

Md. SerajuddIn Vs. State of Orissa

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Court : Orissa

Decided On : Jan-24-1969

Reported in : AIR1969Ori152

Judge : S. Barman, C.J. and ;S. Acharya, J.

Acts : [Contract Act, 1872](#) - Sections 2 and 56; [Constitution of India](#) - Article 299 and 299(1); Mines and Minerals (Regulation and Development) Act, 1957 - Sections 5; [Government Grants Act, 1895](#) - Sections 2 and 3; [Transfer of Property Act, 1882](#) - Sections 111 and 114

Appeal No. : First Appeal No. 33 of 1967

Appellant : Md. Serajuddin

Respondent : State of Orissa

Advocate for Def. : Adv. General and ;S. Misra, Adv. (2)

Advocate for Pet/Ap. : R. Chowdhury, ;R.N. Misra, ;R.K. Mohanty, ;S. Patnaik and ;Sidhartha Roy, Advs.

Disposition : Appeal dismissed

Judgement :

Acharya, J.

1. This Is a defendant's appeal against the judgment and decree passed by the Additional Subordinate Judge, Cuttack in T. S. No. 55 of 1964 decreeing the plaintiff's suit for evicting the defendant from the suit mines, directing him to deliver possession of the same to the plaintiff, and restraining the defendant by a permanent injunction from operating the suit mines in any manner.

2. The plaintiff who is the State of Orissa filed the suit on the following facts.

3. The suit mines belonging to the plaintiff having a rich deposit of Chromite ore were leased out to the defendant by Government orders dated 10-10-1958 (lease executed on 26-3-1959), on his application dated 9-4-1953 representing that he would set up a plant for the manufacture of Ferro Chrome and Ferro Silicon, and that he had obtained necessary licence for import of machineries, furnace and other equipments for setting up such a Plant. The aforesaid mining lease was granted In favour of the defendant after prolonged correspondence, deliberation and discussion between the two parties regarding the terms of the lease, and on obtaining prior approval of the Central Government as required under the Mines and Minerals Act, 1957. The Government of India while conveying their approval to the grant of the said lease in favour of the defendant (Ext. 18), with a view to ensure supply of mineral to the Ferro Chrome Plant, stated therein that a condition be incorporated in the lease deed to the effect that if M/s. Sarajuddin & Co., of which the defendant was the Managing Partner, failed to set up the Plant, the State Government would be entitled to cancel the mining lease without any compensation. On receiving the approval of the Central Government with the above stipulation, the plaintiff intimated the defendant by their letter Ext. 17 dated 30-9-1958 and order Ext 16 and letter Ext. 15 both dated 10-10-1958 that the plaintiff had proposed/ordered to grant the mining lease to the defendant in respect of the suit mines subject to the acceptance by the defendant of all the usual conditions in mining lease, and the conditions already agreed upon, and also the further condition as laid down by the Central Government that the defendant should set up a Ferro Chrome Plant within five years from the date of order dated 10-10-1958, and that if the defendant failed to erect the Plant within that period the plaintiff would have the option to cancel the lease without compensation. The defendant was asked (by Ext. 15) to intimate his acceptance of the above terms in

writing through the Collector, Cuttack. The defendant by his letter (Ext. 12) dated 16-1-1959 intimated his unqualified acceptance of the above terms and conditions.

4. The plaintiffs case was that the mining lease was granted with the purpose and intention of encouraging the defendant to set up the Plant after having been ensured about the supply of raw materials to feed the Plant. Although the said lease was for a period of 20 years, it was specifically stipulated in Clause 10 of the Part IX that the lessee should set up a Ferro Chrome Plant within five years from 10-10-1958, failing which the State Government would have the option to cancel the lease without compensation. As the Industrial Licence, granted by the Central Government on 8-5-1958 for setting up a Ferro Chrome Plant, was in favour of M/s. Serajuddin & Co., while the mining lease was executed in favour of the defendant Mohammad Serajuddin, the Managing Partner of M/s. Serajuddin & Co., the Government of India advised the plaintiff to ask the defendant to transfer the said mining lease in favour of M/s. Serajuddin & Co. The plaintiff on the above advice of the Central Government asked the defendant by their letter dated 7th January, 1960 (Ext. 9) to get the aforesaid lease transferred in the name of M/s. Serajuddin & Co., or to arrange transfer of the Industrial Licence in the name of the defendant. The defendant, in fact, as per Ext. D-55 dated 22-1-1962, gave his consent in writing to the transfer of the mining lease in favour of M/s. Serajuddin & Co. as suggested in the above letter.

