

(1971) 04 MP CK 0001
In the Madhya Pradesh High Court
Case No : F.A. No. 58 of 1967

State of Madhya Pradesh

APPELLANT

Vs

Bahmansha Byramji

RESPONDENT

Date of Decision : 28-04-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299(1)
Land Acquisition (Mines) Act, 1885 — Section 5(2)
Land Acquisition Act, 1894 — Section 4, 6
Transfer of Property Act, 1882 — Section 130

Citation : (1978) ILR (MP) 768

Hon'ble Judges : Shiv Dayal Shrivastava, J; A.P. Sen, J

Bench : Division Bench

Advocate : K.P. Munshi, for the Appellant; V.S. Pandit, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Sen, J.—This appeal, filed by the State Government of Madhya Pradesh, is directed against a judgment of the Additional District Judge. Balaghat, dated 4th April 1967, whereby the learned Judge has decreed the plaintiff's claim for compensation to the extent of Rs. 71,851, as representing loss of profits for alleged deprivation of 1500 tons of manganese ore.

2. The facts leading to the appeal may be shortly stated. M/s. B.P. Byramji and Company, Nagpur, of which the plaintiff Bahmanshaw Byramji was a partner, held as many as 13 mining leases for extraction of manganese ore in the erstwhile State of Madhya Pradesh, of which the Bharweli Aolijhiri mines was one, which covered an area of 319.28 acres and was to last for a period of 20 years from 22nd March 1952. Upon the dissolution of that firm on 31st October 1954, its partners, by their application dated 11th July 1955 applied to the State Government for sanction to transfer its pre-existing mining leases to the outgoing partners. As per the schedules annexed thereto, the Bharweli Aolijhiri mines was to be transferred to the plaintiff. The State Government accorded its

sanction under Rule 37 of the Mineral Concession Rules, 1949, for assignment of the mining leases as applied for vide its memorandum No. 6415-5268-VII. M, dated 24th August 1955. The transfers were sanctioned on condition that M/s. B.P. Byramji and Company, Nagpur executed a mining lease afresh for each of the mines and the transferees entered into transfer agreements both in the standard forms. As a result of this, M/s. B.P. Byramji and Company of the one part and the State Government of the other executed a new mining lease dated 31st December 1955 in respect of the Bharweli Aolijhiri mines, whereby the quondam partnership firm was demised the right to extract manganese ore from the aforesaid mines for a period of 20 years w.e.f. 22nd March 1952, i.e. from the date of commencement of the original lease. The transfer agreement, if any, executed by the plaintiff is not on record.

3. In the year 1954-55 the State Government constructed the Gangulpara canal for providing irrigational facilities to the cultivators, which ran through the leased area of the Bharweli Aolijhiri mines, as shown in red in the map filed along with the written statement, and covering an area of 2.32 acres. Under the terms of the lease, M/s. B.P. Byramji and Company was, however, prohibited from working the mines within a distance of 50 yards from the canal on either side and, therefore, the result of the construction of the canal was that no mining operations could be carried on over an area of 13.40 acres. M/s. B.P. Byramji and Company accordingly made a claim for payment of compensation. The Assistant Engineer, P.W.D. (Irrigation), Canal Sub-Division, Balaghat appears to have referred the question of settling the amount of compensation payable for acquisition of the aforesaid 13.40 acres to the Land Acquisition Officer, Balaghat. Thereupon, proceedings were started by the Land Acquisition Officer, Balaghat in Land Acquisition Case No. III of 1954 55, purporting to act under the Land Acquisition Act, 1894. He issued a notice in those proceedings to M/s B.P. Byramji and Company and in pursuance of the said notice, the plaintiff appeared and filed his statement of claim. During the proceedings, Shri C.N. Chari, Mining Officer, Balaghat, submitted a report dated 12th October 1955 stating that the estimated loss of manganese ore as a result of construction of the canal was of 1852 tons approximately. On 30th June 1959, the Land Acquisition Officer, however, dropped the proceedings stating that the State Government had, in the meanwhile, "acquired the land subject to acquisition by private negotiation."

