PATNA HIGH COURT

Secretary of State

Vs

Lodna Colliery Co., Ltd

(Courtney-Terrell, C.J. and Dhavle, J.)

05.12.1935

JUDGMENT

Courtney-Terrell, C.J.

1. The plaintiffs in the suits out of which these appeals arise seek to recover from the Secretary of State, defendant No. 1 the appellant, compensation which they say has become due to them under certain provisions of the Mines Acquisition Act and complain that the Secretary of State has declined to follow the prescribed procedure for assessing such compensation and has declined to pay the statutory or any compensation, wherefor they have been compelled to resort to the Civil Court. The facts as to which there is little or any dispute are as follows; The Raja of Jharia is the landlord of a large area. In the year 1891, by two documents (Exs. 12 and 12-A) he granted a permanent, marousi mukarrari of the surface and subsoil of 468 bighas including the 9.03 acres with which this case is concerned to two persons hereinafter referred to as Banerji and Laik. Banerji and Laik transferred their rights to Messrs. Turner Morrison & Co. on June 5, 1897, by a document (Ex. 12-B). These persons in turn on February 4, 1928, transferred their rights to the Lodna Colliery Co., Ltd., (Ex. 12-D) who in turn transferred such rights to the Lodna Colliery Co. (1920), Ltd. on June 6, 1929, by Ex. 12-E.

2. Banerji and Laik had on April 14, 1896, by patta Ex. 13, granted a sub-lease of the right to recover minerals (at a cash rental and a tonnage royalty with a minimum), of an area of 190 bighas (including the 9.03 acres above referred to) out of the said 468 bighas to one Golap Chandra Sarkar. This was a perpetual lease. He in turn by Ex. 14 granted a sub-lease of his subsoil rights in the said 190 bighas to one Ramlal Singh on September 30, 1899, reserving a tonnage royalty with a minimum. Ramlal Singh by Ex. G-2 granted a sub-lease to Bipin Behari Bose who carried on business under the style of the North Barakar Coal Co. This lease is dated February 4, 1909. The business of Bipin Behari Bose was in 1924 converted into a Limited Liability Company and since that year has been in possession of the mining rights under the said Sarkar. The situation in 1920 was that the Lodna Colliery Co. (1920), Limited was the mokarrdridar of the 468 bighas: Sarkar was the lessee of the mining rights in the 190 bighas of that area with an obligation to pay royalty on the coal raised by him, and Bipin Behari Bose was the tenant under Sarkar. The E. I. R. Co., Ltd., had about 1920 acquired the surface rights in an area of 9 03 acres out of the 190 bighas beneath which the Sarkars and their assigns or sub-lessees had the working lease of the mining rights, and had constructed railway sidings thereon.

3. Sarkar is now dead, leaving two sons Jitendra and Rishendra, who are the plaintiffs respectively in Suit No. 73 of 1930 which has given rise to First Appeal No. 84 of 1932 and Suit No. 55 of 1930 which has given rise to Appeal No. 85 of 1932. The Lodna Colliery Co. (1920), Ltd., is the plaintiff in Suit No. 54 of 1930 which has given rise to First Appeal No. 83 of 1932. In this suit the Secretary of State is defendant No. 1, the North Barakar Coal Co. (1920) Limited is defendant No. 2 and Bipin Behari Bose is defendant No. 3; the two brothers Rishendra and Jitendra Sarkar are defendants Nos. 5 and 6 the present Raja of Jharia is defendant No. 7, the late Raja's widows are defendants Nos. 8 and 9 and the Receiver of the Jharia Raj estate is defendant No. 10. The plaintiff Company complains, that it has been restricted by Government under the Mines Acquisition Act from working (through its lessees) under this area of 9.03 acres; that the plaintiff Company is a person interested in that it is entitled to a royally from the North Barakar Coal Co., Ltd. the Company's lessee and that notwithstanding the restriction the Government took no step to ascertain the statutory compensation payable to the plaintiff Company and refuses to pay any such compensation. In Suit No. 73 of 1930, which has given rise to First Appeal No. 8.4 of 1932, Jitendranath Sarkar, one of the two sons of Golap Chandra Sarkar deceased, claims that he also is a person interested under the lease of September 30, 1899, (Ex. 14) to & share in the royalty payable to his father by the North Barakar Coal Co., Ltd. Suit No. 55 of 1930 giving rise to First Appeal No. 85 of 1932 is a similar suit by Rishendra Sarkar for the half-share to which he is entitled. In Jitendra's suit the Secretary of State is defendant No. 1, the parties interested in the Jharia Raj above referred to are defendants Nos. 2 to 5 inclusive. The Lodna Colliery Co. (1920) Limited, plaintiffs in appeal No. 83 of 1932 are defendants 6, Rishendra Sarkar is defendant No. 7, Bipin Behari Bose is defendant No. 8 and the North Barakar Coal Co. (1920) Ltd., is defendant No. 9. In appeal No. 85 arising out of the suit brought by Rishendra Sarkar the same parties appear as defendants but Jitendra is in turn made defendant No. 5.

4. For an extension of the Jharia Damuda Branch of the East Indian Ry., the surface rights in the area of 9'03 acres out of the 190 bighas under which the plaintiffs had interests as lessors, and under the surface of which Bipin Behari Bose had the working colliery rights, were acquired by the Government in various small instalments. On September 19, 1921, Bipin Behari Bose, by Ex. G-2, gave notice to the Bihar and Orissa Government and to the Agent of the East Indian Ry. of his intention to work the coal mines under the said 9.03 acres. The procedure is governed by the Mines Acquisition Act, and under that Act in the event of such a notice, if the Railway Company or other Government authority interested in the surface rights consider that the surface is endangered, they are at liberty to publish a declaration prohibiting or restricting work under the area in question, and thereupon the persons interested became entitled to compensation, and machinery is provided for estimating the compensation.