The defendant in spite of repeated extension of time by the Government of India did not take effective steps to set up the Plant, and as such the Industrial Licence was ultimately revoked on 13-12-1962 (Ext. H-38). As the defendant did not set up the Ferro Chrome Plant within the period of five years from 10-10-1958, as expressly agreed upon by him in Clause 10 of Part IX of the mining lease, and as it was the only consideration on which the lease was granted, and the Government of India was induced to accord their approval to the grant of the mining lease, the plaintiff by their letter dated 5-12-1963 determined the said lease in exercise of the power reserved to them under the conditions of the said lease. The determination order was communicated to the defendant and he was directed to stop all operations on the suit mines, and to quit and deliver possession of the same to the plaintiff through the Collector, Cuttack. As the defendant did not quit the suit

mines, and continued in possession of the same as a trespasser, and illegally continued mining operations over the suit property, the plaintiff filed the suit.

5. The defendant contested the suit admitting that he was the Managing Partner of the registered partnership Firm M/s. Serajuddin & Co., and that in March 1953 he applied for the mining lease, but denied having undertaken to set up a Ferro Chrome Plant. The defendant contended that by about 1955 negotiation started between him and the plaintiff (the State Government) for mining Chromite, and setting up a Ferro Chrome Industry, and that he was able to obtain in the name of M/s. Serajuddin & Co. an Industrial Licence (Ext. H-46) dated 8-5-58 for setting up a Ferro Chrome Plant in the State of Orissa. It was expressly and impliedly agreed upon and understood between him and the State Government that the latter would ensure adequate supply of raw materials by granting a mining lease for Chromite, and to acquire land for setting up the aforesaid Plant and its township, and also assured supply of electric energy for the proposed Plant to the extent of 20,000 K. W. at the first instance and 40,000 K. W. in subsequent stages, and that the State Government would also render adequate financial assistance for the project. The defendant, acting on these promises, understanding and assurance of the State Government undertook the mining lease for Chromite as per the duly registered indenture of lease (Ext. H-47) dated 26-3-1959.

Thereafter the defendant entered into a provisional agreement (Ext. F-5 dated 30-12-1960) with M/s. Demag-Elektor-metallurgie GMBH of West Germany (hereinafter to be referred as M/s. Demag) for the manufacture, supply and installation of the proposed Ferro Chrome Plant, and obtained a project report from them at a huge cost. The defendant admitted the acceptance of the terms of the lease deed as per Ext. 12 dated 16-1-1959, but contended that the said acceptance was void being in contravention of Article 299 of the Constitution. As the Industrial Licence (Ext. H-46) was ultimately revoked by the Central Government on 13-12-1962 (Ext. H-38) after some extension of time, it became absolutely impossible for the defendant to set up the Ferro Chrome Plant. The determination of the above mining lease by the State Government by Ext. C-66 dated 5-12-1963 is illegal, void, mala fide, wrongful and has no effect.

It was further contended that Clause 10 of Part IX of the lease deed being in conflict with Clause 4 of the said part. it was unlawful for the State Government to determine the lease without taking action under Clause 4; and that there was no breach of any of the conditions or default on the part of the defendant at any stage; and that the said Clause 10 being absolutely vague the defendant had no liability or obligation to set up the Plant; and that the Deputy Secretary who signed the said determination order (Ext. C-61) had no power or authority to sign the same on behalf of the State Government; and also that the said order is illegal and inoperative being based on wrong assumptions of fact. It was not possible for the defendant to set up the Plant as the State Government refused to render financial assistance, did not give adequate area to the defendant to obtain Chromite for the Plant, did not acquire land for the Plant site and its township, and did not take any step regarding supply of electric energy. On the above grounds the defendant urged that the suit be dismissed with costs.

6. At the outset Mr. Roy, the learned counsel for the appellant, seriously contended that on the facts of this case the obligation of the defendant to set up a Plant would not arise at all until and unless the State Government provided the requisite electricity therefor, and also made arrangements for the land upon which the Plant was to be built, such terms being essentially implied in the lease. In this connection it was contended that the State Government without performing their part of the reciprocal promises impliedly made for the supply of electricity, land and raw materials, could not have enforced performance of Clause 10 of Part IX of the lease; and that in view of the nature of the obligation undertaken, supply of electricity and arrangements for land by the State Government should have been considered as obvious and something which came in as a matter of course and essential to be imported to give business efficacy to the lease.

7. In order to elucidate his above points Mr. Roy drew our attention to various correspondence between the defendant and the plaintiff beginning from 11-1-1956 upto the cancellation of the lease in the year 1963. The documents relied upon by him may be divided into two categories -- namely (1) the documents which are prior to the date of the order of the State Government granting lease of the mining area on 10-10-1958, or even the actual execution of the deed on 26-3-1959, and

(2) all those documents which followed after the said two dates.

