APPELLATE CIVIL

Before D. Falshaw, C.J., and Tek Chand, J.

SHIV DAYAL KAPOOR AND OTHERS,—*Appellants.*

versus

UNION OF INDIA AND ANOTHER,—*Respondents.*

Regular First Appeal No. 13 of 1952,

1963

March, 21st.

Contract Act (IX of 1872)—Privity of Contract—Meaning of—Rights anl obligations under a contract—Whether can be acquired by or imposed on a third party not privy to the contract—Maxim volenti non fit injuria*—When can be pleaded in defence—Act of conversion—When committed—Relief under tort of conversion not claimed in plaint—Whether can be granted.*

Held, that privity of contract means the relationship subsisting between two contracting parties. "Privity" in this context implies a mutuality of will and is an interaction of parties and their successors. It creats a legal bond or tie or a *vinculum juris.* This rule of privity of contract is that no one but the parties to a contract can be bound by it or entitled under it but it has certain exceptions. There is deemed to be an artificial privity in the case of a trustee and beneficiary and also principal and agent. The rule of Common Law in Englnad was expanded by engrafting fictions in order to prevent the rigour of the law.

Held that when an obligation is founded upon a contract, the assent of a person to be bound is at the root of the matter and is indespensable. As the third party is not an assenting party he cannot be called upon to bear the burden of the contract nor can any contractual obligations be imposed on him. It is the counter-part of the principle that a third party cannot acquire a rights under a contract.

Held, that the principle underlying the maxim *volenti non fit injuria* is that where a damage is suffered by consent, it does not give rise to a cause of action or that a man must bear loss arising out of the act to which he has assented. The defence on the basis of this maxim is raised in cases of

torts where a party consents to run the risk of accidental harm or in cases of master and servant and of persons coming to dangerous premises.

Held, that an act of conversion may be committed. (1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market ovent although not delivered, (4) when it is wrongfully retained and (5) when it is wrongfully destroyed or changed in nature.

Held that the fact that the plaint does not mention that the plaintiffs are seeking relief under the tort of conversion, is not sufficient to deprive the plaintiffs of the only remedy available to them in the circumstances established when all the facts are set out and the contesting defendant has not been prejudiced in any manner. The appropriate relief will not be withheld where all the facts are stated in the plaint and supported by evidence and the matter has been raised before and considered by the trial Court. There is no element of surprise and on that account the contesting defendant has not been prejudiced in any way.

Regular First Appeal from the decree of Shri Chander Gupt Suri, Sub-Judge, 1st Class, Delhi; dated the 28th September, 1951, dismissing the plaintiffs suit.

GURBACHAN SINGH, D. K. KAPUR, R. L. TANDAN AND VENOO BHAGAT, ADVOCATES, for the Appellants.

JINDRA LAL AND DALJIT SINGH, ADVOCATES, for the Respondents.

JUDGMENT

Tek Chand, J. TEK CHAND, J.—This is a plaintiffs' first appeal from the judgment and decree of the Court of Subordinate Judge, Delhi, dismissing the plaintiff's suit, but leaving the parties to bear their own costs. The plaintiffs are seven in number, out of whom plaintiff No. 5 is a minor. Plaintiffs Nos. 2 to 5 are sons of plaintiff No. 1. The first defendant is the Union of India and the second defendant is Captain S. Kirpa Ram. The

claim in the suit is for recovery of Rs. 72,266-13-0 and for the grant of mandatory injunction or in the alternative for recovery of Rs. 1,47,730-12-0.

The second defendant, who is a Government Contractor, has been carrying on business under the name and style of R. S. Captain Kirpa Ram and Sons. The Central Goevrnment had invited tenders for supply of door frames and window frames (Chaukat), etc., and shutters of hard and soft wood. The second defendant submitted his tender in his business name of Captain S. Kirpa Ram and Sons for C. P. Teak wood, Deodar and Kail. In the month of February, 1948, the Government made a new proposal to defendant No. 2 to make the entire supply in teak wood if he would charge at the lowest rates which had been tendered by different tenders. An agreement was thus brought about and the agreement form was signed by defendant No. 2 on 27th of July, 1948. On behalf of the Governor-General of India in Council, the Chief Engineer signed the agreement on 18th December, 1948 (vide Exhibit D.I.). Under this agreement the second defendant was to use C. P. Teak wood but in February, 1949, the terms of the contract were changed and defendant No. 2 was to execute the contract partly in Teak wood and partly in Deoadar wood. The reason alleged for this change was that there was considerable difficulty in procuring railway wagons for transport of Teak wood from the Central Provinces. By this change the quantity of Teak wood to be supplied was reduced to 5,58,000 square feet. To distinguish this contarct from other contarcts which were held by the second defendant from the Central Public Works Department, this contract was styled "Captain S. Kirpa Ram and Sons (Woodwork)". The entire supply was to be completed within ten months. Clause 2 provided: "The time allowed for carrying out the work as entered in the tender ..... shall be

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

reckoned from the date on which the order to commence work is given to the contractor." Time was deemed to be an essence of the contract on the part of the contractor.

Owing to financial difficulties, it is stated that the second defendant could not finance the execution of work. Before the agreement was signed on behalf of the Government, the second defendant approached plaintiffs No. 1 to 4 with a request to finance the business to which they agreed subject to certain terms. Plaintiffs 6 and 7 also agreed to join. A formal agreement was drawn up on 30th of August, 1948, and it was executed between plaintiffs Nos. 1 to 4 and plaintiffs Nos. 6 and 7 of the one part and the second defendant of the other (vide Exhibit P. 16). By its terms, plaintiffs Nos. 1 to 4 agreed to advance up to Rs. 2,00,000. The 5th plaintiff was admitted to the benefits of the partnership. This agreement was modified by a later agreement dated 15th April, 1949, whereby the plaintiffs Nos. 1 to 4 agreed to contribute Rs. 3,00,000. Defendant No. 2 was entitled to profits and was also liable to losses in the ratio 4 annas 3 pies in the rupee. The agreement as modified was sent to the Central P.W.D., and its receipt was acknowledged by letter dated 12th of May, 1949 (*vide* Exhibit P. 18). It is said that the plaintiffs in order to carry out the contract erected a factory at considerable expense on a site near Central Public Works Department Warehouse, Factory Road, New Delhi, which had been allotted by the Government. Considerable sum of money was spent on the erection of the building and for connecting the premises with the electric mains. The total cost for this construction as detailed in Annexure 'A' attached with the plaint comes to Rs. 90,977-3-0.

