Brij Lal Suri vs State Of Uttar Pradesh And Ors. on 8 December, 1953

Equivalent citations: AIR1954ALL393, AIR 1954 ALLAHABAD 393

JUDGMENT

Mootham, J.

1. This is a petition under Article 226 of the Constitution. The petitioner is the karta of a joint Hindu family firm which carries on business in the name of the Northern India Lime Marketing Association, hereinafter referred to as "the Association". The first respondent is the State of Uttar Pradesh and the other respondents are State officials. The principle relief sought by the petitioner is the issue of a writ in the nature of 'mandamus' to compel the State Government to issue to the Association a mining lease to which he claims that it has a statutory right.

2. The circumstances giving rise to this petition are briefly these: In the Dehra Dun District of this State there are valuable limestone deposits, and on the 31-7-1948, the Association was granted a prospecting licence in the form prescribed by the United provinces Mining Concessions and Mineral Development Rules, 1940 (hereinafter referred to as "the 1940 Rules") and purporting to be issued in accordance with those Rules. The licence was for a period of one year in the first instance, and under it the Association was given the right subject to the royalties, covenants and agreements therein reserved & contained to enter upon the lands described in the schedule thereto, to search for and win certain specified minerals lying under such land and to carry away and dispose of the minerals so worked for the use and benefit of the Association. The minerals specified in this licence included limestone.

3. Rule 31 of the 1940 Rules provided that every prospecting licence shall contain such conditions as may in any particular case seem necessary, and shall in all cases contain certain prescribed conditions one of which is that "when the licensee has, before the termination of the period of the licence, applied for the grant of a mining lease, the Collector may further extend the period of the licence until a mining lease is granted or for such time as he may deem fit."

4. Rule 33 of these Rules further provided that on or before the determination of his licence the licensee shall have a right, in the case of minerals other than precious stones, "to a mining lease in accordance with the terms contained in the rules for mining leases."

These provisions are embodied (in the reverse order) in Clauses (1) and (2) of Part IV of the prospecting licence granted to the Association. They read as follows:

> "(1) During the subsistence of this licence the licensee shall have the right subject to compliance with the said rules to a mining lease in accordance with the said rules in respect of over so much of the said lands as the licensee may desire and the Provincial Government shall think fit to grant and to the first offer of such mining lease in respect of precious stones within the said land as the Government may think fit to grant.
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> (2) If during the term hereby granted, the licensee shall apply in accordance with the said rules for a mining lease on the said lands or any part thereof this licence shall on expiration by effluxion of time of the term hereby granted if the licensee shall by notice in writing to the Collector so require be extended for a further term to end either on the date on which such lease should be granted or on such other date as the Collector shall in his discretion prescribe."

On 20-9-1948, the Association applied for a mining lease for thirty years. It is not in dispute that the formalities attending the making of this application were observed by the Association. On 14-6-1949, the mining lease not having been granted and the term of the prospecting licence being about to expire, the Association applied in writing to the Collector, Dehradun, under Clause (2) of Part IV of the licence that the period of the prospecting licence be extended to the date of the execution of the mining lease. The term of the Association's prospecting licence was not however extended and no mining lease has been granted, notwithstanding repeated requests therefor made by the Association.

5. It is in these circumstances that the Association has now come to this Court; it claims that it has a statutory right to a mining lease and that the State Government's refusal to grant a mining lease is a violation of its fundamental right to property.

6. The petition in this case is a long one and sets out in considerable detail the course of events during the past four years, not all of which is relevant for the determination of the questions which we have to decide. No fewer than sixteen affidavits in addition to that accompanying the petition are to be found on the record, and with regard to certain of these it is desirable to make some reference. In the case of four of them, namely the counter-affidavits filed by B.B. Lal and Uyan Prakash on 25-5-1951, by Indardatt Saklani on the 1-6-1951, and by Dharamvir Singh on 14-6-1951, it was discovered at the hearing, and is conceded by the Advocate-General who appears for the respondents, that they have been neither duly sworn nor affirmed.

The statements contained in such affidavits cannot therefore, it is common ground, be taken into consideration, These counter-affidavits having been rejected learned counsel for the petitioner contends, and in my opinion rightly, that the five affidavits filed by way of rejoinder--four by Brijlal Suri on 17-3-1952, and one by Madan Gopal Suri on 29-4-1952, should also be excluded from consideration. A supplementary rejoinder by Brijlal Suri filed on 7-7-1952, was lodged in the office and leave to file it appears neither to have been sought for nor obtained from the Court. This affidavit must, in my opinion, be disregarded. The six remaining affidavits were filed with the leave of the Court.

Before passing to other matters I am constrained to observe that several of the affidavits filed in this case, and particularly those filed by the fourth respondent and by Sri H.K. Mathur, are in a form which is most unsatisfactory. This Court has repeatedly pointed out that affidavits in all matters other than such as are purely interlocutory must be restricted to matters of fact which are within the personal knowledge of the deponent. They must not contain statements based on information received or be made vehicles for the expression of opinion. These are elementary matters, but they have been wholly disregarded by whoever was responsible for drafting the affidavits sworn on behalf of the respondents.

7. A number of questions have been argued be fore us, but there are in my opinion four basic questions which require to be determined, namely (a) Had the Association at any time a right under the 1940 Rules to the grant of a mining lease in respect of limestone? (b) Did that right subsist at the date upon which this petition was filed? (c) Is that right a statutory right, and (d) Are the circumstances of this case such as would justify the Court, in the exercise of its discretion, in issuing a writ in the nature of 'mandamus?' It is illogical but convenient, for reasons which will appear later, to consider "the last three questions before the first. This I now propose to do, the consideration of each of these questions being based on the assumption that the answer to the first question is in the affirmative, namely that the Association had under the 1940 Rules the right to the grant of a mining lease in respect of limestone.

8. It is not in dispute, if the 1940 Rules applied to limestone, that the Association had a right, on or before the determination of its licence, to a mining lease. The question is whether that right subsisted on the date on which this petition was filed. The State says in the first place, that whatever right the Association had to the grant of a mining lease under its prospecting licence was voluntarily surrendered at a meeting attended by representatives of the Association and of the Government held on 17-11-1948, or in other words that the original agreement was superseded by a subsequent agreement made on that date. A meeting was held on 17-11-1948, but it is not altogether easy to ascertain the circumstances in which it took place.

