

(1988) 02 MP CK 0032

In the Madhya Pradesh High Court

Case No : Civil Revision No. 22 of 1987

Kanhiyalal

APPELLANT

Vs

Smt. Durgabai

RESPONDENT

Date of Decision : 11-02-1988

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 19, 6

Citation : (1988) MPJR 105 : (1989) MPLJ 254

Hon'ble Judges : V.D. Gyani, J

Bench : Single Bench

Advocate : Shrivastava, for the Appellant; A. Siddique, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Varma, J.

The defendants 1 to 4 in Civil Suit No. 25-A of 1976 appeal against the judgment and decree for Rs. 1,69,052.00 passed against them and in favour of plaintiff/respondent No. 1. Respondents 2 to 5 were also defendants 5 to 8 in that suit No decree has been passed against them.

The respondent/plaintiff Associated Cement Company Ltd held a mining lease over an extensive area including Khasra No. 325 in village Amenta, Tahsil Murwara, District Jabalpur. The appellants also held like lease in respect of the adjoining Khasra No. 326 which is towards south of Khasra No. 325. Adjoining and towards north of Khasra No. 325 is Khasra No. 319. This is held on lease by other respondents, i.e., respondents 2 to 5. All the parties were engaged in extracting lime stone from various quarries. According to the plaintiff, appellant Ramnaresh Swami (defendant No. 3 in the suit) informed the plaintiffs Manager on spot and complained that respondents 2 to 5 were illegally extracting lime stone on Khasra No. 325 held by the plaintiff. This put the plaintiff to inquiry, the plaintiff got the Khasra measured through the Tahsildar. A revenue survey also took place and yet another survey was done by the Mining Inspector. All this was

done between January, 1974 to March 1974. According to the plaintiff, it was found that although lime stone was illegally extracted from Khasra No. 325 the persons responsible for such extraction were the appellants. The suit for recovery of damages was, therefore, initially filed only against the appellants. When the appellants entered appearance and filed their written statement, and tried to throw the blame upon the respondents 2 to 5, they were also joined as defendants and relief was alternatively claimed against them. Quantifying the damages, the plaintiff/respondent alleged that in all 10,546 metric ton lime stone was unlawfully extracted from Khasra No. 325. Calculated at the rate of Rs. 20.00 per ton, the cost of limestones so extracted comes to Rs. 2,10,920.00. To this amount was added Rs. 18,204 as sales tax. A total sum of Rs. 41,868.00 was calculated to be the quarrying cost at the rate of Rs. 3.97 per ton. After giving deduction for this cost of quarrying, a total amount of Rs. 2,14,431.00 was claimed in the suit. This amount included interest at 14% per cent upto the date of the suit. Injunction was also claimed restraining the defendants from interfering with the plaintiffs possession over the quarry.

All the defendants including the appellants, denied the entire claim of the plaintiff. The appellants denied to have made any extraction of limestone from Khasra No. 325. They also questioned the quantity of limestone allegedly extracted and also challenged the cost of the material as too high. They also pleaded that the lease in plaintiffs favour is void in terms of Section 6 of the Mines and Minerals (Regulation and Development) Act, 1957 (No. 67 of 1957), and rule 31 of the Minerals Concession Rules, 1960. It was, therefore, alleged that the plaintiff has acquired no right to quarry and, therefore, could not recover. The other defendants/respondents 2 to 5 totally denied the plaintiffs claim and stated that they were not responsible at all for extracting limestone from Khasra No. 325. At the trial, the parties filed documents and examined witnesses. The trial Court, vide the impugned judgment and decree, held the lease in plaintiffs favour to be valid. It was, however, held that the plaintiff was not in possession of the land out of which limestone was extracted. It is the appellants who extracted the limestone unlawfully. The quantity of limestone extracted as alleged by the plaintiff was accepted. It was also held proved that the price of the limestone so extracted was Rs. 20.00 per ton. Interest and the amount of sales tax claimed were denied. Other reliefs have also been denied. Only the appellants have been held liable. No liability has been fixed upon respondents 2 to 5 and the suit against them has been dismissed. In its final analysis, the trial Court passed a decree in favour of plaintiff/respondent No. 1 and against the appellants in a sum of Rs. 1,69,052.00 as aforesaid.