It was alleged that the Government (defendant No. 1) was to procure for the contractor (defendant

No. 2) 235 railway wagons for transporting from Central Provinces 1,25,000 cubic feet of Teak wood required for manufacturing 5,58,000 square feet of finished stores. The Government, however, failed to carry out its obligations and priority permits were given for 125 railway wagons only out of 235 wagons which were needed. Out of these only 58 wagons were secured and up to 15th of November, 1948. only 6 wagons had been provided. It was also alleged that electric connections were procured after considerable delay. Despite the handicaps the plaintiffs managed to manufacture 1,14,553 square feet of Chaukats, shutters, etc., out of which 89,506 square feet of finished stores were tendered to and accepted by the C.P.W.D., leaving 25,047 square feet of finished stores lying with the plaintiffs ready for delivery. The details of the quantity tendered and of the quantity left over are given in Annexures 'B' and 'C', respectively.

The plaintiffs contend that the Government raised obstacles in the execution of the contract by making deductions from the bills for stores supplied. This was done in satisfaction of the claim on account of alleged arrears of income tax for the year 1942-43 from defendant No 2. Deductions were also made on account of the amount claimed by the Delhi Improvement Trust as rent of the site of the factory works at Rs. 2,000 per mensem and also on account of security deposit. According to the Government the previous security deposit of Rs. 50,000 had been appropriated towards the said arrears of income tax. These deductions from the bills for May, 1949, aggregated to Rs. 31,856. The entire amount of bills for June was withheld. The plaintiffs complained that these deductions crippled their finances and practically paralysed the production work.

On 16th August, 1949, Shri O. P. Mahindra, Executive Engineer-in-charge, sent a letter to Messrs

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

R. S. Kirpa Ram and Sons stating that the date of commencement of the work was 19th of April, 1948, and 10th months were allowed for completion of the work. Only ten per cent of the work had been completed and thereby clause 2 of the agreement was contravened and the contractor had rendered himself liable to pay compensation. The contract was rescinded under clause 3(a). He wrote "also I take possession on 18th August, 1949, of all tools and plants materials and stores in or upon the above work, or the site thereof belonging to you, or procured by you and intended to be used for the execution of the above work, under clause 4 of your agreement." It was also said that the work done up-to-date would be measured on 20th of August, 1949 (*vide* Exhibit P. 19). The threat was carried out and guards were posted immediately at the site. The plaintiffs denied any default on the part of defendant No. 2, the responsibility for the default, if any, was said to be that of the Government. It was said that the Government had fixed 19th of April, 1948, as the date for commencement of the work most arbitrarily as the contract itself came into existence on 18th of December, 1948. No order to commence work had ever been given. The electric connection was not given till 23rd of December, 1948. No deductions on account of arrears due from defendant No. 2, as claimed by the Government, could have been made as defendant No. 2 had no disposing power over any portion of the amount of the bills. The assets in the nature of the entire undertaking and tools, plant, materials and stores could not be taken possession of as they were the property of the plaintiffs and not of defendant No. 2. By these wrongful exactions the work had been brought to a stand-still and the protests of the plaintiffs against these deductions on the ground that "Captain Kirpa Ram and Sons (wood work)" were an entirely different firm than Messrs Kirpa Ram and Sons, of which Captain Kirpa Ram was the sole

proprietor, turned out to be unavailing. A telegram dated 26th of August, 1949, of protest was sent to Executive Engineer, Chief Engineer, C.P.W.D., New Delhi, and also to Secretary, Works, Mines, Power, Government of India (*vide* Exhibit P. 21). This was followed by a detailed notice under section 80 of the Code of Civil Procedure, dated the 30th of August, 1949. It is alleged that taking advantage of the fact that the plaintiffs could not institute a suit before the expiration of the statutory period of two months, the first defendant set up another contractor Rai Bahadur Jodha Mal in respect of the Deodar wood-work and started using the plaintiffs' machinery, plant, etc., and continued to use it for some three months up to the end of November, 1949. This was done contrary to law. The manufactured stores lying at the site were removed. The value of logs, seasoned wood, manufactured Chaukats and manufactured shutters, as detailed in Annexure 'C', comes to Rs. 1,47,730-12-0. After the contract of defendant No. 2 had been illegally put an end to, the plaintiffs were entitled to remove the material, but they were prevented from doing so.

The suit has been valued for purposes of jurisdiction at Rs. 2,20,497-2-0 and court fee on the amount has been paid. On the basis of the above allegations the plaintiffs pray for a decree for Rs. 72,266-13-0 to be passed in respect of the price of stores supplied and accepted (Rs. 50,686-13-0), in respect of claim for damages on account of salary of staff (Rs. 3,780), use and consequent deterioration of tools, plant and machinery (Rs. 9,500), and interest on capital amounting to Rs. 3,50,000 at 6 per cent from 18th August, 1949 to 10th January, 1950 (Rs. 8,300). It was also prayed that defendant No. 1 be ordered by a mandatory injunction to deliver to the plaintiffs the stores and timber which the C.P.W.D., had removed from the site of the plaintiffs' works as detailed in Annexure 'C'. In case

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

defendant No. 1 was unable to do so or in the event that the Court could not grant mandatory injunction a sum of Rs. 1,47,730-12-0 was claimed as compensation. Another relief by way of permanent injunction directing defendant No. 1 to remove the guards, restraining its servants from interfering with the plaintiffs' possession and restraining defendant No. 1 or his servants or agents from removing the casing or Teak wood waste lying at the site was also claimed. Defendant No. 2 did not put in appearance despite having been duly served. The above allegations were denied in the written statement by defendant No. 1. A preliminary objection was also raised against the maintainability of the suit against defendant No. 1 as there was no privity of contract between the plaintiffs and defendant No. 1.

On the merits it was maintained that the date of commencement of the contract was 19th of April, 1948, and this was also admitted by the contractor, defendant No. 2 in his letter dated the 3rd of December, 1948. The Government admitted having undertaken to arrange priority permits for 235 railway wagons for transporting Teak wood. The Government admitted that the factory was constructed and stores and machinery brought there. The partnership deed between the plaintiffs and defendant No. 2 was sent to the C.P.W.D., authorities but that was not sufficient for creating contractual relationship between the plaintiffs and the Government. The quantities of finished goods, alleged to have been manufactured on the site as claimed by the plaintiffs, were not denied, but the price of the finished goods as claimed by the plaintiffs was not accepted. The Government maintained that the forfeiture of the security deposit and payment of the amount together with 25 per cent of the running bills to the income tax

authorities against income tax due from defendant No. 2 was in accordance with law. These were in the nature of Crown debts and were recoverable as arrears of land revenue. Recovery on account of rent for the site of the factory payable to the Improvement Trust was validly made. It was also claimed that the factory, machinery and other tools, etc., lying on the works were lawfully seized under the agreement. The contractor had failed to execute the contract within the stipulated time of 10 months from the date of commencement of work which, according to defendant No. 1, was 19th of April, 1948. It was stated that the property seized had been measured and mentioned in inventories prepared in the presence of the representatives of the contractor and it was also said that necessary credit for the same would be given to defendant No. 2. The trial Court framed the following issues:—

(1) Did the plaintiffs or any one of them finance the contract obtained by defendant No. 2 and to what extent?