8. The documents relied upon in support of his above contention regarding supply of electricity prior to 10-10-1953 are mainly these; Ext. B-2 dated 28-11-1957, Ext. D-5 dated 16-6-1958, Ext. C-11 dated 9-9-1958. A reading of Ext. B-2 would show that there was a meeting attended by the Chief Secretary, the defendant, and his technical consultant, where amongst other things the requirement of electricity to the extent of 20,000 K.W. for the Plant was discussed and the Chief Secretary indicated then that such power could not be made available at that time, and could be met if and when the Planning Commission approved of the installation of a Thermal Station in the State. There is no indication in Ext. B-2 of assurance by the Chief Secretary to supply power of the required amount; and expression of wishes and hopes in Ext. B-2, dependent on uncertain eventualities, and future decisions could not, in our view, amount to an agreement or promise enforceable in law.

By Ext. D-5 the probable date of requirement of full supply of power was slated to be 'within two years from the date on which the order of the Plant and machineries is placed with the suppliers'. It was requested therein to assure the quantity of power which could be supplied to the defendant on various dates, without which it would not be possible for him to order supply of machineries. By Ext. D-6 the Chief Secretary was requested to appraise the defendant about the quantity of power and their respective dates of supply at Jaipur Road. Ext. D-7 dated 19-8-58 is a letter from the Chief Engineer, Electricity to the defendant asking him to furnish information on different items regarding the Plant and the electric power required for the same. Ext. C-11 indicates the intention of the State Government to generally offer facilities for early establishment of Industries in the State. It also states that Government were agreeable to make available 20,000 K. W. of power for the Plant but the same would depend on the result of future discussion of the State Government with the Planning Commission. Supply of electricity thus being dependent on the uncertain result of the discussion of the State Government with the Planning Commission, there could not have been an assurance to that effect in the said meeting; and such a thing would not be implied as a term of the lease. On a reading of the aforesaid letters we are satisfied that there was nothing in any of these letters from which a binding contract between the plaintiff and the

defendant could be spelled out.

9. Some of the other exhibits in this context would show that the defendant, in express terms, sought the help of the State Government to establish this Plant, and hoped that the State Government would extend necessary facilities to the defendant in the procurement of cheap power, metallurgical coke, transport etc. (Ext. A-3 dated 6-2-1967). In reply to the above expression of hope for help the Additional Secretary to Government replied in Ext A-4 dated 16-3-1956 that they would be glad to offer every possible encouragement to the establishment of various Industries in the State in order to put into use the power, mineral and other natural resources of the State. By Ext. B-2 it was indicated that supply of electricity upto defendant's expectation could not be assured, and that Government in future would consider bulk supply as desired by the defendant in case they would be able to set up further generating Plants. Most of these letters are couched in a language indicating desires and wishes of the State Government which might be fulfilled in future to help, assist and extend facilities to the defendant.

10. Regarding the alleged promises or assurance to make available land prior to 10-10-1958, the learned counsel for the appellant relied mostly on Ext. B-2 dated 28-11-1957, Ext. B-9 dated 7/1/1958, Ext. B-13 dated 24-4-1958 Ext. B-19 dated 25-6-1958 and Ext. B-22 dated 22-7-1958. Ext. B-2 shows that the Chief Secretary was told about the requirement of 40 to 50 acres of land for the Plant and the township. Ext. B-9 is a letter from the Secretary to Government to M/s. Serajuddin & Co. asking the latter to contact the District Collector for their requirement of land. Ext. B-13 is an application by the defendant to the Collector for allowing them to conduct contour survey of the area in connection with the acquisition of land. Ext. B-19 is a letter seeking clarification as to why land was required near Jaipur Road Railway Station instead of at Bhadrak. These documents only indicate that the appellant entreated for help, assistance, support and/or intervention of the Government to get land and electricity for the Plant. The expectations, wishes and longings of the defendant expressed in these letters, and suitably replied to by the Government, could not have the sanctity of a term of an agreement so as to be enforceable in law. To help and assist a particular person in performing his obligations may be considered as duties of imperfect obligations, enforcement of

which is not sanctioned in law. After prolonged correspondence and detailed discussion on the terms of the lease, it ultimately came to be executed on 26-3-1959. If supply of land and electricity would have been the agreed understanding between the parties that would have definitely found place in some form or other in the aforesaid lease Ext. H-47 dated 26-3-1959. Absence of even a feeble mention regarding these matters obliterates the possibility of any such assurance, much less an agreement on these matters.

11. The appellant knew that under Section 5(2) of the Mines and Minerals (Regulation and Development) Act, 1957, no mining lease could be granted without the previous approval of the Central Government. The terms of the mining lease and specially Clause 10 of Part IX thereto had to be inserted on the specific direction of the Central Government, and, as such, the lease got the approval only on the inclusion of the aforesaid term. If supply of electricity and making available vast areas of the land for setting up of the Plant and township, involving various complex and complicated considerations, are to be construed as implied terms of the lease executed later, then in our opinion the provisions of Section 5(2) of the Mines and Minerals Act, 1957 would be rendered absolutely nugatory.

