Pusha Ram Vs. Modern Construction Co. (P) Ltd., Kota

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Court : Rajasthan

Decided On : May-09-1980

Reported in : AIR1981Raj47; 1980()WLN508

Judge : Mahendra Bhushan, J.

Acts : Constitution of Indai - Article 300; Contract Act, 1872 - Sections 2, 15, 23, 37 and 73; Rajasthan Minor Mineral Concession Rules, 1959 - Rules 34, 36 and 36(2)

Appeal No. : Civil First Appeal Nos. 27 of 1967 and 97 and 101 of 1972

Appellant : Pusha Ram

Respondent : Modern Construction Co. (P) Ltd., Kota

Advocate for Def. : M.B.L. Bhargava, Adv. and; G.C. Kasliwal, Sr. Adv.

Advocate for Pet/Ap. : B.P. Agarwal, Adv.

Judgement :

Mahendra Bhushan, J.

1. Though the appeals arise out of separate suits, in which separate judgments have been passed, but they relate to the same Royalty Collection Contract, and some of issues are common. Therefore, it will be convenient to dispose of these

appeals by a common judgement.

2. I will first narrate the facts of the case.

3. A notice-was published in the Rajasthan Gazette dated May 25, 1961, under Rule 3(5 (1) of the Rajasthan Minor Mineral Concession Rules, 1959 (hereinafter referred to as the Rules) for grant of several royalty collection contracts ending on March 31, 1963 for a period of two years. We are presently concerned with item No. 30 of the said notification regarding royalty collection contract for ordinary sand and building stones excavated from the quarries in 12 villages of Tehsil, Bhanerorgarh, mentioned therein. The auction took place on June 22, 1961, and the bid of Pusharam (hereinafter referred to as the plaintiff) of Rupees 3,351/-, being the highest, the State of Rajasthan granted to the plaintiff a right to collect royalty chargeable on ordinary sand and building stones at the rate of 25 N. P. per tonne, as specified in the Rules. An order dated July 3, 1961 granting the contract was communicated to the plaintiff, and the plaintiff executed an agreement on July 10, 1961, which was duly registered. The Modern Construction Company (P) Ltd., (hereinafter referred to as the M. C. C. Co.) had taken a contract for construction of main dam and allied buildings in Rana Pratap Sagar Dam, Chambal Project. This project was being executed under the Control and Supervision of the Chief Engineer, Rana Pratap Sagar Dam, Chambal Project, Kota. For the construction of the dam, the M. C. C. Co., quarried and removed building stones and ordinary sand since November 1961 from the 12 villages, mentioned in the agreement of royalty collection contract, given to the plaintiff but in spite of repeated demands by the plaintiff did not pay any royalty to him. The Superintending Engineer (Irrigation deducted the amount of royalty on the building stones and sand excavated and removed by the M. C. C. Co., from the area of 12 villages under the contract of the plaintiff, from the monthly running bills of the M. C. C. Co. Though, the period of contract was up to March 31, 1963, but purporting to act in pursuance of Clause (16) of the agreement, the Government issued one month's notice dated April 27, 1962 to terminate the plaintiff's contract. In the notice, the Government merely declared that the construction of Rana Pratao Sagar Dam is in the 'public interest'. The said notice was served on the plaintiff on May 6, 1962, and its one month's term expired on June 6. 1962. The case of the plaintiff is, that the Government of

Rajasthan terminated the royalty collection contract prematurely, arbitrarily and illegally, and that Clause (16) of the agreement was not warranted by law. The ex parte order of the termination was opposed to the principles of natural justice, inasmuch as, no opportunity to hear the plaintiff before the contract was terminated was granted.

4. The plaintiff filed suit No. 8/62 against the M. C. C. Co., in the court of District Judge, Kota on May 31, 1962 for the recovery of a sum of Rs. 25,000/- being the amount of royalty, which was payable to the plaintiff by the M. C. C. Co., during the subsistence of the contract i.e., up to 5-6-1962, along with interest. The M. C. C. Co., raised various pleas, and also pleaded that there was no privity of contract between it and the plaintiff; that the contract for collection of royalty, on which the plaintiff has based his claim. is contrary to public policy and 'public interest', and as such is void, that the plaintiff is not entitled to charge any royalty from it, because Clause 5 of the standard form of agreement, as prescribed under the rules clearly lays down that in case where royalty collection contracts are given on village-wise basis, the royalty collection contractor shall not charge any royalty from the Irrigation or Public Works Department contractors on such minerals, as are certified by the Executive Engineer, concerned, as required for Government work; that the agreement does not come under the term 'royalty collection contract', as defined under Rule 3 (9) of the Rules, that Rule 34 of the Rules is ultra vires of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as the Act); that the auction of the royalty collection contract was in violation of the procedure prescribed in Rule 36 of the Rules, and as such the contract is bad ab initio, and cannot be the basis of the suit.

