
(1956) 04 PAT CK 0031

In the Patna High Court

Case No : Misc. Judicial Case No's. 150, 152, 200, 202, 212, 224, 232, 233, 235, 246, 260, 325, 362, 378, 514, 529, 632, 536, 560, 561, 576 to 579, 586, 602, 604, 609, 629, 649, 653, 661, 688, 689 and 695 of 1954 and 6, 11, 18, 29, 32, 82, 83 and 85 of 1955

Nathuni Rai and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 26-04-1956

Acts Referred:

Bengal Irrigation Act, 1876 — Section 48(3), 74, 78, 99
Constitution of India, 1950 — Article 245, 246, 254, 265

Citation : AIR 1956 Patna 482

Hon'ble Judges : Das, C.J.;Choudhary, J

Bench : Division Bench

Advocate : Kailash Rai, Gorakh Nah Singh, Ugra Singh, Basudev Prasad, Shambhu Prasad Singh, Dasu Sinha, Ramji Sharan, K.P. Varma II, Lakshman Saran Sinha, Indra Bhanu Singh and Ramanugrah Prasad, for the Appellant; Government Advocate and Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Das, C.J.—These are 43 applications for the issue of writs under Article 223 of the Constitution, in the circumstances stated below. The applications have been heard together, and this judgment will govern them all.

2. The petitioners of the different applications are all holders of long term leases or permits, ranging from seven to twelve years, for the supply of water from the Son canals, the leases or permits having been granted to them on applications made u/s 74, Bengal Irrigation Act, 1876 (Bengal Act 3 of 1876), and granted in accordance with the rules known as the Son and Champaran Canals Irrigation Rules. The lands of the petitioners for which they hold permits for the supply of water lie in three districts, Patna, Shahabad and Gaya.

Rule 36 of the Son and Champaran Canals Irrigation Rules, published under

notification No. 3605-1, dated 13-11-1931, laid down certain rates which were payable for the supply of water for the purpose of flow irrigation. Though those rates were altered from time to time, the case of the petitioners was that at the time when the long term leases or permits were granted to them, the water rate payable for such leases or permits was Rs. 4-8-0 per acre and in one case, it was Rs. 4-2-0 per acre.

In accordance with Rules 47, 48, etc. of the aforesaid Rules, demand statements (parches) and Khatianis were prepared and the petitioners continued to pay water rates at the rates shown in the demand statements. On 17-10-1952, the State Government of Bihar made a notification, which was published in an extraordinary issue of the Bihar Gazette on 23-10-1952, by which the water rate was doubled. The notification in question, which is an annexure to some of the petitions, is in the following terms. I am quoting the notification only so far as it is relevant for our purpose) :

NOTIFICATION. (17th October, 1952.)

"No. B/R-8-2-08/52-I.-12902. -- In exercise of the powers conferred by Section 99 of the Bengal Irrigation Act, 1876 (Bengal Act 3 of 1876), the Governor of Bihar is pleased to direct that the following amendments shall be made in the Son and Champaran Canals Irrigation Rules.

2. These amendments shall come into operation with effect from the 26th October, 1952.

Amendments.

In column 4 of the table of rates under sub-rule (1) of Rule 36 of the said Rules -

(a) Son Canals,

(i) for the figures "4-8-0" against the entry "long term", the figures "9-0-0" shall be substituted."

The petitioners say that in pursuance of the aforesaid notification, the opposite party to these applications have been demanding water rate at Rs. 9/- per acre with effect from 26-10-1952, though the long term leases or permits which they hold were executed long before that date. The petitioners further say that in some cases certificates have been issued against them; in some cases distress warrants have been issued; and in some cases notices of demand have been made for payment of the water rate at the enhanced rate. The petitioners contend that they are not liable to pay the enhanced water rate, and that their liability is determined by the terms of the long term leases or permits which they hold.