4. The plaintiff alleges that since no compensation was paid to him, he served a notice of demand upon the Collector, Balaghat, claiming compensation for the alleged loss of manganese ore. The Collector, by his memo No. Q/MC/347, dated 1st February 1960, intimated the plaintiff that the land "having been acquired by private negotiation" and the plaintiff having "permitted" the construction of the canal with the area of his lease, on certain terms and conditions, "no question of payment of compensation arose." The plaintiff alleges that he did not enter into any private negotiation with the State Government with respect to the compensation payable nor was there any settlement of his claim for compensation. On the basis of the Mining Officer's report, he claims that he lost

1852 tons of manganese ore, resulting in a loss of profit to him of Rs. 91,211. To this, he added Rs. 11,390 as compensation for disturbance of the surface of 13.40 acres at Rs. 850 per acre, and Rs. 1,708.50 as compensation at 15% thereon in lieu of compulsory acquisition of the land. He served a notice u/s 80 of the Code of Civil Procedure, dated 17th October 1960 making a demand for payment of Rs. 1,04,309.50 and thereafter filed the present suit for recovery of the said amount, with future interest thereon at 9% per annum from the date of suit till realisation.

5. The State Government disputed its liability for payment of the compensation amount claimed. While accepting the fact that proceedings started for the acquisition of the land for construction of the Gangulpara canal ultimately failed and that there was no settlement arrived at between the parties regarding the amount of compensation payable, it pleaded that the plaintiff was not entitled to any compensation. It pleaded inter alia that (i) the plaintiff, having consented and acquiesced in the construction of the canal, was now estopped from claiming compensation for such manganese ore as could be or might have been underneath the earth over which the canal was passing; (ii) the prohibition to work the area within 50 yards on either side of the canal, being a legal disability, under the terms of the lease, no compensation for loss of manganese ore on that account could be claimed; (iii) the plaintiff could not rely upon the Mining Officer's report which was neither correct nor based on any actual or factual data; (iv) the disturbance of the affected area did not affect the plaintiff's enjoyment of the mineral rights; (v) the plaintiff had been more than recompensed by appropriating the manganese ore extracted wholly at the cost of the Government from the area in question during the construction work; (vi) the suit was not maintainable; (vii) the canal had been constructed for the general public good, and the Government had the right to construct such canal without payment of compensation ; (viii) the canal was constructed at the agreed alignment as shown in the map filed with the written statement; (ix) the plaintiff had not lost 1852 tons of manganese ore nor deprived of profits amounting to Rs. 91,211, as per ton profit could, in no case, exceed Rs. 5; (x) the working of the area was and would have been, un-economical and uncommercial due to the depth of the location of the ore and on account of uncertainties, scarcity and poor quality of ore; (xi) the suit was barred by limitation, and (xii) there was no right to surface compensation as the land did not belong to the plaintiff.

6. The learned trial Judge has held that the State Government had agreed to pay compensation for deprivation of minerals through the machinery provided by the Land Acquisition Act and as the proceedings taken thereunder were ordered to be filed, the plaintiff was deprived of such compensation and the suit was, therefore, maintainable. In arriving at that conclusion, the learned Judge observes as follows : --

It is clear that the Contract between the parties for payment of compensation was mutually shaped, was mutually decided to be settled, by legal means, and

the reports of the experts had also been called, and then the stand was changed to avoid the liability of the compensation, which appears to be an afterthought, and cannot be accepted.

The learned Judge also held that due to the construction of the canal, the plaintiff was put to a loss of 1500 tons of manganese ore resulting in deprivation of profits of Rs. 82,500 which the plaintiff could have earned if he had worked the area, at the rate of Rs. 55 per ton, and deducting therefrom royalty amounting to Rs 10,649, the learned Judge ascertained the amount of compensation to be Rs. 71,851. While dealing with the aspect, the learned Judge states as follows: --

..... the contractual liability of the defendant with the plaintiff for payment of compensation is co-extensive, with the construction of the canal through his area with permission and with agreement to pay him compensation.....

