
(1964) 04 MP CK 0002

In the Madhya Pradesh High Court

Case No : First Appeal No. 85 of 1960

Firm Bhagwandas Shobhalal Jain, a Registered firm and
Another

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 29-04-1964

Acts Referred:

Civil Procedure Code, 1998 — Order 2 Rule 2
Contract Act, 1872 — Section 73
Limitation Act, 1908 — Article 115
Sales of Goods Act, 1930 — Section 2

Citation : AIR 1966 MP 95 : (1966) ILR (MP) 913 : (1965) 10 MPLJ 809

Hon'ble Judges : T.P. Naik, J;S.P. Bhargava, J

Bench : Division Bench

Advocate : B.L. Seth, for the Appellant; R.J. Bhawe, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Naik, J.

This is a first appeal by the plaintiff, whose suit for damages for a breach of contract assessed by him at Rs. 1,80,000/-against the State of Madhya Pradesh has been dismissed by the Additional District Judge, Rewa.

The suit of the plaintiff was inter alia, based on the following allegations: that the plaintiff was a registered partnership firm with Bhagwandas and Shobhalal as its managing partners, carrying on business of manufacture and sale of bidis at Mohalla Chameli Chauk, Sagar; that the plaintiffs were a lessee of the then Charkhari State for collecting tendu leaves from its Isanagar Pargana for the period ending 30-9-1949; that after Independence, the State of Charkhari merged with the neighbouring States of Bundelkhand and Baghel-khand to form a United State of Vindhya Pradesh under a popular Government; that on 4-12-1948 the plaintiffs applied to the Minister for Commerce and Industries for

extension of the period of the aforesaid lease by another five years on a consideration of Rs. 1,000/- per annum; that on 11-12-1948, a lease was sanctioned in their favour as prayed for by them under the signature of Shri Mohanlal, Secretary, Commerce and Industries Department, Government of Vindhya Pradesh; and on 14-12-1948, on their paying Rs. 1,000/- in advance, a lease was executed in their favour by the Conservator of Forests, in respect of the Isanagar Pargana of the old Charkhari State for the period 1-10-1949 to 30-9-1954; that on 26-9-1949, the Government of the United State of Vindhya Pradesh unilaterally cancelled the lease on the ground that it had been granted "without proper authority" and "in contravention of past practice;" that an application dated 8-10-1949 to the Chief Minister of United State of Vindhya Pradesh protesting against the aforesaid cancellation was rejected by him; that the area comprising the forests of Isanagar Pargana of the old Charkhari State was redistributed into various forest circles which were then re-auctioned on 19-11-1949 for the year 1949-50; that their civil suit against the then State Government of Vindhya Pradesh for injunction and damages was dismissed by the Judicial Commissioner, holding, inter alia, that though the lease in favour of the plaintiffs was valid, they had not been able to prove damages sustained by them; that of the re-grouped circles, some were re-auctioned on 23-11-1950 for the year 1950-51, and thereafter again for three years on 22-10-1951, which the plaintiffs themselves purchased for a total consideration of Rs. 59,004/-; that of the rest of the circles, they were wrongfully deprived of the theka and the profits arising therefrom; and that though the total loss thus suffered by them was very much more, they claimed only Rs. 1,80,000/- from the State of Vindhya Pradesh towards damages.

The defendant, Government of Vindhya Pradesh contested the claim, inter alia, contending that the lease in favour of the plaintiffs for the period 1-10-1949 to 30-9-1954 was validly cancelled; that the suit was barred by Rule 2 of Order II of the Code of Civil Procedure; that the suit was also barred by time; and that the amount of damages claimed could not be said to relate only to the Isanagar Pargana of the old Charkhari State. The amount of damages claimed was, therefore, denied. It was further contended that the Government of Vindhya Pradesh could not be held liable for the cancellation of the lease done by the then United State of Vindhya Pradesh.

On the coming into existence of the new State of Madhya Pradesh, its name was substituted as defendant in place of the "Union of India", Part C State of Vindhya Pradesh.

The trial Court dismissed the suit, inter alia, holding-

"(1) The cancellation of the lease by the then Government of Vindhya Pradesh was unauthorized, and consequently the defendant would be liable as on a breach of contract.