It appears however that the Association was complaining to the Government that other persons were quarrying or seeking to quarry limestone in the area covered by its prospecting licence and that Government officials were putting obstacles in the way of the Association exercising the right which is claimed under its licence, with the result that the Association was unlikely to be able to fulfil certain contracts it had entered into with sugar factories in the United Provinces for the supply of limestone; while the Government on its part took the view that the Association had no authority under its prospecting licence to quarry limestone (as undoubtedly it was doing) on a commercial basis, and was consequently unwilling to assist if it did not actively obstruct the activities of the Association.

The meeting was held in Lucknow and was attended by Sri A.D. Pandit, I. C. S., District Magistrate, Dehra Dun, and Sri H.K. Mathur of the Industrial Department, U. P. Government, as representatives of Government, and by Sri Brij Lal Suri and his son Sri Manohar Lal Suri representing the Association. Alter the discussion a memorandum of the proceedings was prepared by Sri A.D. Pandit and signed by the four persons present. This memorandum is important and is in

the following terms:

> "The question of supplying limestone to sugar factories in 1948-49 crushing season with reference to the prospecting licence dated 31-7-48 granted to the Northern India Lime Marketing Association by the Collector was discussed. It was found that certain factories had made arrangements for obtaining limestone from other parties, who claimed to have been working with the permission of the landlords in part of the area covered by the prospecting licence. It was felt that it would be difficult to upset these arrangements in the current working season, but at the same time the Northern India Lime Marketing Association said that if any other party were allowed to work in their area it would not be possible for them to meet their commitments of 20,000 tons.
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> The representatives of the Northern India Lime Marketing Association said that in order to get over these difficulties should the Government desire to abrogate the prospecting licence and grant instead a temporary mining lease for the remaining period of the sugar factory season so as to enable them to honour their commitments of 20,000 tons of limestone for quarrying which permission has already been granted by Government they would have no objection to this procedure. Their request for long term mining licence should be examined on merits with other candidates in the light of any new rules that should be framed by Government at a later date.
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> They however agreed to supply to (1) J.S. Oberoi 25 wagons of limestone plus a quantity equivalent to order already filed by them with Government. (2) To Harkishan Lal 100 wagons from Timli quarry for Doiwalla, the rate of supply to be settled by the Collector.
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> These arrangements will be subject to confirmation by Government.
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> A.D. Pandit, 17-11-48 Brij Lal Suri, 17-11-48 Agreed in the interests of Sugar Industry to part with our rights.
>
> M.L. Suri H.K. Mathur, 17-11-48".

9. I find it a matter of some difficulty to determine exactly what was the arrangement which was arrived at. I construe this memorandum to mean that the Association was willing (a) to relinquish its rights under its prospecting licence and (b) to supply not less than 125 wagons of limestone to two named persons at such rates as would be settled by the Collector, provided that the Government (a) granted to the Association a "temporary mining lease" for the remaining period of the sugar factory season, and (b) would, when new mining concession rules were framed by the Government, examine the Association's application for a mining lease "on merits with other candidates".

It is, I think, unfortunate that the provisions of the agreement which was reached on this occasion were not stated in clearer terms; the phrases "temporary mining lease" and "on merits with other candidates", both presenting some difficulty. The former is claimed by the Association to mean what

it says, a mining lease but of short duration; by the State it is said to mean a permit. The latter phrase, the Association says, means merely that priority as between the Association and other applicants, if any, will be determined according to the new rules, while the State says it means that the Government would be at liberty to refuse the Association's application if it considered another applicant more deserving.

10. The validity of the agreement has been challenged by the Association on a number of grounds. It is claimed that it is invalid because (a) the concurrence of the representatives of the Association was obtained by some process of coercion, (b) the agreement should have, but has not, been registered, (c) it has not been implemented by the Government, and (d) the undertaking given by the Association was without consideration. It has also been challenged on the ground that it is not in the form required by Section 175, Government of India Act, 1935, and is therefore null and void.

11. There is, in my opinion, no evidence to Justify the conclusion that the Association's representatives were coerced into entering into this agreement. Brij Lal Suri says he signed because Sri A.D. Pandit said that unless he did so the Government would withdraw its protection from him as a prospector. The Government was undoubtedly anxious to reach some agreement with the Association and it is by no means improbable that Brij Lal Suri was told that unless he fell into line with the Government's wishes things would be made difficult for the Association; but Brij Lal Suri appears to be a shrewd businessman who was prepared to fight for his rights, and I am unable to believe that his will was overpowered by the two officers of Government. He may on second thoughts have concluded that he had made a bad bargain, but that is quite another matter.

12. The argument that the agreement required registration is based on the assumption that it operated to extinguish a title or interest in immoveable properly. A licence coupled with a grant of the minerals when quarried is a 'profit a prendre' which does not pass an estate or interest in the land itself: -- 'Doe d. Hanley v. Wood', (1819) 2 B. & Ald. 724 at p. 738 (A), but it may nevertheless, in view of the wide definition of immoveable property" in Section 2(6), Registration Act require registration. The matter has not been fully argued before us, and as I am of opinion that the agreement is invalid on other grounds I prefer to reserve my opinion on this point.

13. The two other submissions are more substantial, and may be conveniently considered together. It is common ground that no mining lease, temporary or otherwise, has been granted to the Association, but the Government relies on the fact that it issued on 22-11-1948, a temporary permit valid up to 31-3-1949, authorising the Association to extract twenty thousand tons of limestone, and says that it was this permit which was meant by the phrase "temporary mining lease" in the agreement. (This permit, it may be observed in parenthesis, is called a 'temporary permit' and was intended, it appears from Clause 4, to be replaced by a formal mining lease).

To this the Association replies that the grant of a permit to extract limestone could not constitute any consideration in law as it conferred no right on the Association which it did not already possess under its prospecting licence. I do not think that any real attempt has been made by the State to meet this argument. Clause (1) of Part I of the prospecting licence I have already quoted; it gives the Association the sole right and licence to "mine, quarry, bore, dig and search for, win and work all or

any" of the minerals specified in the first schedule to the licence; and Clause (2) of the same Part specifically empowers the Association "to carry away and dispose of the produce thereof to and for the use and benefit of the licensees." This provision is in accordance with Rule 14 of the 1940 Rules which provides that "14. A licence to prospect for minerals, called hereinafter a prospecting licence shall confer on the licensee the sole right subject to the conditions contained in the licence, to mine, quarry, bore, dig and search for, win, work and carry away only specified minerals or, in the event of no minerals being specified, all minerals lying, or being within, under or throughout the land specified in the licence."

