CALCUTTA HIGH COURT

State of West Bengal

Vs.

Brindaban Chandra Pramanik

A.F.O.D. No. 30 of 1951

(Lahiri, CJ. P. N. Mookerjee and Sen, JJ.)

24.07.1956

JUDGMENT

P. N. Mookerjee, J.

1. To the respondents' claim for compensation (Rs. 7,253/10/-) for one thousand maunds and twenty seers of paddy, requisitioned in 1944 by the then Province of Bengal under Rule 75A of the Defense of India Rules, three technical defenses were raised by the Province of West Bengal which was made the sole defendant in the suit, brought in December, 1948. The merits of these defenses have to be considered in the present appeal.

2. The first two Defenses went to the root of the respondents' (plaintiffs') right of action - one attacking the maintainability of a suit of this nature, and the other raising the bar of limitation. The third Defense denied the liability of the defendant, the Province of West Bengal, or for the matter of that, of the present State of West Bengal, for the plaintiffs' claim in view of the transitional Indian Independence (Rights, Property and Liabilities) Order, 1947, which admittedly governs the rights and liabilities of the parties before us. There was also a Defense, taken in the written statement, under Section 80, Civil Procedure Code, but it was not pursued beyond the stage of pleadings.

3. The requisition of the paddy was admitted. Its receipt or delivery to the appropriate authorities of the then Province of Bengal was also admitted. It was admitted further that compensation for the requisitioned paddy had been determined under Clause 4 of Rule 75A of the Defense of India Rules at Rs. 7/4/- per maund which tallied with the amount of the plaintiffs' claim. That claim, however, was attempted to be resisted on the three technical pleas which I have set out above.

4. The learned Subordinaet Judge negatived all the Defense contentions and decreed the plaintiffs' suit. Hence this appeal by the defendant Province, now State of West Bengal.

5. The section 80 plea has not been repeated in this Court but the other three Defenses have been strongly pressed. The learned Junior Government Pleader has laid particular stress on the plea of limitation and he has also urged that the suit is not maintainable in view of Section 17(2) of the Defense of India Act and that, in any event, having regard to the provisions of the Indian

Independence (Rights, Property and Liabilities) Order, 1947, the liability for the plaintiffs' claim cannot be held to be that of the Province or State of West Bengal, and, as such, the present suit must fail.

6. I am unable to accept any of the above contentions.

7. The relevant facts stand admitted and they are as follows :

8. On or about 16-6-1944, the statutory notice of requisition was served on the respondents and, between 25th June and 2nd July following, the requisitioned paddy, one thousand maunds and twenty seers, was duly delivered by them to the Civil Supply Department of the then Province of Bengal.

9. There was assessment of the statutory compensation by the appropriate government authorities under Clause 4 of Rule 75A of the Defense of India Rules at the rate of Rs. 7/4/- per maund, aggregating Rs. 7253/10/- for the entire quantity of one thousand maunds and twenty seers, which was accepted by the plaintiffs. The amount, however, was not paid and, eventually, after the partition, the matter was referred to the Application Committee and, in spite of repeated demands and requests from the plaintiffs, and assurances from the local Government officers, the money remained unpaid till 8-12-1948, when the present suit was instituted after due service of the requisite statutory notice under Section 80, Civil Procedure Code on or about 8-9-1948. The suit, as I have already said, was sought to be defeated on three technical pleas, to which ample reference has already been made and I shall deal with those pleas in the order in which they have been set out above.

10. In my opinion, Section 17(2), Defense of India Act has no application to the present case. In the I first place, it is not a suit for damages or, to quote I the statute, "for any damage caused or likely to be caused." It is a simple suit for recovery of the statutory compensation, payable under clause 4 of Rule 75A of the Defense of India Rules. In the next place, it is strictly unarguable that the suit is for "any damage caused or likely to be caused by anything done or intended to be done in pursuance of this (the Defense of India) Act or any rules made thereunder or any orders issued under any such rule." The paddy was no doubt requisitioned under or in pursuance of the Defense of India Act and or the Defense of India Rules, the statutory compensation was also assessed or determined under or in pursuance thereof, but the non-payment of it which is the basic cause of action of the present suit cannot be said to be in pursuance of that Statute or any rules or orders, made thereunder. The Statute, on the other hand, - of which the Rules are an integral part - expressly provides for payment of statutory compensation for requisitioned properties and does not justified or purport to justify non-payment or withholding of payment of such compensation after its determination. Such non-payment would be not in pursuance of the Defense of India Act or the Rules or Orders, made thereunder, but, rather, in contravention of the same. I hold, therefore, that Section 17(2), Defense of India Act is no bar to the maintainability of the present suit and cannot be pleaded in answer to the plaintiffs' claim.

11. Obviously also it is not a suit "for anything done or intended to be done in pursuance of this (the Defense of India.) Act, or any Rules made there under, or under orders issued under any such Rule" and so Section 17 (1) of the Act which it must be stated in fairness to the Defense, was not pleaded by it, would not hit the suit. Nor would Section 19 stand in the way of the

plaintiff's claim, as that claim is not and cannot be said to be "for compensation for any action taken of the nature described in sub-section (2) of Section 299, Government of India Act", the latter sub-section referring only to "compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owing, any commercial or industrial undertaking" which is admittedly not the case before us. The suit, therefore, is not barred by any of the above porvisions of law and it is perfectly in order.

12. I take up next the Defense plea of limitation. This is founded mainly on Article 2, Indian Limitation Act. Article 36 has also been referred to, in passing, by the learned Assistant Government Pleader. The respondents rely on Article 120. I am inclined to accept the respondents' submission and I have little hesitation in doing so.

13. Article 36 may safely be put aside. This is, not an action on tort and clearly, therefore, that Article can have no application.

14. Of Article 2 also, I am not prepared to take a wide view. It has been rightly restricted to tortious acts or compensation for damages arising from torts or something in the nature of tort Vide Secy of *State v. Lodna Colliery Co. Ltd*[1]. For its application, there must be a tort or an act or omission in the nature of a tort. The present suit, however, as I shall be explaining in the course of this judgment, is not a suit on tort or the like but it is founded on an "actionable wrong" other than tort or of nature different from tort. Article 2, therefore, is, inapplicable and cannot be invoked to defeat this suit.

15. We are left then with the residuary Article 120, if at all any question of limitation arises in cases like the present, for the minimum period of limitation. The suit is thus quite within time, it having been instituted well within six years even from the date of the requisition which would be the starting point of limitation under that Article at the earliest.

16. The appellants' plea of limitation was, therefore, rightly rejected by the learned Subordinate Judge and his decision on the point must be affirmed.

17. Before parting with the point of limitation, I ought to refer to the Privy Council case of *Punjab Cotton Press Co. Ltd. v. Secy. of State*[2], which was strongly relied on by the appellants in support of their argument on Article 2. At first sight, that case may seem to require some explanation. But when the facts are carefully analyzed, the observations of the Judicial Committee at page 73 of the AIR Report, on which particular stress was laid by the appellants' learned Advocate, do not support his contention.

18. The Privy Council case was entirely different. It was not a case of recovery of statutory compensation at all. The suits there were purely actions for damages. The act which caused or was alleged to have caused the damages came, if at all it could be brought under the relevant statute (Northern India Canal and Drainage Act 8 of 1873), only under Section 15, or, to be more precise, under its first part. No other section appears

[1] ILR 15 Pat. 510 : AIR 1936 Pat 513

[2] AIR 1927 PC 72 : 31 Cal WN 835

also to have been mentioned before the Judicial Committee.