(2) The cancellation of the lease could not be called an act of State, and it could,

therefore, be challenged in a Court of law.

(3) The suit was barred under Rule 2 of Order II of the Code of Civil Procedure, as the cause of action for the suit as well as for the earlier suit of 1950 being one and the same, the plaintiff ought to have claimed all the reliefs flowing from it in the former suit.

(4) The suit was barred by time under Article 115 of the Limitation Act, as it was filed more than three years after the date on which the contract had been cancelled by the then United State of Vindhya Pradesh.

(5) If the plaintiff could be held entitled to damages, then the amount of damages proved, to which they would be entitled, would be Rs. 87,170/-.

The first question that arises for consideration in this appeal is whether the State of Madhya Pradesh could be held liable in damages for a breach of contract which admittedly was committed by the then United State of Vindhya Pradesh. This point, though raised in the written statement, was not properly appreciated by the learned trial Judge, because, it may be, that on account of a clerical mistake in paragraph 11 of the written statement, where this point was raised, its importance was not fully appreciated.

The objection, in short, may be stated as follows. The contract of lease in question was entered into on or about 14-12-1948 by the plaintiffs with the Government of the United States of Vindhya Pradesh. Its cancellation was also done by the United States of Vindhya Pradesh on or about 26-9-1949. Thereafter, " on 26-12-1949, the United States of Vindhya Pradesh was dissolved with the merger of the integrating States with the Union of India; and on 26-1-1950, a new State called the State of Vindhya Pradesh, a centrally administered area as a Part C State under the Constitution of India, came into being. The Government never by legislation, agreement, or otherwise, expressly or impliedly, recognized the rights of the plaintiffs in the lease in question: and consequently no liability in respect of its breach could be fastened on it by this suit. The Part C State of Vindhya Pradesh was succeeded by the new State of Madhya Pradesh which also did not expressly or by implication recognize any such rights as could fasten on it any responsibility in respect of any breach by the then Government of the United States of Vindhya Pradesh.

In *Maharaja Shree Umaid Mills Ltd. Vs. Union of India (UOI)*, at pp. 960 and 961, their Lordships of the Supreme Court said:

"It is now well settled by a number of decisions of this Court that an act of State is the taking over of sovereign powers by a State in respect of territory which was not till then a part of it, by conquest, treaty, cession or otherwise, and the municipal courts recognized by the new Sovereign have the power and jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognize or acknowledge by legislation, agreement or otherwise; and that such a recognition may be express or may be implied from

circumstances. The right which the appellant claims stems from the agreement entered into by the Ruler of Jodhpur. The first question is, did the succeeding Sovereign, the United State of Rajasthan, recognize the right? The United State of Rajasthan had in no way affirmed the agreement.. .. So far as the Part B State of Rajasthan is concerned, there is nothing in the record to show that it had affirmed the agreement. Neither the United State of Rajasthan nor the State of Rajasthan affirmed the agreement What then is the position? If the new Sovereign, namely, the United State of Rajasthan or the Part B State of Rajasthan, did not affirm the agreement so far as exemption from the excise duty or Income Tax was concerned, the appellant is clearly out of court."

What is an act of State has now been settled by a string of authorities, as also the effect of an act of State on the contractual rights of a person, with the ex-sovereign State.

Defining the expression "act of State," the Supreme Court in *D.D. Cement Co. Ltd. v. Income Tax Commissioner* AIR 1958 SC 815 at pp. 822 and 823 said:

"The expression "act of State" is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession. Vide *Vajesinghji Joravar Singhji v. Secretary of State* 51 IA 357 : (AIR 1924 PC 216 and *Thakur Amar Singhji Vs. State of Rajasthan*, : (*Thakur Amar Singhji Vs. State of Rajasthan*, at p. 523). And on principle, it makes no difference as to the nature of the act, whether it is acquisition of new territory by an existing State or, as in the present case, formation of a new State out of territories belonging to quondam States. In either case, there is establishment of new sovereignty over the territory in question, and that is an act of State.. .. When the sovereign of a State ----meaning by that expression, the authority in which the sovereignty of the State is vested, enacts a law which creates, declares, or recognizes rights in the subjects, any infraction of those rights would be actionable in the Courts of that State even when that infraction is by the State acting through its officers. It would be no defence to that action that the act complained of is an act of State, because as between the sovereign and his subjects there is no such thing as an act of State, and it is incumbent on his officers to show that their action which is under challenge is within the authority conferred on them by law. Altogether different considerations arise when the act of the sovereign has reference not to the rights of his subjects but to acquisition of territories belonging to another sovereign. That is a matter between independent sovereigns and any dispute arising therefrom must be settled by recourse not to municipal law of either State but to diplomatic action, and that failing, to force. That is an act of State pure and simple, and that is its character until the process of acquisition is completed by conquest or cession. Now, the status of the residents of the territories which are thus acquired is that until acquisition is completed as aforesaid they are the subjects of the ex-sovereign of those territories and thereafter they become the subjects of the new sovereign.