(2) Was the amount so advanced a charge on the assets and profits of the business of defendant No. 2? Does it affect the rights of defendant No. 1 under clause 4 of the contract?

(3) Was the order for commencement of work given by defendant No. 1 before the contract was signed on behalf of the Governor-General and when?

(4) If so, could the said order be given before the date of the contract was signed?

(5) Did not defendant No. 2 make himself liable to the forfeiture of the entire amount of the security deposit?

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

(6) Did not defendant No. 2 commit default in carrying out the contract entitling defendant No. 1 to take action under clause 4 of the contract.

(7) Had defendant No. 1 the right to appropriate any part of the security deposit towards any dues not arising out of the contract ? What was that amount ? If not; what is the effect?

(8) Had defendant No. 1 the right to deduct from the bills of defendant No. 2 the amount of rent, if any, due from defendant No. 2 to the Improvement Trust, If not, what is the effect?

(9) Was defendant No. 1 entitled to hand over the machinery, plant, etc., to Jodha Mal Contractor for work not connected with the contract in dispute?

(10) If the 9th issue goes against the defendant, to what compensation, if any, are the plaintiffs entitled?

(11) What was the value of the stores at the time they were taken over by defendant No. 1?

(12) What was the value of the machinery, plant, buildings, etc., at the time it was taken over by defendant No. 1?

(13) Are the plaintiffs entitled to any compensation from defendant No. 1 regarding the machinery, etc., and the stores taken over by defendant No. 1?

(14) To what amount of damages, if any, are the plaintiffs entitled from the defendant No. 1?

According to the learned trial Court the real point in controversy was whether there was no privity of contract between the plaintiffs and defendant No. 1 and issues 13 and 14 were deemed as covering this part of the controversy. The trial Court did not accept the contention of the plaintiffs that the basis of the suit was the law of torts for wrongful conversion by defendant No. 1 of property belonging to the plaintiffs. The suit was on the basis of breach of contract and in the absence of any privity of contract the relief was not available to the plaintiffs against the first defendant.

On the first issue it was found that the plaintiffs Nos. 1 to 4 had invested a sum of Rs. 3,28,000 approximately in this business and the contribution of plaintiffs Nos. 6 and 7 came to Rs. 45,000, the total being Rs. 3,73,000. This finding has not been contested before us and it is, therefore, unnecessary to refer to the evidence on the basis of which this conclusion was arrived at. The second issue was decided against the plaintiffs on the principal ground that the rights which had been reserved under the agreement of partnership between the plaintiffs and defendant No. 2 were not operative against the Government, defendant No. 1. It may be mentioned that the partnership agreement (Exhibit P. 17) was executed on 30th of August, 1948. Defendant No. 2 had already submitted his tender form duly signed on 27th July, 1948. It is, however, true that on behalf of the other contracting party, the Governor-General of India, the contract was signed by the Chief Engineer on 18th of December, 1948. Plaintiff No. 6 as the attesting witness of the tender had set down his signatures on the same day. The plaintiffs contention was that the partnership agreement was prior in time to the agreement which could only be deemed to have been completed on the date when the representative of the

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

Government had signed it on 18th of December, 1948. The partnership agreement, however, has referred to the agreement between the Government and Kirpa Ram, the two defendants, as being complete despite the fact that in the eye of law that was not so. The trial Court was, however, of the view that the plaintiffs could not have reserved to themselves better rights than those which had been given to the contractor under his tender. According to the Subordinate Judge the rights of the Government came before the claim of the plaintiffs under the partnership agreement. It was also provided that the plaintiffs' charge against defendant No. 2 would only become operative on the balance left after meeting all the liabilities which included liability to the Government. The plaintiffs' priority in the matter of payment from the amounts due to the contractor came into existence when the amounts became payable, but that conferred on rights upon the plaintiffs as against the first defendant. Such rights as the Government had under its contract with defendant No. 2 remained unaffected.

I may at this stage refer to clause 4 of the conditions of the contract between the two defendants, as they have been the subject-matter of adverse comments from the side of the plaintiffs. Under this clause the Divisional Officer after rescinding the contract and measuring up the work of the contractor as contemplated in the preceding clause could, if he so desired, "take possession of all or any tools, plant, material and stores in or upon the works, or the site thereof or belonging to the contractor, or procured by him and intended to be used for the execution of the work or any part thereof paying or allowing for the same any amount at the contract rates, or, in case of these not being applicable, at current market rates to be certified by the Divisional Officer whose certificate thereof shall be final ....." This clause also

empowers the Divisional Officer to sell by auction or private sale on account of the contractor and at his risk such tools, plant, material or stores taken possession of from the premises. Under this provision extensive powers of seizure have been given to the Divisional Officer and they are not confined to the tools, plant, material and stores, etc., belonging to the contractor, but to all such things which are upon the works or on the site even if they are the property of a third party. One of the principal grounds convassed in this case is that the property, which had been taken possession of by the Government, belonged to the plaintiffs and not to defendant No. 2 and had been brought there by the plaintiffs and as such was not liable to seizure in accordance with the terms of the contract as between the two defendants by reason of the fact that the plaintiffs were no party to that contract.