19. The second part of that section (S. 15) (which, in view of its language, must be read along with the first part) provided for statutory compensation to "the proprietors or occupiers" of "lands adjacent to the canal", which the authorities concerned had entered upon and on which they had executed works necessary "for the purpose of repairing or preventing" accident to the canal (vide the first part of the section), "for all damages done to the same." In the case before the Privy Council, there was no allegation that the canal authorities had entered upon the plaintiffs lands, to which damages had been done. The lands, therefore, did not satisfy the requirements of the statute and the plaintiffs also did not fulfil the relevant capacity to attract the provision for statutory compensation and the damages were not of the nature, contemplated by the statute for payment of such compensation. The claim was obviously for damages or compensation under the general law for an actionable wrong in the nature of tort and, as the act, complained of, might well have been an act, purporting to be done under Section 15 of the Statute, and I do not think that anything more was meant by their Lordships at p. 73 of the AIR Report, - there was some scope for a contention under Article 2, Limitation Act and, accordingly, the Privy Council remanded the case for a decision of this aspect of the matter. In the observations of their Lordships I find nothing clear or specific, to justify me to hold that, to claims for recovery of statutory compensation, as in the present case, Article 2 or Article 36, Limitation Act has any application and I would not spell out such a proposition from those observations, in the face of the clear language of the said two Articles pointing to the contrary. Article 36 is absolutely clear on the point and Article 2 also is sufficiently clear when it uses the words "alleged to be in pursuance of any enactment" etc. I would also respectfully point out once again that in AIR 1927 PC 72, the Judicial Committee was really dealing with an ordinary claim for damages under the general law and not a claim for statutory compensation. The decision cited has, therefore, in my opinion, no relevance and not the slightest application to the present case which arises out of a claim for statutory compensation, pure and simple. The Defense of limitation is, accordingly, overruled.

20. The remaining question arises under the Indian Independence (Rights, Property and Liabilities) Order, 1947. The learned Assistant Government Pleader sought to bring the instant case under Article 7. That Article, however, has clearly no application here. The real question is, as was pointed out by my learned brother during arguments, whether the present case came within Article 9 or Article 10 of the Order and the ultimate enquiry would primarily be, as put by him, which of the said two Articles is the residuary provision. . The learned Assistant Government Pleader practically conceded that Article 10 was the residuary Article and that, if the decision turned on the said two articles, Article 10(2) (b) would apply and his clients' plea of denial of liability would fail. Despite this concession, however, the point requires consideration, out of respect to my learned brother and deference to his views and particularly having regard to the several aspects of the matter, pointed out by him during arguments in Court and, later again, during our mutual discussion.

21. The Indian Independence (Rights, Property and Liabilities) Order, 1947, purports to deal with "the initial distribution of rights, property and liabilities, consequential on the setting up of the two Dominions of India and Pakistan" and the virtual partition of some of the old Provinces. By Article 3(1) the provisions of the Order are to have effect "subject to any agreement between the two Dominions or Provinces concerned or to any award that may be made by the Arbitral Tribunal". There is no case here of any such agreement or award and both parties have proceeded on the footing that the present dispute between them has to be decided on the provisions of this

Order without reference to the possibility of any such arrangement or award. The rights and liabilities of the parties will, therefore, be determined on that footing.

22. Articles 4 and 5 of the Order deal with land. Article 6 with goods, coins, bank-notes and currency notes and Article 7 with all other properties subject to the specific provisions, made in the Order (Vide Article 8), for certain contractual rights. Article 8 deals with prepartition contractual rights and liabilities, Article 9 with liabilities in respect of outstanding 'loan, guarantees and other financial obligations" and Article 10 with "liability in respect of an actionable wrong other than breach of contract." Obviously the liability, now in dispute, does not come under any of the Articles 4-8, - and Articles 4 to 7 and 8 deal with properties and rights and purely contractual liabilities which do not, admittedly, cover the present claim, - and the only two Articles which require consideration in connection with the question, now before us are Articles 9 and 10. Article 9 no doubt contains the general words "other financial obligations" but, for reasons which I shall presently give, I am inclined to hold that the said words must be read ejusdem generis with the preceding terms "loans" and "guarantees", and, in my opinion, liabilities, like the present, though undoubtedly in the nature of financial obligations" in the broader sense, would not come within the said expression as used in Article 9 but would properly come within the description of "liability in respect of an actionable wrong" as used in the next Article 10 which seems to me to be the residuary article.

23. Confining myself to the question of liabilities, the three relevant Articles seem to be Articles 8, 9 and 10. Article 8, as I have already said, deals with prepartition contractual liabilities in general. Article 9, so it seems to me, deals with certain special types of contractual liabilities, or liabilities of a similar nature, namely, loans, guarantees, etc., the term "other financial obligations" implying, in my opinion, "financial obligations of the nature of loans and guarantees" on the ejusdem generis principle, and Article 10 deals with all other liabilities under the compendious phrase "liability in respect of an actionable wrong other than breach of contract." That appears to be the broad scheme of the Order in the matter of classification or grouping of liabilities for purposes of division or distribution between different units and this view finds support from the express mention of Article 9 as an exception, by way of a controlling Article, in Article 8 (Vide clause 6), which admittedly deals only with contractual rights and liabilities, and also from the order of placing of the three articles 8, 9 and 10.

24. I am not, therefore, prepared to differ from the restricted, technical or ejusdem generis meaning, given to the expression "other financial obligations" in the two earlier decisions of this Court, reported in *Province of West Bengal v. Midnapore Zemindary Co. Ltd*[3]*.,* and *Sree Sree Iswar Madan Gopal Jiu v. Province of West Bengal*[4]*,* and I would, in agreement with the learned Judges who decided those two cases, construe the phrase "other financial

[3]54 Cal WN 677 : AIR 1950 Cal 159
[4]54 Cal WN 807 : AIR 1950 Cal 463

obligations" in Article 9 ejusdem generis with the preceding words "loans, guarantees" and, on such interpretation, Article 10 would obviously be the residuary article.

25. That Article 9 is not the residuary Article also follows from a very important circumstance, to which I have already referred. Article 9 is followed by Article 10. This is prima facie inconsistent with Article 9 being the residuary Article. Normally, the general or the residuary provision comes

last, save where the particular provision or provisions which follow are mentioned as, or, by way of exception to the general provision, and, judging from this point of view, it would be more proper to hold that Article 10 is the residuary Article. To hold otherwise would be to reverse the normal or natural course of things and I find no sufficient reason for doing so in the present case.

26. Article 10 again is quite appropriate as the residuary Article if we give to the words "actionable wrong" their plain and natural meaning. In this connection, I cannot do better than quote the words of B. K. Mukherjea, J., as he then was, in the well-known case of the *State of Tripura v. The Province of East Bengal*[5], where this very Article came up for some discussion. At page 29 of the report, His Lordship was pleased to make the following significant observations :

> "The word 'wrong' in ordinary legal language means and signifies "privation of right". An Act is wrongful if it infringes the legal right of another and 'actionable' means nothing else than it affords grounds of action in law....."

I respectfully agree with these observations. If the words "actionable wrong" are so construed, and the statute itself contains sufficient warrant in favor of this wider meaning when, in the relevant Article 10, Clause (2) whereof has obviously to be read with clause (1), it speaks of "an actionable wrong other than breach of contract" which plainly implies that, but for the exception made, breach of contract also would have been an "actionable wrong" for purposes of this Article, and this wider meaning is also well supported by the theory of wide and liberal construction, recommenced by Patanjali Sastri, J., as he then was at page 27 of the report - the Article (Art. 10) would be quite apposite as a residuary Article and, in that context and in the context of the preceding Article 8, it would be quite legitimate to give the words "other financial obligations", as occurring in Article 9, the ejusdem generis interpretation of obligations of a contractual nature like "loans, guarantees." Indeed, if Article 10 is not to be rejected as altogether redundant, - and a construction which tends to have this mutilating effect is to be avoided in the absence of compelling circumstances, - no other interpretation of these words is possible, as otherwise Articles 8 and 9 would between themselves cover all cases of pecuniary liabilities and Article 10 would lose all practical value and become redundant for all practical purposes which was certainly not the intention of the Statute.

27. I am also inclined to agree with Sen and Chunder, JJ., Vide 54 Cal WN 807 at page 809 : AIR 1950 Calcutta 463 at p. 464 (D) that Article 9 has obviously some reference to Section 178, Government of India Act where the same words "loans, guarantees and other financial obligations" occur, which reasonably suggests that Article 9, like the said Section 178, deals only with liabilities, connected with matters of revenue.