The quantum of compensation was determined by the learned Judge on the basis of the report of Shri C.N. Chari, Mining Officer, Balaghat, Ex. P-18, although Shri Chari (P.W. 4) accepts that he based his estimate only on experience and eye sight without actually opening any experimental plots and without taking samples for determining the value, quality or quantity of the ore. As regards the question of limitation, the learned Judge held that the suit was not barred by limitation and was governed by Article 120 of the Limitation Act. He, however, negated the plaintiff's claim for surface compensation and also the claim for additional compensation at 15% of the amount, on the ground that there was no compulsory acquisition of the land. The result was that the learned Judge decreed the plaintiff's claim to the extent of Rs. 71,851, as indicated above.

7. The decision of the learned Judge has been challenged before us on a number of grounds. In the first place, it is urged that the plaintiff has no right to claim compensation. The allegation in para 2 of the plaint was that the Gangulpara canal was constructed "in the year 1955 or thereabout", and it suggests that the canal was constructed after the plaintiff became the exclusive owner of the Bharweli Aolijhiri mines. The allegation stands falsified at the stage of evidence. Actually, the canal was constructed in the year 1954-55 as is clear from the evidence of N. R. Palliwal, Chief Agent of M/s B.P. Byramji and Company, (P.W. 1).

8. M/s B.P. Byramji and Company, which held the mining lease, was dissolved on 31st October 1954. The partners of the dissolved firm applied to the State Government for sanction to transfer the mining lease to the plaintiff by their application dated 11th July 1955. The State Government accorded sanction to the assignment of the mining lease under Rule 37 of the Mineral concession Rules, 1949, vide its memorandum No. 6415-5268 VII. M, dated 24th August 1955. The transfer was sanctioned on condition that M/s B.P. Byramji and Company executed a mining lease afresh for the mines and the plaintiff entered into a transfer agreement. As a result of this, M/s B.P. Byramji and Company executed a new mining lease dated 31st December 1955, Ex. D-1, in respect of the Bharweli Aolijhiri mines. The transfer agreement executed by the plaintiff is,

however, not on Record but it can be safely presumed that he must have executed it on that very day.

9. The question, therefore, is whether the right to claim compensation, if any, which M/s Byramji and Company had, had been assigned to the plaintiff or not. Now, the transfer of the mining lease to the plaintiff on 31st December 1955, would not per se result in an assignment of the right to claim compensation. Indeed, a claim to compensation is not a claim to a debt but a mere right to sue which cannot be assigned. A right to sue is personal to the party aggrieved and there could be no assignment of right to sue for damages or cost or for breach of contract. Even if the right to receive unliquidated damages was regarded as an actionable claim, the plaintiff had no right to enforce such claim. The transfer of an actionable claim whether with or without consideration could only be effected by the execution of an instrument in writing in the manner provided by section 130 of the Transfer of Property Act. There is no such document on record from which it could be inferred that M/s B.P. Byramji and Company had transferred their pre-existing right to receive compensation to the plaintiff. The plaintiff has failed to prove that the transfer of the mining lease was along with the right to recover damages or compensation in respect of that property.

10. Before concluding this part of the case, we would like to refer to the contention urged on behalf of the plaintiff that the State Government, having admitted the allegations in para 1 of the plaint was not entitled to raise, for the first time, in appeal, any question as regards the plaintiff's right to bring the suit. It was urged that if the State Government had raised such a plea in the written statement, the plaintiff would have, in that event, met the plea by filing the relevant document showing that the right had been actually assigned to him. There is no merit in the contention. Only allegation in the plaint was that the plaintiff became the exclusive owner of the Bharweli Aolijhiri mines by sanction of the State Government. Now, the ownership in the mines is one thing and the right to claim compensation is another. There was no allegation in the plaint that the right to claim compensation had been assigned to the plaintiff and, therefore, there is no admission of that fact in the pleadings.