12. Under these circumstances, we are of opinion that the defendant while settling the terms of the lease did not consider making the availability of land and electricity to be an obligation of the Government, and did not actually execute the agreement with that understanding and/or intention, and the defendant acted at his risk in entering into such discussion and correspondence on these matters with the individual concerned with the Government.

13. The documents after the aforesaid Government Order dated 10-10-1958 on which reliance was placed by Mr. Roy for the supply of electricity are Exts. D-16 dated 1-2-1959, D. O. dated 9-1-1961 attached to H-21, H-21, dated 18-2-1961, B-41 dated 24/25-5-1961, D-41 dated 25-1-1962, D-42 dated 16-2-1962 and D/43 dated 19-3-1962. The three points in Ext. D-16 which were alleged to have been discussed and agreed upon between the Minister and the defendant were not proved to have been confirmed. D. O. letter No. 36-GM dated 9-1-1961 attached to Ext. H-21 shows that final selection of site, supply of power, and the question of

rate etc. were under consideration, and as such had not been finally decided till then. This would indicate that the minutes of the discussion as alleged in Ext. D-16 were either not correct and/or were not accepted. By Ext. H-21 the State Government expressed their inability to supply power at Jaipur Road to the extent of 20,000 K. W. as required by the appellant then, because there was no surplus power available nor was there any transmission line upto Jaipur Road. It was also mentioned therein that electricity as required could only be supplied early in the year 1965. This clearly suggests that there was no promise, assurance or undertaking between the parties to supply the required amount of electricity to the appellant for the setting up of the Plant within five years as expressly provided in Clause 10 of Part IX of the lease. Ext. B-41 indicates that the proposal for the supply of power on concessional basis for the proposed Ferro Chrome Plant was under examination till 25-5-61. Ext. D-41, Ext D-42 and Ext. D-43 are regarding details of production costs of Ferro Chrome for fixing the rate of power, and are not indicative of anything positive.

14. We do not find anything from the above-mentioned documents that there was any assurance or promise or undertaking, much less an agreement between the parties, that electricity would be made available to the defendant for the setting up of the Ferro Chrome Plant, nor can it be said that it was the intention of the parties that the setting up of the Plant would depend on the supply of electricity by the plaintiff to the defendant.

15. The documents which came into existence after the order of the State Government granting the lease on 10-10-1958, on which reliance was placed by the learned counsel for the appellant in support of his case for land, are mainly these; Ext. B-24 dated 22-11-1958, Ext. H-21 dated 9-1-1961, Ext. G-12 dated 15-12-1961, Ext. G-15 D/- 5-3-1962, Ext. G/16 dated 10.5.1962 and Ext. G-18 dated 14.6. 1962. It is seen from Ext. B-24 that till 22.11.1958 no concrete proposal was received by the Government regarding acquisition of land for the Plant. The defendant was advised in the said letter to move the District Collector and the Chief Engineer, Electricity indicating his requirement of land and electric power for the Plant. From Ext. H-21 it is seen that final selection of site, supply of power and rates etc. were still under consideration of the parties, and such matters could not

be decided till February 1962 because of the delay in receipt of the project report from M/s. Demag, the technical consultant of the appellant. By Ext. G-12 defendant was informed that Government land could not be acquired under the Land Acquisition Act and it was for the appellant to move the subdivisional Officer, Jaipur for doing the needful. Ex. G-15 shows that till 5.3.1962 grant of lease of land in favour of the appellant was still under consideration of the Government, thus obviating all possibilities of any previous agreement and/or decision in the matter. Ext. G-16 is not indicative of anything positive. Ext G-18 is again a humble request made by appellant to the respondent for taking immediate steps for settlement of land in favour of the appellant.

16. From a reading of these letters it is not so obvious or patent that there was a binding promise, undertaking or understanding of an imperative nature between the parties, regarding land to be made available by the State Government to the appellant for setting up of the Ferro Chrome Plant, and as such the same cannot be read as an implied term of the lease.

17. The learned Advocate General, appearing for the plaintiff-respondent, contended that no promise or assurance regarding land or electricity was ever given to the defendant by the plaintiff, and that no such terms as alleged on behalf of the defendant-appellant, could be implied in favour of the defendant because of the provisions of Article 299 of the [Constitution of India](#).

18. We have examined in the foregoing paragraphs that there was no promise or imperative assurance or undertaking for land or electricity given by the plaintiff to the defendant. As this lease deed came to be executed after prolonged discussions, suggestions, counter suggestions, deliberations and correspondence between the plaintiff and the defendant for about six years, and only after the defendant conveyed in writing his acceptance of all the terms contained in the lease, we do not understand why the defendant did not insist on the incorporation in the lease deed of express terms regarding availability of land and electricity, if the defendant was indispensably dependent on the Government for the supply of the same.