5. The Government did in fact publish a declaration. They seem to have been unaware at the time that anyone save Bipin Behari Bose (or as he called himself "The North Barakar Coal Co.") was interested in the working of the mine. The precise form of the declaration is a matter of some importance. It is set forth in Ex. 17 but at the moment it is sufficient to say that mine working under the area in question was restricted to the extent that those working it were compelled to leave large quantities of coal for the support of surface. Bipin Behari Bose then put in a claim for compensation on the ground that he had lost the profits which would accrue to him if he had raised and sold the coal which had to be left to support the surface. By an agreement between the Government and Bipin Behari Bose, the quantity of coal so locked up was ascertained at 256,000 tons and the amount of profit thereon was assessed by a selected arbitrator with the result of an

award to' Bipin Behari Bose of ₹ 1,81,000/-. There is no evidence that the existence of the plaintiffs (to whom Bipin Behari Bose had to pay royalty) was brought to the notice of the Government, or that Bipin Behari Bose brought the proceedings to the notice of his lessors. The declaration of the Government was published on March 11, 1927, by which time the North Barakar Coal Co. Ltd., had taken over the rights of Bipin Behari Bose. An examination of the declaration of restriction made by the Government will show that the North Barakar, Coal Co. (1920) Ltd. is treated as the only person interested in the working of the mines and an expression of willingness to. pay compensation to the company is recited, after which the declaration goes on to impose the restrictions. It has been contended on behalf of the Secretary of State that the declaration does not in express terms say that the North Barakar Coal Co. Ltd. is the only person entitled to compensation, nor does it in express terms say that, the Government were prepared to pay compensation to all persons interested and that the restriction takes effect as regards the North Barakar Goal Co. Ltd., only, and hence that the plaintiffs not having been restricted are in no case entitled to compensation. We have been referred to the terms of the Act which are as follows:

> Section 5. (1) At any time or times after the receipt of a notice under the last foregoing section and whether before or after the expiration of the said period of sixty days, the Local Government may cause the mines or minerals to be inspected by a person appointed by it for the purpose ; and
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> (2) If it appears to the Local Government that the working or getting of the mines or minerals or any part thereof, is likely to cause damage to the surface of the land or any works thereon, the Local Government may publish a declaration of its willingness, either,
>
> (a) to pay compensation for the mines or minerals still an worked or ungotten, or that part thereof, to all persons having an interest in the same; or
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> (b) to pay compensation to all such persons in consideration of those mines or minerals, or that part thereof, being worked or gotten in such manner and subject to such restrictions as the Local Government may in its declaration specify.
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> (3) If the declaration mentioned in case (a) is made, then those mines or minerals, or that part thereof, shall not thereafter be worked or gotten by any person.
>
> (4) If the declaration mentioned in case (6) is made, then those mines or minerals, 'or that part thereof, shall not thereafter be worked or gotten by any person save in the manner and subject to the restrictions specified by the Local Government.
>
> (5) Every declaration made under this section shall be published in such manner as the Local Government may direct.

Section 6. When the working or getting of any mines or minerals has been prevented or restricted under Section 5, the persons interested in those mines or minerals and the amounts of compensation pay able to them respectively shall, subject to all necessary. modifications, be ascertained in the manner provided by the Land Acquisition Act, 1870, for ' ascertaining the

persons interested in the land to be acquired under that Act, and the amounts of " compensation payable to them, respectively.

6. The object of the Act is that all persons interested shall be compensated when the person entitled to work the mines has been restricted. In *Smith v. Great Western Ry. Co*[1]. Lord Cairns construing the similar provisions of the English Act said:

> We have a provision that the lessee shall be dealt with and compensated, and that he shall not work. We have then a provision that all other persons shall be compensated according to their interests, and the inevitable conclusion from that is, that those other persons who are so compensated, or who may be so compensated, shall not work any more than the lessee might work. It would be a matter of astonishment if any Court of Equity could hesitate, if that be the construction of the Act, in prohibiting those other persons who either are to be or may be, thus compensated, from working just as they would prohibit the lessee himself.

7. Moreover the conduct of the Government clearly shows that the declaration was published under Section 5, Sub-section (2) and they had an indemnity from the Railway Company in respect of any compensation which might, be payable by reason of the restriction [see the letter from the Agent of the Railway Company to the Chief Inspector of Mines, dated December 8, 1926 Ex. 2 (Z) 2 at p. 152]. The Railway Company also [see letter Ex. 2 (Z) 2 at p. 152 of the record] intended that an effective declaration should be published and that they were prepared to indemnify the Local Government. The form of the declaration itself, in so far as the restrictions are concerned (see p. 155), contains no limitations as to the persons to be restricted from working. An attempt has been made to argue further that the compensation to the North Barakar Coal Co., was not made under Section 6 of the Act, but was a private voluntary settlement of a dispute, and this attitude was taken up in the letter appearing at p. 211 from the Secretary to Government to the Advocate of the plaintiffs. It is, however, admitted in this letter that the' declaration was published under Section 5, Sub-section (2) and, in my opinion, the argument' is not sustainable.

8. The effective part of the declaration is the restriction and this would have effect against the whole world. The effect of Sections 5 and 6 is merely to provide that the restriction shall not be imposed unless the ", Government shall be willing to compensate all persons interested. The obligation to compensate follows upon the imposition of the restriction and is not dependent on an announcement by the Government that they are willing to pay such compensation, In short if they care to restrict they must also compensate. Moreover, it hardly lies in the mouth of the Government to claim protection from the obligation to compensate by alleging the irregularity of their own conduct. The main contention on behalf of the Secretary of State is that the plaints disclose no cause of action and that if the claims are for damages suffered by reason of a restriction imposed under the Act, Article 2, Limitation Act, applies and the suits are time-barred. The matter of the cause of action is necessarily bound up with the question of limitation, Article 2 is as follows;

> For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India.

9. The period of limitation is ninety days, it is to be counted from the time "when the act or omission takes place." The object of the article is the protection of public officials who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act ; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong, the protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly, the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection : see *Geddis v. The Bann Reservoir*[2] Article 2 has been construed in like manner by the Courts in India: see *Shiam Lal v. Abdul Ra of*[3] My attention has been called to a judgment of this Court delivered by me in *Sunderji Shivji v. Secretary of State*[4] in which another construction was placed upon Article 2 Limitation Act. In view, however, of the argument which has been addressed to us in this case, I am of opinion that the construction I then adopted was erroneous. These suits are not for damages in respect of any alleged tort, they are suits to recover statutory compensation and the Government having admittedly refused to take the necessary statutory procedure for assessing compensation and having refused to pay any compensation are liable to a suit by the plaintiff for the direct recovery of that which would have been payable had the procedure of the statute been followed. The contention that the plaintiff's suit is in respect of a tortious act on the part of Government is based on para. 15 of the plaint in appeal No. 83:

> The plaintiff Company submit that the said declaration was illegal and ultra vires in that it did not provide for payment of compensation to the plaintiff Company or to other persons (besides defendant No. 2) interested in the said mines and that in any view Such declaration cannot affect the rights of the plaintiff Company to full compensation in respect of the same restriction.