Shri V. S. Dabir, learned counsel for the appellants, attacked the judgment and decree of the trial Court on three grounds:

- (i) that the lease in plaintiffs favour is void;
- (ii) limestone from Khasra No. 325 was not extracted by the appellant. The identity of plot from which the limestone was extracted was not established; and

(iii) the plaintiff failed to prove the quantity and price of the limestone extracted, and, therefore, damages assessed and found proved against the appellants are inflated.

Point No. (i) : The appellants' plea and objection in this regard are contained in paragraph 1(c) of their written statement. The allegation is that the plaintiffs admitted in the plaint that they held lease over an area of more than about 18 square mtrs. which is in contravention of section 6 of the Mines and Minerals (Regulation and Development) Act, 1957, as it prohibits the holding lease over an area of more than 10 sq. meters. The length of area held by the plaintiff is more than fifty times of the breadth which contravenes rule 55 of the Minerals Rules. Such a lease held in contravention of the provisions of the Act and rules made thereunder is void u/s 19 of the Act and is of no effect. At the time of hearing, it was also urged that the lease violates rule 31 of the Minerals Concession Rules as it has been given effect to from an anterior date. The lease is also said to be ineffective as no steps were taken to bring it in conformity with the provisions of the Act after its amendment in 1972 and within the prescribed period.

Section 19 of the Mines and Minerals (Regulation and Development) Act, 1957 makes any prospecting licence or mining lease granted, renewed or acquired in contravention of the provisions of the Act or any rules made thereunder "void and of no effect." Section 6(1) prohibits a person to acquire in any State in respect of any material or prescribed goods of associated minerals beyond the prescribed limits. Proviso appended to that clause permits the Central Government for reasons to be recorded by it in writing acquisition of prospecting licence or mining lease in excess of the total area so prescribed if it is of opinion that acquisition is in the interest of development of any mineral

In our opinion, the lease in favour of the plaintiff/respondent No. 1 cannot be said to be void or illegal because it was made effective from the date prior to the date of its execution. The reason is that this is a case of lease renewed Counsel for the parties admitted before us that lease in Khasra No. 325 in plaintiffs favour was not being created for the first time. It was already in existence and although the initial period of lease had expired, the plaintiff lessee was allowed to continue in possession pending application for its renewal. Undoubtedly, the plaintiff was thus holding that area under lease as a tenant holding over. When the lease was so renewed, it became a lessee under the terms in the renewed lease and from the date immediately following the date on which the earlier lease expired. This lease, therefore, cannot be said to be bad merely because earlier date of its commencement was mentioned than the date of its actual execution. Similarly contention was raised and repelled in Smt. Rukmani Devi Gupta and others vs. Associated Cement Companies Ltd, Bombay, F. A No. 120 of 1977 decided on 6-4-1981. We are in complete agreement with the view taken in paragraph 15 of the judgment by the Division Bench deciding Rukmani Devi's case (supra).

We are also not impressed with the argument that the lease in plaintiffs favour

must be held to be void because the area of the grant was far in excess of the ceiling limit prescribed u/s 6(1) of the Act, and, therefore, the plaintiff could not recover under this lease. This argument is based upon the provisions of Section 16(1)(b) of the Act which is in these terms:

Where the rights under any mining lease, granted by the proprietor of an estate or tenure before the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, have vested, on or after 25th day of October, 1949, in the State Government in pursuance of the provisions of any Act of any Provincial or State Legislature which provides for the acquisition of estates, or tenures or provides for agrarian reform, such mining lease shall be brought into conformity with the provisions of this Act and the rules made thereunder within six months from the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972 or within such further time as the Central Government may, by general or special order, specify in this behalf.

