
(1951) 03 GAU CK 0002
In the Gauhati High Court
Case No : First Appeal No. 16 of 1949

Union of India

APPELLANT

Vs

Muralidhar Agarwalla and others

RESPONDENT

Date of Decision : 19-03-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 226, 300
Government of India Act, 1858 — Section 65
Government of India Act, 1915 — Section 32
Government of India Act, 1935 — Section 176
Sales of Goods Act, 1930 — Section 27

Citation : AIR 1952 Guw 141

Hon'ble Judges : T.V. Thadani, C.J.; Ram Labhaya, J

Bench : Division Bench

Advocate : B.N. Choudhuri, for the Appellant; S.M. Lahiri, K.R. Barooah, P.K. Lahiri and S.C. Choudhuri, for the Respondent

Judgement

Thadani, C.J.—This is a first appeal from the judgment and decree of the learned Subordinate Judge, Gauhati, dated 18-8-49, by which he decreed the plaintiff-respondents' suit for a sum of Rs. 14,000/- (rupees fourteen thousand only) against the Appellant, the Dominion of India (now the Union of India).

2. The plaintiffs brought a suit for the recovery of a sum of Rs. 17,701/- as compensation for conversion by the B.A. Railway Administration of large quantity of earth--some 1,16,675 cubic feet, which was alleged to have been dug and removed from the land belonging to the respondents and laid on the double Railway line of the B.A. Railway. It was the respondents' case that while they were absent from Gauhati, the B.A. Railway caused a large quantity of earth to be dug and removed from their land and had it placed on the permanent way, between January and April 1944 without the consent of the plaintiffs; on their return to Gauhati, they complained to the D. C. Kamrup, who directed the Requisition Officer, Gauhati, to satisfy himself in regard to their allegation; the

Requisition Officer reported that 1,16,675 cubic feet of earth from the respondents' land had been dug and removed and recommended that a sum of Rs. 3,500-4-0 be paid to the respondents as compensation; the respondents, however, declined to accept this sum as, in their opinion, it was inadequate, and claimed compensation at the rate of Rs. 12/- per hundred cubic feet, amounting to Rs. 14,001/-, and a further sum of Rs. 3700/- as loss of income at the rate of Rs. 100/- a month from the 1st February 1944 to the 28th February 1947.

3. In due course on 9-12-46, the respondents sent 3 notices under S. 80, Civil P.C.--One addressed to the Governor General in Council, New Delhi, through the Deputy Director, Railway Board, another to the General Manager, B.A. Railway, Calcutta, and a third to the President, B.A. Railway Board, New Delhi. On the 12-3-47, the respondents brought the present suit.

4. In the W.S. verified by the Dy. General Manager, B.A. Railway, Calcutta, he stated that he did not know who had dug and removed the earth from the respondents' land, and was not aware that the P.C. had made an offer of Rs. 3,500-4-0 to the respondents as compensation; even if he did he had no authority of the Railway Administration to make such an offer; in any case, the quantity of earth removed from the respondents' land was in the neighbourhood of 60,000 cubic feet, and not 1,16,675 cubic feet, as alleged by the respondents. He denied the claim of the respondents for the value of the earth removed and loss of income for a period of 37 months, and stated that in any case the respondents' claim was exaggerated and that the proper amount of compensation payable to them must be assessed at a rate not exceeding Rs. 30/- per thousand cubic feet. Other defences to the suit apart from formal defences, taken were--that it was barred by limitation; that the statutory notice was not served on the proper person; that the Union of India was not liable for the claim.

5. On the pleadings, the trial Court framed the following issues:

1. Is the plaintiff entitled to recover compensation as alleged in the plaint?
2. Is the defendant liable to pay compensation for removal of earth and using the same for doubling Railway line as alleged in the plaint?
3. Is the rate at Rs. 120 per 100 c. ft. excessive?
4. Is the plaintiff's claim at Rs. 100 per month for 37 months untenable in law?
5. Is the suit barred by limitation?
6. Is the suit bad for want of legal, valid and proper notice?
7. Is the suit maintainable in its present form?
8. Is the suit bad for misjoinder and nonjoinder of parties?
9. To what relief the plaintiff is entitled?