It is also the case of the petitioners that the notification dated 17-10-1952, has no application to long term leases or permits which, were executed before that date; if, however, it be held that the notification also hits long term leases or permits executed before the date of the notification and in force on that date,

then the enhancement made by the notification is ultra vires and without jurisdiction.

In two of the cases it has also been stated that the notification was made in contravention of Section 99, Bengal Irrigation Act, 1876, and, is therefore, invalid. Certain other arguments against the validity of the enhancement of water rate have also been advanced before us, and I shall notice these arguments in succeeding paragraphs of this judgment. Put briefly, the three main contentions on behalf of the petitioners are (1) the notification dated 17-10-1952, enhancing the water rate, does not affect long term leases or permits which were executed before that date and which were still in force on that date; (2) if the notification affects the water rate payable under such long term leases or permits, then it is ultra vires and without jurisdiction; and (3) the notification in question "is not in conformity with the provisions of the statute under which it purports to have been made, and it is on that ground invalid in law.

The petitioners, therefore, ask for the issue of writs prohibiting the opposite party from realising the enhanced water rate from them during the currency of their long term leases or permits. Some of the petitioners also asked for a temporary injunction restraining the opposite party from realising the enhanced water rate pending disposal of their applications, and a temporary injunction in those terms was granted to some of the petitioners.

3. These applications have been contested on behalf of the State of Bihar. Mr. Lal Narain Sinha, who appeared on behalf of the State of Bihar, has contended that the notification, in question is valid in law and affects even long term leases or permits which were given before the date of the notification and were in force on that date. He has further contended that the notification is in conformity with the provisions of Section 99, Bengal Irrigation Act, 1876, and u/s 78 of the said Act it was for the State Government to determine the rates to be charged for canal water supplied for purposes of irrigation.

The exercise of that power by" the State Government was an exercise of statutory power and was not a matter of contract between the parties. On behalf of the State Government it was denied that any forcible or repressive measures were taken, as was alleged by some of the petitioners, for the realisation of the enhanced water rate. It was alleged that the enhanced water-rate was legal and the petitioners are liable to pay it with effect from 26-10-1952. on which date the enhanced rate came into force.

4. It is necessary now to examine the contentions urged on behalf of the petitioners. But before I do so, it is convenient to quote some of the relevant provisions of the Bengal Irrigation Act of 1876. Part 6 of the Act deals with the supply of water and Section 74, which is the first section in that part, is in these terms:

"74. (1) Any person who desires that water shall be supplied to his land from a canal shall make written application to that effect to the Canal Officer in the form

prescribed by rules made u/s 99; and, except as provided in Section 75A, no person shall be liable to pay any rate or due whatever on account of water supplied to his land with the permission of the Canal Officer otherwise than on an application so made.

(2) An application under this section may be made by any number of persons acting jointly."

Section 75 states that if the Canal Officer grants an application made u/s 74, he shall cause his permission to be recorded in writing in such form as may be prescribed by rules made u/s 99. Those rules are the Son and Champaran Canals Irrigation Rules, to which I have already made a reference. Rule 3 of the said rules deals with applications for the supply of water. So far as a long term lease is concerned, the application has to be made in form No. I, the terms whereof I shall refer in detail when considering the contentions urged on behalf of the petitioners.

"When the application is granted u/s 75 of the Act, a permit has to be granted under Rule 7 of the Son and. Champaran Canals Irrigation Rules in form No. 8, so far as a long term lease is concerned I shall also deal with that form in detail when considering the contentions urged on behalf of the petitioners. Under Rule 8 the period of a long term lease shall not exceed, in the case of Son Canals, ten years for an original lease and twelve years for a renewal of such original lease.