19. The words 'expressed to be made, and executed' which occur in Article 299 of the Constitution, require a deed or formal written contract, so that an oral contract or a contract by correspondence or other informal medium will not fulfil the requirement of the said Article which is provided to safeguard Government against unauthorised contract. Moreover such document must show on its face that it was executed on behalf of the State by the person duly authorised to that effect. Their Lordships of the Supreme Court in *Bhikrai v. Union of India*, AIR 1962 SC 113 held that -

'Government contracts are sometime made in disregard of the forms prescribed; but that would not be a ground for holding that departure from a provision which is mandatory and at the same time salutary may be permitted.'

Provisions of Article 299 of the Constitution are mandatory and are based on the, wholesome principle that the State should not be saddled with any liability without specifically mentioning the same in express words in the deed itself which would enable the various agencies, and the competent authorities to apply their mind consciously to the terms and conditions expressed in the contract itself, before they lend their seals and signatures to the same. The said Article has been incorporated with the object that the contract must show on its face all the conditions and terms on which the State is made to part with its right and is obliged to act in a particular manner, and that it was made on behalf of the State. Our above views get support from the decision of their Lordships of the Supreme Court in *K.P. Chowdhury v. State of Madhya Pradesh*, AIR 1967 SC 203 wherein their Lordships in accordance with the Court's previous decision, held as follows:

'In view of Article 299(1) (of the Constitution) there can be no implied contract between the Government and any other person, the reason being that if such an implied contract between Government and any other person were allowed, that would in effect make Article 299(1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299(1) could get away by saying that an implied contract may be inferred by the facts and circumstances of a particular case.'

Further it is held that -

'If the contract between the Government and another person is not in full compliance with Article 299(1), it would be no contract at all and could not be enforced either by the Government or by the other person as a contract.'

Their Lordships while expressing the above view also expressed the view that they do not say 'that if there is a valid contract as envisaged under Article 299(1), there may not be implications arising out of such a contract.' In our opinion, the words 'implications arising out of such a contract' would mean only such terms and conditions which are intimately entwined, involved and entangled with the express terms in the contract in such a manner that they could be spelled out on a mere reading of the said express terms. These above words cannot go to mean that certain new things could be imported into it from extraneous matter and be implied into the contract as its terms only because by the performance of these implied terms the performance of the contract would be facilitated or expedited.

20. Moreover, in *Reigate v. Union . and Elton Cop Dyeing Co. Ltd.*, (1918) 1 KB 592 at p. 605 it was held that one has at first to see what the parties have expressed in the contract, and an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. Lord Wright in *Luxor (Eastbourne) Ltd. v. Cooper*, 1941 AC 108 held.

'But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying', some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended.'

Their Lordships further held:

'This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.'

21. In the present case it cannot be confidently said that the alleged implied terms, as contended, are too clear to be construed or that such implied terms exist as being something so obvious that they 'go without saying'. We do not find anything from which it can be said that such implications do necessarily and inevitably arise in this case to give effect to the intention of the parties. The suggested implied terms are not inherent in the mining lease and as such are not to be construed to be within the intention of the parties. There was no promise or binding assurance regarding land and electricity given by the plaintiff to the defendant According to the Mines and Minerals Act the State Government cannot grant such a mining lease in favour of any person without getting previous express approval of the Central Government on the terms of the lease. The grant and execution of such a lease being circumscribed by various limitations and being subjected to and regulated by special provision in law and our Constitution, the Courts should be loath to read into its express provisions such implied terms as suggested by the learned counsel for the appellant.

22. In this view of the matter both infact and in law, we are of the view thatthe above contention of the learned counsel for the appellant regarding the allegedimplied terms is fallacious and unacceptable.

23. It was next contended on behalf of the appellant that in any event by the issue of letter No. I-HI-12/61-2628/I (Ext H-21) dated 18-2-1961 the State Government expressly or impliedly extended thetime for the performance of Clause 10 of Part IX upto at least 1965, and as such the lease was not liable to be terminated. The decision of the Supreme Court in Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd., AIR 1958 SC 512 was cited in support of the above contention. This is a case of contract between two private parties, and as such in terms it does not apply to a case of this nature where one of the parties is the State Government and the grant and the execution of such a contract is subjected to and regulated by various special provisions in law. This is a case in which the State Government even if they wished could not have, by their unilateral action, changed, varied modified or altered the terms of the lease even with the express agreement of the other party. The above mentioned Ext. H-21 is a solicitous letter recommending location of the Plant at Jaipur Road instead of at Bhadrak and also the fact that it