10. The meaning of these words is, in my opinion, that the plaintiffs complain not of the restriction itself but of the failure of the Government to pay the compensation which is a liability following upon a lawful restriction. The opening words of para. 16.

The plaintiff Company is a person interested in the mines of which the working or getting has been prevented or restricted and it submits that it is entitled to full and proper compensation in respect of such prevention or restriction, put the meaning of the claim beyond all doubt. A further contention was that the word "compensation" includes not merely damages for a tort but must be construed as including a sum of money to which the plaintiff might be entitled as statutory compensation independently of any question of tort. This contention also is unsound. A similar argument was used in *Fry v. The Cheltenham. Corporation*[5] in which the defendants sought the protection of the Public Authorities Protection Act. It is true that the words of that Act differ slightly from the words of Article 2 and read thus:

Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any parson for any act done in pursuance or execution or intended execution of any Act of Parliament....

11. And the word 'compensation' is not used; but the meaning of the section is precisely similar.

The suit was brought to recover compensation under the Workmen's Compensation Act. The Court of Appeal pointed out that the right to compensation was a statutory right, that the suit did not depend in any way upon tort and that the defendants were not entitled to the benefit of the limitation. Treating the restrictions as having been lawfully imposed, compensation became payable to persons interested and the cause of action arises if the public authority refuses to follow the procedure for ascertaining such compensation or refuses to pay such compensation if awarded : see *Bentley v. Manchester, Sheffield and Lincolnshire Ry. Co*[6]. The compensation is payable from the moment the restrictions are imposed not withstanding that the right to enforce the payment by recourse to the Civil Court does not arise until the compensation is refused by the public authority. It was argued on behalf of the plaintiffs that the refusal to follow the prescribed procedure and to pay compensation give rise to continuing cause of action so that there is no period of limitation. But, in my opinion, this contention is unsound and Article 120 of the Act with a six years period is really applicable.

12. On behalf of the Secretary of State it was argued that the plaintiffs have stipulated for a minimum royalty only and that they could not have compelled the North Barakar Coal Company to work the coal at all. It is said that the Government have merely made a private bargain with the North Barakar Coal Company that they shall not work the coal but has not prevented them from paying the minimum royalty and as the plaintiffs have no cause of action against the North Barakar Coal Company for refusing to work the coal, they can have no claim against the Government for having induced the North Barakar Coal Company to exercise its right to refrain from working. It was sought to establish an analogy with the case of a patentee who having been granted an exclusive license to work an invention at a minimum royalty without any covenant on the part of the licensee to work the invention at all, has no cause of action against a third person who induces the licensee not to work but arranges that the licensee shall merely pay the covenanted minimum royalty. In the case before us, however, the licensee was clearly ready and willing to work the coal under the area in question, and had he done so would have been obliged to pay the royalty and having - been legally restricted from so working, both the licensee and the licensor are entitled to statutory compensation.

13. It is also argued that the North Barakar Coal Company in order to earn the rate of profit and pay the minimum royalty it has made for some years past need not immediately work this particular coal area but might work the other coal in the mine and that until this particular coal is required, if at all, the plaintiffs have no grievance for they will get their minimum royalty. Dealing with a similar argument in ***Eden v. North*** *Eastern Ry. Co*[7]. Lord Loreburn, L. C. said:

> I cannot think that such a principle could be defended. It would make the measure of payment depend upon the size of the coal-field, and the length of the term. If it were applied to building land worth 200 an acre over all, the sum payable for a small part of it taken compulsorily might be much less than the selling value on the plea that the whole of the land would not be sold for building at once, and that it was to be assumed the plot compulsorily taken would have been the last to be sold for building. Whether the land is 'taken' or is 'used' within the meaning of the Act seems to me a matter indifferent. The value must in either case be paid.

14. I have now to deal with the measure of compensation payable to the plaintiffs. The suits are

brought not for compensation in respect of damage to the reversion of the lease and the sub-lease, but in respect of the loss of the royalty to which each plaintiff respectively would have been entitled had the coal locked up been raised and sold by the working lessee, the North Barakar Coal Company. Considering the claims of the plaintiffs and the North Barakar Coal Company collectively, it is contended on behalf of the Secretary of State, and rightly contended, that the compensation jointly payable to them could not exceed in the aggregate the value of the coal so raised and sold, less the working costs, for the value so ascertained would have to be divided amongst the claimants, each of the lessors taking out of such sum his appropriate royalty and the balance going to the North Barakar Coal Company as their profit. This principle was clearly explained in *Eden v. North Eastern Ry. Co*[8]. *(*It is contended, however, on behalf of the Secretary of State as a matter of fact that the North Barakar Coal Company were actually paid and received the whole of the compensation including that which would have been payable to each of the plaintiffs, and, therefore, the Secretary of State should not be bound to pay compensation twice over. But the payment by the Secretary of State to one claimant of the whole value of the coal does not constitute a defence against a claim by another claimant who has lost his profit by reason of the restriction : see *Barnsley Canal Co. v. Twibell*[9]

15. Then we are asked, in the event of a judgment in favour of the plaintiffs, that judgment should be awarded to the Secretary of State against the North Barakar Coal Company to recover that part of the compensation which has in fact been paid to them and should have gone to the plaintiff. I will deal with this contention later. It is first necessary to investigate the question of fact as to what was awarded and paid to the North Barakar Coal Company. The Company no doubt sought the entire value of the coal locked up, alleging that they were entitled to it as their loss of profits. There is also no doubt that the amount of coal so locked up was estimated at 2,56,733 tons, but the matter of the sum to be paid to the North Barakar Coal Company as their profit in respect of such quantity of coal then went on to arbitration and a definite sum was awarded. It may be the fact that the sum was arrived at by taking the value of the coal at such price as was likely to obtain within the period during which the Coal Company would have been able to raise the coal if it had not been hindered by the restrictions, and the net result may have been obtained by deducting the working expenses. The fact remains, however, that a lump sum was awarded and it is not permissible to go into evidence in order to explain the award : see *Duke of Buccleuch v. Metropolitan Board of Works*[10] and *Attorney General for Manitoba v. Kelly*[11] In short, it may well be, and indeed it is very likely, that the North Barakar Coal Co. were overpaid. But even if that fact were established, the question whether in the present suit the North Barakar Coal Co., can be compelled to disgorge to the Secretary of State the amount so overpaid is a very different one.