It is also well established that in the new set-up these residents do not carry with them the rights which they possessed as subjects of the ex-sovereign, and that as subjects of the new sovereign, they have only such rights as are granted or recognized by him. Vide *Secretary of State v. Bai Rajbai* 42 IA 229 : (AIR 1951 PC 59), 51 IA 357 : (AIR 1924 PC 216) (supra), *Secretary of State v. Rustam Khan* 68 IA 109 : (AIR 1941 PC 64) and *Asrar Ahmed v. Durgah Committee, Ajmer* AIR 1947 PC 1." Their Lordships also quote with approval the observations of Lord Dunedin in 51 IA 357: (AIR 1924 PC 216) (supra):

"When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties."

It is important to note that the aforesaid observations were made while repelling the contention that rights to properties which were granted to persons by ex-sovereigns by leases, jagirs or the like, could not be interfered with by the new sovereign, because these were guaranteed to them under the treaty entered into between the ex-sovereign and the new sovereign. In that case, the appellant had held certain lands from the Scindia of Gwalior under a grant. After the territory, where the lands were situate, had been ceded to the British Government by a treaty which provided for the recognition by the new sovereign of rights of the residents under existing leases, jagirs and the like, the British Government in violation of those rights proposed to lease the lands to them which was objected to by them on the ground that their rights could not be interfered with in the manner proposed to be done.

In *Cook v. Sprigg* 1899 AC 572, which was also cited with approval by the Supreme Court, the facts were that the ruler Pondoland in Africa had granted certain concessions in favour of the appellants and subsequently ceded those territories to the British Government; and the latter having declined to recognize those concessions, the appellants sued for a declaration of their rights thereunder. Negating the claim, the Lord Chancellor said:

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign----which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer."

"It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure."

In *The State of Saurashtra Vs. Memon Haji Ismail Haji, , Hidayatullah, J.*, speaking for the Court, borrowing the phrase of Fletcher Moulton, L. J. in *Salaman v. Secretary of State* (1906) 1 KB 613 called an "act of State", "a catastrophic change constituting a new departure", which was a "sovereign act" which was "neither grounded in law" nor did it "pretend to be so". He then examined the principles laid down in *Secretary of State v. Kamachee Boye Sahaba* 13 Moo PC 22 (PC) *Ex-Raja of Coorg v. East India Co.* (1860) 54 ER 642 ; *Sirdar Bhagwan Singh v. Secretary of State* 2 IA 38 (PC) and 68 IA 109: (AIR 1941 PC 64) wherein it had been held that the transactions of Independent States between each other were governed by other laws than those which Municipal Courts administer, as such Courts have neither the means nor the power of enforcing any decision which they make, and said:

"The principle of these cases has been extended to all new territories whether acquired by conquest, or annexation or cession or otherwise and also to rights, contracts, concessions, immunities and privileges erected by the previous paramount power. These are held to be not binding on the succeeding power even though before annexation it was agreed between the two powers, that they would be respected. "

In *Jagannath Agarwala Vs. State of Orissa*, the appellant sought to enforce a claim for money against the State of Orissa based on a breach of contract entered into by the State of Mayurbhanj and its Ruler prior to the merger of the State with the State of Orissa. The claim was investigated by a Claims Officer; but ultimately the appellant was informed by the State Government that it had been rejected as it was barred by limitation. In an appeal from an order of the Orissa High Court under Article 226 of the Constitution, it was contended for the State of Orissa that the rejection of the claim was an act of State and that the new Sovereign State could not be compelled by a process of Municipal Courts to accept a liability of the old Ruler. Upholding the contention, the Court said:

"What is an act of State and when it ceases to apply between a new Sovereign and the subjects of a State conquered, acquired or ceded to the new Sovereign, has been the subject of several decisions of this Court. In *Dalmia Dadri Cement Co. Ltd. Vs. The Commissioner of Income Tax*, : *Dalmia Dadri Cement Co. Ltd.*

Vs. The Commissioner of Income Tax,) and The State of Saurashtra Vs. Memon Haji Ismail Haji, it has been held that unless the new Sovereign, either expressly or impliedly, admits the claim, the municipal courts have no jurisdiction in the matter. The question to consider is whether such a stage had been "reached in the enquiry which had been commenced. No doubt, the plea that this was a part of an act of State was not specifically raised before the High court; but, as pointed out by the Judicial Committee in 51 IA 357 : (AIR 1924 PC 216) no plea is really needed It is the acceptance of the claim which would have bound the new Sovereign State and the act of State would then have come to an end. But short of an acceptance, either express or implied, the time for the exercise of the Sovereign right to reject a claim was still open.: In short, till there was an acceptance by the Government or some officer of the Government, who could be said to bind the Government, the act of State was still open, and, in our opinion, it was so exercised in this case."

In this connection, it is interesting to note that Bose, J., who recorded a separate, opinion in *Dalmia Dadri Cement Co. Ltd. Vs. The Commissioner of Income Tax*, and doubted whether the English view which had been followed in India so far, viz., that all rights to property, including those in real estate, are lost when a new Sovereign takes over, except in so far as the new Sovereign chooses to recognize them or confer new rights in them, was correct in view of the fact that it was contrary to the trend of modern international thought and certain American decisions. But, even so, he held that that view did not extend to personal rights such as those based on contract, nor, in any event, did the new Sovereign assume any obligations of the old State in the absence of express agreement. He further held that for our country that should be the law so far as personal rights were concerned.

Examining the facts of our case in the light of the principles enunciated above, we find that the alleged contract in question was a contract for the sale and purchase of tendu leaves from the Isanagar pargana of the old Charkhari State, which was originally entered into between the plaintiffs and the then United State of Vindhya Pradesh. Its breach was also committed by the latter when they unilaterally rescinded it by their letter dated 26-9-1949. Whatever rights such a breach gave to the plaintiffs were no better than personal rights based on contract enforceable against the party in breach, viz., the United State of Vindhya Pradesh.

As from 26-12-1949, by the agreement of integration or merger, the then Ruler of Charkhari State, as also all the other Rulers of the States forming the United State of Vindhya Pradesh, ceded the governance of their territories to the Government of India. There was thus a change in the sovereignty over the territory in question by the disintegration of the United State and the acquisition by cession of that territory by the Government of India. On 26-1-1950, on the coming into existence of the Constitution, a new State was formed out of the territories of the old United State of Vindhya Pradesh, called the State of Vindhya

Pradesh, a part C State under the Constitution. This cession of the territories of the old Charkhari State by its Ruler, as also by the United State of Vindhya Pradesh, and the consequent relinquishment of their sovereignty over them as from the date of the agreement of merger, the Government of India's acceptance of sovereignty over the new territories and their subsequent formation of a new State under the Constitution called Vindhya Pradesh, Part C State, out of the territories belonging to the quondam States, was an "act of State".

When there is an "act of State" the new Sovereign does not ipso facto assume any obligations of the old State. The municipal Courts of the new Sovereign have the power and jurisdiction to investigate and ascertain only such rights in respect of the old Sovereign as the new Sovereign has chosen to recognize or acknowledge by legislation, agreement, or otherwise; and that such a recognition may be express or may be implied from circumstances.

The right, which the plaintiffs claim, is a personal right which stems from the agreement entered into by them with the United State of Vindhya Pradesh. This right, or contract, or obligation, was never expressly or impliedly acknowledged or recognized by the new Sovereign, viz., the Government of India. Consequently, neither the contract in suit nor the obligations arising therefrom were binding on the Part C State of Vindhya Pradesh, nor could any such rights or obligations be enforced in the municipal Courts of the new" Sovereign.