[5] AIR 1951 SC 23

28. Indeed, it seems to me that the framers of Article 9 of the 1947 Order borrowed not only the phrase "loans, guarantees and other financial obligations" from the corresponding Section 178, Government of India Act of 1935 which was then in force but also the broad scheme of that statute in the matter of the nature, scope and classification of contractual rights and liabilities of the State and a comparison of Sections 177 and 178 of the Act of 1935 with Articles 8 and 9 of the 1947 Order will show that, under both, State or Government contractual liabilities were grouped under two heads, namely, special contracts like loans, guarantees etc and contracts in general. The latter were dealt with in Section 177 and Article 8 and the former in the succeeding

Section 178 and Article 9. The opening words of Section 177(1), namely, "without prejudice to the special provisions of the next succeeding section (S. 178) relating to loans, guarantees and other financial obligations," - and these words "loans, guarantees and other financial obligations" which, in this Section 177, plainly refer to certain special or excepted types of contractual liabilities obviously bear also the same sense in the succeeding Section 178, - "any contract etc." and the opening words of Clause (6) of Article 8, namely, "the provisions of this Article (Art. 8) shall have effect subject to the provisions of Article 9 of the Order", read in the light of the reference to "any contract" and "all.....liabilities which have accrued or may accrue under 'the contract' or any such contract'" in the earlier parts of the Art. (Art. 8), are sufficient to show that by the words "loans, guarantees and other financial obligations" were meant only contractual liabilities of some special type as distinguished from contractual liabilities in general. I do not think it is possible to contend, in view of the clear language of the two provisions (S. 177 and Article 8), that they purport to deal with any liability except contractual liability and, if that be so, the reservations, made in the quotations, set out above, must obviously refer to liabilities, arising out of certain transactions which are treated as special contracts at least for purposes of the above Act and Order.

29. I would, accordingly, construe the phrase "loans, guarantees and other financial obligations" as denoting only certain particular types of contractual liabilities and, in that context, the words "other financial obligations" must bear the ejusdem generis meaning of contractual liabilities of the type of "loans and guarantees" and Article 9 must yield to Article 10 in the matter of its claim to be the residuary Article.

30. Whatever doubts may have existed in the past about the propriety of the above interpretation, - although I myself have none, - have now been practically set at rest by the decision of the Supreme Court in the case of the *State of West Bengal v. Serajuddin Batley*[6], where the Calcutta decisions 54 Cal WN 677 : AIR 1950 Calcutta 159 and 54 Cal WN 807 : AIR 1950 Calcutta 463 were approvingly referred to by their Lordships in express terms and the ejusdem generis meaning of the expression "other financial obligations" in the quoted phrase "loans, guarantees and other financial obligations" as appearing in Article 9, Indian Independence (Rights, Property and Liabilities) Order, 1947, and the correlation of that Article to Section 178, Government of India Act, 1935, were apparently accepted. I do not think that the disinclination of their Lordships to attempt an exhaustive definition of the expression "financial obligations" indicates anything to the contrary and, in my view, that only shows that their Lordships, while accepting the ejusdem generis meaning, merely refrained from attempting the impossible, namely, a detailed and exhaustive cataloguing of the special contractual liabilities which

[6] AIR 1954 SC 193

would come within the said expression "other financial obligations."

31. In the light of what I have said above, I am bound to hold that the phrase "other financial obligations" in Article 9 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, includes only contractual liabilities of the State, akin to loans and guarantees. Of all these, however, the contractual element is a common essential ingredient and, unless this is present, the liability in question would not come within the said phrase "other financial obligations". The context and the structure of the Article would not justify the inclusion of non-contractual liabilities, whatever their other characteristics, within the said phrase and, accordingly, I would not be prepared to hold that statutory compensation for requisitioned paddy, with which we are

here concerned, or, for the matter of that, any statutory compensation for compulsory levy or requisition, would come within that expression. The compensation may be payable under the statute and, in that sense, there may be some sort of guarantee in it, but it cannot be called "contractual liability" in any sense of that term and, the essential contractual element being absent, the ejusdem generis theory would not bring these liabilities for statutory compensation within the expression "other financial obligations" in Article 9. To hold otherwise would mean a distortion of the principle, underlying the ejusdem generis theory, and a misapplication of the same and to include, within the above category, liability for statutory compensation, payable for compulsory levy or requisition, which is, by nature, fundamentally different from contractual obligations in that it arises out of a transaction, founded on compulsion as opposed to volition which underlies every contract and contractual obligation, would, in my opinion, be an unwarranted extension of the said ejusdem generis principle.

32. I would also respectfully point out that, if claims for statutory compensation are held covered by Article 9 the Bench decision of this Court in 54 Cal WN 807 : AIR 1950 Calcutta 463, since ap proved by the Supreme Court in AIR 1954 Supreme Court 193, as noted before, must be held to have been wrongly given, and compensation for lands, acquired in this part of the country, will have to be recovered by the party aggrieved from the foreign East Bengal Government. In the absence of compelling circumstances, I am not prepared to take such an unreasonable view and to place a subject of this "State in such an unjust predicament and practically at the mercy of a foreign State. In the present case. I have been unable to discover any such compelling circumstances, and accordingly. I would respectfully adopt the view of Sen and Chunder, JJ., in the case cited 54 Cal WN 807 : AIR 1950 Calcutta 463, where they applied in effect, the residuary Article 10 to cases of statutory compensation.

33. What would have been the position if, instead of requisition, the paddy had been acquired by the State Government by purchase is, in my view, entirely irrelevant for our present purpose. That would have been clearly a case of pure contractual liability, coming directly under one of the clauses (possibly Clause 2(b)) of Article 8. That, however, would not afford any legitimate clue to the solution of the problem, now before us, where, admittedly, the said Article 8 can have no application and when it is perfectly clear that the 1947 Order was adjusting and apportioning liabilities not on one (any single) fixed principle but on different lines in the different Articles, dealing with the several classes or kinds or categories of liabilities on different footings.

34. I hold, therefore, that Article 10 and not Article 9 is the residuary article, that the words "other financial obligations" must be read ejusdem generis with the words "loans, guarantees" which precede the same and should be given a restricted and technical meaning, namely, financial obligations of the nature of "loans" and "guarantees", and that the said expression would not include non-contractual liabilities e.g., statutory liabilities for compensation for compulsory levy, requisition or acquisition. I hold further that the phrase "actionable wrong" which occurs in Article 10 should receive a wide and liberal interpretation and should be held to connote all infringements of legal rights, for which an action lies in law. Thus read, this Article 10 would obviously include torts and breaches of contract, which would be only two of the species, of which "actionable wrong" is the genus, but would not, by or between themselves, exhaust the whole of it. "Actionable wrong" would have other categories and the present case affords one such illustration. In Article 10, however, "breach of contract" (which has already been provided for in Article 8 and Article 9, as above interpreted) has been expressly excluded and so that

Article would apply to all actionable wrongs other than "breach of contract." In this view, Article 10 (2) (b) would clearly cover the disputed claim and the appellants cannot shake off their liability for the same.

35. I would, accordingly, affirm the decision of the learned Subordinate Judge and dismiss this appeal.

Sen, J.

36. This is an appeal by the State of West Bengal from the decree of Sri D. N. Chakravartty, Subordinate Judge, 2nd Court, Midnapore, in Money Suit No. 18 of 1948.

37. The facts in the case are admitted and are briefly as follows; The plaintiffs Brindaban Chandra Pramanik and Bibhuti Bhushan Pramanik, are brothers living in joint family at Kamarbari in Midnapore district. 1020 Mds. of paddy belonging to the plaintiffs were requisitioned by Government under Rule 75A of the Defense of India Rules in June 1944 and the Paddy was delivered in accordance with the requisition between 25-6-1944 and 2-7-1944. The price of the paddy was assessed at Rs. 7/4/- per maund and on that basis the dues of the plaintiffs came to Rs. 7253/10/- but the amount was not paid by the Government. After the partition the plaintiffs on 8-12-1948 instituted a suit for recovery of the amount against the Province of West Bengal.

38. The State of West Bengal took up the Defense that the suit was barred by the provisions of the Defense of India Act; that it was barred by limitation and that the plaintiffs' claim was not enforceable against the State of West Bengal; that in view of the provisions of Indian Independence (Rights, Property and Liabilities) Order, 1947, the plaintiffs should have made the claim against the Province of East Bengal.

39. The learned Subordinate Judge decided the issues against the State of West Bengal and so decreed the suit in full with costs. In this Court three Defenses taken in the Court below have been urged over again and these accordingly are the points for decision in this appeal.