Admittedly, in the present case, the lease in plaintiffs favour was created before the introduction of Mines and Minerals (Regulation and Development) (Amendment) Act, 1972. After this amendment, the ceiling limit as provided u/s 6 of the Act was altered. Within six months of the introduction of that Amendment Act, the lease should have been brought in conformity with the provisions of the Act. That time could well have been extended by the Central Government by an order in writing. No such order has been brought to our notice extending time. Nevertheless, the lease has been allowed to continue. The plaintiff has not pleaded that any effort was made through any application to bring the lease in conformity with the provisions of the Act within the prescribed period or the period in that behalf was got extended. Nevertheless, the lease has continued in plaintiffs favour without any kind of objection either from the State Government or the Central Government. The plaintiff had acquired this lease by renewal in the year 1971. When acquired, it was valid and did not contravene any provision of the Act or the rules at least as regards the area. It, therefore, cannot be said that the plaintiff "acquired" the lease in contravention of the provisions of Section 6(1)(b) of the Act. The question, therefore, is that a lease once so validly acquired if not brought into conformity with the provisions of the Amendment Act 1972 within the prescribed period can be said to be "void and of no effect" within the meaning of Section 19 of the Act? In our opinion, such a lease may be irregular and may even be liable to be terminated or forfeited for not bringing in conformity with the provisions of the Amendment Act, 1972. It, however, cannot be said to be "void and of no effect" because it was neither "acquired" nor "granted" or renewed in contravention of the provisions of the Act or the rules made thereunder. This is particularly so in regard to the alteration of the ceiling limits after the enforcement of the Amendment Act, 1972 because the proviso to section 6(1)(b) empowers the Central Government to permit any person to acquire one or more mining leases covering any area in excess of the prescribed maximum. Further, rule 6 of the Mining Lease (Modification of Terms) Rules, 1956 also casts a duty on the controller to bring the lease in conformity

with the provisions of the Act Steps could well have been taken by the controller to modify the lease and to reduce its area to bring it into conformity with the provisions of the Amendment Act. If this has not been done, we are of the opinion that the lease cannot be said to be "void and of no effect" as claimed by the appellants.

Supporting the grant as valid, Shri Y.S. Dharmadhikari, learned counsel for the plaintiff/respondent argued that according to section 6(1) of the Act the ceiling limit prescribed under clauses (a) and (b) of that sub-section is in respect of "any mineral" which, according to the learned counsel, means "any one mineral" or "prescribed group of associated minerals." Section 6 of the Act imposes certain restriction as to the area in respect of which in any one State a person may acquire prospecting licences or mining leases. Clause (b) of sub-section (1) of Section 6 limits the extent of area in respect of one or more mining leases to the maximum of 10 square kilometers as amended by the Amendment Act 1972. Words used in this section must, therefore, be construed to be in consonant with and not repugnant to this provision. We are aware that when the words in some statute are clear and plain, the Court is bound to accept the express intention of legislature. At the same time, it is also the cardinal rule of interpretation that a statute has to be read as a whole and words should be studied in their context. The practical utility of this rule is more visible in construction of general rules and resolving its inconsistency by the Courts regarding its harmonious construction. The legislatures are deemed to be precise in language employed by them. The rule of literal construction is to give their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same; but, if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. (See *Jugalkishore Saraf vs. M/s. Raw Cotton Co. Ltd.*, AIR 1955 SC 376). The words "any mineral" used in subsection (1) of Section 6 must, therefore, be first assigned its literal meaning and should be so read that it promotes the object of this section. It should also be read harmoniously with the other provisions creative in various parts of this section. The word "any" as explained in the Full Bench decision of the Mysore High Court, in *Veerappa vs. State of Mysore*, AIR 1965 Mys 227, is a word which excludes limitations of qualifications. It connotes wide generality. It should be given a meaning as wide as possible in the context In *The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc.*, the Court was concerned with the meaning to be assigned to the expression "any one of the Directors" as used in section 76 of the Mines Act, 1952 before its amendment by Act No. 62 of 1959. It was observed that in some contexts, it would mean "only one of the directors, does not matter which one", but in other contexts, it is capable of meaning "every one of the directors." Which of these two meanings was intended by the legislature in any particular statutory phrase has to be decided by the Courts on a consideration of the context in which the words appear, and in particular the scheme and object of the legislation. In *Re: Sunderji Laljee Khakhar*, , a Division Bench of the