5. In this suit, at the fag end, an application was filed on behalf of the plaintiff to bring the State also as one of defendants on record, because during the trial of the case, it transpired that the State through the Superintending Engineer (Irrigation) has deducted the royalty on the building stones and sand used by the M- C. C. Co., in construction of the dam and removed from the area of royalty collection contract of the plaintiff. Though that application was not contested on behalf of the M. C. C. Co., but the learned District Judge disallowed it on the ground of limitation.

6. The learned District Judge framed 18 issues, as mentioned in his judgment, and after trial of the issues, except issue No. 11 with regard to the invalidity of contract, decided all other issues for the plaintiff, but under issue No. 11 the learned District Judge held that Rule 36 (1) of the Rules was mandatory, and because the auction took place before the expiry of 30 days of the notification, the same was not valid, and the agreement entered into between the parties was invalid and inoperative ab initio. The suit of the plaintiff was dismissed.

7. During the pendency of suit No. 8/62, it appears that the plaintiff filed another suit (15/64) on 17-8-1964 for accounts not only for the period the contract was subsisting, but also for the unexpired period of the contract, i.e., 6-6-1962 to 31-3-1963. The plaintiff came out with the case that the defendants taking undue advantage of their position and authority forbade all the contractors from paying the royalty on minor minerals building stones and sand to the plaintiff, and the defendant No. 2 himself charged and collected royalty from the contractors excavating sand and stones from the area under royalty collection contract of the plaintiff. The defendants thus, in the eye of law, acted either as agents of the plaintiffs or as intermeddlers with the moneys and property of the plaintiff, and as such are liable to render accounts and make over all amounts of royalty collections to the plaintiff.

8. The Government of Rajasthan and the Chief Engineer, Rana Pratap Sagar Dam, almost raised the same pleas, which were raised in the earlier suit by the M. C. C. Co. It was pleaded that royalty was not collected on the building stones and sand used in the construction of the dam as an agent of the plaintiff: that all the contractors, who excavated and removed building stones and sand from the area under the contract of the plaintiff are necessary parties that the minor minerals in question were all used by the Irrigation Department Contractors for Rana Pratap Sagar Project, and under Clause (5) of the terms and conditions of the indenture dated July 10, 1961, the plaintiff is not entitled to get any royalty on them, that the State is not bound by the acts of its officers, who auctioned the contract before the expiry of 30 clear days from the publication of the notification, and as such no binding contract enforceable by law was brought into existence; that the contract was granted to the plaintiff by the officers concerned for only Rs. 3,351/-, and the

plaintiff would have collected lacs of rupees by way of royalty and the State exchequer would have been deprived of lacs of rupees. This was contrary to 'public interest', and might be one of the considerations for terminating the so-called contract; that the Government of Rajasthan is the sole judge to decide, whether the contract, as alleged, was in the 'public interest' or not, and the Government of Rajasthan having so decided, its decision is not justiciable; that the Government of Rajasthan is not juristic person and the plaintiff should have brought the suit against the State of Rajasthan. The present suit is not maintainable.

9. On the pleadings of the parties, the learned District Judge framed as many as 13 issues, but it is not necessary to reproduce them here, as they are contained in the judgment of the learned District Judge, and I will confine myself to the points on which arguments have been advanced.

10. The learned District Judge, after recording the evidence of the parties, decided all the issues in favour of the plaintiff, except issue No. 12, which is corresponding to issue No. 11 of Civil Suit No. 8/62. In view of his finding on issue No. 12, the learned District Judge dismissed the suit for accounts, even though holding that the State is liable to account and decreed the suit of the plaintiff only for the refund of Rs. 3,351/-.

11. Two appeals were filed, one by the plaintiff against the judgment and decree of the learned District Judge refusing to decree the suit for accounts, and the other by the defendants against the judgment and decree of the learned District Judge decreeing the suit for Rupees 3,351/-.

12. The points, which have been agitated before this Court in the three appeals, and as such which need to be dealt with, are as follows:--

1. Whether in the contract of the present nature, it is necessary that there should be privity of contract in between the plaintiff and the M. C. C. Co., and whether the suit against the M. C. C. Co., is not maintainable?