40. The first point is that the suit is barred under Section 17(2), Defense of India Act, 1939. Section 17(2), Defense of India Act runs as follows :

> "Save as otherwise expressly provided under this Act, no suit or other legal proceeding shall lie against the Crown for any damage caused or likely to be caused by anything in good faith done or intended to be done in pursuance of this Act or any rules made thereunder".

It is clear that a suit for compensation for requisitioned goods is not a suit which would come within the scope of the provisions quoted above. A suit contemplated by Section 17(2) is a suit for damage incidentally caused to any person by any action taken by Government for the due prosecution of war or otherwise under the powers conferred by the Defense of India Act or the Defense of India Rules. We must therefore agree that Section 17(2) of the Defense of India Act 1939 cannot bar a suit for compensation for the paddy taken by Government on requisition under

Rule 75A of the Defense of India Rules.

41. The learned Assistant Government Pleader has also urged in this connection that the procedure for obtaining compensation from Government for requisitioned property is one laid down under Section 19, Government of India Act and that no separate suit is maintainable. Section 19 however refers to the procedure for the compensation to be paid for requisition of property of the nature described in sub-section (2) of Section 299, Government of India Act, 1935. Sub-Section (2) of Section 299, Government of India Act relates to compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owing, any commercial or industrial under taking. In the present case we are not concerned with compensation for compulsory acquisition of any land or any commercial or industrial undertaking or of any interest in any commercial or industrial undertaking or in any company owing such undertaking. We are concerned with compensation for paddy requisitioned under Rule 75A of the Defense of India Rules. Therefore the procedure laid down in Section 19, Defense of India Act 1939 has clearly no application and a suit for recovery of compensation for the requisitioned paddy cannot therefore be barred on such ground.

42. The second point urged on behalf of the appellant is that the suit is barred by limitation. The requisition was made in June 1944 and the paddy was delivered between 25-6-1944 and 2-7-1944. The suit was filed on 8-12-1948, i. e., more than 4 years after the delivery of the requisitioned paddy. The learned Assistant Government Pleader has urged that Article 2, Limitation Act will apply and that the suit is hopelessly barred by limitation. Article 2, Limitation Act provides a limitation of 90 days only but Article 2 applies to a suit for compensation for doing or omitting to do an act alleged to be in pursuance of any enactment in force for the time being and the limitation starts from the date when the act or omission takes place. The scope of Article 2 was explained by Courtney-Terrell, C. J., in the case of AIR 1936 Patna 513 as follows :

> "The object of the article is the protection of public officials who, *bona fide* purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection, there must be in the first place a *bona fide* belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under color of a statutory duty, and thirdly the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection. Article 2 has no application to suits to recover statutory compensation independently of any question of tort".

43. Apart from the observation of their Lordships of the Patna High Court in the case cited above, it is clear from the wording of the article that the article cannot apply to a suit for recovery of statutory compensation whether for land or for requisitioned movable goods. The learned Assistant Government Pleader has relied on a stray observation of the Privy Council in the case of AIR 1927 PC 72 : 31 Cal WN 835 (B). The facts of that case briefly were that certain officers

of the Punjab Govt. in order to save a railway embankment and the railway lines passing thereon, made some cuts in a canal taking off from the Ravi river which was then subject to flood, and the waters escaping from the cuts did some damage to the mills of the plaintiff, the Punjab Cotton Press Co. Ltd. The plaintiffs filed a suit for recovery of damages against the Secretary of State for India in Council. Section 15, Northern India Canal and Drainage Act, 1873, authorises the officers of the Canal Department to make cuts in order to let out water when it is necessary to do so for the protection of the Canal. Section 15 also provides for statutory compensation which may be assessed and allowed to persons whose property is damaged as a result of such cuts. When the case went up to the Privy Council, their Lordships observed that the cuts made in this case were made in order to protect the railway embankment and the railway lines and not in order to protect the canal itself, and, therefore, the action could not come under Section 15, Northern India Canal and Drainage Act, 1873, and, therefore, Article 2 Limitation Act could have no application but the case would come under Article 36 which provides a limitation of two years for suits for compensation for any marfeasance, misfeasance or nonfeasance independent of contract and not specially provided for. In delivering the judgment Viscount Dunedin made the following observations:

> "No doubt, if they can show that what was done falls within the provisions of the Canal Act. that is to say, if they can show that it was really done, as section 15 of the Canal Act says, in order to avoid accident to the canal then they will come straight within the clause already mentioned, Article 2 of the Second Schedule".

44. This observation is relied on by the learned Assistant Government Pleader to urge where the Government is acting under the provisions of a Statute, a suit for compensation would be governed by Article 2 and not by any other article like the residuary Article 120. The observation of Viscount Dunedin quoted above is however somewhat ambiguous. As pointed out by Courtney-Terrell, C. J., of the Patna High Court in the case previously cited. Article 2 is for protection of the public officials doing an act. If the act of the public officials is wholly within the terms of the statutory provisions the public officials are wholly protected against the claim for damages for the act done, although there may be provisions for recovery of statutory compensation from the Government. There may be a suit for damages against a public servant when the act done is not fully covered by the provisions of a statute but the act purported to have been done under the statutory provisions. This is also clear from the words "the act alleged to be done in pursuance of any enactment" used in Article 2, Limitation Act. In the case before the Privy Council, if the cuts in the canal had been fully in accordance with the provisions of Section 15, Northern India Canal and Drainage Act 1873, the officer making the cuts would not be liable for any damage, but the party would be entitled to be statutorily compensated as provided under Section 15 of the Act. If the cut in the canal did not come wholly within the provisions of Section 15 of the Act but it still purported to have been made in exercise of power conferred by Section 15 of the Act, then the Government would not be liable for statutory compensation, but the particular officer would be liable for damages and such a suit would be governed by Article 2, Limitation Act. When however the cut was not ostensibly done under Section 15 of the Canal Act Article 2 would not apply and Article 36 would apply. Their Lordships of the Privy Council were only concerned with the last case and therefore they did not clearly make the distinction between the first two cases. It must be held that Article 2 does not apply to the present proceedings, and there no specific statutory provisions applicable in such a case we must agree

that the learned Subordinate Judge was right in holding that the residuary Article 120 which provides a 6 year period of limitation would govern the present case. In this connection, reference may be made to the cases, *Secy. of State for India v. Guru Prasad Dhur*[7], and *Rameshwar Singh v. Secy. of State for India*[8], which support the proposition that in a suit for enforcing statutory liability the period of limitation in 6 years under the residuary Article 120.

45. The next point urged by the learned Assistant Government Pleader is that in view of the provisions of Indian Independence (Rights, Property and Liabilities) Order, 1947, the Province of East Bengal and not the Province of West Bengal is liable for the liability which was a liability of undivided Bengal before partition. The learned Subordinate Judge held in this connection that the liability of the Province of undivided Bengal to pay compensation for the requisitioned paddy amounted to a liability for actionable wrong and that therefore the liability had devolved upon the Province of West Bengal in view of clause (2), sub-clause (b) of Article 10, for the cause of action arose wholly within the territory of West Bengal, viz., in Midnapore District where the paddy was delivered after service of the requisition order. The learned Assistant Government Pleader has urged that Article 10 does not apply to the facts of the present case, because Article 10 deals with a liability in respect of an actionable wrong other than a breach of contract, and since the paddy was requisitioned under the provisions of a statute, viz., Rule 75A of the Defense of India Rules, which had the same force as a section of the Defense of India Act, it cannot be said that there was any actionable wrong committed by the requisitioning and taking delivery of the paddy. The learned Assistant Government Pleader, therefore, urges that Article 7 will govern the case. But Article 7 clearly does not apply. It relates to property other than lands, goods, coins, bank notes, currency notes which immediately before the appointed day vested in His Majesty for the purposes of the Governor-General in Council or of a province. Article 7 relates to division of assets, and it relates to property other than lands, goods, coins, etc. In the present case, we are concerned with goods viz., paddy itself, but with the liability to pay compensation for the paddy. Articles 8 to 10 deal with distribution of liability. Article 8 relates to contractual liability. Liability to pay compensation for requisitioned goods is not a contractual liability but is a statutory