On the third and fourth issues the trial Court expressed the view that the seizure was contrary to the terms of the contract. Clause 2 of the conditions of contract (Exhibit D. 1) provides that the time allowed for carrying out the work, which was ten months, "shall be reckoned from the date on which the order to commence work is given to the contractor". The contract was to be carried out with due diligence, time being the essence of the contract on the part of the contractor, and in the event of delay the contractor was liable to pay compensation. According to the construction placed upon this clause by the trial Court a date for the commencement of the work was to be fixed and was to be intimated to the contractor so that he should know that the time had started running. As a matter of fact, there is no indication that a date for commencement of the work had been fixed or communicated to the contractor. On the 4th of March, 1949, the contractor wrote to the Executive

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

Engineer requesting him to confirm that the date of commencement was 15th of January, 1949 (*Vide* Exhibit D. 4). The Executive Engineer wrote back on 18th of March, 1949 (Exhibit D. 5) saying that the date of commencement was under consideration and would be confirmed shortly. A copy of this communication was sent to the Superintending Engineer with a request that he should decide the point at a very early date to enable his office to regularise the contract. It was also said that the contractor was pressing for running payment which had been held up pending the decision of this question. The Executive Engineer, Shri O. P. Mohindra appeared as D.W. 1 and said that up to 18th of March, 1949, the date of commencement of work had not been decided upon and had not been intimated to the contractor. From this, the trial Court rightly concluded that there was nothing from which the contractor could know that the term of ten months stipulated under the contract had started running. The Superintending Engineer in his letter dated the 5th of April, 1949 (Exhibit D.W. 1/6) addressed to the Executive Engineer said that the contractor had admitted himself in his letter dated 3rd of December, 1948. that the above work was awarded to him in April, 1948, and this letter was enough. He then proceded on to say:—

> "The date of commencement of the work can be fixed now on the authority of this letter, after allowing a week's time as preparation period, i.e., 19th April, 1948, should be considered as date of commencement of the work."

Below this letter there is an endorsement to Messrs Kirpa Ram and Sons for information, wherein it is also stated that the date of commencement of the above work would be reckoned from 19th April, 1948,

As the period of completion is shown as 10 months in the agreement it transpires that the contractor had failed to complete the work within the time limit and had made himself liable for penalty unless extension is granted to him for which he should apply forthwith to enable the office to regularise the issue.

The letter of the contractor, to which reference was made by the Superintending Engineer in Exhibit D.W. 1/6, is dated 3rd December, 1948 (Exhibit D. 2). Paragraph 3 of that letter runs as under:—

> "In April, 1948, the Government of India awarded the whole work to us,—*vide* your letter No. CE/WS/253-Const., dated the 12th April, 1948, on the basis of the lowest tender rates."

The above lines contained no admission of the contractor and the Superintending Engineer was not, therefore, justified in arbitrarily communicating the date of commencement as 19th of April, 1948. This communication was made for the first time almost a year later on 5th of April, 1949. Instead of giving him 10 months prospectively after communicating the date of commencement he was informed under the endorsement that the period of completion had already expired. In other words, the communication of the date of commencement of the work was made when the period of 10 months had already expired. This is extremely arbitrary and irregular. I agree with the trial Court that the contractor had not violated the terms of contract which would justify the invocation of caluse 2 of the conditions of the contract. The trial Court also found that there was reliable documentary evidence to show that neither the railway wagons nor the electric connection could be arranged during the whole of the year 1948. During that year less than half a dozen wagons had been

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

available to the contractor out of a total number of 235 wagons which according to the defendant the contractor required. The power connections were given as late as 21st of December, 1948, and 11th of January, 1949. In these circumstances, it is inconceivable how the C.P.W.D., arbitrarily fixed 19th of April, 1948, as the date of commencement of work. On the merits the Subordinate Judge came to the conclusion that the contract had been illegally rescinded and that the contractor was given no chance to complete the contract and the promised facilities had failed. I find myself in complete agreement with this finding. I, however, am not persuaded to hold, as was held by the trial Court, that the plaintiffs, being no parties to the contract, cannot object to any improper performance or breach of any of the terms of the contract. This matter will be considered presently.

On the 5th issue it was held on the merits that nothing done by defendant No. 2 had made himself liable to the forfeiture of the entire amount of security deposit. In this case a sum of Rs. 50,000 had been deposited by the contractor under the contarct. This amount had been forfeited. In order to justify such a forfeiture it was imperative that there should have been a date of commencement of work duly communicated to the contractor and it should have been proved that he was responsible for delay in performing his part of the work. Further, if he had defaulted the Superintending Engineer should have determined the compensation payable in accordance with clause 3 of the conditions of contract. If the compensation so determined had exceeded the amount of the security deposit action under (a) and (c) of clause 3 could have been taken. Thus forfeiture has taken place for which there is not even the remotest justification. The only ground on which the decision is given against the plaintiffs is that not being a party

to the contract it is not for them to agitate this matter. Again on issue No. 6 it has been found that the contractor, defendant No. 2, did not fail to execute the work within the time allowed under the contract Though no default had been committed and the breach had been on the side of the Government, the plaintiffs have been denied relief on the ground that they were strangers to the contract and, therefore, could not get the matter referred to arbitration. No finding on the merits was given on issues Nos. 7 and 8 for the same ground that the plaintiffs were outsiders. On the 9th issue also the trial Court held that the matter could be agitated at the instance of the contarctor only. It was admitted that the machinery had been made over to the other contractors including Rai Bahadur Jodha Mal for the execution not only of this but also of other contracts. The compensation for wrongful user and seizure, according to the trial Court, is payable to the contractor only if the matter had been taken up by him. On the 10th issue it has been held that the plaintiff cannot agitate the quantum of compensation. On the 11th issue the trial Court found that the value of extra items taken over by the Government was approximately Rs. 94,000. The value of the property according to the plaintiffs was Rs. 1,47,000. The quantities mentioned in Annexures 'B' and 'C' to the plaint have not been questioned by the Government. They are not agreed as to the rates of different items. The plaintiffs contended that the Teak wood logs should have been valued at Rs. 7 per cubic feet whereas the C.P.W.D., authorities have given credit to the contractor at the rate of Rs. 3-8-0 per cubic feet. Without calling into question the testimony of P.Ws. 6, 10 and 11 regarding the rates of these items the trial Court in view of clause 4 has said that the contractor is to be allowed payment for the goods taken possession of at current market rates to be certified by the Divisional Officer whose certifi-

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

cate thereof would be final. In other words, if the current market rate is Rs. 7 but the Divisional Officer has certified it to be at half the amount the contractor cannot then claim at the current market rate. On this interpretation of clause 4 the trial Court came to the conclusion that the value of extra items taken over by the Government at the time of the seizure was about Rs. 94,000 and not Rs. 1,47,000 as claimed by the plaintiffs. The 12th issue is as to the value of the machinery, plant, building, etc., at the time they were taken over by defendant No. 1. In the absence of rebuttal on the part of the first defendant the value as assessed by the plaintiffs has been accepted, that is, Rs. 90,977-3-0 as detailed in Annexure 'A' to the plaint. The last two issues have been decided against the plaintiffs for the reason that there is absence of privity of contract. Lastly, finding that it has been a very hard case for the plaintiffs the parties have been left to bear their own costs. It will thus appear that the main ground on which the plaintiffs' suit has been dismissed is one of competence in the plaintiffs as they were strangers to the contract. They have been denied relief as according to the trial Court it was based upon infringement of the terms of the contract to which they were no parties. Their right to relief on the ground of tortious conversion has been denied as the form of the suit, according to the trial Court, did not indicate that they could avail themselves of the remedy in torts. These matters may now be examined. There is no grainsaying the fact that the contract (Exhibit D. 1) which was signed by the tenderer on 27th July, 1948, and by the representative of the Governor-General in Council on 18th December, 1948, had created contractual relationship as between the two defendants and the plaintiffs were strangers to the contract. That being so, the plaintiffs could not apart from certain well-known exceptions—claim any benefit or suffer any liability under

the contract. Both sides before us have argued their respective cases on the basis that there is no privity between them.