14. In my opinion the Association had under its prospecting licence the right to carry away and use for its own benefit, subject to the payment of the prescribed royalty, all minerals which it was authorised to quarry, and that in consequence permission to quarry a specified number of tons of limestone conferred no benefit upon the Association which it did not then possess.

15. It was suggested that under the Permit the Association obtained the benefit of having the exclusive right to extract limestone from the area described in its prospecting licence, but this argument appears to overlook the fact that the Association acquired under its licence the "sole right and licence" to extract limestone within this area.

16. I entertain some doubt whether the document signed by the representatives of the Government and of the Association on the 17th November is anything more than a record of an oral agreement previously arrived at between the parties; but if it be the actual contract then it does not appear to me to comply with the mandatory provisions of Sub-section (3) or Section 175, Government of India Act, 1935. So far as is material that sub-section provides that "all contracts made in the exercise of the executive authority .... of a Province shall be expressed to be made by .... the Governor of the Province .... and all such contracts and ail assurances of property made in the exercise of that authority shall be executed on behalf of the .... Governor by such persons and in such manner as he may direct or authorise."

It appears to me to be clear that a contract does not comply with the provisions of this sub-section unless it is executed not only on behalf of the Governor but also in his name. A similar view was taken by the Bombay High Court in -- 'Secretary of State for India v. Yadavgir', AIR 1936 Bom 19 (B). The decision of this Court in -- 'Deviprasad Srikrishna Prasad Ltd. v. Secy. of State', AIR 1941 All 377 (C) is in my opinion distinguishable as it turned on Section 30(2), Government of India Act, 1915, which did not contain the provision found in the later Act that contracts intended to bind the Governor of a Province must be expressed to be made in his name. The document of 17-11-1948, does not purport to be a contract and is neither expressed to be made by the Governor nor executed on his behalf.

17. In the second place it was argued on behalf of the state that the Association's" right to a mining lease lapsed on the expiration of the term of its prospecting licence on 30-7-1949, reliance being placed on Rule 33 and Clause (1) of Part IV of the Licence, which are in substantially the same terms. Rule 33, so far as it is relevant, provides that:

"On or before the determination of his licence, the licensee shall have a right..... .to a mining lease in accordance with the terms contained in the rules for mining leases....", while the proviso to Clause (1) of Rule 31 provides that when the licensee has, before the termination of the period of the licence, applied for the grant of a mining lease, the Collector may further extend the period of the licence until a mining lease is granted or for such time as he may deem fit. It is contended that because the Government has not extended the period of the licence the Association's right to a mining lease, for which application was admittedly duly made during the term of the licence, has determined. In my opinion this submission is not well founded. Rules 33 and 31 (i) deal with separate matters; the former with the licensee's right to the grant of a mining lease, the latter with the Collector's power to extend the period of the licence.

In my view the licensee's right to a mining lease becomes complete and unassailable in law as soon as he, within the period of his licence, applies for it in the prescribed manner. That right is not dependent on the issue of the mining lease during the period of the licence, nor can it be taken away by failure on the part of the authorities to issue the mining lease before the licence has expired. Normally the issue of a mining lease takes some time, and in the ordinary course a licensee who has applied for such a lease will seek to have the period of his licence extended in order that he may continue operations in such interval as may elapse between the end of the term of the licence and the commencement of that of the lease. He need not however do so, and his decision can in no way affect the right to a mining lease which he has already acquired.

18. is the Association's right to the grant of a mining lease a statutory right?

19. It is argued by the Advocate General that it is not so on several grounds, in the first place, it is contended that whatever rights the Association may nave are contractual and not statutory in character and are insufficient therefore to support a prayer for 'mandamus'. The argument of the Advocate General was that the 1940 Rules had no statutory basis, and he pointed to the fact that the only regulation prior to 1948 with regard to mining operations was Regulation II of 1800 regulating the working of stone quarries at Chunar, Ghazipur and Mirzapur and the Indian Mines Act, 1923, which was concerned only with the regulation of labour.

20. Rules regulating the grant of prospecting licences and mining leases have been in exigence in India for nearly sixty years. Such rules appear to have been first promulgated by the Governor General in Council in 1894 (the Rules will be found in the Supplement to the Gazette of India dated 22-12-1894, p. 1887). These Rules were revised in 1899 (Supplement to the Gazette of India dated 27-5-1899, p. 996) and were superseded by a new set of Rules in 1913 (Supplement to the Gazette of India, dated 20-9-1913, p. 1687). The 1913 Rules were amended from time to time and republished by the Government of India in 1933.

All these Rules were made by the Governor General in Council and sanctioned by the Secretary of State in Council. I can entertain no doubt that they were made under statutory authority. Section 1, Government of India Act, 1859 (22 and 23 Vict. C. 41) empowered the Governor General of India in Council and a number of other administrative officials in India, "subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting, shall from time to time prescribe", 'inter alia', to sell and dispose of all real and personal property in India for the time being vested in Her Majesty under the Government of India Act, 1858, (21 and 22, Vict. C. 108) and to make assurance for that purpose.

21. sub-SECTIONS (1) and (2) of Section 30, Government of India Act, 1915, read as follows:

> "30. (1) The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribe, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchases or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.
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> (2) Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being."

Similar provisions, in almost identical terms, are found in Section 30, government of India Act, 1919.

22. Section 45A of the latter Act provides for the making of rules for the classification of Central and Provincial subjects and for the devolution of authority in respect of the latter to local governments. Under the authority of this section read with Section 129A (which makes further provisions for the regulation of certain matters by rule) the Devolution Rules of 1920 were made. These Rules came into force in the United Provinces on 3-1-1921, and included among the Central Subjects enumerated in Part I of Schedule I to these Rules is item 25:

> "Control of mineral development, in so far as such control is reserved to the Governor-General in Council under rules made by or sanctioned by the Secretary of State, and regulation of mines,"

23. In my opinion the statutory basis for the rules regulating the grant of prospecting licences and mining leases made by the Governor-General in 1894 and 1913 is to be found in Section 1 of the Act of 1859, and they embody the provisions and restrictions on the Governor-General's power to

dispose of property prescribed by the Secretary of State in Council. The rules so made did not cease to have effect on the coming into force of the Government of India Acts of 1915 and 1919; and the power of the Governor-General in Council to promulgate new rules sectioned by the Secretary of State in Council is to be found in Section 30 of both Acts. The statutory nature of these rules is in my opinion recognised in Item 25 of the Devolution Rules to which I have already referred, where reference is made to existing rules "made or sanctioned by" the Secretary of State.