The obligation, being of the ex-sovereign, the fact that it was being enforced by the subject of the new Sovereign makes no difference, because the municipal Courts of the new Sovereign have jurisdiction and power to investigate and ascertain only such rights as the new sovereign has chosen to recognize or acknowledge, expressly or impliedly and all rights not so acknowledged or recognized, they have no power to adjudicate upon.

The fact that, in the instrument of accession or merger, a stipulation had been made that as from the date of merger the United State of Vindhya Pradesh shall cease to exist and all the property, assets and liabilities of that State as well as its rights, duties and obligations shall be those of the Government of India, cannot entitle the appellants-plaintiffs to enforce that stipulation in the municipal Courts of the new Sovereign. The right to enforce it remains only in the high contracting parties.

In the instant case, however, even the high contracting party, whose obligation it is said to be, had repudiated it for the reason that it was "without proper authority" and "in contravention of past practice". It is further significant that even if it had not been so repudiated, the contract, even if subsisting on the date of merger between the plaintiffs and the United State of Vindhya Pradesh, was not binding on the Part C State of Vindhya Pradesh, in view of the "act of State" and in view of the fact that it had not expressly or impliedly recognized or acknowledged the obligation. Consequently, if the contract in question, if any,

was not legally binding on the new Sovereign, viz., Part C State of Vindhya Pradesh after merger, and could have been validly repudiated by it without incurring any obligation thereunder, it could also not furnish any cause of action to the plaintiffs-appellants when the contract had already been repudiated by the United State of Vindhya Pradesh itself prior to the merger, unless the new Sovereign chose to recognize or acknowledge it, of which there was no evidence in the case.

On a parity of reasoning, the new State of Madhya Pradesh was in the same position as the Part C State of Vindhya Pradesh if not better ; and that consequently the suit of the plaintiffs claiming damages in respect of a breach of contract committed by the United State of Vindhya Pradesh, even if there was such a breach, did not lie in the municipal Courts of the new State.

We are, therefore, of opinion that the objection raised as to maintainability of the suit on the ground of an "act of State" was well founded and shall have to be upheld.

The decision on the aforesaid point completely disposes of the appeal; but in order to complete the judgment, we shall briefly consider a few other questions which were also argued at the Bar.

The first question is what the quantum of damages would be to which the plaintiffs may be entitled, if the defendant were to be held liable for breach of the contract in suit.

The plaintiffs had claimed damages amounting to Rs. 1,80,000/-. The defendant had denied the damages altogether; while the trial Court has assessed them at Rs. 87,170/-.

The plaintiffs had claimed damages on the following basis: The total area of Isanagar Pargana of the old Charkhari State was 89,985 acres. Out of this, after re-grouping of the forest circles, 60,891 acres was included in the Pahargaon forest circle, and the rest 29.094 acres in Alipura and Chhatarpur forest circles. Pahargaon circle was purchased by the plaintiffs in auctions for the year 1950-1951 for a consideration of Rs. 12,600/- and for the years 1951 to 1954 for a consideration of Rs. 45,000/- per annum. The total area of Pahargaon circle was 1,52,320 acres, and consequently, for an area of 60,891 acres which was from out of the old Isanagar Pargana the proportionate premium payable would be Rs. 59,004/-. The loss due to excess premium paid in respect of this area was thus, broadly speaking, Rs. 59,004--4,000 i.e. Rs. 55,004/-.

Now, for the rest of the area of 29,094, the claim has been based not on the loss due to excess payment of consideration but on the loss of profits, which the plaintiffs would have earned but for the wrongful cancellation of the theka. This loss of profits has been calculated on the basis of profits earned in Isanagar area included in the Pahargaon circle for an equivalent area. The total loss of profits calculated on the aforesaid basis has been worked out as under:

Year

Acres

No. of Gaddies of leaves.

No. of Bhakkas.

Rate per Bhakka.

Price of yield.

Expenditure incurred.

Profits for the year.

1950-51

29,094

11,67,833

2648

Rs. 21.

55,608

21,184/-

34,424/-

1951-52

29,094

19,90,611

3950

Rs. 24.

94,800

32,894/-

62,706/-

1952-53

29,094

10,39,964

3214

Rs. 16.

51,424

23,569/-

27,855/-

1953-54

29,094

7,55,281

2146

Rs. 22.