was not possible for the Government to supply electric power (20,000 K. W.) required by the appellant for the Plant, as there was no surplus power under the Hirakud Grid and there was no high voltage transmission line upto the area. State Government hoped that the required power could only be supplied early in the year 1965, by which time they expected the Talcher Thermal Station to be commissioned, Much was made of the word 'assurance' in the last sentence of the first paragraph of this letter. The learned Advocate General contended that Mr. Biswal had no authority to write this letter and that there was no basis for such a letter. To us, on the contents and language in this letter, the word 'assurance' would not and cannot import within its scope the intention of the State Government, of an imperative nature, to extend the time till 1965. No such intention can be spelled out as both the change of the location of the Plant as also the supply of power as expressed in the said letter, were contingent upon uncertain factors and the wishes of other agencies, not within the power and control of the State Government. By this letter Government of India was requested 'to grant appropriate time for taking effective steps' for establishing the Plant, For taking 'effective steps' as defined in Section 2 of the Registration and Licensing of Industrial Undertaking Rules, 1952, it was not necessary to wait for the full bulk supply of electric power, and as such extension of time till 1965 could not have been contemplated and/or intended. This being so, it cannot be said that the State Government by writing the aforesaid letter expressly or impliedly extended the time, which they were not empowered to do unilaterally. Moreover, for reasons discussed above such implied extension would not strictly conform to the provisions of Article 299 of the Constitution. We, therefore, do not accept the above contention advanced on behalf of the appellant.

24. In view of our findings that there was no implied term for the supply of electricity and land to the appellant the other contentions raised by the appellant namely that the implied terms and reciprocal promises having not been performed by the Government, it could not enforce performance by Serajuddin of Clause 10 of Part IX of the lease; and that Government could not be in a better position by not performing its implied obligations and duties and call upon Serajuddin to set up the Plant; and that Government could not have taken advantage of its own wrongs, would not arise.

25. On behalf of the State Government it was contended that Serajuddin, the appellant, had no intention of setting up the Plant, and was only committing fraud by indulging in various correspondence with the Government. It was urged that his reading of the implied terms was all a hoax and was utilised as smoke screen to his sham intention not to set up the Plant. In support of the above contention our attention was drawn to various Exhibits some of which are discussed below.

26. In Ext. A-1 dated 29-12-1955 the defendant expressed his intention to erect a Ferro Chrome Industry in Orissa and sought for the co-operation of the State Government in that direction. It was also stated therein that he had worked out the detailed costing, production technicality, and had ascertained the quality and suitability for export etc. In Ext. A-16 dated 4th June, 1956 the defendant stated as follows:

'From the state you would observe, the scheme is intended to serve a dual purpose of conservation of mineral resources and at the same time putting them to the best use for the benefit of the State and Country as a whole. The scheme also contemplates the use of low-grade ores which are not marketable and considered waste at present, in the manufacture of Ferro Chrome, thus ensuring the conservation of the deposits of high grade minerals.'

27. By Ext. H-2 dated 26-2-1957, the Under Secretary to the Government of India made inquiries from M/s. Serajuddin & Co. whether the latter was assured of supply of electric power for the Plant by the State Government, and if power shortage was anticipated what steps they proposed to take to meet that contingency. In reply M/s. Serajuddin & Co. wrote Ext. H-3 dated 27-3-1957 stating that they were assured of every cooperation by the State Government in that direction and in case of shortage of power at any time, they (M/s. Serajuddin & Co.) were prepared to put up their own generators to fill up the gap, and in case of necessity, they would import additional equipment for generating power of their own. They were only waiting for the finalisation and issue of the licence.

28. Ext. D-5 is relevant for two things-- (i) that the project report was not finalised till the 16th of June, 1958, and (ii) that full supply of power would be required within two years of placing orders for the supply of machineries. By Ext. D-12

dated the 18th November, 1958, the defendant informed the Chief Engineer, Electricity, that production could not be commenced unless 20,000 K. W. power was given to them as demanded. This is contrary to the contents of the above letters Exts. D-5 and H-3. By Ext. H-11 dated 29-4-1959 M/s. Serajuddin & Co. prayed for extension of time from the Government of India for taking effective steps for the establishment of the Plant, and requested therein for a change of the site from Bhadrak to Jaipur Road mostly because that place could be the most suitable for the Plant, and also because M/s. Demag were of the opinion that the deposits at Sukinda area were most suited for the Ferro Chrome Plant. Though the Industrial Licence was granted on 8-5-1958 and the mining lease was granted on 26-3-1959, we find from Ext. F-5 dated 30-12-1960 that for the first time an agreement between M/s. Seraju-ddin & Co. and M/s. Demag of West Germany was signed on 16-6-1961 to prepare a final and complete project Report for setting up a Ferro Chrome Plant at a suitable site in the State of Orissa. Then the defendant by his letter Ext. 6 dated the 11th January, 1961, mentioned about his practical difficulty to transfer the lease in the name of M/s. Serajuddin & Co. From this letter we find that at long last in January, 1961, the defendant found from expert's opinion that the ores extracted from the area leased out to him were absolutely unfit for feeding the Ferro Chrome Plant, whereas in Ext. H-11 dated 29-4-1959 it was stated that M/s. Demag, the technical consultant of the defendant was of the opinion that the Chrome deposits in the leased out area were most suited for the Ferro Chrome Plant. Amongst other things in Ext. 6, it was also stated that defendant's assumptions were belied, and the area proved a losing concern for him, and M/s. Serajuddin & Co. were reluctant to take over the area, and that they were still getting samples of ore further analysed with a view to find out its possible utility and suitability for the Ferro Chrome Plant, and that they were expecting expert's advice in the matter within five to six months. The Industrial Licence being of 8-5-1958, the mining lease being of 10-10-1958/26-3-1959, and the previous expert's opinion regarding the suitability of the ore being of April 1959, this letter coming as late as 1961, smacks of a vacillating tendency on the part of the defendant to evade his obligations under the mining lease which were expressly agreed upon to be worked out as specified therein, and which only prompted the Central Government to approve and the State Government to grant