11. We pointedly enquired from the plaintiff's counsel whether the plaintiff's suit was in respect of a tortious act on the part of the Government, or was based on contract, or was for the enforcement of statutory right to compensation. The learned counsel appearing for the plaintiff unequivocally stated that the plaintiff's claim was based on contract.

We may point out at the very inception that the Land Acquisition (Mines) Act, 1885, had no application to the erstwhile State of Madhya Pradesh and, therefore, no compensation could be awarded to the owner of mines in Central Provinces as mines were owned by Government (See, Sarju Prasad Gour v. Ordinance Factory, Jabulpore 1945 NLJ 418 : AIR 1946 Nag. 1. There is, therefore, no question of enforcing the liability u/s 5(2) of that Act.

12. We are of the view that the findings of the learned Judge that the State Government had agreed to pay compensation for deprivation of minerals through the machinery provided by the Land Acquisition Act and that such contract between the parties for payment of compensation was mutually shaped, was mutually decided to be settled, by legal means, and the reports of experts had also been called and then the stand was changed to avoid the liability and that the contractual liability of the State Government with the plaintiff for payment of compensation was co-extensive with the construction of the canal through his area with permission, are un-warranted in law.

13. Under Article 299(1) of the Constitution, three conditions have to be satisfied before a binding contract against a State Government could arise. These three conditions are (1) the contract must be expressed to be made by the Governor, (2) it must be executed in writing, and (3) the execution should be by such persons and in such manner as the Governor might direct or authorise. The provisions of Article 299(1) are mandatory as the object of enacting the provision was that the State should not be saddled with liability for unauthorised contracts the provision was made in public interest and so the word "shall" used therein has always been interpreted as mandatory (see *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, ; *State of West Bengal Vs. B.K. Mondal and Sons, Union of India (UOI) Vs. A.L. Rallia Ram*, ; *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, , and *Mulamchand Vs. State of Madhya Pradesh*, These decisions lay down that a contract between Government and another person which is not in full compliance with Article 299(1), is no contract at all and cannot be enforced either by the Government or by the other person as a contract. The decision in *K.P. Chowdhry's* case also lays down that in view of the mandatory terms of Article 299(1) no implied contract could be spelled out between the Government and another person.

14. The learned Judge has wrongly spelled out a contract by the Government to pay compensation for deprivation of minerals through the machinery provided by the Land Acquisition Act on the basis of memo No. 3048 dated 10th December 1957, from the Assistant Engineer, canal Sub Division, Balaghat to M/s B.P. Byramji and Company, Ex D-4. We are of the view that the so-called undertaking by the Assistant Engineer was not a contract at all within the meaning of Article 299(1) of the Constitution and such undertaking will not bind the Government.

15. There is also no privity of contract between the parties. The mining lease was held by M/s. B.P. Byramji and Company. After the dissolution of the firm on 31st October 1955, its partners applied for sanction to the State Government for transfer of the Bharweli Aolijhiri mines on 11th July 1955. That application of theirs was sanctioned under Rule 37 of the Mineral Concession Rules, 1949, on 24th August 1955. The transfer was sanctioned on condition that M/s. B.P. Byramji and Company executed a fresh mining lease. After the assignment was sanctioned, M/s. B.P. Byramji and Company executed a new mining lease dated 31st December 1955, Ex. D-1. Under the terms of that document the contract is

between M/s. B.P. Byramji and Company of the one party and the State Government of the other. That being so, the contract of lease still subsists between the original contracting parties.

16. Even if we assume that the assignment clothed the plaintiff with the rights of M/s. B.P. Byramji and Company, no contractual liability on the part of the State Government to pay compensation can be spelled out. By clause 12, the contract was made subject to the Mines and Minerals (Regulation and Development) Act, 1948 and the Mineral Concession Rules, 1949. The prohibition to work the area within 50 yards on either side of the canal being a legal disability under the terms of the lease, no compensation for the loss of manganese ore can be claimed. On 31st December 1955, when there was an assignment of the mining lease, the Gangulpara canal was a *fait accompli*. Now, under clause 5 of Part III of the mining lease, the lessee was prohibited from carrying on any mining operations at or to any point within a distance of 50 yards from any canal except with the previous permission of the Collector or any other officer authorised by the State Government in that behalf. The clause nowhere contemplates payment of compensation for the consequent loss of minerals, unlike clause 2 of Part IV which enables the State Government or any person authorised by it in that behalf, to enter upon the land and lay railway, tramways, road-ways etc. That being so, there was no liability for payment of any compensation for alleged deprivation of minerals.