2. Whether the suit No. 15/64, as fram ed, is not maintainable, because it has been filed against the Government of Rajasthan, and not the State?

3. Whether the royalty collection contract dated July 10, 1961 is valid and enforceable, and can be the basis of the suit?

4. If the answer to point No, 3 is in favour of the plaintiff and against the defendants, then whether the termination of the royalty collection contract with effect from 6-6-1962 was legal?

5. Whether the defendants in suit No. 15/64 are liable to account to the plaintiff for the amount of royalty on building stones and sand collected by defendant No. 2 from the M. C. C. Company.

13. Point 1 (2?) Mr. G. C. Kasliwal. Senior Advocate, for the State has contended that under Article 300 of the Constitution of India, the Suit No. 15/64 should have been filed in the name of the State, but has been filed against the Government of Rajasthan, and, therefore, the suit is not properly framed. He further contends that under Section 79, C. P. C. the defendant should have been the State, and not the Government of Rajasthan. It can hardly be disputed that in case of a suit against the Government of Rajasthan, the defendant should be named as the State. But, a look at the judgment of the learned District Judge shows that no issue was struck on this controversy. Moreover, the alleged defect is one with regard to misdiscription of the parties, and is not fatal. The mere description of the parties can be corrected by the Court at any time, it may also he mentioned here that, so far as the appeal is concerned, it has been filed against the State of Rajasthan and not against the Government of Rajasthan. Therefore, this defect is not fatal to the case of the plaintiff, and point No. 1 (2?), as framed is decided accordingly.

14. Point 2 (1?). The relevant issue in Suit No. 8/62 with regard to this controversy is issue No. 5- The doctrine of privity of the contract, though often criticised and sometimes modified is still received as a fundamental assumption of the common law, and ordinarily a stranger to the contract can neither sue or be sued on the basis of it. But. this doctrine is hardly attracted in the facts and circumstances of this case. Royalty of building stones and sand excavated and removed from the

quarries was payable under the rules and this position of law can hardly be disputed. The State through its Mining Department could recover such royalty, but instead of recovering it itself the State under Rule 34 read with Rule 26 of the Rules gave the royalty collection contract to the plaintiff. Therefore, it was under the Rules that the royalty was payable under the Rules that the building stones and sand excavated from the quarries from the area under the contract of the plaintiff, and it was the statutory liability of the M. C. C. Co., and other contractors, who excavated and removed stones and sand to pay the royalty at the prescribed rate either to the Government, or if the Government gave the royalty collection contract to other person then to that person. It may bp mentioned here that it is the case of the State that royalty was payable, though it is not discuted that it was payable to the plaintiff or to the State. The State through its Irrigation Department deducted the amount of royalty on the building stones and excavated and removed by the M. C. C. Co.. from the area under the contract of the plaintiff. Therefore, as already observed above, the doctrine of privity of contract is hardly attracted in the instant case, and the M. C. C. Co., was liable to pay royalty on such of the building stones and sand, which were quarried and removed by them from the area under the contract of the plaintiff.

15. It is no longer disputed that so far as the M. C. C. Co., is concerned, the amount of royalty has been deducted from his bills by the concerned Superintending Engineer (Irrigation). In Civil Suit No. 8/62, the learned District Judge has himself observed (at page 101 of the Paper Book) of Civil Appeal No. 27/67 that, the Government have realised the royalty themselves for which they gave the contract, the contractor has no authority to realise it over again from the same person. hP can seek remedy against the Government.' But, as the State was not a party in that case, no relief could be granted to the plaintiff, but as during the pendency of the earlier suit No. 8/62, the plaintiff filed suit No. 15/64 against the State and another for accounts, and as the appeal in that case are also being disposed of by thus very judgment, I am of the opinion that so far as the M. C. C. Co., is concerned, it having paid the royalty on the building stones and sand excavated from the contract area of the plaintiff to the State, and the State having deducted the amount of royalty from the bills of the M. C. C. Co., so far the M. C. C. Co.. is concerned, it cannot be asked over again to pay the amount of royalty to

the plaintiff, even if it is held ultimately in these appeals that the contract was valid, and the plaintiff is entitled to the amount of royalty under his royalty collection contract. Therefore, so far as the appeal No. 27/67 against the M. C. C. Co., is concerned, in the facts mentioned earlier, it will not be in the interest of justice to accept it. and the same is dismissed.