It has further to be made clear that according to the terms of the partnership entered into between the plaintiffs and defendant No. 2 on 30th of August, 1948, the entire undertaking was of the plaintiffs without any contribution whatsoever from defendant No. 2 and his interest was confined to profit of 4 annas 3 pies in the rupee. The terms of this partnership had been communicated to the C.P.W.D., authorities and they are presumed to be aware of its terms and no objection whatever was raised on the ground that the contract was being assigned or that the work was being sublet. Clause 21 of the conditions of contract provides that the contract shall not be assigned or sublet without the written approval of the Divisional Officer. It was open to the Divisional Officer to rescined the contract after giving notice in writing but the contract had not been rescinded on that ground. The investment in the undertaking is entirely of the plaintiffs which amounts to Rs. 3,73,000 as found by the trial Court while deciding the first issue. This finding has not been questioned before us. The result has been that though no breach of the contract had taken place and though no undertakings given by defendant No. 2 had been violated, not only the contract was illegally rescinded but the deposits have been forfeited, the entire plant, tools, materials and stores have been seized, the factory has been made over to other contractors not only to execute the contract in question but also the other contracts. Deductions have been made from the bills and the security deposit has been given over to the income tax authorities for meeting the previous income tax liabilities for the year 1942-43 (amounting to Rs. 17,00,000) of defendant No. 2. The income-tax claimed had no

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

connection whatsoever with this contract. In other words, though no term of the contract had been infringed by defendant No. 2 and despite the knowledge that the entire undertaking and its assets had been contributed by the plaintiffs the same have been forfeited. The argument on behalf of the Government virtually comes to this: Though we know that the entire undertaking had been financed by the plaintiffs and we did not exercise our power under clause 21 to rescind the contract on the ground of assignment or subletting, though we seized the goods, machinery, plant, etc., which was the exclusive property of the plaintiffs despite there having been no infraction of the conditions of the contract, though we diverted the security deposit to meet the income-tax liability of Kirpa Ram which had not arisen under this contract, though the seizure was of plaintiffs' property who were under no obligation to us, nevertheless we refused reparation to the plaintiffs as they were strangers to the contract we had infringed. There can be no two opinions on a gross unfairness of such an extent. The question to be considered is whether the sanction of the law can be invoked for perpetrating the illegalities when neither defendant No. 2 as a contracting party nor the plaintiffs, whose monies, goods and factory were taken possession, had acted in contravention of any term of the contract. Another contention which was advanced on behalf of the Government was that though the property taken possession of was of the plaintiffs and the seizure was wrongful, remedy was available to Kirpa Ram alone and it was not open to the plaintiffs to contend that the terms of the contract had been violated. It was also urged that the plaintiffs were consenting party to the contract and, therefore, they were in no better position than Kirpa Ram. It was said that the rule of *Volenti non fit injuria* was an effective answer to the plaintiffs' claim.

I may now consider the implications of the rule underlying the doctrine of privity of contract, which means the relationship subsisting between two contracting parties. "Privity" in this context implies a mutuality of will and is an interaction of parties and their successors. It creates a legal bond or tie or a *vinculum juris*. The rule of privity of contract is that no one but the parties to a contract can be bound by it or entitled under it. In the words of Pollock—

> "A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract."

Salmond and Winfield put in thus:—

> "No man can enforce a contract to which he is not a party, even though he has direct interest in the performance of it."

The doctrine of 'privity of contract', as above stated is well settled in England, but it has certain exceptions. There is deemed to be an artificial privity in the case of a trustee and beneficiary and also principal and agent. The rule of common law was expanded by engrafting fictions in order to prevent the rigour of the law. The leading case on the subject is *Tweddle* v. *Atkinson* (1), settling the rule that the third person cannot sue on a contract made by the contracting parties for his benefit and confirmed the rule in *In price* v. *Easton* (2), that a contract cannot confer rights on strangers. Lord Haldane in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge and Co., Ltd.*, (3), stated the principle thus:—

> "In the law of England certain principles are fundamental. One is that only a person

(1) (1861) I.B. & S. 393.
(2) (1833) 4 B. & Ad. 433.
(3) (1915) A.C. 847 (853).

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in *personam.*"

By the term *jus quaesitum tertio* is meant the right of a third person to enforce a contract to which he is not a party. The peculiarity of Scots law is that when a contract shows that the object of the parties to it was to advance the interests of a tertius, and the tertius is named, then a *jus quaesitum tertio* which attached a right of the third party to enforce a contract is created giving the tertius a title to sue. (*Vide* the Dictionary of England Law by Earl Jowitt, page 1936). Lord Haldane in the above passage was probably contrasting the English law from the other system. In a considered judgment of a Bench of Calcutta High Court in *Khirod Behari Dutt* v. *Man Gobinda and others* (4), Lort-Williams, J., after reviewing the English and the Indian decisions, expressed the view that though ordinarily only a person who is a party to the contract can sue on it, where a contract is made for the benefit of a third person, there may be an equity in the third person to sue upon the contract. Reference may also be made to *Adhar Chandra Mondal v. Dolgobinda Das* (5), *Babu Ram Budhu Mal and others* v. *Dhan Singh Bishan Singh and others* (6), *Abdul Ghafur Butt* v. *Mohammad Salim and others* (7), and *A. R. Iswaram Pillai* v. *Sennivaveru Taragan and three others* (8).

(4) A.I.R. 1934 Cal. 682.
(5) A.I.R. 1936 Cal. 663.
(6) A.I.R. 1957 Punj. 169.
(7) (1950) 52 P.L.R. 117.
(8) (1915) I.L.R. 38 Mad. 753.