17. The plaintiff's suit must also fail on the ground that M/s. B.P. Byramji and Company, having consented to and acquiesced in the construction of the canal, the plaintiff was estopped from claiming compensation for such manganese ore as could be or might have been underneath the earth over which the canal was constructed or within 50 yards on either side of the canal. The documents on record clearly show that the construction was with their permission. M/s. B.P. Byramji and Company were fully recompensed by appropriating the manganese ore extracted wholly at the cost of the Government from the area in question during the construction work. The canal was constructed at the agreed alignment. The disturbance of the affected area did not affect their enjoyment of the mineral rights. The canal was constructed for the general public good and the Government had the right to construct such canal without payment of compensation.

18. The plaintiff's suit must also fail on the ground that there is no material on record as to the quantity of the mineral lost or the grade or quality

or the rate at which such mineral could be sold. During the execution work, the entire manganese ore extracted at the cost of the Government from the area in question, was appropriated by M/s. B.P. Byramji and Company. The evidence of N.R. Palliwal, Chief Agent of M/s. B.P. Byramji and Company, (P.W. 1) and M.R. Kabir, Mines Manager, (P.W. 2), furnished no basis for holding that the plaintiff was deprived of 1852 tons of manganese ore or of profits amounting to Rs. 91,211 or that the rate was Rs. 55 per ton. Indeed, their evidence suggest that

the plaintiff has no accounts to support his claim. The plaintiff cannot rely upon the report of Shri C.N. Chari, Mining Officer, Ex. P-12, which was neither correct nor based on actual or factual data. Shri C.N. Chari, Mining Officer, (P.W. 4) admits that he based his estimate only on experience and eyesight without taking actual sample" for determining the value or quantity of the ore. The Mining Officer's report cannot also be acted upon for the reason that it is accepted before us that there was no notification issued by the State Government under sections 4 and 6" of the Land Acquisition Act, 1894. That being so, the proceedings in Land Acquisition Case No. III of 1954-55 started before the Land Acquisition Officer, Balaghat, were wholly without jurisdiction. The Mining Officers report which was submitted in those proceedings cannot, therefore, be acted upon.

19. Lastly, the plaintiff's suit must fail on the ground that it is barred by limitation. The learned Judge observes that this was not a case in which the land had been acquired, under the Land Acquisition Act, or the acquisition remained incomplete, under that Act, but the claim was founded on a contractual liability to pay compensation for deprivation of minerals, through the machinery provided by the Land Acquisition Act, which stand was later changed to avoid the liability. While dealing with this aspect, the learned Judge states as follows: --

It was argued, on the side of the State, that the suit of the plaintiff was barred by limitation, by virtue of Articles 17 and 18 of the Limitation Act, which prescribed one year's limitation, in cases of land acquired for public purposes, for compensation, or when the acquisition is not completed, and reliance was placed on the ruling reported in Chitlay's Limitation Act, at page 1092, 3rd Edn., 1952. In my opinion, to the facts of the present case, this law will have no application because it is not a case in which the land has been acquired under the Land Acquisition Act, or the acquisition has remained incomplete, under that Act. It is patently a case in which the lease granted to the plaintiff, for working for the mines for 20 years, was not allowed to be worked as agreed, and he was prevented from working it, on the basis of a contract, which was instituted between plaintiff and defendant, on an agreement to pay compensation and, therefore, to such a case, Article 120 *ibid.*, would apply, giving a limitation of 6 years, and in this connection, the two rulings reported in *Secretary of State v. Lodna Colliery Co Ltd.* AIR 1936 Pat. 513 and *State of West Bengal Vs. Brindaban Chandra Pramanik and Another*, are clear authority, and which have dealt with cases arising out of similar circumstances. Therefore, the objection of the limitation raised by the State is not tenable. I, therefore, hold that the suit of the plaintiff is not barred by limitation.