16. Point No. 3 -- I will divide this point into two parts. It is first to be seen as to whether the agreement dated July 10, 1961 is contrary to 'public policy'. It is next to be seen, as to whether it. is void ab jnitio for non-compliance of Rule 36 (1) of the Rules. Before, I proceed to deal with these points, it may be observed that the argument of the learned Government Advocate that Rules 34 and 36 are contrary to Section 15 of the Act has no force. It is not disputed that building stones and sand are minor minerals within the meaning of Section 3(e) of the Act. Section 15(1) of the Act, as it stood prior to amendment of 1972, which came into force from 13-9-1972 did not authorise the State Government to make Rules for regulating the grant of other mineral concessions. Sub-section (11 of Section 15, as it stood prior to the aforesaid amendment was, 'The State Government may by notification in the official Gazette, make rules for regulating the grant of prospecting licence and minor leases in respect of minor minerals and for purposes connected therewith.' After the amendment, the words 'prospecting licence and minor leases' were substituted by the words 'quarry leases minor leases or other mineral concessions.' A perusal of Section 15 of the Act will make it amply clear that so far as the sphere of minor minerals is concerned, it was the State Government which had to make rules with regard to them. It is the State Government which is empowered to prescribe and modify the rates of royalty for minor minerals and to provide the mode of its recovery. Even prior to the amendment, the State was empowered to make rules for the purpose connected with the minor minerals. Moreover, in the written statement, no objection to that effect was taken and no issue was struck. Therefore, I am unable to agree with the submission of the learned Advocate that Rules 34 and 36 of the Rules are ultra vires to the powers under Section 15 of the Act of the State Government.

17. Reverting to the two points framed earlier, so far as the invalidity of the contract is concerned, it may be stated that it is the case of the State itself that the

royalty collection contract was granted in accordance with the Rules framed under Section 15 of the Act by the State Government. It can, therefore, not be said that the grant of royalty collection contract was forbidden by law or that if permitted it would defeat the provisions of any law, or is such which the Court regards as immoral or opposed to 'public policy.' Even prior to the present indenture dated July 10, 1961, under the rules, royalty collection contract had been given to somebody else for a petty sum of Rs. 200/-. Not only this, even many other royalty collection contracts were being given by the State Government under the Rules. The royalty collection contract, therefore, having been granted under the Rules, cannot be said to be opposed to 'public policy', and there is no material on record as to how the agreement is against the public policy. It further appears from the judgment of the learned District Judge dated March 28. 1972 that the learned Government Advocate did not press issue No. 13 framed on this controversy, and rightly so. To my mind, the indenture dated July 10, 1961 is not such which is against the public policy under Section 23 of the Contract Act.

18. Taking the other limb of Point No. 3, as to whether the contract dated July 10, 1961 is invalid, the procedure prescribed under Rule 36 (1) of the Rules having not been complied with, it is contended by the learned Advocate for the plaintiff that Rule 36 (1) of the Rules is not mandatory and it has been substantially complied with. He, therefore, submits that the approach of the learned District Judge that this rule was mandatory and as such the indenture dated July 10, 1961 is void ab initio and cannot be made the basis of the suit is not correct. It can no longer be disputed that the Director of Mines and Geology, Government of Rajasthan, was the competent person to grant royalty collection contract of the value of Rs. 3,351/-. Under Schedule (2) of the Rules, the Director of Mines and Geology has powers under Rule 34 (1) of the Rules to grant royalty collection contract by auction or tender, provided the value of it is not more than Rs. 10,000/-, and, provided further that it does not record a fall in the value exceeding 25% over the value of the last year. Even the learned Advocate for the State does not dispute that the Director of Mines and Geology had the powers to grant royalty collection contract to the plaintiff. But, it is stated that the officers had to act in accordance with the Rules, more so, when the question of revenue of a State is involved and because the auction took place 3 days earlier than 30 days, the period prescribed for auction

from the date of publication, the contract is rendered void. It will be useful to reproduce Rules 34 and 36 of the Rules, so far as they are relevant:--

'34. Grant of royalty collection contract by auction or tender. -- (1) Royalty collection contracts may be granted by the Government by auction or tender for a maximum period of two years after which no extension shall be granted.

(2) The amount to be paid annually by the royalty collection contractor to the Government shall be determined in auction or by tender to be submitted for acceptance by the authority competent to grant the contract.

(3) Royalty Collection Contract shall be granted only in such areas as the Government may, by general or special order direct.'