the lease in favour of the defendant. On going through the letter Ext. 6, Ext. H-11, and the letters discussed above, we are of the opinion that the defendant wanted to back out of his commitments under the lease on various pretexts set forth in these letters, and that the defendant was not serious about setting up of the Plant after taking the mining lease.

29. It was urged on behalf of the defendant-appellant that Clause 10 of Part IX of the lease having become impossible of performance, Clause 5 of the same Part excused the defendant from any alleged breach of Clause 10. In support of this our attention was drawn to paragraph 7 of the defendant's deposition wherein he referred to his personal discussion with the then Chief Minister of Orissa, and all that both of them 'told' each other there in connection with the 'force majeure' clause. The subject matter of a duly executed lease by the State Government in favour of the other, embodying various clauses which were expressly agreed upon after thorough discussions, deliberations and correspondence could not be explained away by saying that the defendant understood in a different manner the implications of the various terms of the lease because of his alleged talk with the then Chief Minister.

30. In view of our above findings that the defendant did not have the intention of setting up the Plant, and that there could not be any implied terms indicating obligation on the part of the Government to provide land and electricity as a condition precedent to the setting up of the Plant, the contention that Clause 10 of Part IX of the lease became impossible of performance is wholly untenable.

31. Moreover, the defendant-appellant cannot seek shelter under Clause 5 of Part IX of the lease on the ground that the setting up of the Plant was beyond his control. Under the said clause the State Government was constituted the sole Judge to decide if the failure to fulfil any of the terms and conditions of the lease arose from 'force-majeure'. Therefore the performance of the express terms of the lease by the lessee would not be excused until and unless the Government did not construe the visiting circumstances as 'force-majeure'. Mr. Justice McCardie in *Lebeaupin v. Crispin*, (1920) 2 KB 714 gave an account of what is meant by 'force-majeure'. Their Lordships of the Supreme Court in *Dhanrajmal Gcbindram v.*

Shamji Kalidas and Co., AIR 1961 SC 1285 have been pleased to refer with approval to Mr. Justice MacCardie's account of what is meant by 'force-majeure'. We find therefrom that the expression 'force-majeure' is not a mere French version of the Latin expression 'vis major', and that strikes, breakdown of machinery and such things which, though normally not included in 'vis-major', are included in 'force-majeure'. Mr. Justice Bailache in *Matsoukis v. Priestman & Co.*, 1915-1 KB 631 preferred to give a restricted meaning to 'force-majeure'. In his opinion 'force-majeure' could include strikes, breakdown of machineries, but not bad weather, foot-ball match or funerals.

The rulings and literature on the subject show that where reference is made to 'force-majeure', the intention to save the performing party from the consequences of anything of the nature stated above or over which he has no control. In the present case, the words 'force-majeure' do not stand alone, but the clause in which it occurs in the lease contains examples of what was intended to be conveyed by this expression. The intention with which this term 'force-majeure' is used in Clause 5 of Part IX has been explained therein as follows:--

'In this clause the expression 'Force-majeure' means act of God, War, Insurrection, Riot, Civil Commotion, Strike, Earthquake, Tide, Storm, Tidal Wave, Flood, Lightning, Explosion, Fire and any other happening which the lessee could not reasonably prevent or control.'

It would, therefore, mean that all such things as mentioned above on which the lessee could not have any control would come within this clause. The words 'any other happening which the lessee could not reasonably prevent or control' are to be read and understood ejusdem generis with the words preceding this expression. According to Mr. Justice McCardie the 'Force Majeure' clause should be construed with a close attention to words which precede or follow it, and with due regard to the nature and the general terms of the contract. Therefore the words 'any other happening' must be given Ejusdem generis construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated above in the same clause with close attention to the nature and terms of the lease, and would not reasonably be within the power and

control of the lessee. In this view of the matter, non-availability of land and electric power and the grounds on which the defendant pleaded inability to set up the Plant, in our view, are not such happenings which would come within Clause 5 of Part IX of the lease, and as such the defendant could not take shelter under this clause, and avoid performance of setting up of the Plant, as expressly specified and agreed upon in Clause 10 of Part IX of the lease.