24. The 1913 Rules as amended from time to time formed part of the existing Indian law upon the coming into force of the Government of India Act, 1935, and therefore continued in force until altered or repealed or amended by a competent Legislature or other competent authority (Section 292) or by order in Council (Section 293). Our attention has not been drawn to any enactment by a Legislature or other authority altering, repealing or amending the 1913 Rules as they stood in 1938, nor of any modification made to them other than such as has been effected by the general provisions of the Government of India (Adaptation of Indian Laws) order, 1937. No reference is to be found in the Schedule to this Order to these Rules.

I can in consequence find no authority for the variations from the 1913 Rules as amended and republished in 1936 found in the 1940 Rules which, are not based on the Adaptation of Indian Laws Order of 1937. To the extent therefore (save as I have indicated) that the 1940 Rules do not deviate from the 1936 Rules I am of the view that they have statutory authority. So far, however, as the present petition is concerned the material portions in both Rules are substantially the same. It should be added that the 1940 Rules were themselves superseded on 18-10-1949, by the Mineral Concession Rules, 1949, made under Section 5, Mines and Minerals (Regulation and Development) Act, 1948.

25. The second objection was that the Collector, Dehra Dun, had no authority to execute the prospecting licence in favour of the Association on behalf of the Government, The short answer to this objection is, I think, to be found in the Government of the United Provinces, Judicial (Civil) Department Notification No. 765 /vii-127-1935, dated 27-4-1938, made in exercise of the powers conferred by Sub-section (3) of Section 175, Government of India Act, 1935, which declared "that the under-mentioned contracts and assurances of property may be executed as follows :

> "3 (a) Contracts and other instruments connected with .... spontaneous products and minerals By Collectors and Deputy Commisssioners..."

26. The third objection, suggested perhaps rather than argued, was that the grant of a mining lease to the Association would in effect be creating a monopoly, because, it is said, the entire limestone deposits which are of any value are within the area covered by the Association's prospecting licence. Apart from other considerations we cannot in my opinion entertain this suggestion in the absence of evidence as to the actual extent of the deposits and of such evidence there is none.

27. The fourth objection is that the provisions of the Constitution have no retrospective operation and that as the transactions of which complaint is now made occurred before the Constitution came into force the remedy of 'mandamus' is not open to the Association. I assume for the moment,

although it is a matter which will require consideration later, that the Association had no adequate remedy by way of suit or by proceedings in arbitration. In such circumstances the Association would have been in the position, up to 26-1-1950, of having a legal right without the means of enforcing it. Under Article 226 of the Constitution power for the first time was given to this Court to grant writs, 'inter alia' in the nature of 'mandamus', and I am unable to see why, if in its discretion it thinks proper to do so, this Court has not the power to secure the enforcement of the Association's right.

A number of cases have been cited to us. On behalf of the State, we have been referred to --'Keshavan Madhava Menon v. State of Bombay', AIR 1951 SC 128 (D) -- 'D.K. Nabhirajiah v. State of Mysore', AIR 1952 SC 339 (E). 'Rajaram Dadu v. State', AIR 1951 Nag 443 (FB) (F) and --'Rishindra Nath v. Sakti Bhusan', AIR 1950 Cal 512 (G), in support of the proposition that the provisions of the Constitution have no retrospective effect. That proposition cannot now be challenged, but the question is whether there exists any bar to the Court exercising its power to enforce a present right which arose prior to 1950. The case of -- 'Rashid Ahmad v. Municipal Board, Kairana', AIR 1950 SC 163 (H), comes closer to the point at issue, for there the petitioner had suffered a wrong for which there was no remedy until the Constitution was at a later date adopted; the Supreme Court had no hesitation in giving the petitioner relief. So also in -- 'Elbridge Watson v. R.K. Das', AIR 1951 Cal 430 (I) and --'Calcutta Pinjrapole Society v. S. Banerjee', AIR 1952 Cal 891 (J).

In the case of -- 'Motilal v. Govt. of the State of Uttar Pradesh', AIR 1951 All 257 (FB) (K) a Full Bench of this Court ordered 'mandamus' to issue to compel the Regional Transport Authority to hear and determine certain applications made to it in April, 1949, for the issue of permits to operate stage carriages. In my opinion the petitioner has a right which, in the absence of a specific legal remedy, is capable of being enforced by 'mandamus'.

28. The third question is whether the circumstances of this case are such that the Court should in the exercise of its discretion direct the issue of the writ. 'Mandamus' is a supplementary remedy, of which use is made where a person has a legal right and no other appropriate redress to prevent a failure of justice. 'Mandamus' will not, therefore, ordinarily issue where the petitioner has an adequate legal remedy. The matter lies however within the discretion of the Court, and unless the Court can see clearly, that there is another remedy equally convenient, beneficial, and effectual, the writ will be granted provided the circumstances are such in other respects as to warrant the granting of the writ: 'In re Barlow', (1861) 30 LJ QB 271 (L).

29. Now the argument for the respondents is that the petitioner had aft adequate legal remedy, on the contract under which ail disputes relating, 'inter alia', to the rights of the licensee were to be referred to arbitration under Part V of the Licence. That provision is in the following terms:

> "V. If and whenever any dispute or question shall arise regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensees hereunder or as to the amount or payment of any royalty or other money payable by virtue hereof or otherwise however, in relation to these presents such dispute or question shall be referred to the Governor whose decision thereon shall be

> binding on the parties hereto. 'Provided always that any dispute as to the price to be paid under Clause 17(c) in head or Part II of these presents shall be determined by two arbitrators one to be nominated by the Governor and the other by the licensees or in case of disagreement between the arbitrators by an umpire to be appointed by the arbitrators by writing under their hands before proceeding with the arbitration and the decision of such arbitrators or umpire as the case may be shall be final and binding, on the parties hereto".