'36. Procedure for auction -- The following shall be the procedure for holding auctions under Rules 20 and 34:--(1) the auction shall be notified in the Rajasthan Gazette on the notice boards of the Directors and Mining Engineer or Assistant Mining Engineer's Offices and at least in one newspaper having wide circulation in the locality nearest to the area in question;

(2) the notifiction shall be published at least 30 days before the date of auction and it shall mention the terms and conditions of the auction and the lease or the royalty collection contract, as the case may be. A copy of the notification shall be sent to the Head of the Panchayat or Municipal Board having jurisdiction over the area in question.'

19. The learned District Judge placing reliance on Lajjaram v. State of Rajasthan ILR (1958) 8 Raj 782, and Guruswami v. State of Mysore AIR 1054 SC 592, has held that non-compliance with the procedure under Rule 36 (2) is not an irregularity but illegality, which cannot be waived, and there can be no estoppel against the Government. But to my mind, the learned District Judge has not correctly applied the two authorities on the facts of the instant case. It is not disputed that the auction for the royalty collection contract in dispute was notified in the Rajasthan Gazette dated 25-5-1961, and the auction took place on 22-6-1961, i.e., before the expiry of 30 days from the publication of the notification. Sub-

rule (2) of Rule 36 of the Rules requires that the notification shall be published at least 30 days before the date of auction, and it must contain the terms and conditions of the auction. It is not disputed that it was published in a Hindi paper 'Kolahal' also. The prospective bidders, who had to take part in the auction had no control over those, who published the notification in the official Gazette for the auction of royalty collection contract. It was observed by S. R. Das, J., as his Lordship then was, in Dattatraya Moreshawar v. State of Bombay AIR 1952 SC 181 at p. 185, ' it is well settled that generally speaking, the provisions of Statute creating public duties are directory, and those conferring private rights are imperative. When the provisions of a Statute relate to the performance of a public duty, and the case is such that to hold null and void, acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect, of them not affecting the validity of the acts done.' In State of Punjab v. Satya Pal Dang (AIR 1969 SC 903), Hidayatullah, C. J., as he then was in Para 30 observed as follows :--

'In those cases where strict compliance is indicated to be a condition precedent to the validity of the act itself, the neglect to perform it is indicated as fatal. But, in cases where although a public duty is imposed and the manner of performance is also indicated in imperative language, the provision is usually regarded as merely directory when general injustice or inconvenience results to others and that have no control over those exercising the duty.'

20. It is well settled that generally the use of word 'shall' raised a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by considerations, such as, object and scope of enactment, and the consequences flowing from such con-.struction. There are numerous cases where the word 'shall' has been construed as merely directory. So far as Rule 34, which provides that the royalty collection contracts may be granted by the Government by auction or tender for a maximum period of two years, is concerned, the same is mandatory, and, if at all it is desired by the Government to Igrant a royalty collection contract, it can only do so either by auction or tender and in no other

mode. But, Rule 36 is only procedural and prescribed procedure for auction of a royalty collection contract. The object of publication of a notice of auction in the Rajasthan Gazette is, that it must give sufficient notice to the prospective bidders about the terms and conditions of the auction, and the date when it is to take place. A distinction has to be made. Whether the procedure is not at all followed, i.e., where the notification for the auction of royalty collection contract is not notified at all in the Rajasthan Gazette, and in those cases where a notification is published, but it falls short by a few days. In the instant case, it has fallen short only by three days, it contained the date of the auction of the royalty collection contract in dispute, and thereby sufficient notice was given to the prospective bidders to participate in the bid. It is dearly provided in Sub-rule (5) of Rule 36 that no bids shall be regarded as accepted unless confirmed by the Government or the competent authority, which in this case was Director of Mines and Geology, who accepted the bid, issued an order and thereafter the contract was duly registered in accordance with law. Therefore, notwithstanding the fact that in Sub-rule (2) of Rule 36, the word 'shall' has been used, to my mind it cannot be held that Rule 36 is mandatory, and to my mind it is simply directory, and substantial compliance of it is sufficient, which has been done in this case. To hold otherwise, may render all the royalty collection contracts as invalid and will lead to general injustice and inconvenience to those who had absolutely no control over the officers who are responsible for holding the auction three days before the expiry of thirty days of the publication of the notification. It is common knowledge that notification from the various departments are sent to the Government press for publication in the official gazette, and for unknown reasons there may be some delay in publication of the notification. The yearly contracts are to expire, and if they are not auctioned before the expiry of the year, then either the period of the contract of the earlier contractors has to be extended or there may be no contractor after the expiry of the earlier contract till such time as the new bids are called and accepted. In such cases, there may be loss of Government revenue. Therefore, looking to the object of publication of a notification under Rule 36 (2) of the Rules, I am of the opinion that it is directory, and its substantial compliance is sufficient.