Rules 47, 48 etc., deal with demands and collections, and I shall have occasion later to refer to some of those rules. I go back now to Part 6, Bengal Irrigation Act, 1876. Section 75A of the said Act is in the nature of an exception to Section 74, and I shall refer to Section 75A later in this judgment. Section 76 states "inter alia" that all rules made by the State Government u/s 99 shall be consistent with certain conditions. It is not necessary to read the other sections of Part 6. Part 7 of the Act deals with water-rates, and Section 78, which is the first section in that part, is in these terms:

"78. The rates to be charged for canal water supplied for purposes of irrigation shall be determined by the State Government and all persons accepting the water shall pay for it accordingly."

This is an important section and the learned Government Advocate has attached great importance to it. Section 83 lays down "inter alia" that all sums lawfully due under Part 7 shall be deemed to be rent and shall be recoverable as such by the person to whom it is payable. Section 85 lays down that every arrear of water-rate which is due to Government, and every sum due to Government by any person on account of collection of water-rate, shall be held to be a demand. Part 8 of the Act deals with jurisdiction & Part 9 with offences and penalties. Then there is Part 10 consisting of only one section, namely, S, 99. It is necessary to quote this section "in extenso":

"99. The State Government may, from time to time, make rules to regulate the

following matters:

- (a) the proceedings of any officer who, under any provision of this Act, is required or empowered to take action in any matter;
- (b) the cases in which, the officers to whom, and the conditions subject to which, orders and decisions given under any provision of this Act, and not expressly provided for as regards appeal, shall be appealable;
- (c) the person by whom, the time, place or manner at or in which, anything for the doing of which provision is made in this Act shall be done;
- (d) the amount of any charge made under this Act;
- (e) and generally to carry out the provisions of this Act. The State Government may, from time to time, alter or cancel any rules so made.

Such rules, alterations and cancellation shall be published in the Official Gazette, and shall thereupon have the force of law:

Provided that no rules shall be made by the State Government under the powers conferred on it by this section until a draft of the same shall have been published in the Official Gazette for one month, after which time the State Government may pass such rules as originally published, or with such alterations, additions and omissions as it may think fit".

5. I have already stated that in two of the cases a point has been taken that the notification in question (which I shall hereinafter describe as the impugned notification) does not comply with the provisions of Section 99 and is, therefore, invalid in law. This contention was specifically mentioned in two of the applications only, viz., M. J. C, 629 and 661, where in para. 7 the following was stated:

"That the rules under which the water-rate has been enhanced are illegal and ineffective in the eye of law as no draft of these rules was published in the Gazette prior to the framing of the rules in question."

In the other applications no such contention was raised. But I propose to deal with this contention first. . .

6. The proviso to Section 99 states that no rules shall be made by the State Government under the powers conferred on it by that section until a draft of the same shall have been published in the Official Gazette for one month, after which time the State Government may pass such rules as originally published or with such alterations, additions or omissions as it may think fit. The contention before us is that this proviso has not been complied, with by the State Government in making the impugned notification.

The contravention is said to be in two respects; firstly it is contended that a draft has not been published in the official Gazette for one month; secondly, it is contended that the impugned notification was made before the expiry of one

month. With regard to the first contention it was stated at the Bar that a draft of the" impugned notification was published in three issues of the official Gazette, first on 17-9-1952, again on 24-9-1952, and a third time on 8-10-1952, the 1st October being a holiday. The draft was not published in the issue of the Gazette on 15-10-1952.

The final publication was the publication made in the Bihar Gazette, extraordinary, of 23-10-1952. The argument is that it was necessary for the State Government to publish the draft in all the issues of the Gazette during a period of one month from 17-9-1952, and as there was no publication of the draft in the issue of the Gazette dated 15-10-1952, the draft was not published for one month as required by the proviso to Section 99 of the Act.

7. The point is not covered by any authority and has to be considered as one of first impression, having regard to the words used in the proviso. In my opinion, all that the proviso requires is that a draft of the rules shall be published in the official Gazette for one month; the proviso does not say that in each issue of the Gazette published during the month, whether ordinary or extra-ordinary, a draft of the rules must be published, and a failure to publish the draft in any one of the issues of the Gazette during the month will invalidate the rules.