Bombay High Court was concerned with the meaning attributed to the words "any debt or security" appearing in Schedule of Article 12 of the Court Fees Act, as amended by Bombay Finance Act (2 of 1932). The words used in Article 12 of the Court Fees Act are "on the amount or value of any debt or security specified in the certificate". It was held that in this context, the word "any" embraces all the debts and securities specified in the certificate and it must be the aggregate of all of them which determines the amount of the fee which has to be paid and not each of the items specified in the certificate. Read in the context and with a view to give full meaning to the provisions in sub-section (1) of Section 6, the words "any mineral" or "prescribed group of associated minerals" would only mean any kind of minerals mentioned in the lease. The area covered by all kinds of minerals or prescribed group of associated minerals included in the lease should not extend beyond the prescribed limit. The lease may be in respect of more than one minerals or prescribed group of minerals but then the aggregate of the area under the grant should not exceed the ceiling. If what the learned counsel for the plaintiff/respondent means to suggest is accepted, the result would be to permit mining leases to embrace area beyond the prescribed limit. This, in our opinion, is not intended by the express words used in clause (b) of sub-section (1) of Section 6 of the Act. We are, therefore, of the opinion that a person may acquire one or more mining leases in respect of any kind of mineral or prescribed group of associated minerals but the total area of grant or grants, as the case may be, should not exceed the prescribed limit. We, therefore, reject the contention so raised by Shri Dharmadhikari.

Yet another argument in support of the contention that the lease in plaintiffs favour is not valid is based upon section 247 of the M. P. Land Revenue Code, 1959. The contention is that since in respect of the present grant of lease in plaintiffs favour the provisions contained in sub-sections (3), (4), (5) and (6) of section 247 of the Code have not been complied with, the assignment is not complete and, therefore, the plaintiff has acquired no right over the land covered by the grant including Khasra No. 325 and, therefore, the plaintiff cannot maintain the action. This contention is also not sound. According to section 247 of the Code, the right to all minerals, mines and quarries vests in the State Government which shall have powers necessary for the proper enjoyment of such rights. The Government has right to assign these rights by grant of leases. Sub-sections (3), (4), (5) and (6) relate to the rights and liabilities of such assignee from the Government. They contemplate a prior assignment and an assignee. The assignment is not created by force of provisions in those sub-sections. Therefore, even if there is some non-compliance of any of those provisions, it is difficult to see how it affects the creation of interest by grant of a valid lease. In *Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others*, it is held that the grant of lease creates an interest in the lessee, providing a right to carry on mining operation, as right to enjoy immovable property and as a lease having the characteristics of a lease contemplated u/s 105 of the Transfer of Property Act. The provisions of section 247 of the Code are thus only subsidiary provisions

having little to do with assignment of right in the minerals, mines and quarries. We may usefully refer to a Division Bench decision of this Court in Premchand Sugnichand and Others Vs. State of Madhya Pradesh and Others, . The following observations are noteworthy:

Sub-section (3) itself makes a distinction between the "right over any minerals, mines and quarries" and the, "powers" to do certain acts for the proper enjoyment of that right. While the assignment of the right to minerals, mines and quarries is not fettered, the exercise of the powers necessary for the proper enjoyment of that right is hedged with conditions and is also burdened with the liability to pay compensation as enacted in sub-sections (4) and (5) comes into play only after the State Government has assigned its right over any minerals, mines or quarries. There are in these provisions two separate and distinct concepts, the concept of a vested right and the concept of powers necessary for enjoyment of that right. Unfortunately, these two concepts have been mixed up in the language employed in these enactments with the consequence that the contentions like the one here continue to be urged, though, as we would show immediately, we had made the position clear in Amalgamated Coal Fields Ltd. vs. Collector, Chhindwara, 1963 MPLJ 307.