21. I have already said above that the rulings relied on by the learned District Judge and referred to earlier do not apply to the facts of the instant case. In

Lajjaram's case (ILR (1958) 8 Raj 782) (supra) it was only held on the strength of Guruswami's case (AIR 1954 SC 592) (supra) that if royalty collection is to be farmed out to contractors, there are only two ways of doing it, as provided in Sub-rule (2) of Rule 34, viz., either by auction or by tender. It was not a case where the provisions of the rules with regard to the procedure to be adopted in the auction were held to be mandatory. In Guruswami's case also, the Act and the relevant rules provided that liquor licencing in the State of Mysore can only be done in certain specified ways, and it was held that any discretion, as is left to the authorities is strictly controlled by Statute and Rule. Therefore, the learned District Judge was not right when he observed that the period of at least 30 days notice of auction from the date of publication in the gazette is mandatory. As already observed, it is only directory, and its substantial compliance is sufficient, which has been done in this case. Therefore, issue No. 11 of suit No. 8/62 and issue No. 12 of suit No. 15/64 are decided for the plaintiff and against the defendants, and the finding of the learned District Judge is accordingly reversed.

22. Point No. 4 -- The Government in cancelling the contract dated July 10. 1961 purported to act under Clause 16 of the agreement, which is as follows: --

'16. The contract may be terminated by the State Government, if considered by it to be in the 'public interest' by giving one month's notice.'

23. It has already been mentioned above that the suit for accounts was filed for the expired period of the contract i.e, from July 3rd, 1961 to 5-6-1962, and also for the unexpired period of the contract up to 31-3-1963, A took at the agreement dated July 10. 1961 (Ex. 1) in Civil Suit No. 15/64 (at pages 126 onwards of the Paper Book) will show that there are two clauses in the agreement dealing with the cancellation of the contract. The first is Clause 13 under which in case of default in the due observance of the terms and conditions of the contract, the contract can be terminated by the Government by giving one month's notice, and the other is Clause 16, which has already been extracted above. As observed earlier, the Government has only purported to act under Clause 16 of the agreement (Ex, 1) on the ground that the cancellation is in 'public interest'. It can hardly be disputed that the decision of the Government that the termination of the contract by it is in

'public interest' is justiciable. In Yarlagadda China Rattayya v. Donepudi Venkataramayya, AIR 1959 Andh Pra 551, it has been held that it is always open to canvass the grounds urged in justification of a cancellation of a contract in a Court of Law, and it is quite competent for a court to review bona fides, go into the motive underlying such actions, and if the Court is satisfied that they are inadequate or insufficient, it will certainly set aside the order of cancellation of the contract. In the Union of India v. Anglo Afghan Agencies, AIR 1968 SC 718. their Lordships have observed that under our jurisprudence the Government cannot claim to be the Judge of its obligation to the citizen of an ex parte appraisement of the circumstances in which the obligation has arisen. A look at the order (Ex. 13) dated 27-4-1962 terminating the agreement dated July 10, 1962 will show that two grounds have been mentioned therein for the cancellation of the contract, the first is that large quantity of stones and sand from the quarries under the contract of the plaintiff are required for construction of Rana Pratap Sagar Dam, and the second is that the construction of the Rana Pratap Sagar Dam is considered by the State Government to be in 'public interest'. It is even the case of the State that royalty was collected from the contractor, and even under the agreement entered into by the M. C. C. Co., with the State Government for execution of the project Rana Pratap Sagar Dam there was a clause which clearly makes the contractor liable to pay royalty etc. on construction of the dam. In other words, the State does not dispute that the royalty was chargeable from the contractor on the building stones and sand quarried and removed by him from the various quarries, Therefore, the mere fact that large quantities of stones and sand were to be used in the project by the contractors, when the contractor was in any case to pay royalty on the building stones and sand, cannot be a ground of termination of contract in 'public interest' under Clause 16 of the agreement. It is nowhere mentioned in Ex. 13 that the cancellation of the royalty collection contract was in 'public interest', and all that is mentioned is that the construction of Rana Pratap Sagar Dam is considered by the State Government to be in 'public interest'. Even in the written statement filed on behalf of the Slate and another in para 30, all that has been mentioned is that if the contract was permitted to subsist, the State exchequer would have been deprived of lacs of rupees and this was contrary to public interest, and might be one of the considerations for terminating the so called