47,212

16,453/-

30,759/-

The total loss of profits for this area thus works out at Rs. 1,55,744/-. Giving up the rest of the claim, only Rs. 1,20,996/- has been claimed on this account. The total loss of profits for the whole area thus claimed comes to Rs. 55,004 + Rs. 1,20,996 = Rs. 1,76,000.

The trial Court has calculated damages on the basis of loss due to excess premium paid. It has, on the basis of total premium paid for four years for Pahargaon circle of 238 Sq. Miles, calculated the proportionate premium payable for an area of 147 Sq. miles, which was the area of the old Isanagar Pargana, and deducting from it the premium payable in terms of his contract of lease, has worked out the excess premium paid which, according to it, was the loss suffered by the plaintiffs on account of breach of the contract. On computation, the loss of premium suffered by the plaintiffs due to wrongful cancellation of the contract comes to Rs. 87,170/- which he has held to be the damages suffered.

In our opinion, both the methods are not wholly correct. The plaintiffs are entitled to such damages as they may have suffered because of the wrongful cancellation of the contract of lease, i.e., the law should endeavour to place them in the same position in which they would be but for the aforesaid wrongful cancellation. The contract was for earning profits by the collection and sale of tendu leaves from the Isanagar Pargana of the old Charkhari State for the years 1950 to 1954. Now, the Isanagar Pargana of the old Charkhari State has been re-grouped into two areas one in the Pahargaon circle and the other in the Alipura and Chhattarpur circles. Of this, the area in Pahargaon circle, along with some other areas in that circle, was taken by the plaintiffs on lease for the whole period of the contract in suit by bidding at the open auctions for a total consideration of Rs. 1,47,600/- (Rs. 12,600/- for the year 1950-51 + Rs. 45,000/- per annum for the next three years). Consequently, they had earned all the profits that they would have earned from that area if the contract had been honoured, except that they were required to pay towards the premium, a sum which was very much in excess of the premium payable under their contract.

This excess premium, which the plaintiffs were required to pay in respect of the portion of the Isanagar Pargana in their possession, can be taken to be proportional to its area. As the total area of the Pahargaon circle was 1,52,320 acres and that of the old Isanagar Pargana included in it 60,891 acres, the proportionate premium payable would be

$60891 \times \frac{1,47,600}{1,52,320}$ i.e., Rs. 59,004/- and deducting from it the proportionate premium payable in respect of this area in terms of their contract, i.e.,

60891×4000 89,985 the loss of profits suffered by them in respect of this area by payment of excess premium works out at Rs. 59,004--Rs. 2706 (to the nearest rupee) i.e.. Rs. 5629S/-.

Now remains the area of 29,094 acres which has been included in the new grouped Alipura and Chhatarpur circles. We do not know if these were auctioned; and, if so, for how much. We also do not know if they contained tendu leaves proportionate to that area as compared to the area in the Pahargaon circle. It is common knowledge that all areas need not contain an even distribution of leaves, so that it cannot, with any reasonable degree of certainty, be said that net profits for the area of 29,094 acres would be equivalent to the net profits of an equal area of the Isanagar Pargana included in the Pahargaon circle. It may be that the plaintiffs have chosen areas with prolific growth of leaves and consequently may not answer any law of averages. It is pertinent to note that the plaintiffs were the lessees of this area --also for the previous four years and could, therefore, have given the net yield of tendu leaves in those years. They admittedly keep account books on which they have relied for proving their profits. Consequently, there is no reason why they did not disclose their profits from this area of 29,094 acres for the previous four years. In our opinion, that would have been a far more reliable and satisfactory method of computing net profits for this area of 29.094 acres than the method adopted by the plaintiffs, which, in our opinion, cannot possibly give any idea of the loss or profits for that area. As the plaintiffs had, within their power to give, better and more satisfactory data for the computation of damages in respect of this area of 29,094 acres and they have not cared to give it, but have relied on a very hypothetical and misleading data, we hold that the damages for this area have not been proved. The plaintiffs would thus be entitled to Rs. 56298/- only as proved damages. The rest of their claim shall have to be dismissed, even if it were held that they were entitled to damages as on a breach of contract.