On 26-11-1949, the Association filed an application (No. 202 of 1949 in the Court of the Civil Judge, Dehra Dun) under Section 20, Arbitration Act, 1940. In this application the Association enumerated the disputes which, it is contended, should be referred to arbitration under Part V of the prospecting licence. The particulars of the disputes set out in para. 8 of the application were the following:

> "(i) Whether the applicant is entitled to hold, exercise and enjoy the land and all the rights and powers under the licence as he has been doing so far till the grant of the mining lease without any hindrance or interference by the opposite party;
>
> (ii) Whether the opposite party can directly or indirectly alienate any rights or interests in the property to a third party in violation of the contract or impose any conditions, limitations and restrictions over the rights, possessory or otherwise, of the applicant under the licence as the opposite party threatens to do;
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> (iii) Whether the applicant is entitled to a fair and reasonable price of the minerals, including gypsum, which latter has been attached and taken away by the Collector, Dehra Dun;
>
> (iv) Whether the opposite party has any right to charge royalty in excess of that agreed to according to the terms of the licence;
>
> (v) Whether the opposite party can withhold the grant of a mining lease to the applicant indefinitely as is being done by them;
>
> (vi) Whether the orders passed by the opposite party in contravention of the terms of the agreement are 'ultra vires' and not binding upon the applicant."

The hearing of this application, notice of which, was issued to the respondent, was stayed in circumstances to which I shall refer later. On 19-12-1949, a written objection was filed on the respondents' behalf against an order which had been made by the Court granting the Association an interim injunction. This objection is of importance as indicating the attitude of the State towards the proposed arbitration proceedings. The State's contentions, as set out in these objections Included the following :

> (a) that the Association's prospecting licence in so far as minor minerals, including limestone, were concerned was not governed by the 1940 Rules

(b) that the Collector, Dehra Dun, was not competent to issue the prospecting licence the terms of which were not in consequence binding on the State Government;

(c) the prospecting licence was never acted upon and was superseded by permits dated 22nd November and 24-11-1949;

(d) that the prospecting licence was bad for want of registration;

(e) that the period of the prospecting licence not having been extended no agreement subsisted at the time the application was filed.

The State Government, in short, contended that no question of the enforcement of the arbitration clause arose. At some other date which is not known to us, the State Government raised the following additional objection in the suit: "That the aforesaid agreement dated 31-7-1948 between the petitioner and the Governor of U. P. was superseded by a subsequent agreement dated 17-11-1948 under which the petitioner accepted a limited permit in lieu of the agreement dated 31-7-1948, and that as a result of the alleged new agreement dated 17-11-1948, the prospecting licence ceased to have any binding effect on the opposite party."

Thereafter on 19-9-1951, the petitioner filed an application in this Court under Article 228 of the Constitution which contained two prayers: the first that proceedings in the arbitration suit be stayed pending the disposal of the writ petition, the second that the suit be withdrawn to this Court on the ground that the objections to which I have last referred raised a substantial question of law as to the interpretation of the Constitution.

30. Upon the filing of this application, this Court directed notice to issue and at the same time made an interim order staying further proceedings in the District Court. So matters have remained: it appears that the interim order has not been confirmed nor has the State Government raised any objection to the order of stay. It must therefore, I think, be assumed that the Government is, in effect, a consenting party to the stay of the arbitration suit. In these circumstances it is in my view somewhat difficult for the respondents to contend successfully that the petitioner should now be relegated to his arbitration suit. There are however other factors which I consider this Court is entitled to take into consideration in determining whether it should exercise its discretion in issuing a writ. The dispute between the Association and the Government began in the year 1948. We are now nearing the end of 1953, and it is apparent that there has been constant friction between these parties in the intervening years.

If we relegate the petitioner to his suit the questions which have been argued before us at length will have to be reargued before another court and it is unfortunately not improbable that several years may elapse before a final decision is reached. An early disposal of the matters at issue between the Association and Government is in the interest of both. Taking all the circumstances into consideration I find it difficult to hold that the arbitration suit constitutes, in November 1953, a remedy equally convenient, beneficial and effectual, and I would not reject the petition on the ground that it does.

31. I now turn to the first question, namely whether the Association had at any time a right under the 1940 Rules to the grant of a mining lease in respect of limestone. Rule 6 of the 1940 Rules provides that "Nothing in these Rules shall apply to minor minerals, such as slate, building stone, limestone and clay, the extraction of which may be regulated by such separate orders as the provincial Government may pass in the matter, having regard to the merits of each individual case."

and it is the contention of the Association that the Provincial Government had by order applied the 1940 Rules to the extraction of limestone. This is denied by the State on whose behalf it is said that neither were the 1940 Rules applied to limestone generally nor was any separate order made in the case of the Association. A subsidiary submission made on behalf of the Association is that it is only limestone used for lime burning which is a minor mineral under these Rules, and that limestone used for other purposes is by implication a major mineral. This contention is based on the fact that in Rule 6 the words 'limestone' and 'clay' are not separated by a comma but joined by the word 'and' from which it is argued that the minor mineral referred to is a combination of limestone and clay and not pure limestone. It is however a well known rule of grammar that where reference is made to a series of items repetition of the word 'and' or 'or' as the case may be, is avoided by the use of a comma except in the case of the last pair of words when the appropriate conjunction is inserted. The submission in my opinion is without foundation.

32. The main contention involves a question of fact. The Association, there can be no doubt, was primarily interested in the commercial possibilities of exploiting the limestone resources of the Dehra Dun district, and when it applied for a prospecting licence the mineral in which it was most interested, although others were also mentioned, was limestone. The licence which was granted to it on 31-7-1948, was in the Standard Form prescribed by the 1940 Rules. It was purported to be made between the Governor of the United Provinces of the one part and the Association of the other part, and after reciting that the Association had applied 'for a licence to prospect for sulphates, carbonates, phosphates and sulphides such as gypsum, alabaster, limestone, calcite marble, dolomite, maghecites, apatite, rock sulphates, phyrites' granted and demised to the Association the sole right and licence 'to enter upon the lands described in the said schedule and to mine, quarry, bore, dig, search for win and work all or any of the above mentioned minerals lying or being within, under or throughout the said lands.' Eighteen days later, on 18-8-1948, the Collector wrote to the Association a letter (Appendix J 1 to Brij Lal Suri's first affidavit) stating that as under the 1940 Rules a licence cannot be granted for minor minerals, the entry relating to limestone in the Association's licence is deleted and that the Association should present the licence at his office for correction. The Association protested, and drew the Collector's attention to two earlier communications from the Deputy Secretary to the United Provinces Government to the Superintendent, Dehra Dun: G. O. No. 1298 WP/ XVIII-W32/1942 dated 12-4-1943, and D. O. No. 2419 (L) XVIII dated 27-7-1943. Copies of these letters have by consent been made part of the record. In the first of these letters occurs the following sentence :

> 'Notwithstanding any previous orders, any application for the grant of a lease in respect of these deposits' -- that is, limestone -- 'should be referred to Government for sanction', and in the second is to be found the following:

'You will observe from Rule 6 of the U. P. Mining Concession and Mineral Development Rules that those rules do not apply to Limestone, but in view of the importance of these deposits near Mussoorie Government consider that it will be desirable to apply to them the same rules as for major minerals.' On 23-8-1948, the Collector wrote to the Association a further letter (Appendix LI) in which he said "It is therefore within the powers of Government to give you a prospecting licence for minor minerals such as Limestone under Rule 6 of the U. P. Mining Concessions and Mineral Development Rules 1940. The entry regarding limestone in your Licence is therefore in order."