6. On the question of notice, the learned Trial Judge has stated:

Their learned Advocate very rightly did not press this issue at the bar. I, therefore, have no other alternative than to answer this issue also in the negative.

Mr. B.N. Choudhuri for the Union of India contended that assuming the appellant's advocate did not press the issue as to notice, his conduct would at the most amount to a waiver or abandonment of an issue, neither of which constitutes an effective answer to a statutory provision as to notice. He further contended that as by their notice the respondents demanded payment of the amount within a month, the notice was not in accordance with law.

7. We think, on the facts of this case, it is unnecessary to express our view as to whether a statutory notice can be waived or an issue as to a statutory notice abandoned by an advocate. The Madras High Court in the cases reported in "Venkata Narasimha v. Bhashyakarlu Naidu", 22 Mad 538; "Venkata Narasimha Naidu v. Bhashyakarlu Naidu", 25 Mad 367 (P.C.) and "Venkataswami v. Mahalakshmi, AIR 1949 Mad 747, has undoubtedly answered the question in the affirmative.

8. We propose to decide the issue as to notice on the short ground that as a notice under S. 80, Civil P.C., in the case before us was served on the President of the Railway Board, a receipt of which has been acknowledged, the notice was valid in law as the President of the Railway Board is also the Secretary to the Government of India in the Railway Department.

9. Mr. Lahiri for the respondents has drawn our attention to an extract from a report of the Railway Board on Indian Railways for 1925-26, Vol. I, pages 86-87. Paragraph 3 of the extract reads as follows:

The Railway Board as now constituted, consists of the Chief Commissioner as President, the Financial Commissioner and two members, the Chief Commissioner being the Secretary to the Government of India in the Railway Department.

Mr. Lahiri has also drawn our attention to the Hindustan Year Book, 1947, at page 79 of which appears the following passage:

On 1st April 1924, in accordance with the recommendation of.....The Chief Commissioner is the Secretary to the Government in the Railway Department.

10. We gave an opportunity to Mr. Choudhuri to contradict the statement that the President of the Railway Board was Secretary to the Government of India in the Railway Department, by making an official reference in this behalf to the proper authority. Notwithstanding the opportunity given to Mr. Choudhuri, he has not been able to contradict the report to which we have referred. We have reason, therefore, to think that at the trial the appellant's advocate knew that the President of the Railway Board was also the Secretary to the Government of

India in the Railway Department, and that his statement to the Court that he did not press the issue to a decision was based on this knowledge. In our view, the service of the notice upon the President of the Railway Board who is ex-officio Secretary to the Government of India in the Railway Department, was good service in accordance with S. 80, Civil P.C. As to Mr. Choudhuri's contention that the notice was bad because the respondents called upon the appellant to pay the claim within a month, it is sufficient to say that such a demand cannot invalidate the notice if the suit was, in fact, filed after the expiry of 2 months, as required by S. 80 of the Code of Civil Procedure. The present suit was admittedly filed after the expiry of the period of notice as required by S. 80, Civil P.C.

11. The next question argued before us by Mr. Choudhuri was the question of limitation. He contended that the appropriate Article of the Indian Limitation Act governing the facts of this case was Art. 36, and not Art. 48. It was not disputed by Mr. Choudhuri that if Art. 48, and not Art. 36, applied to the facts of the present case, the suit was within time, provided the notice under S. 80, Civil P.C., was held to be a good notice. The question, therefore, for our consideration is-- which of the two Articles is applicable to the claim in suit. We have come to the conclusion that Art. 18, and not Art. 36, applies. Art. 36, being a residuary article, will apply only if none of the other relevant articles is shown to be applicable. Article 48 is in these terms:

Description of suit. Period of limitation. Time from which period begins to run.

For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same. Three years. When the person having the right to the possession of the property first learns in whose possession it is.