In the case under our consideration, a draft of the rules was published in three issues of the Gazette, on 17-9-1952, 24-9-1952, and 8-10-1952, but the draft was not published on 15-10-1952. Therefore, the point for consideration is if the failure to publish the draft on 15-10-1952, amounted to a contravention of the requirements of the proviso to Section 99.

I must concede that the point is not entirely free from difficulty; but it seems to me that having regard to the words used in the proviso, it cannot be said that there has been a contravention of the proviso by reason of the failure to publish the draft in the issue of the Gazette on 15-10-1952.

8. The second point urged in this connection is again a point of first impression. The proviso requires that a draft of the rules shall be published in the official Gazette for one month, after which time the State Government may pass such rules as originally published or with such alterations, additions or omissions as it may think fit. Learned counsel for the petitioners has emphasised the words "after which time" occurring in the proviso, and the argument is that the impugned notification was published before the expiry of one month.

The argument proceeds on the footing that 17-9-1952, on which date a draft of the rules was first published, should be excluded for calculating the period of one month, and learned Counsel relied on the decision in -- Batuk Prasad Bhagat and Another Vs. Rudra Das Chakravarty and Others, , That was a case in which Section 12, Limitation Act and Section 9, General Clauses" Act, 1897, fell for consideration and it was held that Section 12, Limitation Act was a provision equivalent to Section 9, General Clauses Act, 1897.

Learned counsel for the petitioners has drawn our attention to Section 11, Bihar and Orissa General Clauses Act, 1917. This section states "inter alia" that in any Bihar and Orissa Act it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

There is a definition of the expression "Bihar and Orissa Act" occurring in Section 11, and that definition will be found in item 7 of Section 4. Irrespective of the consideration whether Section 11 of the Bihar and Orissa General Clauses Act, 1917, does or does not apply for the interpretation of the provisions of the Bengal irrigation Act, 1876, it seems to me that the expressions "from" and "to" do not occur in the proviso to Section 99, Bengal Irrigation Act, 1876.

Section 11, Bihar and Orissa General Clauses Act, 1917, embodies a rule of construction with regard to the expression "from" and "to" occurring in any Bihar and Orissa Act or Bihar Act. I doubt very much if that rule of construction can have any application with regard to the words used in the proviso to Section 99, Bengal Irrigation Act, 1876. Under the proviso to Section 99 of the said Act, the point for consideration is if the State Government made the rules after having published the draft in the official Gazette for one month.

The expression "after which time" occurring in the proviso can only mean after one month. I doubt if the question of excluding 17-9-1952, the date on which a draft of the rules was first published, arises at all under the proviso to Section 99. Let us assume, however, that 17-9-1952, should be excluded. If that date is excluded, then 17-10-1952, falls on the thirtieth day and not after the thirtieth day; it is argued, therefore, that when the notification was made on 17-10-1952, the period of one month had not expired.

The argument fails to take note of the important circumstance that though the notification was dated 17-10-1952, it was published in an extraordinary issue of the Bihar Gazette on 23-10-1952, and the notification said that the amendments shall come into operation with effect from 26-10-1952. In reality, therefore, the rules were made effective and operative from 26-10-1952, which was well after the period of one month mentioned in the proviso to Section 99, Bengal Irrigation Act, 1876.

Therefore, in my opinion, there was no contravention of the provisions of Section 99, and the impugned notification cannot be held to be invalid on the ground that it has not complied with the provisions contained in the proviso to Section 99, Bengal Irrigation Act, 1876. Even conceding that the provisions contained in the said proviso are mandatory in nature, I am of the view that there has been a substantial compliance with those provisions and the impugned notification cannot be held invalid on the ground that it has not complied with the requirements of the proviso to Section 99, Bengal Irrigation Act of 1876.