It has also to be remembered that the law imposes a duty upon the plaintiffs to take all reasonable steps to mitigate the loss caused by a breach of contract and debars him from claiming compensation for any part of the damages which is due to his neglect to do so: *British Westing House Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* 1912 AC 673 . It may, therefore, well be that this taking of the contract by the plaintiff for the collection and removal of tendu leaves from the Pahargaon circle was a step in this

direction and consequently the area from which they had purchased the right being more than the area of the Isanagar Pargana, they could not yet claim the loss in profits due to their being deprived of possession of 29,094 acres out of the area which was then included in Alipura and Chhatarpur circles. It has also not been shown that contract of the Isanagar Pargana was only a part of their requirements, and that consequently they were not minimising damages when they were taking the contract of the Pahargaon circle. On the other hand, the fact that they claimed only the loss of profits due to excess premium paid in respect of that part of the area in Pahargaon circle which was formerly included in the Isanagar Pargana of the old Charkhari State, showed that they had taken the contract of Pahargaon circle to mitigate their damages. The claim for loss of profits in respect of 29,094 acres can thus not be allowed on the aforesaid ground also.

The second question is whether the suit was barred by time.

The suit was filed on 30-8-1954 claiming compensation from the defendant for a breach of contract to pluck and remove tendu leaves from the Isanagar Pargana of the old Charkhari State for the period 1-10-1949 to 30-9-1954. The contract was entered into by the United State of Vindhya Pradesh on or about 14-12-1948 and was repudiated by it on 26-9-1949 before it had become operative.

The contract was for the sale and purchase of tendu leaves which can be likened to an annual crop which begins to sprout in December and January and is gathered by June. The agreement to sale was thus of "future goods" within the meaning of Section 2, Clause (6), of the Indian Sale of Goods Act. It is possible for a person to agree to sell goods which are not in existence on the date of the contract of sale, if it be the natural product of something to which the seller has a present right. The distinction between "a sale" and "an agreement to sell" has been well brought out in Section 4 of the Sale of Goods Act. Where the property in the goods is transferred in praesenti to the buyer, the transaction is a "sale". But, if the property in the goods is to be transferred at a future time, the transaction is an "agreement to sell". As the tendu leaves, the subject-matter of the contract in suit, were not in existence on the date of the contract, the contract was a contract to sell or an agreement to sell, and not a sale.

Whether a contract to sell is a single indivisible unit or comprises several "severable" units is a question of fact in each case depending on the intention of the parties, viz., whether they intended to create a single indivisible contract or a bundle of separate contracts. In the instant case, the plaintiffs had applied for and obtained an extension of the contract for five years for a consideration of Rs. 5,000/- payable in five equal instalments of Rs. 1000/- each on the 1st February of every year of contract beginning from 1-2-1950: (see Exs. P-26 and P-27). A contract is said to be severable when the parties intend that there shall be a number of separate promises supported by separate considerations, as for example, where goods are to be delivered and paid for by instalments, and each instalment is to be regarded as a distinct undertaking: (see Jackson v. Rotex

Motor and Cycle Co. 1910 2 KB 937). But, here there is a single promise for a single consideration. The contract is for a unit period of five years and for a single consideration of Rs. 5,000/- for the whole period. It is true that the consideration is payable in five instalments of Rs. 1,000/-per year each; but from this alone, it cannot be suggested that each year's crop was severally agreed to be sold for Rs. 1,000/- and that the contract in question was a composite contract of five distinct undertakings, each supported by a separate specific consideration. On the other hand, the contract provides that the duration of its effectiveness was from 1-10-1949 to 30-9-1954 within which period the plaintiffs could remove the forest produce agreed to be purchased by them and that they could do so only within that period. To us it appears that the total consideration of Rs. 5,000 as well as the total period of five years were integral parts of the consideration, and the whole contract was a single indivisible unit; and the parties had not agreed to enter into five contracts to sell, each for one year on a severable consideration of Rs. 1,000/- per annum.

Ordinarily, a contract cannot be terminated unilaterally.

"Consequently, if one party commits a breach sufficiently serious to constitute a discharge, it does not automatically abrogate the mutual obligations, but merely gives the other party an option either to ignore the breach and to insist upon performance when due, or to accept the repudiation and treat himself as free from further liability. If he adopts the latter course, he can sue for damages forthwith, whether the time for performance is due or not; but if he refuses to regard the contract as discharged, he presents the guilty party with an opportunity to reconsider his attitude." (See Cheshire and Fifoot's The Law of Contract", Fifth Edition, p. 491).