12. Mr. Choudhuri contended that earth is not specific movable property, and attempted to distinguish the case of "Adjai Coal Co. Ltd. v. Panna Lal", 34 Cal. WN 483 (P.C.), in which Lord Thankerton, delivering the judgment of the Judicial Committee, had observed :

On the question of limitation their Lordships are of opinion that the point is governed by the decision of this Board in "L.P. Evans Pug v. Ashutosh Sen", 56 Ind App 93 (P.C.), a coal encroachment case, in which it was held that Art. 43 of Sch. I of the Indian Limitation Act, 1908, applies to all conversions, whether dishonest or not,

by saying that whereas coal may be regarded as specific movable property, earth cannot be so regarded.

13. In our view, the words "specific movable property" have not the same meaning as identifiable movable property. If movable property, whether it is earth or coal," is alleged to have been removed from a particular place belonging to or in possession of a particular person, the earth or coal so removed is specific movable property, although it may not be identifiable. It is true that in a case

reported in "Hirday Narain v. Babu Ram", AIR 1941 Oudh 172,--a case in which the subject-matter of the removal was earth--the learned Judges of the Oudh Chief Court applied Art. 36 of the Limitation Act. But it is plain from a perusal of the judgment in that case that the learned Judges were not dealing with a case of conversion of specific movable property. Moreover, nowhere have the learned Judges of the Oudh Chief Court said that Art. 48 did not apply to the facts before them. As we have said Art. 36, being a residuary article, can be applied, only when it is shown that no other relevant article applies. The Oudh case would have been of assistance to Mr. Choudhuri if the learned Judges had stated that to a case of conversion of specific movable property. Art. 48 of the Indian Limitation Act did not apply.

14. Mr. Choudhuri next referred us to a case reported in "Vishnu Keshav v. Ramchandra Bhaskar", 11 Bom 130, a case which, in our opinion, has no application to the fact before us in that the learned Judges were not dealing with a case of conversion of specific movable property. In this view, the plea of limitation fails.

15. The next question argued was the question of the liability of the Union of India to be sued on the facts of this case. This question must be answered with reference to Art. 300 of the Constitution of India read with S. 176 of the Government of India Act, 1935, S. 32 of the Government of India Act, 1915, and S. 65 of the Act of 1858.

16. In the case before us, the Union of India is sued for conversion of a large quantity of earth dug and removed from the land belonging to the respondents. The plaintiffs were not in a position to prove that the earth so dug and removed was dug and removed by an agent or agents, including an independent contractor or servant or servants of the Union of India. But they have established the fact that the earth so dug and removed was laid on the double Railway track of the B.A. Railway. It is, therefore, reasonable to suppose that the earth so removed was used for the purposes of the Union of India in the Railway Department. It is admitted in the W.S.

that an allegation was made (by whom, it is not stated) that some contractors, supposed to have been engaged by the Railway Administration, had dug and removed the earth from the plaintiffs' land.

Whether the Railway Administration engaged an independent contractor for the execution of the undertaking or had the work done by its servants, was a fact within its knowledge. No attempt was made by the Railway Administration to prove on what terms and in what circumstances it had this work done. This aspect of the case, however, ceases to have any significance in view of the proved fact that the earth dug and removed from the plaintiffs' land was laid on the Railway track. The simple question then for our consideration is--whether on these facts, the Union of India was liable to be sued.

17. Mr. Choudhuri contended that the Union of India being a sovereign power,

was not liable to be sued for tortuous acts committed by its agents or servants. The proposition so broadly stated is, we think, quite erroneous. The liability of the Dominion of India to be sued, whether arising out of contract or tort -- is to be decided with reference to the terms of S. 65 of Act of 1858 and the decided cases upon the subject.

18. In "*SECRETARY OF STATE v, KAMACHEE BOYE*", 7 Moo Ind App 476, their Lordships of the Privy Council negatived the liability of the Secretary of State for India in Council on the following grounds:

(1) That the Raja of Tanjore was an independent sovereign in India; (2) that the seizing of the State of Tanjore was an act of State, i.e., it was not an act affecting to justify itself on grounds of Municipal law and was directed against an independent sovereign State; (3) that the transactions between independent States are governed by other laws than those which Municipal Courts administer. Such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may take.