9. I now proceed to a consideration of the other main contention urged on behalf

of the petitioners. The contention is that the impugned notification does not affect long term leases or permits which were given before 26-10-1952, and which were still current and in force on that date. It has been very seriously argued before us that there was a contract between the opposite party on one side and the petitioners on the other, which contract was embodied in the long term leases or permits granted in form 8.

In pursuance of those permits, demand statements (parchas) and khatianis were prepared. The parties were bound by the terms mentioned in the permits and in the demand statements or khatianis and it was not open to the opposite party to go behind those terms. The argument of learned counsel for the petitioners proceeds entirely on the footing that the water-rate payable by the petitioners under the long term leases or permits granted to them was a matter of contract between the parties and it was not open to the opposite party to go behind that contract by an unilateral act.

In my view, the entire argument is based on a misconception as to the legal position. I agree with the learned Government Advocate that u/s 78, Bengal Irrigation Act, 1876, the State Government had the statutory power to determine the rates to be charged for canal water supplied for purposes of irrigation. Section 78 is of the nature of a charging section and consists of two parts. The first part says that the State Government has the power to determine the rates to be charged for canal water supplied for purposes of irrigation; and the second part says that all persons accepting the water shall pay for it accordingly.

The exercise of the power by the State Government u/s 78 is the exercise of a statutory power and is not a matter of contract between the parties. Learned counsel for the petitioners has referred me to Section 74 and has particularly emphasised that under that section a written application has to be made for the supply of water; the section further says that no person shall be liable to pay any rate or due whatever on account of water supplied to his land with the permission of the Canal Officer otherwise than on an application so made. When the application is granted, the canal officer has to record his permission in writing in accordance with the rules made u/s 99. My attention has also been drawn to form which is the form of an application for a long term lease. This form states:

"We, whose names are attached, apply u/s 74 of Act 3 of 1876 and the rules under it, by which we agree to- be bound, for water to be supplied from the abovenamed distributory, etc." There has been a good deal of argument before us as to what is meant by the expression "the rules under it, by which we agree to be bound". The argument of learned Counsel for the petitioners is that that expression merely means that the petitioners agreed to be bound by the rules which were existing at the time when the contract was made, The permit in form No. 8 also contains a similar provision. It states: "This permit is issued u/s 75 of Act 3 of 1876 for the irrigation of the area mentioned above. It is subject, to the provisions of all rules passed under the Act."

Again, the argument of learned counsel for the petitioners is that the expression "subject to the provisions of all rules passed under the Act" merely means that the petitioners agreed to be bound by the rules passed under the Act and existing at the time when the contract was made. I am unable to accept this meaning of the expression.

In my opinion, the expressions occurring in form No. 1 and form No. 8 mean, clearly enough, that the parties knew that the rules were liable to be changed by the State Government and the persons applying for supply of water and getting permits for such supply, agreed, to be bound by the rules made from time to time by the State Government u/s 99 of the Act.

The determination of the water-rate was not a matter of contract between the parties; it depended on the exercise of a statutory power by the State Government, and that is the reason why in the application for permits as well as in the permits, there was a clear stipulation that the persons who applied for the supply of water or who got permits for such supply would be bound by such rules as were made by the State Government u/s 99 of the Act.

Section 78 was the charging section, and the determination of the water-rate has to be made by rules u/s 99; this is clear from Clause (d) of Section 99. It has been argued before us that S. 78 refers to the stage when the application for supply is made, and any determination of water-rate, after a permit has been granted embodying the terms of the contract between the parties, can have no effect on that contract. Such an interpretation of Section 78 I am unable to accept.

Under Section 78, read with Section 99, it is for the State Government to determine by rule what rate should be charged for canal water supplied for purposes of irrigation, and all persons accepting water shall pay at that rate. It was because of Section 78 that it was necessary to incorporate in form No. 1 and form No. 8 the stipulation that persons applying for long term leases or getting such leases would be bound by the rules made by the State Government.