A little later the Collector appears to have again had doubts about the matter and on 6th September following he informed the Association that he had referred the whole question to Government and that in the meantime the quarrying of limestone was to be stopped. No further letter appears to have been sent to the Association prior to the meeting of representatives of Government and the Association held on 17-11-1948, to which I have already referred, but on 1640-1948, Sri L.M. Bhatia, the Under Secretary, Industries Department, United Provinces Government wrote a letter, No. G. O. 3805 (5)--XVIII-245 (Appendix O. 1) to the Collector, Dehra Dun, which contained the following sentences:

"No party can be allowed to use it" -- that is, a prospecting licence -- "for purposes other than those contemplated under the rules. It is true that the 1940 Rules, as they stand, are not clear cut on this point and leave much room for doubt. Government have, therefore, taken up a detailed examination of the rules, which are now equally applicable to Limestone, with a view to fill up these gaps and suitable instructions in the matter will issue in due course".

On 30-12-1948, the Collector informed the Association in writing (Appendix T. 1) that its licence "is hereby cancelled".

33. The Association's case is that the statement in the letter of 16-10-1948, that the 1940 Rules "are now equally applicable to Limestone" taken in conjunction with the subsequent conduct of the representatives of Government at the meeting held on the 17th November, which it is said proceeded on the assumption that the Association's licence covered limestone, and in the absence of any evidence to the contrary, is sufficient to enable this Court to infer that an order had in fact been made by the Government applying the 1940 Rules to limestone.

34. It was also said in the course of argument on behalf of the Association that the latter had no reason to foresee that the State would raise the point that the 1940 Rules did not apply to limestone, and that it was unable to obtain inspection of certain files in the custody of the District Magistrate, Dehra Dun. These are matters of dispute, and in the view I take it is not necessary for me to express an opinion on them.

35. The contention of the State is that the Association has failed to discharge the burden of proving the existence of any such order, its attitude is a purely negative one : a denial that the statement in Sri L.M. Bhatia's letter of the 16th October is correct, or that it means what its words imply. It has produced no evidence to show that the statement in that letter is wrong or is based on some misunderstanding; but it must be noted that there is on the record a letter from this same officer, Sri L.M. Bhatia (to which our attention was not drawn by the respondents during the argument) dated 27-5-1949, (Annexure W. 1) which it is very difficult, if not impossible, to reconcile with the statement in his earlier letter that the 1940 Rules are applicable to limestone.

In my opinion this Court has not got before it material sufficient for it to determine satisfactorily whether any general order was made by the Provincial Government applying the 1940 Rules to limestone or whether any separate order to that effect, was passed in the case of the licence issued to the Association. I hold that the right in respect of which the writ is applied for in this petition is not free from doubt, and I am of opinion that we should direct the issue of a writ of 'mandamus' in the alternative in order that the existence of the right may be determined on the return to the writ.

36. No rules have yet been framed by this Court prescribing the procedure to be followed on the issue of a writ of 'mandamus;' and it has so far, I think, been the practice of the Court to issue a peremptory writ requiring unconditional compliance by the person to whom it is directed. Prior to 1938, when by Section 7, Administration of Justice (Miscellaneous Provisions) Act of that year the prerogative writs were abolished, the writ of 'mandamus', except where the writ was peremptory, commanded the person to whom it was directed to perform a stated duty or to show cause to the contrary within the time commanded for the return of the writ. It is upon the return that a disputed question of fact can be fully investigated, the proceedings taking the form of an action. Witnesses can if necessary be examined and advantage taken of the provisions of Civil P. C. for discovery and inspection.

37. In -- 'The Queen v. Churchwardens of All Saints, Wigan', (1876) 1 AC 611 at p. 620 (M) Lord Chelmsford said-

> "So in cases where the right, in respect of which a rule for a mandamus has been granted, upon showing cause appears to be doubtful, the Court frequently grants a mandamus in order that the right may be tried upon the return; this is also a matter of discretion."

38. In -- 'The King v. Registrar of Companies', (1912) 3 K B 23 (N) a rule had been issued calling upon the Registrar of Companies to show cause why a writ of 'mandamus' should not issue directed to him commanding him to retain and register the memorandum and articles of association of a certain company. The Registrar had declined to do so on the ground that the name of the company so nearly resembled that of another company as to be calculated, to deceive. In discharging the rule Lord Alverstone, C. J., said that the Court could not make the rule for a 'mandamus' absolute unless it came to the conclusion either that the name was not calculated to deceive, or "that there was so much doubt in the matter or such dispute of fact that we thought it desirable to allow the writ to issue that a return might be made in order to have further investigation upon further materials."

There is in my judgment in the present case such a dispute of fact that 'further investigation upon further materials' is eminently desirable.

39. I would therefore direct the issue of a writ in the nature of 'mandamus' to the first respondent commanding it to execute in favour of the Association a mining lease, in respect of the minerals specified in the prospecting licence dated 31-7-1948, for a term of 30 years over an area to be determined in accordance with the provisions of Rule 35 of the Mineral Concession Rules, 1949, within one month or to show cause to the contrary.

40. The petition also contained other prayers, the second of which was for a writ in the nature of 'certiorari' to quash an order made on 15-2-1951, by the second respondent suspending the petitioner's licence for explosives. That licence has now expired and the petition so far as that relief is concerned has become infructuous. If, on an application being made to him for a fresh licence the second respondent declines to grant it for reasons which would entitle the petitioner to move this Court for relief the present petition is no bar to his doing so, The Advocate General has given the Court an undertaking that the first respondent will, without further delay, consider and dispose of two applications made by the petitioner for mining leases in respect of other areas dated respectively 27-10-1949, and 28-10-1949. This was the subject of the seventh prayer. The remaining reliefs sought by the petitioner were not pressed before us.

41. The question of costs will be considered on the return to the writ. Further proceedings are not tied to this Bench.

P.N. Sapru, J.