16. On behalf of the Secretary of State it has been suggested that all the parties are before the Court and that it would be a hardship to drive the Secretary of State to further litigation. The question, however, cannot be determined in this simple manner. The pleadings do not exhibit any such claim by the Secretary of State against the North Barakar Coal Co. Alternatively it was suggested that instead of a judgment in favour of the plaintiffs against the Secretary of State, judgment might be entered for the plaintiff's against the North Barakar Coal Co. for money had and received from the Secretary of State for the benefit of the plaintiffs. The plaintiffs, however, while not refusing to ask for relief against the North Barakar Coal Co. naturally did not welcome

the suggestion with any enthusiasm, and it was pointed out on behalf of the North Barakar Coal Co. that the pleadings disclosed no claim by the plaintiffs against them for the money which might have been payable by the Secretary of State. On behalf of the Secretary of State it was contended that the question of the liability of the North Barakar Coal Co. to the plaintiff Company in the suit by that Company was contemplated by reason of the last four words of Issue No. 5 before the learned Judge : "Is the plaintiff entitled to any compensation ; if so from whom?" The learned Judge who tried the case had settled the issues, but commented upon, this issue as follows:

> The plaints would show that the plaintiffs claim compensation from defendant No. 1 though all the persons interested in the property have been made parties. But somehow or other an issue came to be framed as to who was liable for compensation to the plaintiff's. At the time of hearing, a petition was filed by defendant No. 2 (the North Barakar Coal Company) praying to delete this portion of the issue. This petition was opposed by defendant No. 1 and it was alleged, perhaps for the first time, that the amount of compensation that was paid to defendant No. 2 included compensation payable to all the persons interested, and that, therefore, the plaintiffs' decree, if any, should be against defendant No. 2 and not against defendant No. 1. When this position was created, the learned Advocate of the plaintiff's stated that in case the Court finds that the amount of compensation payable to them was included in the amount paid to defendant No. 2, the Court may lass a decree against defendant No. 2. In such circumstances the issue above referred to was allowed to stand. Later on, however, the plaintiffs chose to stick to the position taken in the plaints, and it was urged on their behalf in argument that they had their claim against defendant No. 1, and that if defendant No. 1 had made payment to defendant No. 2 in excess of what was payable to him, it was the lock-out of defendant No. 1 to take steps for having the excess amount refunded. I have already noted that the case made out in the plaint seems to lay a claim against defendant No. 1 only. There is no indication in any of the plaints from which it can be said that the plaintiffs sought any relief as against defendant No. 2.

17. At no time before the suit or in his written statement has the Secretary of State taken up the attitude that the plaintiffs should look to the North Barakar Coal Co. for such compensation as might be due to them out of the amount already paid to the North Barakar Coal Co. Nor have any of the plaintiffs made any such claim in their plaints, and the North Barakar Coal Co. made no claim against the (Secretary of State based on its liability to pay royalty to any of the plaintiffs. In my opinion the learned Judge took the correct view of the matter and the plaintiffs have not seriously sought before us a judgment against the North Barakar Coal Co. As to the amounts which have been awarded by way of compensation there has been no serious contest on the part of the Secretary of State as to. the accuracy with which the amounts have been calculated. The royalty has been computed on the basis of the quantity of coal locked up as admitted by the Secretary of Stale.

18. The plaintiffs have, however, filed a cross-objection complaining that they should have been awarded a further sum of 15 per cent. under Section 23 (2), Land Acquisition Act, to compensate

them for the compulsory nature of the acquisition. They invoke the preamble of the Mines Act and Section 6, but the conditions of the Land Acquisition Act are to be applied "subject to necessary modifications." When coal underground is acquired the compulsory acquisition gives to the royalty owner an immediate instead of the deferred payment which he would otherwise receive. The circumstances are very different from those which surround a compulsory acquisition of land and, in my opinion, Section 23 (2) is clearly inapplicable. Prompt instead of deferred payment of royalty cannot be considered as a grievance. This cross-objection was not seriously pressed ; it has no merit and must be dismissed. The only other matter to be dealt with is the objection on behalf of Bipin Bihari Bose and the North Barakar Coal Company, who have been made defendants in the plaintiffs' suit to the order of the learned Judge that each of the defendants shall bear his own costs. It is contended that costs should have been awarded against the plaintiffs in favour of the North Barakar Coal Company and Bipin Behari Bose, but the North Barakar Coal Company have throughout denied the right of the plaintiffs to receive any compensation [see Ex. 2 to] a letter from Messrs. Morgan & Co., Solicitors for the North Barakar Coal Company, to Messrs. Orr Dignam & Co. for the plaintiff Company, dated May 20, 1930 at p, 263]. Moreover, the right of the plaintiffs to receive compensation is expressly denied in para. 11 of the written statement of the North Barakar Coal Company Ltd., in Appeal No. 83 of 1932 and in para. 6 of the written statement in the suit by Rishendra Nath Sarkar. In para. 8 of the written statement the North Barakar Coal. Company make a similar denial of the rights of the plaintiffs to receive compensation. The North Barakar Coal Company have been guilty of a breach of the duty laid down in Section 108, Clause (n), Transfer of Property Act, according to which they should have given notice to their lessors of the interference with their rights by reason of the restriction. Finally, costs are in the discretion of the Court below: provided that there was material for the exercise of this discretion, an appellate Court cannot interfere : see *Donald Campbell & Co. v. Pollak*[12] In the result I would dismiss the three appeals of the Secretary of State with costs to each of the contesting respondents. There will be one set of costs to the Lodna Coal Company and one set of costs to the other two plaintiffs Jitendra and Rishendra to be divided between them equally.