10. Our attention has also been drawn to Rules 47, 48 etc., learned counsel for the petitioners has particularly emphasised Sub-rule (3) of Rule 48 which says:

"No notice of demand other than the parchas referred to in Clauses (1) and (2) shall be issued during the"currency of the lease".

It is contended that Sub-rule (3) of Rule 48 makes it quite clear that there cannot be any alteration of the demand during the currency of the lease.

In my opinion, Sub-rule (3) of Rule 48 must be read as subject to the provisions of the statute under which the rules have been made. After all, the rules made under the statute carry out the purpose of the statute; they cannot override the provisions of the statute. Rules 47, 48 etc., provide the machinery for demands and collections. They have no bearing on the question of the determination of the water-rate in exercise of the statutory power given by Section 78 of the Act.

There has been some argument before us as to whether the imposition of a water-rate u/s 78 of the Act is a tax or a fee.

The argument on behalf of the petitioners is that it is a tax; the argument on behalf of the State Government is that it is a fee imposed by the State Government as a result of legislation and for certain services rendered, in Wharton's Law Lexicon, page 713 (Edn. 11), a rate is defined as a charge made by a railway, water, gas, or other public company for services rendered. In the case - under our consideration, the water-rate is charged for the purpose of supplying water, that is, for a service rendered, and I have no doubt in my mind that it is not a tax.

As observed in the -- The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , a tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. It was further pointed out therein that as the object of a tax is not to confer any special benefit upon any particular individual, there was no element of "quid pro quo" between the tax payer and the public authority.

A fee, on the contrary, is a charge for a special service rendered to individuals by some governmental agency, and the amount of the fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. In the present case, the water-rate is undoubtedly a fee to be determined by the State Government from time to time according as the cost of the service to be rendered decreases or increases.

It has been stated before us that in 1938-39 the water-rate was decreased by notification No. 2962-1, dated 12-5-1939. The reduction came into effect from 1-4-1938, and was applicable to all existing leases. In the present case no question of giving retrospective effect to the impugned notification arises at all. All that the opposite party are trying to do is to realise water-rate at the rate determined by the State Government, with effect from 26-10-1952.

The short question before us is not whether the impugned notification has retrospective effect, but the question whether it affects the long term leases or permits already granted before that date and in force on that date. If the matter is not a matter of contract only but depends on the exercise of statutory power by the State Government then I see no reason why the State Government cannot determine the water-rate to be paid with effect from a particular date and why such determination shall have no effect on all concerned from that date. That the matter is not a matter entirely of contract between the parties is also clear from Section 75A of the Act which is an exception to Section 74.

Section 75A makes certain persons liable for water-rate even though they have not made applications for the supply of water. Section 76 also shows that it is not a matter entirely of contract between the parties. My conclusion, therefore, is

that u/s 78 of the Act it was open to the State Government to determine the water-rate to be charged for canal water supplied for purposes of irrigation by a rule made u/s 99; and provided the impugned notification does not contravene the provisions of Section 99, all persons accepting water have to pay water-rate as determined by the State Government by the impugned notification, with effect from 26-10-1952.

If, however, the impugned notification contravenes the provisions of Section 99, then it is invalid, and the petitioners are not liable to pay the enhanced water-rate. I have already said earlier that in my opinion the impugned notification is substantially in conformity with the provisions of Section 99 of the Act.

11. I do not think that any person who has applied for and has got a permit for the supply of water has a vested or a contractual right to get water at the particular rate mentioned in the permit, irrespective of the rate determined by the State Government u/s 78 of the Act. Section 74 of the Act does not, in my opinion override Section 78, nor is there any repugnancy between the two, though in certain sections of the Act the expression "contract" or "agreement" has been used.

Section 74 merely lays down that an application for the supply of water has to be made and no person shall be liable to pay any rate or due on account of the supply of water otherwise than on an application made u/s 74, subject to the exception mentioned in Section 75. Section 74 deals with the supply of water and does not deal with the determination of the water-rate that is determined by the State Government u/s 78.