42. This is a petition under Article 226 of the Constitution. The main reliefs sought by the petitioner are :

> "(a) a writ of certiorari or such other order or direction commanding respondent No. 1 to execute in favour of the petitioner the long term mining lease applied for by him on 20-9-1948 in accordance with the Mines and Minerals (Regulation and Development) Act, 1948, (Act 53 of 1948) reads with Mineral Concession Rules, 1949.
>
> (b) an order or direction to respondents Nos. 1 to 5 not to interfere with the petitioner's right of possession & enjoyment of the mineral property and not permit or alienate any right or interest to any other person in the aforesaid property and
>
> (c) a writ of mandamus or any other direction or order commanding respondent No. 1 to dispose of the petitioner's applications dated the 27th and 28th October 1949 respectively and to pass orders thereon in accordance with the Mineral Concession Rules, 1949."

43. Included in the petition are prayers for certain other reliefs which it is unnecessary to specify here.

44. The facts which have given rise to this petition may be stated as follows:

45. Of the joint family firm known as Messrs. Northern India Lime Marketing Association the petitioner is the 'karta'. The four other members of this firm are his sons, namely, Manohar Lal, Madan Gopal, Nand Gopal and Surendra Mohan. The petition has been filed by the petitioner on behalf of the firm as a whole. The petitioner firm was granted a prospecting licence (No. 5 of 1948) which is marked as Appendix 'A', p. 89, on 31-7-1948 for a period of one year in the first instance covering an area of ten villages in the district of Dehra Dun. This district has rich limestone deposits. This licence permitted the petitioner firm to prospect for sulphates, carbonates and sulphides such as gypsum, albaster 'limestone', calcite marble, dolomite, magnocites, apatite, rock sulphate and phyrites in the land mentioned above in Dehra Dun district.

It was executed in the standard form prescribed for prospecting licences, i.e., it was in the form of an agreement or indenture made between, the Governor of Uttar Pradesh of the one part & the licensee of the other part. It purports to have been signed on behalf of the Governor by the then Collector of Dehra Dun, Sri A.D. Pandit, and Sri Brij Lal Suri on behalf of the Northern, India Lime Marketing Association. Under its terms, the 'exclusive' right to exploit the mineral, resources and to enter upon the land, to mine, quarry, bore, dig, search for, win and work all or any of the above mentioned minerals lying or being within, under or thereabout the said lands was conferred upon the petitioner firm.

The petitioner's case is that the land specified in the licence was put into his possession and that thereafter he started quarrying, and exercising the rights which had been granted to him under the licence. The petitioner's allegation further is that his possession was proclaimed in the village comprised in the licence through the tahsildar. After depositing the requisite security under the rules and complying with the other rules of procedure governing such applications, the petitioner, invoking his rights under Clause IV(1) of the licence, applied on 20-9-1948 for a mining lease for 30 years relying not only on Clause IV(1) of the licence but also -- and this is important -- on Rule 33, United Provinces Mining Concessions and Mineral Development Rules, 1940, which provides that the licensee shall have a right on or before the termination of his licence in the case of minerals other than precious stones to a mining lease in accordance with the terms contained in the rules for mining leases.

It may be further mentioned that there is a provision in Rule 31 of the 1940 Rules that if the licensee has before the termination of the period of licence applied for a grant of a mining lease "the Collector may further extend the period of the licence until a mining lease is granted or for such time as he may deem fit."

Here it may be mentioned that on 26-10-1948 a suit was filed by persons claiming to be working minerals under leases from certain zamindars for an injunction restraining the petitioner from quarrying limestone in the licensed area. On 3-11-1948 another suit of a similar nature was filed by some other parties. 'Ex parte' injunctions were granted in both the suits which were ultimately dismissed on 10-2-1950 and 14-1-1950 respectively. On 3-11-1948 the Collector, however, directed the petitioner not to carry on the operations in the excluded area on the ground that one Sri Jairam

Singh Oberoi had been granted a certificate of approval and that the U. P. Government had directed that, pending a final decision about the grant of a lease, no other party should be allowed to remove limestone from the area which he had hitherto been working and where he had spent considerable sums of money in the construction of roads etc., (see Appendix P1. P. 209).

The petitioner protested against that order & sent a telegram to the Minister, Development Industries, Lucknow, on 12-11-1948 (see Appendix Q1, p. 211), requesting him to recall the orders interfering with his work of essential production. He also wanted an enquiry to be instituted into the conduct of those responsible for interference with him. On the same date, i.e., 12-11-1948 the petitioner also interviewed the Secretary to the U. P. Government, Industries Department, Sri Mathur. On 17th November there was a meeting at Lucknow at which the Collector, Sri A.D. Pandit, and the Industries Secretary, Sri H.K. Mathur, were present. In a later part of this judgment I shall discuss the conclusions I have arrived at in regard to the happenings at this meeting.

To continue with the story, on 22-11-1948 the Collector issued a temporary permit to the petitioner permitting him, pending the issue of a mining lease, to extract 10,000 tons of limestone from the area described in his prospecting licence dated 31-7-1948, subject to certain conditions (see Appendix S1, p. 217). In December 1948 the petitioner was asked to deposit Rs. 30,000/- as advance royalties. On 30-12-1948 the Collector wrote to the petitioner firm that he would cancel the permit unless the royalty was paid within 24 hours by it.

On 14-6-1949, i.e., before the expiry of his prospecting licence, the petitioner wrote to the Collector pointing out that as he had applied for a long term lease on 20-9-1948 in accordance with the rules governing the application and issue of a mining lease of the land for which the prospecting licence No. 5 dated 31-7-1948 had been granted to him and that as there was likely to be some further delay in the execution of the mining lease, the prospecting licence granted to the petitioner firm should be extended till the issue of the mining lease in his favour (see Appendix B, p. 109). On 28-6-1949 the Collector wrote to the petitioner informing him that his prospecting licence No. 5 dated 31-7-1948 had been cancelled and that indeed he had himself voluntarily agreed to abrogate the licence on 17-11-1948 (vide Appendix B/B, p. 111).

On 12-7-1949 the petitioner wrote to the Secretary to the Government U. P., Industries Department, Lucknow, requesting him to pass orders for the grant and execution of a mining lease and pointed out that the Central Government had permitted the Provincial Government to grant mining lease, pending the issue of rules to be framed by the Central Government under the new Act, in accordance with the instructions issued to them by the Central Government and his prayer was that, in case of any further unavoidable delay in the execution of the mining lease, orders might be passed extending the period of the prospecting licence till such time as the lease was executed. He placed his reliance on Clauses (1) & (2) of Part IV of the licence agreement (see Appendix C. P. 113), which are reproduced below:

> "IV(1). During the subsistence of this licence the licensee shall have the right subject to compliance with the said rules to a mining lease in accordance with the said rules in respect of over so much of the said lands as the licensees may desire and the

Provincial Government shall think fit to grant and to the first offer of such mining lease in respect of precious stones within the said lands as Governor may think fit to grant.