19. In "*Secretary of State v. Forster*", 12 Beng LR 120 (P.C.), the liability of the Secretary of State was affirmed and the "*TANJORE CASE*", (7 Moo PC 476) distinguished. It was observed:

The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held rent free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India.

20. In "*Jehangir v. Secretary of State*", 6 Bom. L.R. 131, the liability of the Secretary of State to be sued was affirmed. Batty, J., observed:

An act of State in respect of which the jurisdiction of the Courts is barred, must be an act which does not purport to be done under colour of legal title at all, and which must rest for its jurisdiction on considerations of external politics and interstitial duties and rights In dealing with its own subjects, therefore, a Government must defend its action as justified by positive law, and cannot rely on a plea of political expediency which would only justify action in relation to foreign matters to which the law of the land does not extend.

In another part of the judgment, Batty, J., made it clear that there can be no such thing as an act of State between the Sovereign and his subjects.

21. In *Peninsular and Oriental Steam Navigation Co. v. Secy. of State*, 5 Bom.

H.C.R. App. 1 the earliest case on the subject, Sir Barnes Peacock C.J., in the course of the judgment enunciated the following principle:

In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Grey, C.J., in the case of "Bank of Bengal v. United Company", (Bignell Rep. p. 12) which was cited in the argument, that the fact of the Company having been invested with powers, usually called sovereign powers, did not constitute them sovereigns.

22. It is true that there are certain passages in the judgment of Sir Barnes Peacock, C.J., which gave rise to some misapprehension in the matter of the liability of the Secretary of State for India. For instance, in "Nabin Chandra Dey v. Secretary of State for India", 1 Cal. 11 the Calcutta High Court, in negating the liability of the Secretary of State for India in Council, quoted, with approval, certain observations of Sir Barnes Peacock, C.J., in the "P and O Company" Case (5 Bom. H C R App. 1). The view taken in "Nabin Chandra v. Secretary of State, (1 Cal. 11) has apparently prevailed in some cases reported in Secretary of State v. Sukhdeo, 21 All. 341, Jehangir M. Cursetji v. Secy. of State, 27 Bom. 189, Secretary of State v. Cockeraft, 39 Mad. 351, Municipal Corporation Bombay v. Secy. of State, 58 Bom. 660, Muhammad Abdul Qaiyum Vs. Secretary of State , AIR 1943 287 (Nagpur) and Uday Chand v. Province of Bengal, 51 Cal, W.N. 537.

23. In Secretary of State v. Sari Bhanji, 5 Mad. 273, however the judgment of the "P and O Company" case, (5 Bom. H.C.R. App. 1) was interpreted differently. The learned Judges of the Madras High Court held that if the claims did not arise out of an act of State, they could be entertained by the civil Court. Sir Charles Turner, C.J., observed :

Where an act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers, conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of civil Courts.

24. In a recent case, P.V. Rao Vs. Khushaldas S. Advani, , Chagla, C.J., summarised the law on the subject in these terms:

An act of state is different fundamentally from an act of sovereign authority. An act of State operates extra-territorially. Its legal title is not any Municipal law but the overriding sovereignty of the State. It does not deal with the subject of the State but deals with aliens or foreigners who cannot seek the protection of the Municipal law. It is difficult to conceive of an act of State as between a Sovereign and his subjects. If Government justifies its act under colour of title and that title arises from a Municipal law, that act can never be an act of State. Its legality and validity must be tested by the Municipal Courts.

