P. Syndicate (p.) Ltd.

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 25-04-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Government Grants Act, 1895 — Section 2
Mines and Minerals (Development and Regulation) Act, 1957 — Section 13(1), 26, 26(2), 26(3), 9
Transfer of Property Act, 1882 — Section 106

Citation : (1972) J LJ 857

Hon'ble Judges : Bishambhar Dayal, C.J; Shiv Dayal Shrivastava, J

Bench : Division Bench

Advocate : D.M. Dharmadhikari, for the Appellant; J.P. Bajpai, D.A.G. for State, K.K. Adhikari, for Intervener, for the Respondent

Final Decision : Dismissed

Judgement

Shivdayal, J

1 This is a petition under Article 226 of the Constitution seeking a writ of mandamus not to interfere with the working of the Kali-chhapar mates by the petitioner, a lease of which had been granted to the petitioner but which was cancelled by an order of the State Government dated March J, 1971.

2. In the year 1963, mining lease was granted to the petitioner-company for extraction of mineral coal for a period of 30 years. According to clause 2 of Part V of the lease, the petitioner was required to pay royalty every six months, that is, on the 15th March and 15th September, and also dead rent six mothly, that is, on the 15th January and 15th July.

3. On November 9, 1971, the Collector, Chhindwara, issued a notice to the petitioner-company in the name of the Governor and in exercise of the power delegated to him by "Natural Resources Department Notification No. 824-4045-

XII, dated 12th February 1970", requiring it to comply with the following within 60 days from the receipt of that notice :-

(1) To pay the outstanding amount of royalty Rs. 64, 327.64 P. and dead rent Rs. 2,490. 31 P. and

(2) To remedy the breach committed by the petitioner company, because it had closed the mining operations without obtaining prior permission of the State Government and had not carried out the mining operations in a proper, skillful and workman-like manner and had thus committed breach of rule 27(1)(f) of the Mineral Concession Rules, 1960.

It appears that some payments were made by the petitioner-company and the breach was remedied only in part.

4. By order dated March 3, 1971, the Government of Madhya Pradesh cancelled the lease saying that an amount of Rs. 40,318.07 P. still remained unpaid and the breach had also been remedied only in part.

5. Three contentions have been raised before us. It is first contended that the lease could not be cancelled inasmuch as the Collector was not competent to issue the notice dated November 9, 1971.

6. Section 13(1) of the Mines and Minerals (Regulation and Development) Act, 1957, (hereinafter called the Act), confers rule making powers on the Central Government. It reads as follows :-

"The Central Government may, by notification in the Official Gazette, make rules for regulating the grant of prospecting licenses and mining leases in respect of minerals and for purposes connected therewith."

In exercise of the above powers, the Central Government has made rule called "The Mineral Concession Rules, 1960" (hereinafter called the Rules). Rule 27(5) provides as follows:-

"If the lessee makes any default in payment of royalty as required by Section 9 or commits a breach of any of the conditions other than those referred to in sub-rule (4), the State Government shall give notice to the lessee requiring him to pay the royalty or remedy the breach, as the case may be, within 60 days from the date of the receipt of the notice and if the royalty is not paid or the breach is not remedied within such period, the State Government may, without prejudice to any proceeding that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."

Section 26(3) of the Act reads as follows :-

"Any rules made by the Central Government under this Act may confer powers and impose duties or authorise the conferring of powers and imposition of duties upon any State Government of any officer or authority subordinate there to."

Thus, the State Government has power to issue a notice. That power can be

delegated u/s 26(2) of the Act. It reads thus :-

"The State Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act may in relation to such matters and subject to such conditions, if any as may be specified in the notification, be exercisable also by such officer or authority subordinate to the State Government as may be specified in the notification."

In exercise of the powers conferred by sub-section (2) of section 26 of the Act, the State Government directed that the power to issue notice exercisable by it under sub-rule (5) of rule 27 of the Rules, "shall be exercisable also by the Collectors". This notification No. 824-4045 XII dated February 12, 1970, was published in the MP. Rajpatra, Part I, dated August 1, 1970.

7. From the above provisions, the position is abundantly clear that the Collector had the power to issue the notice under rule 27(5) of the Rules.

8 Shri D.M. Dharmadhikari, Learned Counsel for the petitioner, strenuously urged that the State Government can delegate only those powers which are exercisable by it "under the Act", but not "under the Rules"; Emphasis is laid on the words of sub-section (2) of section 26 and on the omission of the words "'and the rules made thereunder" after the words "under this Act." We see no force in this contention. When rules are made in exercise of powers conferred by an Act, for all purposes of construction or obligation, they must be treated as if they are in the Act, that is they have the same effect as if they are contained in the Act itself. It is stated in Maxwell on Interpretation of Statutes (10th Edition), at page 50, as follows : -

"Instruments made under an Act.....are to be of the same effect as if contained in the Act, and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise, exactly as if they were in the Act."

(Wicks v. D.P.P. 1947 AC 362)

9. In The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, , their Lordships considered the rules made under the Police Act and held as follows :-

"The statutory rules cannot be described as or equated with, administrative directions. If so, the Police Act and the rules made there-under constitute a self contained Code providing for the appointment of police officers and prescribing the procedure for their removal."