contracts. No doubt, the law permits the defendant to justify the repudiation of the contract on any ground which existed at the time of repudiation, whether or not it was stated in the correspondence. (See Juggilali Kamlapat v. Pratapmal Rameshwar. (AIR 1978 SC 389)). But, no evidence has been led on behalf of the defendants as to how the termination or cancellation of the contract dated July 10, 1961 was in 'public interest'. There must be some nexus in between the cancellation of the contract under Clause 16 of the agreement and the 'public interest', and merely after grant of royalty collection contract, the project Rana Pratap Sagar Dam was taken in hand, which required large quantities of stones and sand on which large amount of royalty would have been paid by the contractor, it cannot be said that it was in the public interest to cancel the contract. It can hardly be disputed by the State that while giving tenders and quoting rates for a particular work, the contractor quote its rates also on the basis of royalty on any material, if payable and, if thereafter the contractor has to pay the royalty, which may be a huge amount, it cannot be said that the cancellation of the royalty collection contract is in 'public interest'. Therefore merely because the plaintiff would have earned huge profits causing loss of revenue amounting to lacs of rupees to the State can hardly be a ground to cancel the contract of the plaintiff in 'public interest'. There is no material on record that the termination of the plaintiff's contract was in 'public interest'. It appears that it was at the behest of the irrigation authorities of the Chambal Project that the contract of the plaintiff was cancelled, as in view of the irrigation authorities the plaintiff would have made huge profits by way of royalty, the profits which should otherwise go to the State. I, therefore, uphold the finding of the learned District Judge on this issue and hold that the termination of the contract by Ex. 13 does not appear to be in 'public interest', and, therefore, the termination order is invalid. It is also invalid, because it was cancelled without granting any opportunity to the plaintiff of hearing, which was necessary in the facts and circumstances of this case.

24. Point No. 5 -- It is contended by the learned Government Advocate that the rights and liabilities of the plaintiff flow from Ex. 1, agreement dated July 10, 1961. Under it, the plaintiff had only a right to collect royalty from quarry holders or from persons quarrying or removing stones excavated from the quarries of such quarry holders. He submits that unless the plaintiff pleads and proves that the contractors

of the Irrigation Department including the M. C. C. Co., removed stones and sand excavated from the quarries of the quarry holders, he is not entitled to recover any royalty from the contractors and even if the Government has recovered royalty from the contractors who did not remove the building stones and sand from the quarries of the quarry holders, the plaintiff is not entitled to recover the amount from the Government. The learned counsel for the plaintiff submits that this is a new plea, which is being raised for the first time and the fact of the stones and sand having been brought by the contractors from the quarry holders within the area of the contract of the plaintiff was never disputed nor challenged either in the correspondence which passed prior to the filing of the suit, nor in the written statement. It is well settled that no party can be allowed to set up a new case and, therefore, because it was never challenged, rather it was admitted that the building stones and sand were removed by the contractors from the quarry holders within the contract area of the plaintiff, the learned Government Advocate cannot be allowed to argue this case for the first time, as it is not a pure question of law and is more factual than legal.

25. It is next contended by the learned Government Advocate that under Clause (4) of the agreement (Ex. 1) it was the duty of the contractor to collect royalty at quarry mouth from the minor minerals excavated and despatched, and, if the royalty is not paid at the quarry mouth, then to recover royalty at any place near the quarry, provided that such place is fixed, and prior approval thereto has been obtained in writing from the Director, Mining Engineer/Assistant Mining Engineer. It is further submitted that under Clause 14 of the agreement (Ex. 1), the contractor had to make his own arrangements for collection of royalty, and the State Government was not responsible, if any quarry holder refuses to pay any royalty to the contractor. The learned Government Advocate, therefore, submits that if the contractor failed to recover royalty under the agreement from the contractors, (for) the excavated or removed building stones and sand, he is himself to be blamed and even if the State has recovered the royalty, it cannot be called upon to account to the plaintiff. To my mind, the royalty in this case could not be collected from the contractors, because the Irrigation Department deducted the amount of royalty from the bills of the contractors, and the Irrigation authorities never wanted its contractors to pay the royalty to the plaintiff, who was the royalty collection