This is, however, not a case in which the plaintiffs as strangers are claiming benefits of the contract. The plaintiffs' contention is that in a contract between the Government and Captain S. Kirpa Ram the contracting parties cannot impose a liability on the plaintiffs who are strangers to the contract. Their contention is that Captain S. Kirpa Ram by agreeing to clause 4 of the conditions of the contract, whereby it was open to the Divisional Officer to take possession of all tools, plant, materials and stores in or upon the works or the site not only belonging to the contractor but also procured by him and intended to be used for the execution of the work, could not impose a liability upon the plaintiffs or any other stranger and thereby put in jeopardy their property. The plaintiffs contend that on the strength of the terms of the contract the Government could not claim a right to seize the goods of the plaintiffs. In other words, in a suit by the plaintiffs the defence under clause 4 of the terms and conditions of the contract is not open to the Government. Cheshire and Fifoot in the Law of Contract, Fifth Edtion, page 378, have put the matter thus:—

> "The doctrine of privity, while in principle at least it prevents a third party beneficiary from suing on a contract, operates with equal logic to forbid the contracting parties to enforce obligations against a stranger. It has long been an axiom of the common law that a contract between A. and B. cannot impose a liability upon C."

Pollock in his book on Contracts puts it thus:—

> "A contract cannot be annexed to goods so as to follow the property in the goods either at common law or in equity". (*Vide* 13th edition at page 187).

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

At page 162 the matter was put thus: —

> "It is obvious on principle that it is not competent to contracting parties to impose liabilities on other persons without their consent."

The principle that when an obligation is founded upon a contract the assent of a person to be bound is at the root of the matter and is indispensable, as the third party is not an assenting party he cannot be called upon to bear the burden of the contract. It is thus open to the plaintiffs to say to the Government that under contract with Captain S. Kirpa Ram you could have taken the materials, stores, etc., brought by him on the site but it is not open as a defence to the plaintiffs' claim with respect to their assets as not being contracting parties they had not incurred that obligation. According to Ansen, "it is a trial principle of law that a person cannot be subjected to the burden of a contract to which he is not a party." (*Vide* Anson's Law of Contract, 21st edition, page 161). The principle is firmly established that contractual liabilities cannot be imposed upon a party who is not a privy to the contract. It is the counter-part of the principle that a third party cannot acquire rights under a contract. We have not been referred to any principle or precedent on the strength of which the Government can set up in defence to the plaintiffs' claim the conditions of contract to which Captain S. Kirpa Ram alone was a party.

The learned counsel for the Government has relied upon the principle underlying the maxim *volenti non fit injuria*. He has contended that the partnership entered into between the plaintiffs and Captain S. Kirpa Ram was with a view to exploit the undertaking covered by the contract between him and the Government. The contract had not been

signed on behalf of the Government till 18th December, 1948, and the partnership has been effected on the 30th of August, 1948. It was, however, assumed in the partnership that the contract, which had been signed by Captain S. Kirpa Ram, was a good contract and the work had been commenced in pursuance of the same. The contention before us is that the plaintiffs who were aware of the contract are deemed to have knowledge of the terms "owners" and otherwise contained therein and when they entered into the partnership they are deemed to have assented to the liabilities which Captain S. Kirpa Ram had undertaken to incur. The principle underlying the maxim is that where a damage is suffered by consent it does not give rise to a cause of action or that a man must bear loss arising out of the act to which he has assented. Assuming that the plaintiffs had knowledge of clause 4 of the terms and conditions of the contract (Exhibit D. 1) that would not mean that they consented to the imposition of the liability relating to seizure of any goods brought there by them. There is a sharp distinction between knowledge and *scienti* which does not necessarily imply consent. Bowen, L. J., in *Thomas* v. *Quartermaine* (9), said:—

> "The maxim, be it observed, is not '*scienti non fit injuria*' but '*volenti*'. It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk .....".

The defence of *volenti non fit injuria* is raised in cases of torts where a party consents to run the risk of accidental harm or in cases of master and servant and of persons coming to dangerous premises. No case has been cited at the bar and I am aware of none where

(9) (1887) 18 Q.B.D. 685 (696).

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

doctrine has been applied to a case where the facts and circumstances are analogous.

It was then urged that it was a suit on the basis of breach of contract and the plaintiffs not being privy to the contract could not claim any relief. The plaintiffs' contention is that they are not resting their claim to damages on the consequence of a breach of contract but they have an independent right to recover compensation for the wrongful actions of conversion on the part of the Government.

An act of conversion may be committed, (1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market overt although not delivered, (4) when it is wrongfully retained and (5) when it is wrongfully destroyed or changed in nature. (*Vide* Clerk and Lindsell on Torts, 11th edition, page 422). It cannot be seriously disputed that the acts complained of by the plaintiffs against the Government do not amount to acts of conversion. If the taking on the part of the Government was in breach of contract with Captain S. Kirpa Ram it is undoubtedly wrongful. If the property so taken was that of the plaintiffs the act of the Government complained of does not cease to be wrongful simply because Captain S. Kirpa Ram did not complain of a tort of conversion in respect of goods and other property brought on the site, but in which he had no proprietory interest. In my view it is open to the plaintiffs to contend that their property has been wrongfully converted to their detriment by the Government. They can further say that the act of the Government in the exercise of colourable right under contract with Captain S. Kirpa Ram was illegal even *qua* Captain S. Kirpa Ram and not sanctioned by the terms of the contract. In Exhibit P. 19, letter addressed by the Executive Engineer to Messrs R. S. Kirpa Ram and Sons, dated 16th of August, 1949, it

was said that the date of commencement of work was 19th of April, 1948, and ten months were allowed for completion of the work and by failing to comply with clause 2 of the agreement the contracting party had rendered iteslf liable to pay compensation. In this letter he also referred to taking possession on 18th August, 1949, of all tools, plant, materials and stores in or upon the above work or the site. The trial Court had rightly found that there was nothing to show that any such date for the commencement of the work had been fixed and much less communicated to the contractor before the term under the contract had started running against him. The contractor had written to the Executive Engineer to confirm the date of commencement of the work was 15th of January, 1949. (*Vide* Exhibit D. 4). The Executive Engineer wrote back in reply on 18th March, 1949, saying that the issue regarding the date of commencement of the work was still under consideration and would be confirmed shortly. (*Vide* Exhibit D. 5). He had endorsed this letter to the Superintending Engineer requesting him to decide the point at an early date. As D. W. 1 the Executive Engineer had admitted that the date of commencement had not been decided upon and had not been intimated to the contractor up to 18th March, 1949. The contractor had no material for knowing when the period of ten months stipulated under he contract started running. A so-called date of commencement of the work was arbitrarily fixed as 19th April, 1948, by the Superintending Engineer (*Vide* Exhibit D.W. 1/6), but for this there is no basis. The rescission of the contract and in pursuance thereof the seizure of the goods, etc., was in breach of the terms of the contract. In this case the seizure being of the property of the plaintiffs, Captain S. Kirpa Ram took up an attitude of unconcern as he did not stand to lose anything having no stake at all. The result thus is that the Government could not justify its various acts of

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

seizure, conversion, etc., complained of by the plaintiffs as having been done in exercise of the rights conferred by the contract. The property brought on the site, whether at the instance of Captain S. Kirpa Ram or in consequence of the volition of the plaintiffs, was not liable to being taken possession of. In this case the acts complained of are wrongs done not only to the contractor but also to the plaintiffs and the latter are not without a remedy.