Their Lordships referred to the above passage in Maxwell. The expressions "by the Act" and "under the Act" are frequently used in enactments. The words "by the Act" refer to the provisions directly enacted in the statute itself and are gatherable from its express language or by necessary implication, The words "under the Act" refer to what is not directly to be found in a statute itself, but is to be found elsewhere by virtue of powers given in the Act, enabling this to be done. The words "by the Act" refer to what is directly done by the enactment,

while the Words "under the Act" indicate what is done indirectly, that is, by rule making authorities which are vested with those powers by the Act. See AIR 1949 136 (Privy Council) , and G. Narayanaswami Naidu Vs. C. Krishnamurthi and Another, , which were approved by their Lordships of the Supreme Court in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, Their Lordships have laid down thus : -

"A power conferred by a bye-law is not one conferred "by the Act" for in the context the expression "conferred by the Act" would mean "conferred expressly or by necessary implication by the Act itself..... The meaning of the words "under the Act" is well known, "By" an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words "under the Act" would in that context signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a subordinate law-making authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act."

10. Therefore, in our view, statutory rules framed under an Act, constitute part and parcel of the Act itself so that when an act is authorised to be done under the Rules framed under the Act, it is also authorised to be done "under the Act". Moreover, a reference to a power "under the Act" includes a power conferred indirectly by a subordinate legislation, e.g., Rules framed under that Act, so that a power conferred under the rules can be exercised as if it is conferred by the Act. Even if the words "by the Act" may be restricted to refer to something which the Act itself empowers, the expression "under the Act" is wide enough to embrace powers conferred and duties imposed by the rules framed under the Act.

11. It must now be said that the words "under this Act" employed in section 26(2) of the Act clearly refer to the subordinate legislation, i.e., the Mineral Concessions Rules, 1960, which were made in exercise of the powers conferred by the Act.

12. Accordingly, we hold that the Collector was competent to issue the notice under rule 27(5) of the rules by virtue of the Notification No. 824-4045-XII, dated February 12, 1970, issued by the State Government in exercise of the powers conferred by section 26(2) of the Act.

13. We shall look at this point from another angle also. Clause 2 of the Part IX of the lease also provides for a notice to be given by the State Government. This condition being contractual, the State Government can undoubtedly authorise any one as its agent to do the act. Therefore, the Collector could be authorised to issue a notice on behalf of the State Government. In the present case, as a matter of fact, the notice (Annexure "D") was issued by the Collector on behalf of the Governor of Madhya Pradesh. The order cancelling the lease was passed

by the State Government itself.

14. Looked at from any angle, the first contention must be rejected.

15. It was then contended for the petitioner that the notice issued to the petitioner did not strictly comply with the requirements of section 106 of the Transfer of Property Act. There is no substance in this contention. Section 2 of the Government Grants Act, 1895, exempts Government Grants from the operation of the Transfer of Property Act It reads as follows :-

"Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favour of any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed".

The second contention must also be rejected.

16. The third contention is that the Government waived its right of cancelling the lease because of forfeiture, when it accepted part payment of Rs. 5.021/- on January 31, 1972 Learned Counsel relies upon the general law of waiver. Waiver is in intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. To constitute waiver, there must be clear intention of the lessor to continue the lease and waive his right of forfeiture. In *Bashesar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, , Mr. Justice S.K. Das succinctly said : -

"The generally accepted connotation is that to constitute "waiver", there must be an intentional relinquishment of a Known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege."

We are deeply of the view that where a payment becomes due and it entails the consequence of forfeiture of a lease, then the liability of forfeiture is in addition to the liability of payment. Therefore, after a notice is given in exercise of the right of forfeiture, if any payment, wholly or in part, of the amount due is made by the notice and accepted by the person giving notice, it per se does not amount to waiver of the right of forfeiture.

17. One of the elements necessary to constitute waiver is an intention on the part of the lessor to treat the lease as subsisting. In order that the acceptance of rent may amount to waiver of the notice to quit, the rent accepted must be for a period after the notice. Acceptance of rent due from the tenant for a period falling prior to the date on which the tenant has to vacate cannot entail a deprivation of the lessor's right of ejectment. The reason is that the lessee is still liable to pay the arrears of rent. Hence, merely because the lessee pays the arrears, there can be no inference that the lessor entitles him to continue the tenancy.

18. Applying the above general law of waiver to the present case it must be held that the petitioner's contention is clearly untenable. It is not denied that the amounts as specified in the Collector's notice were due to the State Government and were payable by the petitioner company. That being so, if any payment was accepted by the Government, it was because the Government had a right to recover that amount. That right was separate and independent of the right to cancel the lease because of default. The latter right accrued to the State in addition to the former right. Acceptance after notice, of money which had fallen due before notice, did not by itself constitute any intentional relinquishment of the right to cancel the lease.

19. This petition is accordingly dismissed with costs. Counsel's fee Rs. 250/- , if certified.