contractor of the area. Therefore, the State through the officers of the Irrigation Department recovered the amount which was payable under Ex. 1, to which the State was a party to the plaintiff. The suit of the plaintiff is based for the expired period of the contract on the ground that the Government put obstructions in the recovery of the royalty from its contractors, and it has recovered it. For the unexpired period of contract, the suit is based for compensation or damages on the ground of breach of contract by terminating it illegally and under Section 73 of the Contract Act, the principle for award of damages or compensation is, that as far as possible, the party injured by the other party's breach of contract is entitled to such money compensation, as will put him in the position, he would have been but for the breach. The plaintiff has no accounts and has no means to know as to what amount of royalty was recovered from the different contractors by the Irrigation Department from the quarry holders within the contract area of the plaintiff. The plaintiff has also no means to know for the unexpired period of the contract as to what amount of royalty had been recovered from the bills of the contractors by the State through its Irrigation Department. The State cannot be said to be an agent of the plaintiff for recovering the amount of royalty. But, the State was a party to the agreement (Ex. 1) dated July 10, 1961, under which the plaintiff was entitled to recover royalty in his contract area on building stones and sand excavated from quarry holders, and the State through its officers not only put up obstructions and did not allow the plaintiff to recover the royalty, but it has recovered the royalty amount and thereby committed a breach of the terms of the agreement. Under Order 20, Rule 16. C. P. C. in a suit for an account of pecuniary transactions, (1) between a principal and an agent, and (2) in any other suit not provided under Order 20, where it is necessary to ascertain the amount of money due to or from any party, the court feels that an account should be taken, then the court shall before passing a final decree pass a preliminary decree directing such accounts to be taken, as its thinks fit. To my mind, in equity, a suit for account is always maintainable where there are circumstances of special nature and complication necessitating the taking of accounts. It is not disputed that complete and correct accounts are with the defendants, and this position is not denied by the defendants. As already observed above, the plaintiff is not in a position to know as to what amount of royalty during the expired period of the contract, or/and

during the unexpired period of contract was recovered by the defendants from the bills of the contractors on the building stones and sand excavated and removed from the quarry holders within the contract area of the plaintiff and used in the construction of the dam. Therefore, in the special facts and circumstances of this case, it is a fit case in which the suit for accounts of the plaintiff should be decreed against the State.

26. Before parting with this case, I would like to observe that the Government having itself given the royalty collection contract to the plaintiff, it was not befitting on behalf of the Government to have recovered the royalty from the contract area of the plaintiff from the differenl contractors. The Government having realised the amount of royalty, which amount should have gone to the plaintiff, but could not go, because the Officers of the Government intermeddled and recovered the amount themselves, should not have contested the suit for accounts and should have come out with an offer at least for the unexpired period of the contract that it is willing to pay the amount of royalty collected by it from the contractors for building stones and sand removed from the area of the plaintiff. The Government in a democracy should set up examples of morality, so that its subject may follow the moral so set. But, the curious stand, which has been taken by the State Government that the royalty collection contract, which was given by It, was against public policy, and the plaintiff is not entitled for accounts, is such which cannot be approved.

27. In the result, the appeal No. 27/67 is dismissed, but the costs are made easy. The appeal No. 97/72 of the plaintiff is hereby accepted. The judgment and decree of the learned District Judge, Kota is hereby set aside. The suit of the plaintiff for accounts against the defendants is decreed, and as it is necessary to ascertain the amount of money due to the plaintiff from the defendants, the accounts should be taken. Therefore, a preliminary decree for accounts in favour of the plaintiff and against the defendants in Civil Suit No. 15/67 is passed, and it is directed that the accounts of royalty amount received or deducted by the defendants from the bills of the contractors on the building stones and sand, removed from the contract area of the plaintiff during the period 3-7-1961 to 3-3-1963 be taken. The accounts in the office of defendant (2) or his subordinates with regard to deduction of the

royalty amount from the bills of the contractors on building stones and sand brought from the contract area of the plaintiff shall be taken as prima facie evidence on the truth of the matters therein contained, but the parties will be at liberty to raise such objection, as they may be advised. The trial court is directed to appoint a Commissioner to take accounts between the parties and while taking the accounts, the Commissioner shall give due credit to the defendants for Rs. 3,351/-, which the plaintiff was required to deposit as contract money for the second year of the contract. The plaintiff shall get costs of this suit throughout from the defendants in Civil Suit No. 15/64. As tha suit of the plaintiff for accounts has been decreed, it could not have been decreed for Rs. 3,351/-, and therefore, that part of the decree of the learned District-Judge, Kota is set aside, This also disposes of the appeal No. 101/72 of the State. The costs of this State appeal are made easy. Ordered accordingly.