Dhavle, J.

19. These are appeals by the Secretary of State, the principal defendant in three suits for compensation for restrictions imposed, under Section 5 (2) (b), Land Acquisition (Mines) Act, 1885, on the working of the top section of No. 11-12 Combined Seam of the Lodna Colliery lying under certain portions of the East Indian Railway near Jharia. Appeal No. 83 arises out of Title Suit No. 54 instituted by the Lodna Colliery Co. (1920) Ltd., holding (under a series of assignments) a permanent mukarrari of the mauza under the zamindar, inclusive of the subsoil rights. Appeals Nos. 84 and 85 arise out of Title Suits Nos. 73 and 55 instituted by Jatindra Nath Sarkar and Rishendra Nath Sarkar, sons of the late Babu Golap Chandra Sarkar who in 1896 obtained a maurasidar mukarrari of 190 bighas out of the mauza, for mining coal, on a rent of ₹ 1,110-8-0/- together with a royalty of 9 1/2 pies per ton of coal subject to a minimum of ₹ 100/-. In 18,99 Babu Gopal Chandra Sarkar made what is called kaimi settlement with one Ram Lal Singh, for working the coal "according to his wish" on a royally of 0 annas per ton of coal and 2 annas per ton of coal dust subject to a minimum of ₹ 3,000/- a year. From Ram Lal Singh, Bipin

Behari Bose, a defendant in all the three suits before us, obtained a similar settlement in 1909 to work the coal "at his sweet will" on the same royalty subject to a higher minimum. Carrying on business as the North Barakar Coal Company (converted into a Limited Liability Company in 1924), Bipin Behari Bose in September 1921 gave to the Local Government and the East Indian Railway Co. a 60 days' notice of his intention to work...under the surface acquired by Government for the East Indian Railway Company."

20. This was both intended and taken as a notice under Section 4, Land Acquisition (Mines) Act, and led to an inspection of the mine under Section 5 (1) of the Act by the Chief Inspector of Mines. It appeared necessary to restrict the working of the coal to save the surface and the works of the East Indian Railway Company, a state-owned railway thereon, and a protracted correspondence followed, some of which is before us, between the Local Government, the Chief Inspector, the Coal Company, and the East Indian Railway Company, which would have to bear the burden of the compensation payable under the Act for the restrictions. The East Indian Railway Company thought that the Assisted Sidings Agreement entered into by the Coal Company made compensation unnecessary, but this was (I understand) later on discovered to be a mistake. The Coal Company had no objection to the restrictions proposed and even pressed for the statutory declaration imposing them, but would not agree to give up their claim to compensation though it was pointed out to them that this might hold the declaration up indefinitely. The position of the Local Government is clearly explained in a letter of March 17, 4925, [Ex. 2 (j) 28 at p. 143, Part 3 of the paper book of Appeal No. 83] written by Mr. Dain, Secretary to Government to the Agent, East Indian Railway Company, explaining that as Government would render themselves liable to compensate the Colliery Company for the coal left un-Worked in accordance with an order for restricted working, they were unable to issue such an order unless they were assured either (a) that the Colliery Company were willing to forego compensation, or (b) that the Assisted Sidings Agreement was applicable and sufficient to preclude a claim to compensation or (c) the Railway Administration was pre-pared to indemnify the Local Government in respect of any compensation awarded, and adding that in consequence they must leave the matter in the hands of the Railway Administration.

21. A part of the subsequent correspondence is before us, and it was only in December 1926 (see p. 152 of the paper-book; that the East Indian Railway Company wrote that they were prepared to indemnify the Local Government in the event of any compensation being allowed, and asked the Government to publish the necessary declaration restricting the working of the minerals underlying such portion of the land as the railway was unable to relinquish. On March 11, 1927, Government made a declaration under Section 5 (2) (6) restricting the working in certain ways (p. 155 of the paper-book), and this was published in the Bihar and Orissa Gazette of March 16, 1927. A copy of this declaration was sent to the Coal Company on March 30, and the company was not long in sending in a claim for compensation amounting to ₹ 9,60,000/- (nearly) for the coal locked up by the declaration. Then followed much correspondence (which is not all before us) between the Local Government and the East Indian Railway Company, the latter being apparently anxious that the question of ' compensation should be settled by the Civil Court and not by the Land Acquisition Officer under Section 6 of the Act, Government on their part pointing out that having made the declaration it was scarcely open to them to refrain from an award under the Act and insist on a reference to the Civil Court and that in their opinion the best course in the end probably would be to withdraw the declaration but that they would follow the advice of the Railway Administration if the latter were prepared to meet all the expenses

involved (see pp. 170 and 172 of the paper-book). Ultimately the question of compensation payable to the Coal Company was referred by agreement between the East Indian Railway Company, and the Coal Company to the arbitration of Mr. Simpson, Chief Inspector of Mines, and Mr. Whitworth, Chief Mining Engineer of the Railway Board. Mr. Simpson was to find the quantity of coal locked up, and found it at over a quarter of a million tons; Mr. Whitworth was to assess on Mr. Simpson's figure the compensation payable to the Coal Company and placed it at ₹ 1,81,750/- (pp. 179 and 192 of the paper-book). Before this amount was actually paid to the Coal Company, in July 1929, Rishindra Nath Sarkar and the Lodna Colliery Company heard of the matter and started enquiring from the authorities with a view to secure the compensation to which they considered themselves entitled.

22. None of the- superior landlords seems to have been mentioned prior to the settlement with the North Barakar Coal Co. When the landlords came in, arbitration was again, proposed, but the Goal Co. disputed the right of the superior landlords to compensation and desired the whole matter be referred to arbitration, 'while Rishindra Nath Sarkar (if not the Lodna Colliery Co. also) insisted that their right to compensation must be recognised and the arbitration confined to the assessment of the compensation only (see pp. 254 and 278 of the paper-book). The negotiations thus fell through in April 1930, and the Lodna Colliery Co. and Rishindra Nath Sarkar instituted their suits on July 15, 1930, while Jatindra Nath Sarkar followed with his suit on September 19, 1930. It will be seen that the appellant, the Secretary of State, figures in these suits in more than one way, the declaration restricting the working being made by the Local Government, and the claim to compensation being opposed by the East Indian Railway Co.