25. In *Venkata Rao v. Secretary of State*, 64 Ind. App. 55 (P.C.) their Lordships of the Privy Council observed that S. 32, Government of India Act, 1915, merely dealt with parties and procedure, and that if an action lay against the Government, that right could not be taken away simply because an identical right of action did not exist against the East India Company. Apparently, relying upon this decision, Chagla, C.J., in *P.V. Rao Vs. Khushaldas S. Advani*, stated:

Therefore it would not be too much to assume that if the *Peninsular Case* (5 Bom. H.C.R. App. 1) laid down that the right of the subject to sue Government was limited to any consideration as to whether East India Company could or could not have been sued as a trading corporation, that was not the correct statement of the law.

26. Mukherjea J. on appeal by the State of Bombay in *P.V. Rao Vs. Khushaldas S. Advani*, had occasion to deal with S. 32, Government of India Act, 1915, read with the corresponding provisions in the Act of 1858. He referred to the decision of the Madras High Court in *Secretary of State v. Sari Bhanji*, 5 Mad. 273, with approval. Two learned Judges of the Supreme Court of India apparently took the view that action can be brought against a State Government under the provisions of Art. 226 of the Constitution of India on the analogy of the liability of the Union of India to be sued for all acts like any private individual except for act of State properly so called. Our conclusion then is that the Union of India is liable to be sued for all acts arising out of breaches of the Municipal law in the same way as a private individual.

27. We will now proceed to consider the question of the liability of the appellant on the merits of the case. It is true that plaintiff 3 has stated in his evidence that he did not know who the contractor working for the B.A. Railway was; nor did he know for whom the workmen who were digging and removing the earth, were working. But on one point his evidence is quite definite, and that is that the earth removed from his land was placed on the permanent way proposed to be constructed for the double Railway line of the B.A. Railway. This evidence of plaintiff 3 is corroborated by the evidence of Suruj Prosad Malik, Madhab Ram Das and Someswar Choudhury. No attempt was made by the B.A. Railway even remotely to suggest that the earth laid on the double line was acquired from a different source and in different circumstances to those alleged by the respondents. If the B.A. Railway had acquired the earth for the purposes of the Railway line from some other person, it should have examined that other person to rebut the evidence led by the respondents. On the respondents' evidence, therefore, we are satisfied that a large quantity of earth was removed from the respondents' land and laid on the permanent way of the B.A. Railway.

28. Mr. Lahiri has rightly contended that once it is established that the earth removed from the respondents' land was laid on the permanent way of the B.A. Railway, an inference can properly be drawn from the circumstances of the case that the B.A. Railway intended to hold the earth so placed on its permanent track, adversely to the true owners (in this case the respondents) and that such

an intention would render the appellant liable for conversion. Mr. Choudhuri for the appellant, on the other hand, contended that in the absence of a demand by the owner and refusal by the persons sought to be made liable for conversion, there can be no conversion. We are unable to accept this contention. In our view, refusal upon demand is only one instance of conversion, as stated by Schwabe, C.J., in *Sinnam Chetty and Another Vs. G.S. Alagiri Aiyar and Others*, . If in a given case, there is evidence that the defendant has dealt with goods in a manner adverse to the plaintiff and inconsistent with his right to the use and possession of them, such dealing with the goods, in our opinion, amounts to conversion, notwithstanding the fact that no demand for the return of the goods was made.

29. In this case, the appellant has made it quite clear by taking exception to the action of the Deputy Commissioner in offering a sum of money by way of compensation, as stated in para 5 of the Written Statement that, the appellant was holding the earth adversely to the respondents. In para 6 of the W.S., it is further stated that there is nothing to show that the quantity of earth alleged to have been removed was used for the Railway line. These two statements, in our opinion, indicate with reasonable certainty the intention of the appellant to retain the earth adversely to the respondents. At one stage of the case it was contended by Mr. Choudhuri that the B.A. Railway in all probability employed an independent contractor for the supply of the earth, and that it is reasonable to suppose, therefore, that the contractor received the price of the earth supplied to the B.A. Railway. Assuming that it is so, it would tend to prove beyond all reasonable doubt that the B.A. Railway intended to retain the earth adversely to the respondents, for, it would be unlikely to return the earth for which it had paid the price. We are satisfied from the circumstances of this case that the B.A. Railway had no intention of returning the earth to the respondents even if the respondents had made a demand for it.