[7] ILR 20 Cal 51 (FB)
[8] ILR 34 Cal 470

liability, and therefore Article 8 is ruled out. Requisitioning of' paddy being a legal act in pursuance of a statute cannot be regarded as an actionable wrong, and therefore, we are thrown back on Article 9 which relates to liabilities in respect of such loans, guarantees and other financial obligations of the Governor-General in Council or of a province as are outstanding immediately before the appointed day. If the liability to pay compensation for the requisitioned goods comes within the terms 'other financial obligations', clearly Article 9 would be applicable, and in that case, the liability would be that of the province of East Bengal. It has been held by this Court that the term 'other financial obligations' should be interpreted as ejusdem generis with loans and guarantees "vide the cases 54 Cal WN 677 : AIR 1950 Calcutta 159 and 54 Cal WN 807 : AIR 1950 Calcutta 463. In the first case, viz., 54 Cal WN 677 : AIR 1950 Calcutta 159 the liability was in respect of rent for a house which had been taken on hire by the Government for running a hospital. It was urged before their Lordships Harries, C. J., and Sarkar, J., that the dues upto the date of partition were 'other financial obligations' coming within the terms of Article 9, Indian Independence (Rights, Property and Liabilities) Order, 1947, and therefore the Government of East Bengal would be liable. Their Lordships, however, held that the obligations to pay rent for the house arose out of a contract and it was therefore purely a contractual

obligation covered by Article 8, and did not fall within 'other financial obligations' in Article 9. In delivering the judgment, Harries, C. J., observed as follows :

> "The obligation to pay rent is in one sense a financial obligation, but I think it is clear that the words 'and other financial obligations of a province' in Article 9 must be construed ejusdem generic with the words 'loans and guarantees..... Clearly it was not intended to cover purely contractual obligations; otherwise, Article 8 becomes wholly worthless."

In 54 Cal WN 807 : AIR 1950 Calcutta 463, their Lordships were concerned with the claim for compensation for land acquired in the district of Burdwan before the appointed day; a suit had been filed also before the appointed day and their Lordships held that the suit for compensation for land acquired must be regarded as a suit for the land which under Article 5 had devolved on the province of West Bengal and under Article 12, the province of West Bengal must be substituted for the Province of Bengal. In repelling the argument advanced on behalf of the West Bengal Government that the claim could be covered by Article 9, Indian Independence (Rights, Property and Liabilities) Order, 1947, their Lordships (Sen and Chunder, JJ.) repeated the observations of Harries, C. J., in the earlier case, viz., that the words 'other financial obligations' must be interpreted as ejusdem generis with loans and guarantees. Their Lordships gave the reason that Article 9 has reference to Article 178, Government of India Act, 1935, where the same words 'loans and guarantees and other financial obligations' are also used, and that it would appear from the Government of India Act that the obligations considered in that connection were obligations charged upon the revenue of the State and therefore in Article 9 of the Rights, Property and Liabilities Order also the words 'other financial obligations' must mean obligations of the same nature as loans and guarantees charged on the revenue of the State. It may however be pointed out that in Section 178, Government of India Act, the words 'other financial obligations' are expressly defined as obligations secured on the revenues. Clause (1) of Section 176 deals with "all liabilities in respect of such loans guarantees and other obligations of the Secretary of State in Council as are outstanding immediately before the commencement of Part III of this Act, and were secured on the revenues of India". Clause (4) of the same section deals with "any loans or other financial obligations secured upon the revenues of province" in respect of liability of any local Government in India. In Article 9 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, the words 'other financial obligations' are not expressly qualified as to mean obligations which are charged on the revenues of the State, and even accepting that the expression "other financial obligations" is to be interpreted ejusdem generis with loans and guarantees, the point has to be borne in mind in deciding what can be included within that expression.

46. Mr. Arun Kumar Dutt appearing for the respondents has urged that the learned Subordinate Judge was right in holding that Article 10 would apply to the present case and he has referred to the Supreme Court ruling in the case AIR 1951 Supreme Court 23 and has urged that the words 'liability in respect of an actionable wrong' as used in Article 10 must be given a wide interpretation, and that the words do not merely connote a liability for damages for completed tortious act but that the words have a much wider connotation. The facts of the case were that a notice for assessment under the Bengal Agricultural Income-tax Act, 1944, had been served on the Tripura State; and the Tripura State by its Ruler on 12-6-1945 instituted a suit in the Court of the Subordinate Judge, Dacca for a declaration that the Bengal Agricultural Income-tax Act in so

far as it purported to impose a liability to pay agricultural income-tax on Indian State or its Ruler was ultra vires and that the notice issued by the Agricultural Income-tax Officer, Dacca was without jurisdiction. This suit was transferred to the Court of the Subordinate Judge Alipore, and the question before their Lordships of the Supreme Court was whether after the partition such a suit would be maintainable against the Province of East Bengal. Patanjali Sastri, J., delivering the judgment of Kania, C. J.. Patanjali Sastri, J., and Chandrasekhara Aiyar, J., observed as follows :

> "Under Section 9(1) (b), Indian Independence Act 1947, the Governor General of British India was directed to make provision by order,
> 'for dividing between the new Dominions and the new Provinces to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor General in Council, or as the case may be, of the relevant Provinces which under this Act are to cease to exist,' and the Indian Independence (Rights, Property and Liabilities') Order is the only order by which such provision was made. The intention being thus to provide for the initial distribution of rights property and liabilities as between the two Dominions and their Provinces, a wide and liberal construction, as far as the language used would admit, should be placed upon the terms of the Order, so as to leave no gap or lacuna in relation to the matters sought to be provided for". Patanjali Sastri, J., further observed,
> "There is no reason, accordingly, why the words 'liability in respect of an actionable wrong' should be understood in the restricted sense of liability for damages for completed tortious acts. We consider that the words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorised act already commenced". In the same case B. K. Mukherjea, J., observed as follows :
> "The High Court took the view that the expression 'actionable wrong other than a breach of contract' is synonymous with 'tort' ..... It seems to me that the learned Judges have attached a narrow and somewhat restricted meaning to the words of the Article mentioned above and that the plain language of the provision read in the light of the context would demand and justify a wider and more liberal interpretation. In my opinion, there can be an actionable wrong which does not arise out of a breach of contract and at the same time does not answer to the description of a 'tort' as it is understood in English Law; and if the plaintiff's allegations are correct, it is an actionable wrong precisely of that type which we have in the present case".

B. K. Mukherjea, J., further observed as follows :

> "The word 'wrong' in ordinary legal language means and signifies 'privation of right'. An act is wrongful if it infringes the legal right of another, and 'actionable' means nothing else than that it affords grounds for action in law".

47. On this observation of B. K. Mukherjea, J., Mr. Dutt appearing for the respondent has relied and has urged that as the respondent has been kept out of the money due to him as compensation for the goods requisitioned he has suffered a wrong and as this affords a ground for action in law it is an actionable wrong and therefore Article 10, interpreted widely as the Supreme Court

intended it to be interpreted, would cover the claim in the present case and therefore the liability would be that of the province of West Bengal. It is however difficult to accept the proposition that the mere omission to pay the statutory compensation would amount to an actionable wrong as contemplated in Article 10. The suit is directly a suit for recovery of statutory compensation and not for damages in respect of an actionable wrong in the way of withholding proper compensation. The Supreme Court decision shows that for a case to come under Article 10 there must be some wrongful act, some illegal and unauthorized act done. The requisitioning of paddy was not an illegal or unauthorized act - it was an act under statutory power. It is therefore difficult to see how the claim for statutory compensation can be a liability in respect of an actionable wrong. To bring such a claim within the scope of Article 10 by contending that it is really a suit for damages for an actionable wrong, to wit, withholding the payment of the compensation appears to be to stretch the scope of Article 10 unduly; if Article 10 be used for every case in which payment is withheld, there would be no need for Article 9.