In the instant case, we have no doubt that though the termination of the contract by the United State of Vindhya Pradesh was unilateral, it was very specific and definite. It could have left no doubt that so far as the United State of Vindhya Pradtsh was concerned, the contract had been as unequivocally rescinded as possible. On receipt of the letter of rescission, the plaintiffs had made a representation to the Chief Minister of the State on or about 8-10-1949 (Ex. P-30), but that had also been rejected by him. Thereafter, the Isanagar Pargana, in respect of which they had been granted the right was broken up and re-distributed in three circles, viz., Pahargaon, Alipura and Chhatar-pur, so that it must have been clear to the plaintiffs that any reconsideration of the question on the part of the United State of Vindhya Pradesh was out of question. We have also no doubt that the plaintiffs had also accepted the repudiation and treated themselves as free from further liability. There is no evidence that they performed any of their obligations under the contract thereafter, nor that they continued to offer the consideration on due dates. On the other hand, they filed a suit, for injunction and damages against the State of Vindhya Pradesh, Part C State, basing their cause of action on the illegal repudiation of the contract by the United State of Vindhya Pradesh. The case was thus squarely governed by

the provisions of Article 115 of the Indian Limitation Act, and the period of limitation started from the date of breach of the contract, which occurred in the instant case on 26-9-1949. The contract, having been rescinded by the United State of Vindhya Pradesh and the rescission having been accepted by the plaintiffs, no question of successive breaches arises, nor can it be said to be a case of continuing breach. Consequently, the trial Court rightly held that the claim of the plaintiffs was barred by time.

On the third question also, if we are right in holding that the repudiation of the contract had been accepted by the plaintiffs who had thereafter considered themselves free from any obligation arising thereunder, the suit was barred under Rule 2 of Order II of the CPC as well, as all the reliefs flowing from the same cause of action should have been claimed in one suit, and not split up as the plaintiffs claim to do. Under that rule, "where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished". The rule is a corollary to Rule 1, which says that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court". "Cause of action" means all the essential bundle of facts which a plaintiff must allege and prove in order to entitle him to the reliefs claimed. According to the Judicial Committee of the Privy Council in *Rajah of Pittapur v. Sri Rajah Venkata Mahipatisurya* 12 IA 116, "cause of action" in Order II, means "the cause of action for which the suit is brought". Now, the civil suit of the plaintiffs filed by them in 1950 was based on the allegation that there was a contract with United State of Vindhya Pradesh, that the United State of Vindhya Pradesh had committed breach of that contract by illegally rescinding it, and that the breach had caused damages to them for which they were suing. It was also alleged that the first season for leaf collection began in 1950; but before that could happen, the State Government had auctioned the forests, first for one year (1949-50), then again for one year (1950-51) and thereafter for three years (1951-1954). They, therefore, filed the suit claiming Rs. 1,00,000 as damages for the year 1950 only. It would be noticed that the contract alleged is one of which the breach had been complained on account of its illegal repudiation by the State Government giving the plaintiffs right to damages. There was nothing to prevent them from claiming all the damages, to which were entitled on account of the breach. Where there is a breach of one and the same contract, the reliefs cannot be allowed to be spill up : (See *Duncan Brothers & Co. v. Jeet-mull*, ILR Cal 372. The matter may be different where there are several contracts contained in the same instrument, in which case the causes of action would be different for every one of them. Thus, where it is expressly provided by an indent that each monthly shipment and item should be treated as a separate contract, the plaintiff is entitled to bring a separate suit for damages in respect of each shipment: (see *Volkart v. Sabju Sahib* ILR Mad 304 and *Mandal and Co. Vs. Fazul Ellahie*,). In the instant case, however, the contract is one and indivisible,

the breach is also one, and consequently the plaintiffs had only one cause of action which could not be split up in the manner sought to be done. The lower Court was, thus, right in holding that the suit was barred under Rule 2 of Order 2 of the Code of Civil Procedure.

The appeal, therefore, fails and is dismissed with costs.