It is urged that the suit is not in proper form and the tort of conversion does not form its basis. It is true that the plaint does not mention that the plaintiffs are seeking relief under the tort of conversion but that would be no ground for depriving the plaintiffs of the only remedy available to them in the circumstances established when all the facts are set out and the first defendant has not been prejudiced in any manner. The contention was raised before the trial Court, though unsuccessfully, that the basis of the suit was a tort of wrongful conversion by defendant No. 1 of the property belonging to the plaintiffs. It is possible that it might not have been clear to the mind of the person drafting the plaint that the relief was specifically sought on the ground of the tort of conversion and I would not withhold the appropriate relief where all the facts are stated in the plaint and supported by evidence and the matter has been raised before and considered by the trial Court. There is no element of surprise and on that account the first defendant has not been prejudiced in any way. On the proved facts on the record the tort of conversion has been committed against the plaintiffs and the fact that the plaintiffs are no privy to the contract would not disentitle them from recovering damages for the wrongful act of conversion. The plaintiffs are entitled to relief not only on the ground of breach of contract to which they were not parties but for the

reason that while seemingly enforcing the contract the Government wrongfully took possession of the monies and property which belonged to the plaintiffs. In this case, even if the monies and property belonged to the contractor these could not be seized under the contract as Captain S. Kirpa Ram had not violated any of its provisions. The date for commencement of the work under clause 2 could not be fixed by either party and the time under clause 2 was required to be reckoned from the date when order to commence work was given and in this case no such order had been given. The rescission of the contract was wrongful and the stores and other property had been seized illegally. The illegality committed was *vis a vis* Captain S. Kirpa and *a fortiori* against the plaintiffs who had violated no right of the Government and had incurred no liability or obligation under any legal duty which they might be said to be owing to the Government.

In view of the above findings, the next question is the relief to which the plaintiffs are entitled. According to paragraph 31 of the plaint the first prayer is for the passing of a decree for Rs. 72,266-13-0 consisting of two items of Rs. 50,686-13-0 and Rs. 21,580. The figure of Rs. 50,686-13-0 has been arrived at in the following manner. The total quantity of manufactured stores as tendered by the plaintiffs to the Central Public Works Department and accepted by the latter are of the value of Rs. 1,17,830-9-0. The details are given in Annexure 'B' the correctness of which has not been questioned. The plaintiffs were paid by the Government various sums aggregating to Rs. 43,409 leaving a balance of Rs. 74,421-9-0. After deducting a sum of Rs. 23,734-12-0 which has been withheld by the Central Public Works Department with the plaintiffs' consent for payment to the plaintiffs' staff and labour. the net amount remaining unpaid to the plaintiffs on account of stores supplied and

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

accepted thus comes to Rs. 50,686-13-0. This sum is undoubtedly due to the plaintiffs, and is allowed.

The other claim of Rs. 21,580 consists of three items, the details of which are given in paragraph 25 of the plaint. Rs. 3,780 is being claimed on account of salary of staff which had to remain idle. There is no sufficient proof led on the record and this amount cannot legitimately be claimed. P.W. 14 Ram Kishan, Secretary and Accountant of Captain S. Kirpa Ram and Sons (woodworks) did state that their staff remained idle for about four months after the Government took over possession of the factory and that a loss of Rs. 3,700 had been incurred. No registers have been produced and there is no sufficient material on this record in support of the contention of the plaintiffs. The next amount of Rs. 9,500 claimed on account of use and consequence deterioration from 18th of August, 1949 to 10th of January, 1950, on the part of the Central Public Works Department and their contractor Rai Bahadur Jodha Mal in respect of the tools, plant and machinery, etc. The claim appears to be exaggerated. It does appear that the factory was given to another contractor and charge was made at the rate of Rs. 30 per day per saw. The saw was used for a period of 4 months and 3 weeks beginning from 18th of August, 1949, till the date of the suit, that is 10th of January, 1950. On this basis the total comes to Rs. 4,200 to which the plaintiffs should be entitled. The next item is of Rs. 8,300 which is being claimed as interest on capital amounting to Rs. 3,50,000 invested and blocked up at 6 per cent from 18th of August, 1949 to 14th of January, 1950. The trial Court has found that the plaintiffs Nos. 1 to 4 had invested a sum of about Rs. 3,28,000 and plaintiffs Nos. 6 and 7 had invested another sum of about Rs. 45,000. The total investment comes to Rs. 3,73,000, but in the plaint interest is being claimed

on an investment of Rs. 3,50,000. The claim of Rs. 8,300, therefore, stands proved and the plaintiffs are entitled to it. The result, therefore, is that out of the three amounts comprising Rs. 21,580, the plaintiffs are entitled to two amounts of Rs. 4,200 and Rs. 8,300 only, making a total of Rs. 12,500. Out of a total claim of Rs. 72,266-13-0 as claimed in paragraph 31 (a) of the plaint the plaintiffs should be entitled to a decree for Rs. 63,186-13-0, but in view of the discussion which follows the sum of Rs. 4,200 has to be excluded out of this item.

Under paragraph 31(b) the plaintiffs have claimed a sum of Rs. 1,47,730-12-0. This is in respect of the stores and timber which the Central Public Works Department removed from the site of the plaintiffs' work as detailed in Annexure 'C' attached with the petition. The plaintiffs in their plaint have asked for the issuance of a mandatory injunction for the delivery of the above stores and timber and in the alternative have asked that in case defendant No. 1 was unable to return the stores, etc., then he should be ordered to pay compensation in the sum of Rs. 1,47,730-12-0.