48. In a case decided and reported after we had heard the arguments in the present case, the Supreme Court considered the meaning of the expression 'other financial obligations' as used in Article 9; vide AIR 1954 Supreme Court 193. In that case, the liability to pay rent under a lease was the liability under consideration; it was held that it did not come within Article 9 but would come within Article 8. The Supreme Court observed that if the expression 'other financial obligations' were interpreted ejusdem generis with the expressions 'loans' and 'guarantees' there could be no difficulty in drawing the line between matters that would fall within Article 8 and those that would fall within Article 9. The Supreme Court referred in this connection to the two Calcutta cases already referred to. But the Supreme Court did not finally decide what obligations would the included in the expression 'other financial obligations;' and observed that in each case the question whether a particular obligation fell within the expression 'financial obligations' within the meaning of Article 9 would have to be considered. In the present case it has to be decided whether the claim for statutory compensation for requisitioned goods comes within the expression 'other financial obligations.' As the claim does not arise from contract and does not arise from an actionable wrong, and as Articles 8 to 10 must be taken to include all kinds of obligations of the State, the claim must come within Article 9 as an item of other financial obligation. For coming to this finding it is not necessary to disagree with the view taken in the two division benches of this court that any financial obligation to come within Article 9 must be of the same kind as a loan or a guarantee. Accepting that view, it may be said that the requisitioning of goods amounts to making a compulsory levy for which compensation is guaranteed by the same statute as empowers officers to make the levy; the obligation of the State to pay the compensation is an obligation akin to a loan and a guarantee. I would hold that the claim in the present case comes within the scope of Article 9 and therefore the State of West Bengal has no liability.

50. In this connection it may be observed that as the law stands at present, if instead of requisition, the paddy had been taken by the Government of Bengal in June 1944 under a contract for purchase, the outstanding price would have been a liability of the State of East Bengal, in view of the terms of Article 8(2)(b) as interpreted in *Union of India v. Lokenath Saha*[9], followed by the Dacca High Court in *Haripada Roy Chaudhuri v. Province of East Bengal*[10],

51. In both cases there would be similar hardship to the party, in view of the remote chance of recovery of the price from East Bengal Government. But we have to interpret the law as it stands. The remedy would be for the Government of India to accept liability by suitable legislation or

arrangement with East Bengal if possible.

52. I would therefore allow this appeal, without costs. In view of the different conclusion reached by my learned brother, the case will have to be referred to a third Judge.

53. BY THE COURT :- As we have been unable to agree on the interpretation of Articles 9 and 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, and, as this disagreement has led to a difference in our final conclusions, let this case be placed before the Hon'ble Chief Justice for an appropriate reference to a third Judge.

54. The facts which are relevant for the purposes of this appeal are undisputed and are simple enough. On 16-6-1944 Shri H. N. Roy, Sub-divisional Officer, Contai, in the district of Midnapur requisitioned 1020 maunds of paddy belonging to the two plaintiffs under Rule 75A of the Defense of India Rules and in pursuance of the order of requisition they delivered the entire quantity between June 25 and July 2, 1944 to the Contai Civil Supply Department Thereafter the compensation payable to the plaintiffs under Clause (4) of Rule 75A Defense of India Rules was assessed at the rate of Rs. 7/4/- per maund and a sum of Rs. 7253/10/- was found due to the plaintiffs. The then Government of the Province of Bengal, however, succeeded in evading payment for more than three years on some pretext or other with the result that the liability continued till 15-8-1947 when the Province of Bengal was partitioned and the Indian Independence (Rights, Property and Liabilities) Order, 1947 came into operation. The tenacity of the plaintiffs in pressing their claim resulted in a letter being written by the Additional District Magistrate, Midnapur to the Assistant Director of Procurement and Cordoning Government of West Bengal, Department of Civil Supplies, Free School Street, Calcutta on 7-7-1948, to

[9]55 Cal WN 195 : AIR 1952 Cal140
[10]5 DR 83 - annexed to 57 Cal WN

arrange for the payment of the plaintiffs' dues amounting to Rs. 7253/10/- "as quickly as possible." The concluding portion of the letter is in the following terms :

> "In the event of any further delay in the matter there is apprehension of the filing of a Civil Suit by the claimant for realization of his dues". (See Ex. 4 (a)). Eventually, however, on 8-12-1948, the plaintiffs had to institute a suit for the realization of their dues. On 8-3-1949 the then Government of the Province of West Bengal filed a written statement in which they admitted all the facts alleged by the plaintiffs but denied their liability on three grounds (a) that the suit was barred by Section 19, Defense of India Act; (b) that the suit was barred by limitation; (c) that the pre-partition liability of the province of Bengal was, under the Indian Independence (Rights, Property and Liabilities) Order of 1947, a liability of the Province of East Bengal and as such the defendant was not liable. The learned Subordinate Judge who tried the suit overruled the Defense and made a decree in favour of the plaintiffs and against that decree the defendant filed an appeal to this Court. The learned Judges of the Division Bench which heard the appeal agreed in overruling the Defense on the questions of the bar of Section 19, Defense of India Act and the bar of limitation and consequently those questions do not arise for my consideration. They, however, differed on the interpretation of Articles 9 and 10 of the

Indian Independence (Rights, Property and Liabilities) Order, 1947. P. N. Mookerjee, J., held that the liability which the plaintiffs sought to enforce in the present suit was governed by Article 10 (2) (b) of the aforesaid order and as such it was a liability of the Province of West Bengal whereas Sen, J., held that it was governed by Article 9(b) and consequently it was a liability of the Province of East Bengal. Therefore the only question before me is whether the plaintiffs' claim comes under the one or the other article.

55. Articles 8, 9 and 10 of the Indian Independence (Rights, Property and Liabilities) Order 1947, divide all the prepartition liabilities of the Province of Bengal between the Province of West Bengal and the Province of East Bengal which came into existence on 15-8-1947. Leaving aside the provisions which are not material for the purposes of this case, Article 8(2) (a) provides that any liability of the Province of Bengal on a contract made before 15-8-1947 shall be the liability of the Province of West Bengal "if the contract is for purposes which as from that day (i. e. 15-8-1947) are exclusively purposes of the Province of West Bengal" and Article 8(2) (b) provides that in any other case it shall be the liability of the Province of East Bengal. Clause (6) of Art, 8 provides that the provisions of that article shall be subject to Article 9. The material portion of Article 9 is as follows :

"All liabilities in respect of such loans, guarantees and other financial obligations....of a Province as are outstanding immediately before the appointed day shall as from that day
(a) ....
(b) in the case of the liabilities of the Province of Bengal, be liabilities of the Province of East Bengal".

56. Article 10(2) (b) provides that where immediately before the appointed day the Province of Bengal is subject to any liability in respect of an actionable wrong other than breach of contract the liability shall be the liability of the Province of West Bengal if the cause of action arose wholly within territories which, as from that day are the territories of that Province.

57. There is no dispute that the cause of action in the present case arose wholly within territories which as from the appointed day are the territories of the Province of West Bengal because both the requisition and the delivery of the paddy took place in the district of Midnapur. The controversy centres round the exact nature of the liability of the Province of Bengal. That liability is created by Rule 75A(4) of the Defense of India Rules. Sub-rule (1) of Rule 75A authorized the Central or Provincial Government to requisition any moveable or immovable property if in the opinion of that Government it was necessary, or expedient so to do for securing the Defense of British India, public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community. Sub-rule (4) runs as follows :

"Whenever in pursuance of sub-rule (1) - the Central or Provincial Government requisitions - any movable property the owner thereof shall be paid such compensation as that Government may determine."

58. P. N. Mookerjee, J., has held that the statutory liability to pay compensation created by R. 75-A (4) is an actionable wrong other than breach of contract within the meaning of Article 10 (2) (b) of the order whereas Sen, J., has held that it comes under the category of "other financial obligations" within the meaning of Article 9 (b), the consequence being that according to the former it is the liability of the Province of West Bengal whereas according to the latter it is the liability of the Province of East Bengal.