12. I now proceed to notice certain other arguments which all come under the contention that if the impugned notification affects the long term leases or permits which were given before the date of the impugned notification and which were in force on that date, then the impugned notification is ultra vires and without jurisdiction. One of the arguments under this head has been that if Section 78 is interpreted to give the State Government a power to so determine the water-rate as to affect the existing and current permits or leases, then Section 78 amounts to delegated legislation and must be held bad on that ground.

Mr. Basudev Prasad, who argued one of the cases, went to the length of submitting that even the old water-rate fixed by Rule 36 of the Son and Champaran Canals Irrigation Rules was bad, because Section 78 of the Bengal Irrigation Act, 1876, was bad on the ground of delegated legislation. I do not think that this point leads any serious refutation. It was open to the Legislature to leave it to the State Government to determine the water-rate from time to time and for obvious reasons.

I have already stated that the water-rate is a charge for a special service rendered to individuals and is supposed to be based on the expenses incurred by Government in rendering the service. It was obviously impossible for the

Legislature to calculate the cost of the service from time to time and, therefore, it was left to the State Government to determine the rate from time to time according as to the costs of the service to be rendered increased or decreased. I do not think that Section 78, Bengal Irrigation Act, 1876, can be said to amount to an abdication of the legislative function.

13. Next it has been argued that S, 78, if it is interpreted in the manner suggested by the learned Government Advocate, really legislates about contracts, which is Item 7 of List 3 of Schedule 7 of the Constitution of India. Learned counsel for the petitioners has argued that under Article 254 of the Constitution, Section 78 must give way to the provisions of the Indian Contract Act. If I may say without meaning any disrespect, this argument is also based on a misconception of the legal position. I have said more than once that the determination of the water-rate is not a matter of contract between the parties; it is an exercise of statutory power and, therefore, no question of repugnancy between Section 78 on one side and the provisions of the Indian Contract Act on the other arises in these cases.

14. There has been a good deal of argument before us as to the essential elements of a lease. It has been contended on behalf of the petitioners that a lease must be certain in four particulars; rent subject-matter of lease; duration; and parties. It has been argued that all these four essential elements of a lease are to be found in the permits which were granted to the petitioners, and, therefore, it was not open to the State Government to go behind the lease and enhance the water-rate which the petitioners had to pay." There has been some argument before us on the question as to whether a contract is bad if an essential element is undetermined but is determinate. Mr. Lal Narain Sinha has argued that if an essential element is undetermined and undeterminable, then the contract is bad; if, however, the essential element is undetermined but is determinable, then the contract is good. This argument of Mr. Lal Narain Sinha has been seriously challenged by learned counsel for the petitioners and a large number of decisions, both English and Indian, have been cited before us.

In my opinion, it is unnecessary to go into this question on the present applications. I have said, and I repeat, that the determination of the water-rate u/s 78 of the Act was not a matter of contract between the parties; it was an exercise of statutory power and, therefore, the question whether the contract was good or bad does not really arise. Mr. Lal Narain Sinha also suggested that if the question was looked at purely from the point of view of contract, then the contract should have been in the form laid down in Article 299 of the Constitution or Section 175, Government of India Act, 1935. That, again, is a question which does not arise in the present cases and need not be discussed.

15. For the reasons given above, I would hold that the petitioners have not been able to make out any case for the issue of writs on their applications. I would accordingly dismiss the applications, but, in the circumstances, I would make no order for costs.

16. There has been a great delay in delivering this judgment for which I alone am responsible. After we had heard these applications, I remained busy with two enquiries into the firings at Patna and Nawadah; those enquiries occupied me for about eight months, and thereafter I was in indifferent health for some time. I greatly regret the delay in preparing this judgment, but I hope that I have dealt with all the points argued before us as fully as possible.

Choudhary, J.

17. I agree.