In this view of the matter, the appellants are not right in saying that the plaintiff could not get any right in the area covered by lease and, therefore, could not recover the damages for illegal extraction without due compliance of the provisions contained in section 247 of the M. P. Land Revenue Code, 1959. This contention is also repelled.

Point No. (i) is, therefore, answered against the appellants and in favour of the respondent No. 1 plaintiff and we hold that it has a right to recover damages for wrongful extraction of minerals out of Khasra No. 325 covered by the mining lease in its favour.

Point No. (ii) : The finding of the lower Court is that it is the appellants who extracted minerals from the land comprised in Khasra No. 325. Of the face of the evidence on record, and particularly in view of the admissions made by the appellants themselves, no serious challenge can be laid to this finding. It may be remembered that the prime mover of the cause leading to this litigation is none else than the appellant No. 3 himself. It is he who made the complaint to the plaintiffs agent regarding illegal extractions from out of Khasra No. 325. From a reading of paragraph 21 of the written statement filed by the appellants, their contention seems to be that the plaintiff had never been in possession of Khasra No. 325 and that Khasra was owned by one of the relatives of partners of the appellant firm. It has been expressly pleaded at the end of paragraph 21 of the written statement, that the possession over Khasra No. 325 is still continuing with the defendants (appellants). This would be further clear from Ex. D/4 which is appellants" reply to the plaintiffs application under Order 39, Rules 1 and 2, Code of Civil Procedure. In paragraph 10 of this document Ex. D/4, it has been expressly stated that the appellants have been in continuous and lawful

possession over Khasra No. 325 and the possession was continuing. To quote : "The continuous and lawful possession over Khasra No. 325 is still continuing with the defendants" (appellants). We also have on record a letter dated 16-5-1974 written by the Mining Inspector to the Sub-Divisional Officer, Katni. That document is marked Ex.D/3. It mentions of a report received by the Mining Officer regarding illegal extraction of minerals out of Khasra No. 325. Attempt, however, was made at the trial by the appellants to throw the blame of this illegal extraction from Khasra No. 325 upon the other defendants, viz., respondents 2 to 5 in this appeal. These respondents have examined Shrikant Nigam as D. W. 3. He has deposed on oath that this illegal extraction was done by the appellants. This witness was working in adjoining mines. Not one question was put to this witness suggesting that the extraction was done not by the appellants but by respondents 2 to 5.

Shri V. S. Dabir, learned counsel for the appellants, was at pains to argue that there was no proper demarcation of Khasra No. 325 and suggestion, therefore, has been that it could not be ascertained if the extraction was from the land comprised in Khasra No. 325 and, at any rate, the extent of extraction could not be justly determined. Reference was made in this regard to the evidence of Naval Kishore (P. W. 2), V. P. Thomas (P. W. 3) and Shambhunath Tiwari (P. W. 6). In our opinion, this argument does not advance the appellants' case at all. As we have pointed out above, it was the appellants' own complaint that the respondents 2 to 5 were extracting lime stone from Khasra No. 325. It was nobody's case that limestones were illegally extracted from some other Khasra number. Therefore, even if the boundaries of Khasra No. 325 might not have been precisely ascertained, we are of the opinion that it does not materially affect the plaintiffs case. The appellants should be held bound by their own admissions which is further fortified by the circumstantial evidence mentioned above. Admittedly, the plaintiff did not extract any mineral from that Khasra number and the evidence including the appellants' admission proves that it is the appellants and none else who extracted lime stones from Khasra No. 325. This finding of the trial Court, is, therefore, upheld.