59. The Indian Independence (Rights, Property and Liabilities) Order was promulgated by the Governor-General of British India under powers conferred on him by Section 9 (1) (b) of the Indian Independence Act, 1947 for making an initial distribution of the assets and liabilities of undivided India and undivided Provinces between the two Dominions and the new Provinces which came into existence under that Act. The liabilities of the undivided Province of Bengal were distributed by Articles 8 (2), 9 (b) and 10 (2) of the Order. Article 8 in express terms deals with contractual liability; Article 9 read with Article 8 (6) leads to the conclusion that "liabilities in respect of loans, guarantees and other financial obligations" of the Province of Bengal which were outstanding before the appointed day, are also a special class of contractual liabilities; and then Article 10 deals with a liability in respect of an "actionable wrong other than a breach of contract". It is not disputed that the classification of liabilities made by Articles 8, 9 and 10 is exhaustive, so that whatever is not dealt with by Articles 8 and 9 comes under Article 10. In the case of 1951 SCR 1 notice was served upon the Manager of the Tripura State under the Bengal Agri. Income-tax Act calling upon him to submit a return of agricultural income received by him during the previous year. The Ruler of the State then instituted a suit in June, 1946 in the Court of the Subordinate Judge, Dacca for a declaration that the aforesaid Act in so far as it purported to impose a liability to pay agricultural income-tax on the plaintiff was ultra vires and void and for an injunction restraining the defendant from proceeding with the assessment. The suit was transferred from the Court of the Subordinate Judge, Dacca to the Court of a Subordinate Judge, 24-Parganas. After partition of Bengal the Province of East Bengal was substituted in the place of Province of Bengal and it raised a plea that the Court of Alipur being situated in West Bengal had no jurisdiction to try the suit. The trial Court overruled the plea, but in revision this Court reversed the decision of the trial Court upon the view that Article 10 (2) of the Rights, Property and Liabilities Order, 1947 applied to tortious acts (See the decision of this Court in *Province of East Bengal v. State of Tripura*[11], at p. 380) (K). On appeal the Supreme Court held that the interpretation of the expression "actionable wrong" as given by this Court was too narrow. The judgment of the Supreme Court is reported in 1951 SCR 1 . At p. 12 (Of SCR) Patanjali Sastri, J., in delivering the majority judgment observed as follows :

> "The intention being thus to provide for the initial distribution of rights, property and liabilities, as between the two Dominions and their Provinces a wide and liberal construction, as far as the language used would admit, should be placed upon the terms of the Order, so as to leave no gap or lacuna in relation to the matters sought to be provided for."

Again at p. 13 (of SCR) :

> "Reference was made to certain text books where a tort is spoken of as an 'actionable wrong' and it was suggested that the two expressions are synonymous. Every tort is

undoubtedly an actionable wrong, but the converse does not necessarily follow."

Mukerjea, J., who concurred with the majority by a separate judgment makes the following observations at p. 45 (of SCR) :

> "In my opinion there can be an actionable wrong which does not arise out of a breach of contract arid at the same time does not answer to the description of a tort as it is understood in English Law and if the plaintiff's allegations are correct, it is an actionable wrong precisely of that type which we have in the present case. The word 'wrong' in ordinary legal language means and signifies 'privation of right'. An act is wrongful if it infringes the legal right of another and "actionable" means nothing else than that it affords grounds for action in law."

60. The effect of these observations is that Arts, 8, 9 and 10 between themselves distribute all the pre-partition liabilities of the undivided Province of Bengal so as to leave "no gap or lacuna". In other words, as Articles 8 and 9 distribute contractual liabilities the expression "liability in respect of an actionable wrong other than breach of contract", occurring in Article 10 must include all non-contractual liabilities. The division of liabilities is a division by dichotomy so that the subdivisions exhaust between themselves the entire universe of discourse. That is what I understand to be the significance of leaving no "gap or lacuna". The expression "actionable wrong" is not used in any technical sense but means all infringements of rights which are actionable, and the only condition required to bring them under Article 10 is that they must be infringements of

[11]53 Cal WN 368

non-contractual rights; because if they are infringements of contractual rights they fall either under Article 8 or Article 9.

61. The learned Additional Government Pleader has strenuously contended before me that as the paddy was requisitioned in pursuance of a statutory authority conferred by R. 75-A of the Defense of India Rules and as those Rules have not been challenged by the plaintiffs as ultra vires it cannot be regarded as an actionable wrong within the meaning of Article 10. It is pointed out that in the Tripura case the plaintiff challenged the constitutional validity of the Bengal Agricultural Income-tax Act in so far as it purported to impose a liability on the plaintiff and as in the present case there is no challenge to the validity of the Defense of India Rules, the wrong complained of by the plaintiff cannot be said to be an actionable wrong, within the meaning of Article 10. To my mind it is nothing but a confusion of thought to suggest that the plaintiffs in the present case are complaining of requisition of paddy. They do not and cannot challenge the requisition; their cause of action is based on the infringement of their statutory right to get compensation under clause (4) of R. 75-A. The only question therefore is whether the failure to pay statutory compensation is an actionable wrong and upon a true interpretation of that expression in the light of the observations made by the Supreme Court in the Tripura case I have no doubt that it is. This conclusion is also borne out by the decisions of this Court in the following cases : *Khagendra Nath v. State of West Bengal*[12], (Das and Das Gupta, JJ.); *Ramesh Chandra Das, v. Province of Bengal*[13], (Das and P. N. Mookerjee, JJ.) and *Hindusthan Housing and Land Development Trust Ltd. v. State of West Bengal*[14], (Bose, J.). In Khagendra Nath Ganguli's case the suit was for a declaration that the assessment of revenue upon land was illegal

and for an injunction restraining the Province of Bengal from enforcing the liability and it was held that such a suit was with respect to a liability of the Province of Bengal for an actionable wrong other than breach of contract and as such is governed by Article 10 (2) of the Indian Independence (Rights, Property and Liabilities) Order, 1947. In the case of Ramesh Chandra Das the suit was for a declaration that an order of discharge from service served upon the plaintiff by the Province of Bengal was illegal and for a further declaration that the plaintiff might be deemed to be still in Service. Following the decision of the Supreme Court in the Tripura case, Das and P. N. Mookerjee, JJ., held that the plaintiff's claim was based on a liability in respect of an actionable wrong other than breach of contract, as envisaged by Article 10 (2) of the aforesaid Order of 1947. The case of Hindusthan Housing and Land Development Trust Ltd., is directly in point as there is nothing to distinguish the facts of that case from the facts of the case before me. In that case the plaintiff company was the owner of certain lands in 24-Parganas. On 21-6-46, the then Government of Bengal requisitioned the lands. On or about 30-6-1947 the Land Acquisition Collector, 24-Parganas fixed and offered to pay Rs. 4,641/- per month as compensation in respect of the said lands with effect from 29-6-1948 and the plaintiff agreed to it. On 15-5-1947 the Collector sanctioned payment of the pre-partition claim then due. The State of West Bengal, however, did not pay the compensation for the period 29-6-48 to 14-8-47 on the ground that under Article 9 (b) of the Indian Independence (Rights, Property and Liabilities) Order, 1947 it was the liability of the Province of East Bengal, Upon these facts Bose, J., held that the non-fulfillment of the statutory obligation to pay compensation is a liability in respect of an actionable wrong under Article 10 (2)

[12] AIR 1852 Cal 855 [14]59 Cal WN 405

[13]57 Cal WN 767 : AIR 1953 Cal 188

(b). In interpreting the judgment of the Supreme Court in the Tripura case his Lordship observes as follows at page 411 :

> "Formerly the view taken by this Court was that the expression 'actionable wrong' as occurring in para. 10 of the order had reference to tortious acts only but the Supreme Court has held that they include all wrongs which give a right of action to the person wronged."

I respectfully agree with this interpretation of the judgment of the Supreme Court in the Tripura case provided it is taken with the qualification that the wrongs envisaged by Article 10 arises out of non-contractual liabilities. Reading the judgment as a whole there can be no doubt that his Lordship was also making the above observations subject to that qualification.