23. The principal contention of the appellant is that the plaintiffs have no cause of action against him, as the declaration offers compensation to and restricts working by the North Barakar Coal. Co. only. It is pointed out that the leases and subleases do not entitle any of the plaintiffs to work the coal or even to insist on its being worked by the North Barakar Coal Co., but only entitle the Lodna Colliery Co. and the Sarkar brothers perpetually to certain tonnage royalties subject to a minimum, ultimately coming from the party immediately entitled to work the coal : and upon this it is argued that the restrictions imposed by the Secretary of State on the working of the coal by the North Barakar Coal Co. constitute no interference with the rights of any of the plaintiffs. But the plaints are not really based on any interference with the plaintiffs' contractual rights, nor are they based on any tortious act committed by the Secretary of State and entitling the plaintiffs to compensation. It is true that in para. 19 of his plaint Rishindra Nath Sarkar spoke of collusion between the Secretary of State and Bipin Behari Bose and the North Barakar Coal Co. in depriving him of the share of the profits which he would have been entitled to if the working of the coal had not been restricted, but when particulars of this conspiracy were demanded, none was given, and the charge of conspiracy was dropped so much so that it never figured in the issues.

24. The gist of the suits as I read the plaints (see paras. 16, 12 and 8, respectively) was recovery of statutory compensation for restrictions imposed on the working' of the colliery under Section 5 (2) (6) of the Act--compensation which should, in the ordinary course, have been awarded in the special manner laid down in Section 6 of the Act, but which has to be realized by suit because the special procedure was not adopted, the East Indian Railway Co. taking its stand upon its settlement with the Coal Co. together with the leases of the plaintiffs. The appellant lays stress on the wording of the declaration, which expresses the willingness of the Government of Bihar and

Orissa to pay compensation to the North Barakar Coal Co. in consideration of the working being carried out in the manner and subject to the restrictions specified. But it also purports to have been made under Section 5 (2) (6) and recites the notice given by Bipin Behari Bose in accordance with the Act and the inspection made under Section 5 (1) of the Act. And in order to understand the effect of the actual declaration, we have to consider the powers and the intention of the Local Government. Now, when a declaration is made under Clause (b), Sub-section 2, Section 5 of the Act, two consequences follow : (1) under Sub-section 4 of the same section the mine shall not thereafter be worked...by any person save in the manner and subject to the restrictions specified and (2) under Section 6 :

> the persons interested in those mines...and the amount of compensation payable to them...shall, subject to all necessary modification, be ascertained in the manner provided by the Land Acquisition Act (1894)....

25. It is true, as has been urged for the appellant, that notwithstanding the provisions of Section 6, the parties will be competent to enter into an agreement as to the amount of compensation and that the agreement so made could be enforced in the ordinary way : see *Fort Press Co., Ltd. v. Municipal Corporation of City of Bombay*[13] But what we have to decide in the present cases is whether it is possible for Government, when proceeding under the Act, by expressing its willingness to compensate the person who was immediately entitled to work the coal and had as such given the notice under Section 4, effectively to limit its liability to pay compensation to all such persons viz., all persons having an interest in the mine or minerals still on worked or ungotten) in consideration of those mines...being worked or gotten in such manner and subject to such restrictions as the Local Government may in its declaration specify : see Section 5(2)(b).

26. The Act provides for a notice by the person for the time being immediately entitled to work the coal, but empowers Government upon the receipt of such a notice to restrict the working thereafter by any person, and at the same time -as an essential part of the same transaction-- entails upon Government an obligation to pay compensation to all persons having an interest in the mines or minerals still unworked or ungotten. If Government does not publish a declaration as provided in Section 5, before the expiration of the 60 days of the notice) the mine or colliery may, under Section 7, be worked thereafter in the usual and proper manner unless and until such a declaration is subsequently made : but here again, whenever -Government does make the declaration, the working is restricted for all time and "by any person," and Government becomes liable to compensate all persons Laving an interest in the working of the mine and thus affected by the restrictions imposed. The compensation payable is thus in no case limited to the actual worker, and the restrictions which are imposed because "it appears to the Local Government that the working or getting of the mines or minerals or any part thereof is likely to cause damage to the surface of the land or any works thereon," must ex necessitate rei be permanent. The coal that is to be left unworked under the declaration in the present cases was in the opinion of the Local Government required for the support of the East Indian Railway Co. and would, if dealt with by Government under the Act, cease to be available not merely to the North Baraker Coal Co., but also to superior landlords of every degree who would all be [as Lord Atkinson put it in *Eden v. North Eastern Rly. Co*[14].] deprived of the use, enjoyment and benefit of it as if it had been destroyed or removed and disposed of ; the coal locked up would, as it were, be dedicated to the use of the Company, to support their superincumbent soil, and (he compensation payable would be the price the coal would fetch as and when won and raised, less the cost of working the mine,

winning and raising the coal, for no appreciable reduction can be made for the remote contingency that should the Railway cease to exist, the owner's right to work and win the coal will revive.