Point No. (iii) : The plaintiffs allegation is that the appellants have dug and removed limestones to the extent of 10.546 tonnes from the area comprised in Khasra No. 325. The appellants have denied these allegations. The only evidence led by the respondent/plaintiff is the statement of Shambhunath Tiwari (P.W.6). At the relevant time, this witness was quarry Manager in the employment of the plaintiff. He surveyed the pits in Khasra No. 325 by dividing it into three blocks. He measured the length, breadth and the depth of these blocks separately. He has deposed that the pits in three blocks measured $1560 + 1100 + 1242 = 3902$ cubic metres. According to this witness, in the pit measuring 0.37 square metres on an average one tonne lime stone is found. Thus measuring those pits, the witness calculated the lime stone extracted was 10.546 tonnes. There does not appear to be any effective cross-examination of this witness on this point. Shri Dabir, learned counsel for the appellants, urged with reference to the 1st

Schedule to the M. P. Minor Mineral Rules, that 0.61 cubic metres would yield one tonne of limestone. Thus, according to the learned counsel, 3902 cubic metres of pits would yield 6396.72 tonnes of lime stone. Shri Dharmadhikari, learned counsel for the respondent/plaintiff however, argued that the method of determining the limestone extracted as in Schedule I is only for the purpose of assessing royalty and, therefore, it cannot be taken to be any basis for ascertaining the actual lime stone extracted. True it is that the quantity of lime stone extracted may differ from quarry to quarry. However, in absence of any specific data in that behalf, it shall be only fair and just to refer to that Schedule even for the purpose of knowing the quantity of lime stone extracted from a particular area. Even the plaintiffs witness, Shambhunath Tiwari (P.W. 6) has only applied an average and has not stated the actual quantity extracted. He deposed that it is usual to take for the purpose that 0.37 cubic metres of a pit shall give out one tonne of lime stone. For such a practice of calculating the lime stone from any pit he has laid no basis. It shall, therefore, be just and fair to take the same basis for assessing the quantity of lime stone extracted as it applied for assessing the royalty thereon. We would, therefore, accept the appellants' version that in absence of any positive evidence, it should be taken that 0.61 cubic metres of pit shall yield one tonne of lime stone and, therefore, the total lime stone extracted by the appellants should be taken as 6397 tonne metres, not 10.546 tonnes as alleged by the plaintiff and accepted by the lower Court.

In order to determine the actual amount to be paid to the respondent/plaintiff as damages for the unauthorised mining and wrongful removal of the aforesaid quantity (6397 tonnes) of lime stone from out of Khasra No. 325, some principles may be noticed. In "Mc Gregor on Damages", 14th Edition, in paragraph 1058, the principle in this regard is stated in these words:

Where mineral in the earth is wrongfully severed and raised by the defendant, its value at the pit's mouth is greater by virtue of the severance and raising than its value in the earth, since it is of no use to anyone until severed and raised. Therefore, the exact loss to the plaintiff, whether in an action of trover for wrongfully converting his minerals or in an action of trespass to goods for wrongfully taking them away, is measured by the price at the pit's less both the cost of severing and the cost of raising. If the defendant is not allowed to deduct these costs, the plaintiff is paid for expenditure which he has never incurred. On the other hand, if the defendant is allowed to deduct this outlay, it may be said that he is being paid for his own unlawful act.

This milder rule allowing deduction of cost of severance is now uniformly applied, except in cases of wilful or fraudulent trespass. Thus, the Courts put the burden on the plaintiff of showing applicability of stricter rule of not even deducting the cost of severance while awarding damages. In absence of any evidence of fraud, the milder rule is applied. The inference drawn from certain decided cases, at paragraph 1062, in "Mc Gregor on Damages" has been

summarised thus:

The rationale of the decisions is that the technical rule has been maintained in cases where the conduct of the defendant has been wilful and therefore such as formerly to have permitted exemplary damages to be visited upon him, and the costs of severance that he has incurred thus came to represent a kind of crystallised damages of exemplary damages; on the other hand, where exemplary damages have not been appropriate, the technical rule has been abandoned and the defendant has been allowed to deduct the costs of severance.

Now the decision in *Rookes vs. Varnard*, 1964 AC 1129 has imposed a general ban on the awarding of exemplary damages. To this general ban, recognised exception is that case where the defendant has calculated that he would profit from his tortious act. (See also : *Broome vs. Cassell and Co.*, 1972 AC 1027). At the same time, it is also well recognised that cost of raising the mineral should also be deducted.