62. Then again it was contended by the learned Additional Government Pleader that the liability in the present case is either a contractual or at least a quasi-contractual liability and as such the case cannot be governed by Article 10. When I pointed out that it would be impossible for me to hold that a statutory liability could be treated as contractual the learned Additional Government Pleader invited my attention to the description of the plaintiff's claim as given in the plaint where the claim made by the plaintiff has been described as "price due for paddy" and it has been alleged that the defendant's officers promised to pay Rs. 7,253/10/- for the "price" of 1,000 mds. 20 seers of paddy. It has been argued that the price of a commodity is the result of a contract between the buyer and seller and therefore upon a true construction of the plaint it should be held that in the present suit the plaintiffs are seeking to enforce a contractual liability. The plaint, read

as a whole, however, leaves no room for doubt that what the plaintiffs are seeking to realise is the exact amount determined by the Government as payable to the plaintiffs and as communicated to the plaintiffs by the Additional District Magistrate by his Memo dated 7-7-1948, and that Memo is referred to in para. 5 of the plaint and was filed with the plaint. The defendant in para. 7 of its written statement describes the amount as "compensation" determined under clause (4) of R. 75-A of the Defense of India Rules. After all it seems to me that it is nothing but playing with words to suggest that what the plaintiffs are seeking to recover is "price" as distinguished from "compensation". The amount which the plaintiffs are seeking to recover and the mode in which it was determined are admitted and thereafter it does not, in my opinion, matter in the least whether it is described as "price" or as "compensation". What was payable to the plaintiffs as compensation under Rule 75-A (4) of the Defense of India Rules was being described by the plaintiffs as "price" which may at best be said to be a misdescription. I cannot, however, hold that such a misdescription would alter the nature and character of the defendant's liability and convert it into a contractual liability.

63. The learned Additional Government Pleader then relied upon the case of *Attorney-General v. De Keyser's Royal Hotel*[15], for the proposition that the liability of the Government in the present case is at least quasi-contractual. The case cited is well-known for the proposition that the Crown has no prerogative right to take possession of the land or buildings of a subject without paying compensation, but I was somewhat surprised to hear that the liability of the Crown in such a case is based upon what has been described

[15](1920) AC 508

by the Additional Government Pleader as quasl-contract or implied contract, and I am bound to say that the case expressly negatives the very proposition for which it was cited. It is pointed out in that case that when possession is taken in invitum it is destructive of mutual consent which constitutes the essence of a contract, and in the very opening paragraph of his speech Lord Dunedin in rejecting the claim made by De Keyser's Hotel that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of implied contract observes as follows :

> "In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as of right, basing that right specifically on the Defense of Realm Act. ... To spell out of this attitude on either side an implied contract is to my mind a sheer impossibility." These obseryations destroy the very foundation of the proposition for which this case was cited.

64. Then, again, it was urged that the liability of the Government under clause (4) of R. 75-A of the Defense of India Rules is at all events, a statutory obligation and therefore it is an obligation on a constructive contract which is outside the purview of Article 10 (2) of the Indian Independence (Rights, Property and Liabilities) Order of 1947. Reliance is placed on Halsbury - Laws of England - Edn. 3 - Vol. 8 - P. 257 - Article 448 for the proposition that statutory debts are a species of "other constructive contracts". Article 448 itself, however, does not state that statutory debts are constructive contracts but that article is placed under the general heading "other constructive contracts" and from this it is argued that statutory obligations constitute a class of constructive contracts. In our law, however, the expression 'constructive contract' is not

used anywhere. Chapter V, Indian Contract Act which deals with legal relations analogous to what have been described as constructive contracts under the English Law bears the heading "certain relations resembling those created by contract". If they are relations resembling those created by contract they cannot be said to be contracts. Moreover the observations of Lord Dunedin which I have quoted above explode the theory that a statutory liability to pay can be I said to be a contractual liability in any sense, be cause the element of mutual consent is lacking. For these reasons I am unable to hold that a statutory debt can be said to be a species of constructive contract. But even if I do I do not see how it improves the appellant's case. The expression "actionable wrong other than breach of contract" in Article 10 does not mean "other than breach of constructive contract." The word contract occurring in that article means a contract as defined by Section 2, Indian Contract Act which includes an agreement.

65. The object of the learned Additional Government Pleader in seeking to establish that the liability of the Government in the present case is founded on contract, quasi-contract or constructive contract is to take the case out of the operation of Article 10 and bring it under Article 9 (b). In order to attract the operation of Article 9 two things must be established : (1) that the liability is a contractual liability and (2) that the financial obligations of the nature of "such loans and guarantees as are outstanding immediately before the appointed day." If any of these elements be found wanting the case will fall outside Article 9. I have already held that the liability in the present case cannot be said to be a contractual liability in any sense. Therefore the first element has not been established. But I am of the opinion that the second element is also absent. The words "financial obligation" in Article 9 must, by the operation of Article 8 (6), be held to mean contractual obligation and if the provisions of Article 9 (b) are to be interpreted consistently with those of Article 8 (2) (a) that financial obligation must be of a class other than what is contemplated by Article 8 (2) (a). For this reason it has been held in the cases of *Nilima Sarkar v. Governor-General in Council*[16], Harries, C. J. and S. B, Sinha, J.); 54 Cal WN 677 : AIR 1950 Calcutta 159 (Harries, C. J., and Sarkar, J.); 54 Cal WN 807 : AIR 1950 Calcutta 463 (Sen and Chunder, JJ.) that the words "financial obligation" in Article 9 must be construed ejusdem generis with the words "loans and guarantees" in the said article. The decisions of this Court in the cases of Midnapur Zemindary Co. Ltd. and Sree Sree Madan Gopal Jiu, have since been approved by the Supreme Court in the case of 1954 SCR 378 . In that case the question was whether the liability to pay rent under a lease was a "financial obligation" within the meaning of Article 9 (b). The Supreme Court pointed out that though an obligation to pay money under a contract or breach thereof was a financial obligation in the popular sense, if Article 9 were to be construed so as not to "rob Article 8 of practically the whole of its content", that phrase as occurring in Article 9 must be construed ejusdem generis with the words "loans and guarantees". It was further held that the whole expression "loans, guarantees and other financial obligations" must be interpreted in the technical sense in which it was used in Section 178, Government of India Act, 1935 and

> "in that context financial obligation would mean obligations arising out of arrangements or agreements relating to State finance, such as distribution of revenue, the obligation to grant financial assistance by the Union to any State or the obligation of a State to make contributions and the like."

It is impossible to hold that the statutory obligation of the State to pay compensation tq the

plaintiffs in the present case is a financial obligation in that technical sense or that it arises out of arrangements or agreements relating to State finance.

66. Consequently I am constrained to hold that the appellant has failed to prove either of the elements which are required to bring the case under Article 9 (b). My conclusion, accordingly, is that the case is to be governed by Article 10 (2), Indian Independence (Rights Property and Liabilities) Order of 1947 and not by Article 9 (b).

67. Let the appeal be now placed before the Hon'ble the Chief Justice so that final order may be passed by the Division Bench which heard it.

68. The respondents are entitled to their costs of hearing before me. Having regard to the fact that they have been unlawfully deprived of the use of their money for a period of about twelve years, I assess the hearing fee before me at thirty gold mohurs. In awarding costs I have followed the precedent in the case of *Corporation of Calcutta v. Ashutosh De*[17], decided by Rankin, C. J., Buckland and Cammiade, JJ.

(Final Order of the Division Bench dated 24-7-1956.)

P. N. Mookerjee, J.

[16]86 Cal LJ 98

[17]31 Cal WN 864 : AIR 1927 Cal 659

69. In this appeal which was originally heard by this Bench, there was a difference of opinion between my learned brother and myself on the question of interpretation of Articles 9 and 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, and as to the applicability of the one or the other of the said provisions to the present case. This difference also led to a divergence in our ultimate conclusions, my learned brother being of the opinion that Article 9 would apply to the case and the appeal should be allowed, while, in my view, the case was covered by Article 10 (2) (b) and the appeal should have been dismissed. In view of the above difference, the matter was placed before Lahiri, J., as the Third Judge under Section 98, Civil Procedure Code, read with Clause 36, Letters Patent.

70. Lahiri, J., has now given his opinion on the substantive point of difference, namely, whether Article 9 or Article 10 would apply to this case and he. has, in effect, expresed the view that the present case would come under Article 10 (2) (b) of the Indian Independence (Rights, Property and Liabilities) Order, 1947. In accordance, therefore, with the opinion of the majority, as required by Section 98, Civil Procedure Code and Clause 36, Letters Patent, the appeal will now be dismissed and it is dismissed accordingly.

71. In view of the order for costs, already made by Lahiri, J., which stands, we do not propose to make any other order for costs in this appeal.

72. Under Section 82, Civil Procedure Code and subject to the other provisions of the section, the appellant State is given two months' time from this date to pay up the decretal amount (including costs) to the respondents.

Sen, J.

73. I agree.

Appeal dismissed.