27. That is the scheme of the Act, ; piecemeal dealing with the total interest in the coal is not contemplated, and the embargo which is to be perpetual involves (as was only to be expected) payment of compensation to all interests affected. The declaration made by Government must be read in the light of these considerations. It is, moreover, not the case either of the Local Government or of the East Indian Railway Co.; that what the declaration was intended to affect was the partial interest of the North Barakar Coal Co., only. Government repeatedly said that they had acted under Section 5 (2) (b) of the Act, and could hardly be conceived to contest the statutory liability to compensate all persons interested on the ground of any irregularity committed by themselves. The declaration, it is true, expressed willingness to pay compensation to the North Barakar Coal Co. (only), but this was obviously an unintended informality. No enquiries were made prior to the declaration regarding the various interests affected or likely to be affected by the restrictions ; and even the East, Indian Railway Co., which is prosecuting the appeal, says in para. 24 of its grounds of appeal in Appeal No. 83 that it should have been held that the declaration of March 11, 1927, expressing willingness to pay compensation to the North Barakar Coal Co., was published under the belief that the said Company was alone entitled to compensation. It need hardly be added that such a belief could have had no reference to the title deeds of the parties which were only brought to the notice of Government at a much later stage. It is in fact nobody's case that in issuing the declaration the Local Government acted, or even intended to act, on the supposition that it had power under the Act to confine the compensation to the North Barakar Coal Co., to the exclusion of such other parties as might be entitled to it under the Act for the restrictions imposed on the working of the coal. Clearly, the Local Government had neither the power nor the intention to impose restrictions on the working of the coal by the North Barakar Coal Co. only or to limit its liability to pay compensation--a liability which is implicit in the statutory proceeding--to that Company alone. It follows that notwithstanding its informal character, the declaration must operate as if it had, in full compliance with the Act, expressed willingness to compensate all interests concerned and laid the Secretary of State under the statutory obligation to compensate them all. That, irrespective of any declaration and restriction under the Act, the plaintiffs were not themselves entitled to work the coal or even to insist on its being worked seems immaterial. As soon as the declaration is made, the coal comes under a perpetual embargo and full compensation becomes payable, which must in part go to the plaintiffs as the superior landlords, exactly as if the North Barakar Coal Co. were to have worked the coal in due course and the tonnage royalties accordingly to have accrued to the plaintiffs.

28. The Coal Company had power under its lease to work the coal, and Government must have been satisfied that the Company was about to work it before imposing the restrictions involved in the declaration. The private settlement between the East Indian Railway Co. and the Coal Co. does not alter the facts that the latter has been compensated on the footing that it had worked the coal in. due course, and that the embargo placed on the working of the coal locked up by the statutory declaration (how ever informal), affects all interests. It is, therefore, impossible to accept the contention that the plaintiffs are none the worse for the declaration because they were not entitled to work the coal or insist on its being worked, nor entitled to any royalties until the

coal was actually worked (as worked it has not been, nor ever can be during the tenure of the Coal Co). In my opinion, the coal has been effectively locked up, notwithstanding the unintended informality of the declaration under Section 5, (2) (b). This necessarily entails payment of compensation not Only to the Coal Co., but also to the plaintiffs for the tonnage royalties to which they are entitled as superior landlords ; and the liability to compensate the latter which is inherent in a proceeding under the Act cannot be evaded by pointing to the contractual relations between them and the Coal Co. Government may not inconceivably have secured a restricted working of the coal by Coal Co., without incurring any liability to the plaintiffs, by an appropriate contract : but in that case a declaration under the Act would have been entirely uncalled for. As it was, Government first made the declaration, and did so without any contract ; with any party interested in the coal and after a declaration under the Act, the royalties due to the landlords must, unless they are settled by agreement with them, be paid in the manner indicated in Section 6 of the Act and cannot be justly or successfully withheld by declining to proceed under the section, while no attempt is made to withdraw the declaration. I am, therefore, unable to accept the contention that the suits should have been dismissed for want of a cause of action.

29. It has also been contended on behalf of the appellant that the claims of the plaintiffs are barred by limitation. On this point, the lower Court relied upon *Rameswat Singh v. Secretary of State* [15]and *Mantharaoadi Venkayya v. Secretary of State*[16] and held that the suits were governed by the six years' limitation laid down in Article 120, Schedule I to the Limitation Act for suits for which no period of limitation is provided elsewhere, in the schedule. Sir Sultan Ahmad has argued that the suits are governed by the 90 days' limitation prescribed by Article 2 of the Schedule. This article deals with suits "for compensation for doing or omitting to do an act alleged to be in pursuance of an enactment in force for the time being in British India." And the argument advanced before us, as I understand it, is that these were suits for compensation for omitting to proceed under Section 6, Land Acquisition (Mines) Act after the declaration restricting the working under Section 5. That, however, is not the character of the suits: the compensation claimed is not compensation for omitting to proceed under Section 6, but compensation automatically involved in the imposition of restrictions upon the working of the coal under Section 5.

30. The language of Article 2 is very far from happy, as was pointed our in a recent Full Bench decision of the Allahabad High Court: *Shiam Lal v. Abdul Rao*[17] But the provision has been usually taken to be intended for the protection, by means of a short period of limitation of those who in the exercise of their statutory powers exceed their authority in good faith and expose themselves to suits for compensation for actionable wrongs. It seems to me that the legislature could hardly have intended by means of a general provision like that in Article 2 to provide for the failure of the Local Government to adopt the special procedure laid down in Section 6, Land Acquisition (Mines) Act in cases where compensation becomes payable under Section 5 for the imposition of authorized restrictions. In *Secretary of State v. Guru, Proshad Dhur*[18] Petheram, C.J. observed that the Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, and therefore held that a suit for the recovery of surplus sale proceeds under the revenue sale law fell not within Article 62 but within Article 120, Limitation Act. Similar reasoning would apply to the facts of the present cases with even greater force; for the proceedings under Section 6, Land Acquisition (Mines) Act take so much time that it is scarcely likely that the law would contemplate a period of 90 clays only within which suits must be filed by interested parties for the compensation that ought to be automatically given to them,

while it might be impossible for the parties (as indeed was the case here) to say when exactly the authorities were in default in omitting to adopt the special procedure for determining and awarding the compensation due under Section 5. If Article 120 applies, there is no question that the suits are within time; and it seems to me that Article 2 has no application to suits for recovery of statutory compensation but is confined to suits for recovery of compensation in the sense of damages for acts which are not legalized wrongs but are and remain torts. Learned Counsel for the Lodna Colliery Co., respondent in Appeal No. 83, has also suggested that the suits might come within Section 23, Limitation Act.