We may now refer to the evidence led by the parties in this regard Plaintiffs witness, R. P. Nagrath (P.W.4) deposed that on 10-5-1975, he had contracted to sell the plaintiff limestone at Rs. 31.10 paise per tonne. Ex. P/8 is the quotation which has been proved by this witness. He also deposed that to be the fair market price of limestone then existing. In cross-examination, he stated that he made no supply pursuant to this offer. He also deposed that price so quoted included the cost of production, profit, royalty and transportation charges. Cost of production will come to Rs. 10.00 or Rs. 11.00 per tonne. He added that at Amehta mines land in question, i.e., where Khasra No. 325 is situated, the cost of production may be a little less, i.e. Rs. 6.00 or Rs. 7.00 per tonne. Speaking on the quality of limestone found in Khasra No. 325, Shambhunath Tiwari (P.W. 6) stated that limestone found there was of a good quality. As against this, we have the evidence of S. C. Jain (D.W.6). At the relevant time, this witness was Accountant in Maheshwari Lime Works. He deposed that Maheshwari Lime Works purchased limestone at pit mouth at Rs. 13.75 paise per tonne. This contained 19 per cent calcium. He proved Exs. D/1 and D/2 which are the purchase vouchers. There does not appear to be any effective cross-examination of this witness. From the persual of the two bills Ex. D/1 and Ex. D/2 and the quotation Ex. P/8, it appears that Maheshwari Lime Works is a dealer constituent of Bharat Lime Co. on whose quotation (Ex. P/8) the plaintiff relies. Since this quotation was never accepted it remained at a mere stage of offer and on the face of bills Exs. D/1 and D/2, it will be difficult to rely upon it for purpose of ascertaining the price of lime stone. We would prefer to place reliance upon these documents Exs. D/1 and D/2 and the evidence of Shri S. C. Jain (D.W.6).

Shri V.K. Trivedi (P.W.1) who was then the Accountant in the employment of the respondent No. 1/plaintiff, has deposed that in the year 1974, the raising cost of mineral was Rs. 3.97 paise per tonne. The appellants in order to show the raising cost have in this Court filed an application under Order 41, Rule 27, Code of Civil Procedure, for taking certain documents on record These documents are returns

submitted by the plaintiff showing cost of production. The reasons stated for filing these documents at this stage are not convincing and do not make out a case for permitting the appellants to file this evidence now at the appellate stage. To us, the material on record furnishes sufficient basis to decide this issue. We do not require these documents for our decision. The application (I.A. No. 1804 of 1981) is, therefore, rejected Relying upon the evidence of Shri V. K. Trivedi (P.W.1), we would, therefore, allow a deduction of a round figure Rs. 3.90 paise per tonne as raising cost. Thus the pit mouth value of lime stone at the relevant time would come to Rs. 13.75 -- Rs. 3.90 = Rs. 9.85 per tonne as raising list Calculated at this rate per tonne, the price of 6397 tonnes of limestone which, as we have found above, was unlawfully extracted by the appellants from the plaintiffs quarry in Khasra No. 325, comes to Rs. 63,010/-. We would take a round figure at Rs. 63,000/-. Thus, according to our finding, the plaintiff/respondent No. 1 is entitled to recover Rs. 63,000/- as damages from the appellants. We may mention that the lower Court has committed an error in this regard in accepting the plaintiffs version in his pleadings without advertng to and properly appreciating the evidence on record.

The appeal thus succeeds and is partly allowed. The decree passed by the lower Court is modified. Instead of an amount of Rs. 1,69,052/- as awarded by the lower Court, the plaintiff/respondent No. 1 is held entitled to recover from the appellants as damages a sum of Rs. 63,000/-. Costs in this appeal shall be borne by the parties as incurred. Costs in the lower Court shall be assessed in proportion to plaintiffs success. Counsel's fee according to schedule.