According to the finding of the Court on issue No. 11, the value under this head has been assessed at Rs. 94,000. The trial Court has observed that it is admitted that the parties are *ad idem* about the quantities that have been taken over and the only difference is regarding rates of different items. The item of Teak wood logs No. 11 in the statement Exhibit P.W. 35 A is alone responsible for a difference of about Rs. 25,000 because according to the plaintiffs the value of Teak wood logs was Rs. 7 per cubic foot whereas the Central Public Works Department authorities have given credit to the contractor at the rate of Rs. 3-8-0 per cubic foot. According to the statement of P.W. 6, Gian Chand, P.W. 10, Sardar Singh,

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

and P.W. 11 Jawala Parshad Rs. 7 per cubic foot was the minimum prevailing rate. The trial Court has not disbelieved their testimony, but reduced the rate to Rs. 3-8-0 per cubic foot on the ground that under clause 4 of Exhibit D. 1, it is provided that the market rates certified by the Divisional Officer shall be final. The reasoning of the trial Court cannot prevail for the simple reason that there is no privity of contract between the plaintiffs and respondent No. 1 and the plaintiffs are not bound by the terms of Exhibit D. 1. I may, however, mention that in Exhibit P.W. 3/5, which is a letter by Shri O. P. Mohindra, Executive Engineer, Construction Division No. 1, to the Superintending Engineer, Central Circle, Central Public Works Department, New Delhi, dated 21st of October, 1950, it is stated that the rates have been provided according to the market value on the date of taking possession of the materials less the recovery shown for demolishing at the end of the statement. The statement referred to is Exhibit P. W. 3/5A. Under the 6th column of that statement it is indicated that the rate against each item has been arrived at by working out on the market rates. Shri O. P. Mohindra has also appeared as D.W. 1 where he stated that the price of the articles taken over by the Government was assessed by him and was forwarded to the Government of India and has referred to the estimate of the valuation Exhibit P.W. 3/5A. This evidence does not give any indication as to what the prevailing market rate was at the time and how it has been determined. I would in the circumstances accept the testimony of P.W.s 6, 10 and 11 which has not been rejected by the trial Court and hold that the prevailing market rate of Teak wood was Rs. 7 per cubic foot. I would, therefore, allow to the plaintiffs compensation in the sum of Rs. 1,47,730-12-0 as claimed by them.

In paragraph 31(c) the petitioner has prayed for the grant of permanent injunction directing defendant

No. 1 to remove the guards, the Central Public Works Department have posted at the site of the plaintiffs' work; restraining defendant No. 1, their servants, or agents from interfering with the possession of the plaintiffs and to allow them to remain in undisturbed possession of the plaint, machinery, etc., restraining defendant No. 1, their servants, or agents from removing the casing or Teak wood waste lying at the site near C.P.W.D. warehouse, Factory Road, New Delhi, or tools, etc., lying or from using the tools, machinery, and plant, etc. It is also prayed in the alternative that if the above relief by way of permanent injunction cannot be given, such other relief might be granted as the Court may deem fit to grant. The learned counsel for the plaintiffs concedes that the relief under the above head has become infructuous because the plaint was presented on 17th of January, 1950, and defendant No. 1, through other contractors, had been in possession of the site and has been working the machinery installed there for over 12 years. I do not think that, in the circumstances, relief by way of permanent injunction is suitable or will serve any purpose. This relief is refused, but the question is whether the plaintiffs, by way of substitution, can be granted relief by way of damages. It is true that they have not asked for it, but in the circumstances of this case there is no bar to the Court allowing this, particularly when the matter has been put in issue No. 12 and a finding has been given by the trial Court. According to Annexure 'A' filed with the plaint the total expenditure incurred on machinery, which includes cost of machinery, tools, parts, etc., cost of stores applied on machinery, railway freight on machinery, cartage on machinery, repairs and replacement, etc., of Bandsaw machines, and terminal tax comes to Rs. 25,916-4-6. The expenditure incurred on erection of the factory comes to Rs. 65,060-14-6. The total of the two sums being Rs. 90,977-3-0. The Court

Shiv Dayal Kapoor and others
v.
Union of India and another

Tek Chand, J.

below has found that this total is supported by the account books of the plaintiffs and by vouchers and cash memos. The figure has not been disputed and no evidence in rebuttal has been led. The trial Court has rightly taken the value of the machinery, plant, building, etc., as stated in Annexure 'A' to the plant as correct. It was laid down by a Division Bench in *Amir* v. *Malik Khan Chand* (10), that although declaratory decrees are asked for, the plaintiffs can be given decrees for possession of the land if they pay the Court fees required for possessory suits. In *Mehar Chand* v. *Milkhi Ram and others* (11), the Full Bench expressed the view that the pleadings of the parties should not be too strictly construed and that it was the duty of the Courts to mould the relief to be granted to the plaintiff according to the facts proved which, however, should not be inconsistent with his pleadings.

In *Dhani Sahu and others* v. *Bishan Prasad Singh and others* (12), Fazl Ali, J., sitting in Division Bench, expressed the view that a plaintiff ought to be given such relief as he is entitled to get on the facts established upon the evidence in the case even if the plaint does not contain a specific prayer for that relief. I, therefore, allow to the plaintiffs as damages a sum of Rs. 90,977-3-0 under this head, but the plaintiffs will not be entitled to execute the decree under this head without paying court fee on the amount of Rs. 90,977-3-0. As the plaintiffs are being allowed a decree for damages for Rs. 90,977-3-0 they cannot claim along with it the sum of Rs. 4,200 on account of use of the factory at the rate of Rs. 30 per day per saw when it was given by respondent No. 1 for use for a period of four months three weeks from 18th of

(10) A.I.R. 1923 Lahore 255.
(11) A.I.R. 1932 Lahore 401 (411).
(12) A.I.R. 1942 Patna 247.

August, 1949, the date of taking over, till the date of the suit, 10th of January, 1950. The plaintiffs cannot simultaneously have relief by way of damages and also compensation for use and occupation for a particular period. The result, therefore, is that the plaintiffs suit is decreed for Rs. 2,97,694-12-0 with proportionate costs.

D. FALSHAW, C.J.—I agree.

APPELLATE CIVIL

Before Daya Krishan Mahajan and Prem Chand Pandit, JJ.

GRAM PANCHAYAT SIDHBARI AND OTHERS,—*Appellants.*

versus

SUKH RAM DASS AND OTHERS;—*Respondents.*

Regular First Appeal No. 194 of 1957,

1963

April, 8th:

Adverse possession—Co-sharer—When can plead—Joint property and shamlat land—Rules as to adverse possession—Registration Act (XVI of 1908)—S. 49—Unregistered gift deed—Whether admissible in evidence as to ascertain nature of possession—Punjab Village Common Land Regulation Act (XVIII of 1961)—S. 2(g)—House—Meaning of—Whether confined to residential house.

Held, that the rule is well settled that possession of one co-sharer cannot be adverse to another merely because one co-sharer is in exclusive possession of the property and has enjoyed the same to the exclusion of the others without payment of rent. It is also equally well settled that one co-sharer can possess adversely against his other co-sharers provided he manifests an unequivocal intention to the knowledge of the other co-sharers to do so, that is by denying their title to the property exclusively possessed by him as co-sharer.