31. This section provides that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. In my view, however, the suits have boon brought not for compensation for such a breach or wrong, continuing or otherwise, but for statutory compensation arising out of (or rather, implied in) restrictions authorised by the Land Acquisition (Mines) Act, plaintiffs being driven (and entitled) to sue because the Local Government declined to proceed under Section 6 as they should have done. Regarded in this light, the suits were not within Article 2 but within Article 120 and in my opinion they have been rightly held by the lower Court to be in time. The amount of compensation payable to the plaintiffs has not been the subject of serious dispute before us. The compensation to which the plaintiffs were entitled was the royalties, and these are tonnage royalties on a quantity of coal regarding which also there was no dispute. Learned Counsel for the Lodna Colliery Co. did indeed suggest, and his argument was adopted by the Advocates for the other plaintiffs, that the plaintiffs were also entitled to the addition of "15 per cent. on the market value" provided in Sub-section 23, Section 23, Land Acquisition Act, 1891, which applies to proceedings under Section 6, Land Acquisition (Mines) Act. But as my Lord the Chief Justice pointed out during the arguments, not only does Section 6 make the Land Acquisition Act applicable "subject to all necessary modifications" but further, Sub-section 2, Section 23, Land Acquisition Act only provides for the addition of 15 per cent. of the market value "in consideration of the compulsory nature of the acquisition." This is clearly inapplicable to the plaintiffs-respondents. Their interest in the coal, whenever wrought and raised, was limited to the tonnage royalties, and what is more, they were none of them entitled to insist on the coal being worked at any time. What the declaration under Section 5 (2), (b), Land Acquisition (Mines) Act, has done to them is only to enable them to realise their tonnage royalties in presenti instead of having to wait for them indefinitely. The legislature could not have intended to award an extra 15 per cent. "in consideration of the compulsory nature" of such an acquisition and in my opinion, the learned Subordinate Judge was right in disallowing this addition to them.

32. It has also been contended on behalf of the appellant that the North Barakar Coal Co. having been paid in full for all the coal locked up, plaintiffs ought to get their compensation from that Company and not from the Secretary of State, or in the alternative, that if the Secretary of State is held liable to pay the plaintiffs notwithstanding the full payment to the North Barakar Coal Co., he should have a decree for the corresponding amount or amounts against this Coal Company. It is admitted that the Secretary of State did not take up this position in his written statements in the three suits, but it is urged that he was exonerated from doing so by reason of the denial of Bipin Bihari Bose and the North Barakar Coal Company that the plaintiffs were entitled to any money from them. The learned Subordinate Judge seems inadvertently to have framed an issue on the point. The point was thus raised in the lower Court and has been again raised here. Whatever the

technical aspects of the matter may be--and it is by no means clear that Sections 30 and 31 Land Acquisition Act which have been relied on for the appellant are really available where there is no award by a Land Acquisition Officer made after notice to the interested parties--it seems clear that the contention must foil on the merits.

33. Neither the plaintiffs nor the Secretary of State can have any decree against the North Barakar Coal Company for the royalties unless it is proved that they were included in the payment to the North Barakar Coal Co. Sir Sultan Ahmad for the appellant points out that in the claim made by the North Barakar Coal Co. (see p. 165 of: the paper-book) the "nett profit" which is claimed is arrived at by deducting the "working cost" from the "gross value." This does not, however, necessarily point to the inclusion of the royalties in the net profit, for they may have been included in what the Coal Co. put forward as the working cost, though it is not impossible that the Coal Co. might have laid their claim on the footing that the payment of the apparently undisclosed royalties was a matter between them and the superior landlord and was no concern of the Secretary of State. It also appears that in the lower Court the Secretary of State accepted the position that it was not open to him to call the Chief Mining Engineer of the Railway Board to say whether or not his award included royalties. Sir Sultan Ahmad has endeavoured to show that royalties were included in the award by making certain calculations from some of the data found in the claim of the North Barakar Coal Co. itself, but there is nothing to show that these were the lines on which the Chief Mining Engineer proceeded in fact when he made his award, the subject-matter of which was expressed as "the amount of compensation payable to the North Barakar Coal Co." in respect of the quantity of coal found by Mr. Simpson to have been locked up by reason of restrictions imposed on its working. Sir Sultan Ahmad's calculations also proceeded on the footing that the price of coal remained the same throughout the years during which Chief Mining Engineer expected the North Barakar Coal Co. would have been able to raise the coal after the declaration by the Local Government; the Company's figures related to an earlier period. The Chief Mining Engineer as an arbitrator could not be questioned as to the lines on which he had proceeded, and indeed he was not called as a witness in the case. In my opinion the appellant has utterly failed to make out the contention that the plaintiffs' royalties were included in his payment to the North Barakar Coal Co., and it is clear that payment to the Coal Co., even if made out, would really have been no defence to the suits as constituted.

34. This disposes of the appeals, and it remains to deal with the only cross-objection urged before us on behalf of the respondents Bipin Bihari Bose and the North Barakar Coal Co. as regards the costs of the lower Court that they have been ordered to bear. That these respondents were proper parties to the suits is not seriously denied. It is also clear that it was their action during the negotiations that prevented the settlement of the disputes. The learned Subordinate Judge thus had material before him to justify withholding their costs, and if he has not , specifically referred to it, that is not a sufficient reason for interference by this Court. So far as the cross-objection seeks costs of the lower Court from the principal defendant, I consider that it does not even lie under Order XLI, Rule 22, Civil Procedure Code, as 1 had occasion to show in detail in *Chanda Bibi v. Mohanram Sahu 13 Pat. 200 : 153 Ind. Cas. 412 : AIR 1934 Pat. 131 : 15 PLT 42 : 7 RP 332(Supra)*. I would, therefore, dismiss the appeal with costs, as held by my Lord the Chief Justice, and also dismiss the cross-objections.

Cases Referred.

1(1878) 3 AC 165 : 47 LJ Ch. 97 : 37 LT 645 : 26 WR 130

2(1878) 3 AC 430
3AIR 1935 All. 538 : 155 Ind. Cas. 131 : (1935) Cr. Cas. 560 : (1935) ALJ 459 : 7 RA 876 (FB)
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5(1911) 81 LJKB 41
6(1891) 3 Ch. D 222 : 60 LJ Ch. 641 : 65 LT 22
7(1907) AC 400 : 76 LJKB 940 : 97 LT 954 : 71 JP 450 : 23 TLR 685 : 51 SJ 623, at p. 405 Page of (1907) A.C. [Ed.]
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9(1843) 13 LJ Ch 434 : 7 Beav. 19
10(1872) 5 HL 418 : 5 Ex. Ch. 221 : 41 LJ Ex. 137 : 27 LT 1
11(1922) 1 AC 258 : 01 LJPC 101 : 126 LT 711 : 38 TLR 281
12(1927) AC 732 : 96 LJKB 1093 : 137 LT 656 : 43 TLR 495 : 71 SJ 450
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