30. Assuming that the B.A. Railway had engaged a contractor for the supply of the earth and paid the price of the earth so supplied to the contractor for which there is no evidence even so the appellant would be liable, for, as between the innocent respondents and the innocent appellant, the rights of the former must prevail in view of S. 27, Sale of Goods Act. It is not the case of the appellant that the proviso to S. 27 applies. The appellant's case is equally unsustainable if the earth belonging to the respondents was laid on the permanent way by its servants, for the plain reason that the conversion was the act of the appellant in the facts of this case. Our conclusion then is that the appellant is liable, in conversion for the value of the earth belonging to the respondents.

31. As to the quantity of earth removed, we think the learned Trial Judge has correctly held that it was 1,16,675 c. ft. According to the evidence of Nandinath Talukdar, he was deputed by a Sub-Deputy Collector to measure the volume of earth removed from the respondents' land. He found that 1,16,675 c. ft. of earth had been removed. It is true that this witness did not measure the quantity of

earth laid on the Railway track. But another witness, Suruj Prosad Malik, has stated in his evidence that he saw workmen digging and removing earth from the respondents' land and laying it on the permanent way of the B.A. Railway. It is, therefore, reasonable to suppose that 1,16,675 c. ft. of earth removed from the respondents' land was laid on the Railway track, in the absence of any evidence led by the B.A. Railway as to the quantity of earth used by it, for the permanent way.

31a. In the matter of the assessment of the value of the earth belonging to the respondents and used by the B.A. Railway, we think the amount awarded by the Trial Court must be reduced. Apparently the Trial Court assessed the value of the earth not on the basis of its market value prevailing in April 1944, but on the basis of the value prevailing at some later date. Mr. Choudhuri for the appellant has relied upon a statement in the evidence of Nandinath Talukdar, a Mandal in the Requisition Department, in which he had stated that the Municipal rate in 1944 was Rs. 30 per thousand cubic feet. In re-examination, however, he corrected himself by saying that the rate of Rs. 30 per 1,000 c. ft. was for filling up lands with earth from the same plot from which the earth was removed.

32. The evidence of Madhab Ram Das, Head Clerk of the Municipal Board, appears to be more satisfactory on the question of the assessment of compensation. According to this witness, the market value in 1944-45 was Rs. 100 per 1,000 c. ft. No evidence was led by the B.A. Railway to rebut this evidence. On the basis of Rs. 100 for every 1000 c. ft. of earth, compensation for 1,16,675 c. ft. amounts to Rs. 11,667-8-0, and not Rs. 14000, as awarded by the learned Trial Judge. It is unnecessary to refer in detail to the 2 cases reported in AIR 1943 162 (Nagpur) and Alliance Bank Simla Ltd. v. Ghamandi Lal, AIR 1927 Lah. 408 which lay down the principle that the compensation for conversion is to be determined with reference to the date of conversion.

33. The respondents have filed a cross objection against the refusal of the learned Trial Judge to award the sum of Rs. 8700 claimed by the respondents for loss of income. The learned Trial Judge has rightly observed that once a plaintiff claims compensation for conversion he cannot also claim any sum of money for loss of income. Mr. Lahiri has not cited any authority to us in support of his contention that a claim for loss of income resulting from conversion can be successfully made in addition to a claim for compensation for conversion.

34. The result is that the judgment and decree of the Trial Court is modified as indicated in our judgment. There will thus be a decree for the respondents for Rs. 11,667-8-0 and costs thereon. Before us, Mr. Lahiri for the respondents did not argue the question of interest upon the decretal amount from the date of the institution of the suit till realisation. The Trial Court has not awarded any interest. The result is that, with the modification as indicated above, the appeal is disposed of with costs to the respondents on the amount decreed by us in both the Courts. The cross objections are dismissed with costs. The decretal amount is ordered to be satisfied in 2 months.

Ram Labhaya, J.

35. I agree with my Lord the Chief Justice in the conclusion he has reached.