32. It was next argued on behalf of the appellant that since Clause 10 of Part IX of the lease contains no provision reserving for the plaintiff a right of reentry on its breach, there can be no forfeiture of the lease under Section 111(g) of the Transfer of Property Act. It was also contended that without a notice under Section 114 of the Transfer of Property Act, the lease could not be terminated; and that the Government Grants Act has no application to such a case. In reply it was emphatically contended on behalf of the respondent that this lease granted by the State Government is completely covered by the provisions of the Government Grants Act (Act XV of 1895), and as such the aforesaid provisions of the Transfer of Property Act would not apply to this case. It was also urged that there is an implied clause for re-entry in the lease and that the requirement of Section 111(g) has been provided for in Clauses 5 and 6 of Part IX of the lease.

33. Grants by the Government are usually construed most favourably for the Government, and that appears to be the reason why application of some laws are generally excepted in such cases. Under Section 2 of the Government Grants Act, application of the provisions of the Transfer of Property Act has been excepted specifically as follows:--

'Nothing in the [Transfer of Property Act, 1882](#), contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favour of any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.'

This being so, in our opinion, the provisions of Section 111(g) and Section 114 of the Transfer of Property Act have no application to a grant of this nature, because though this may not be a grant of land in perpetuity, it is certainly a grant by

transfer of interest in land, and as such, the impugned grant is completely covered by the provisions of the Government Grants Act. In *Secy. of State for India v. Nistarini Annie Mitter*, AIR 1927 Pat 319 it has been held that-

'Leases granted by the Crown are outside the operation of the Transfer of Property Act. There is no distinction between grants by virtue of the prerogative rights of the Crown and grants made as a mercantile transaction for profit'

This decision was followed with approval in *V. Pedda Rangaswami Shreshti v. Sri Vishnu Nimbakar*, AIR 1946 Mad 180 and this view finds support from the decisions in *Gaya Prasad v. Secy, of State* AIR 1939 All 263, *Rupan Singh v. Akhaj Singh*, AIR 1931 Pat 268 and *Manindra Nath Binda v. Amiya Pal*, AIR 1951 Cal 361.

34. As we hold this lease to be covered by the provisions of the Government Grants Act of 1895, all the provisions, restrictions, conditions and limitations contained in the said lease shall be followed and take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary, as provided for under Section 3 of the said Act. The decisions in *Ullattuthedi Choyi v. Secy. of State for India*, 41 Mad LJ 494 : (AIR 1921 Mad 409), *Suraj Kanta Roy Chowdhury v. Secy. of State*, AIR 1938 Cal 229 and AIR 1939 All 263 reiterate this view. This being so, the contention raised by the learned counsel for the appellant regarding the applicability of the several provisions of the Transfer of Property Act is of no avail, as they would not apply in view of the provisions of the Government Grants Act.

35. It was next contended by the appellant that the order of determination dated 5-12-1963 (Exts. 3 and C-66) could not be passed by the State Government, and was a nullity in view of the order of stay passed on 2-6-1962 by the Central Government (Ext. H-44), which was in force at that time. On an application under Rule 54 of the Mineral Concession Rules, 1960. filed by the defendant before the Central Government, regarding arrears of royalty outstanding against the defendant and its realisation, the Central Government by their order dated 2nd June, 1962 (Ext. H-44) directed the State Government not to interfere with the possession and working of the mining property, provided the petitioner (defendant)

complied with the various conditions stipulated in the said letter. In paragraph 3 of the said letter it was expressly mentioned that the aforesaid orders' were irrespective of any action taken till then by the State Government or the petitioner, and/or without any prejudice to the rights or obligations of the State Government or the Petitioner. This letter (Ext. H-44) was clarified by a subsequent Government letter dated 28th August, 1964 (Ext. H-40). In this letter the Central Government directed that all proceedings pursuant to the non-payment of arrears of royalty should be stayed and the lessee would not be dispossessed in their working of the lease until further orders. These two letters would show that the above-mentioned letters, containing the stay orders, were in connection with the recovery of arrears of royalty, and the State Government was directed not to interfere with the possession of the lessee for the non-payment and recovery of arrears of royalty. Moreover, Ext. H-64 is specific to the effect that the above order was without any prejudice to the rights and obligations of the State Government. The right of the State Government to determine the lease arose independently of the above proceedings before the Central Government, because of the non-compliance of the express terms of the lease, specifically agreed to between the parties, and the said rights did not in any way relate to and were not concerned with the above proceedings before the Central Government in which the stay orders were passed. In our view, therefore, the stay orders could not in any way affect the rights of the State Government to determine the lease by passing the aforesaid orders, Exts. 3 and C-66.

36. For the reasons stated above, we do not find any merit in this appeal, which must fail, and is accordingly dismissed with costs.

Barman, C.J.

37. I agree.