20. The stand of the plaintiff before us has also been that the suit for compensation was based on a contract. If that be so, then the suit would not be governed by Article 120 but by Article 115. However, as we have already pointed out, there was no such contract between the parties for payment of any compensation for loss of minerals, either through the machinery of the Land

Acquisition Act or otherwise.

21. The question then is what is the appropriate Article of the Limitation Act applicable. In *Mantharavadi Venkayya v. The Secretary of State for India in Council* ILR 27 Mad. 535, there was a claim for damages for breach of a statutory duty on the Collector's part to render an award on acquisition of land. The land having vested in the Government, *Subrahmaniam Ayyar and Bhashyam Ayyangar, JJ* held that Article 18 contemplated a suit for compensation for non-completion, and that article does not apply to a case in which the land has vested in Government. On that view, their Lordships held that Article 120 governed the suit. So also, in *Rameshwar Singh v. Secretary of State for India* ILR 34 Cal. 470, *Mookerjee and Holmwood JJ.* held that Article 17 applies where there is acquisition of land for public purposes but there is failure on the part of the Collector to pay or deposit in Court the amount awarded by him under the Land Acquisition Act. Their Lordships further held that Article 18 applies to suits for compensation for non-completion of and refusal to complete the acquisition, whereas, Article 14 to one to set aside any order of the officer of Government in his official capacity. The suit before them being for compensation which could not be foreseen at the time of the acquisition, they held that the rule of limitation applicable was that provided in Article 120

22. The decisions in *Secretary of State v. Lodna Colliery Co Ltd* (supra) and *State of West Bengal v. Brindahan Chandra* (supra), on which the learned Judge has relied, are distinguishable on facts. In *Secretary of State v. Lodna Colliery Co. Ltd.* the suit was for enforcement of a statutory liability for payment of compensation u/s 5(2) of the Land Acquisition (Mines) Act, 1885 and such a suit was held to be governed by Article 120. In *State of West Bengal v. Brindahan Chandra*, there was a claim for payment of statutory compensation under Rule 75-a (4) of the Defence of India Rules, 1939. The non-payment of such compensation was the cause of action of the suit and it was held that the suit was under the residuary Article 120 quite within time.

23. Article 2 is the proper Article to apply where a public officer, while purporting to act bona fide in pursuance of his statutory authority, has exceeded his powers and committed a tortious act and a suit is instituted for damages. This subject was elaborately discussed by Courtney-Terrell, C. J. in *Secretary of State v. Lodna Colliery Co., Ltd. and others* (supra), in these words: --

The object of the article is the protection of public officials who, bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly the act

must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection.

In *Mohammad Saadat Ali Khan v. The Administrator, Corporation of City of Lahore* ILR 1945 Lah 523 (FB), where all rulings on the subject were noticed, Mahajan J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute". These authorities bear the imprimatur of the Supreme Court in *State of Punjab Vs. Modern Cultivators, Ladwa*, as laying down the correct law.

24. The suit, as framed, is a suit for damages for non-completion and refusal to complete the acquisition under the Land Acquisition Act. Such a suit falls within the purview of Article 18 of the Limitation Act. It is true that we have found, as a fact, that there was no acquisition of the land, but the question of limitation must be determined with reference to the frame of the suit. Even otherwise, we think Article 2 squarely applies to the facts of the present case. The object of the article is the protection of the public officials who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortuous act. Failing Article 2, the suit will fall within the purview of Article 36. On any view of the matter, the plaintiff's suit was barred by limitation.

25. In the result, the appeal succeeds and is allowed with costs. The judgment and decree of the learned Additional District Judge are set aside and the plaintiff's suit is dismissed throughout. Hearing fee as per schedule.