(2) If during the term hereby granted the licensees shall apply in accordance with the said rules for a mining lease of the said lands or any part thereof this licence shall upon the expiration by effluxion of time of the term hereby granted if the licensees shall by notice in writing to the Collector so required be extended for a further term to and either on the date on which such lease shall be granted or on such other date as the Collector shall in his discretion prescribe."

On 24-7-1949 the Secretary to Government, U. P., Industries Department, Lucknow, wrote to the Counsel for the petitioner, Sri J.M. Chatterji, pointing out that he had not promised to get the petitioner's licence extended so far as limestone or gypsum was concerned. As regards the other minerals, the petitioner was told that 'prima facie' at that time there was no prohibition against the grant of permission to private parties to exploit those minerals and that the petitioner's application would be considered on its merits and early orders passed. The letter further stated that the rules for the grant of mineral concessions and mining leases were under revision by the Central Government in consultation with the Provincial Government and that it was not possible for Sri Suri or any one else to get anything out of Government by using "high pressure methods", (see Appendix D, p. 115).

It is argued that this was tantamount to a refusal to grant a permit for extracting limestone at that time. On 11-8-1949 the petitioner wrote to the Central Government to direct the Provincial Government to execute the mining lease in his favour to which he was entitled (see Appendix E, p. 117). On 22-9-1949 the Central Government wrote a letter to the U. P. Government which is marked Appendix P, p. 119, stating that it would no doubt be preferable for the Provincial Government to issue fresh mining leases on the coming into force of the new rules; but it was not desirable in the public interest that mining activities should come to a stand-still in the meantime.

It was, therefore, suggested that the Provincial Government might consider extending the period of the prospecting licence of the petitioner by another year from the date of expiry (see Appendix F, p. 119). On 27-10-1949 and 28-10-1949 the petitioner submitted further applications for the grant of a mining lease in respect of some other minerals. On 23-11-1949 the Assistant Secretary to the Government of India, Ministry of Works, Mines and Power, New Delhi, Sri M. Malhotra, wrote to the Secretary to Government, U. P. Industries Department, Lucknow, pointing out that the petitioner had written to them that he had not been granted either a mining lease or renewal of the prospecting licence for which he had made an application to the Provincial Government and that his minerals production was suffering.

The letter added that it was not desirable in the public interest that mining activities should come to a stand-still. It was further pointed out in that letter that Mineral Concession Rules under Section 5, Mines and Minerals (Regulation and Development) Act, 1948, had since been issued in the Gazette of India (Extraordinary), dated 19-10-1949. A request was therefore, made that the Provincial Government should take a very early decision on the application of the petitioner so as to enable

him to proceed with the production of the minerals in question (vide Appendix F/F, p. 121). On 24-11-1949 a permit was issued by the Collector to the petitioner. On 26-11-1949 the petitioner firm made an application against the U. P. Government under Section 20, Arbitration Act in the court of the Civil Judge, Dehra Dun. It was numbered as suit No. 202 of 1949 (see Appendix G, p. 123). The prospecting licence contained the following arbitration clause:

> "IV(5). If and whenever any dispute or question shall arise regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensees hereunder or as to the amount or payment of any royalty, or other payable by virtue hereof or otherwise however, in relation to these presents such dispute or question shall be referred to the Governor whose decision thereon shall be final and binding on the parties hereto.
>
> PROVIDED ALWAYS that any dispute as regards the price to be paid under Clause 17 (c) in head or Part II of these presents shall be determined by two arbitrators one to be nominated by the Governor & the other by the licensees or in case of disagreement between the arbitrators by an umpire to be appointed by the arbitrators by writing under their hands before proceeding with the arbitration and the decision of such arbitrators or umpire as the case may be shall be final and binding on the parties hereto."

46. The points in dispute in respect of which the petitioner sought arbitration were 'inter alia' as follows :

> "(i) Whether the applicant is entitled to hold, exercise and enjoy the land and all the rights and powers under the licence as he has been doing so far till the grant of the mining lease without any hindrance or interference by the opposite party.
>
> (ii) Whether the opposite party can directly or indirectly alienate any rights or interests in the property to third party in violation of the contract or impose any conditions, limitations and restrictions over the rights, possessory or otherwise, of the applicant under the licence as the opposite party threatens to do.

.....

(v) Whether the opposite party can withold the grant of a mining lease to the applicant indefinitely as is being done by them.....".

47. The defence of the U. P. Government appears to have been that the prospecting licence for minor minerals was not governed by the U. P. Mining Concessions and Mineral Development Rules, 1940 and that for that reason no application could be legally entertained nor any concession in pursuance thereof be conceded by the Collector. A further plea was that the prospecting licence issued by the Collector was not binding on the Government as he was not competent to execute it. Other pleas taken were that the agreement was never acted upon and as a matter of fact had been voluntarily

given up by the applicant.

48. It was further contended that the licence having run out its period and no other prospecting licence having been issued the applicant had no rights under the licence and that in any case the applicant was estopped by his conduct to present the application for arbitration. The line of defence taken would appear from the objections raised against the interim injunction issued by the court (Appendix M, pp. 131-133).

49. On the very date on which the application under Section 20, Arbitration Act was made the court at the instance of the petitioner firm issued an injunction (a) restraining the opposite party to the suit from issuing any permit, licence or lease to any other party, and (b) allowing any other person to remove or quarry limestone in the area covered by the petitioner's licence (vide Appendix J, p. 129). On 30-11-1949 the petitioner instituted contempt proceedings for breaches of the order of 20-11-1949. Thereafter between 13-12-1949 and 18-12-1950 disputes went on regarding the injunction application before the court of the Civil Judge, Dehra Dun. On 18-12-1950 the Collector ordered the petitioner to stop quarrying and removing minerals.

On 18-12-1950 the Collector wrote to the railway authorities, Dehra Dun, directing them not to book limestone consigned by the petitioner firm and also to detain lour wagons booked by them. On the same date, i.e., 18-12-1950, the Collector further wrote to two of petitioner's customers directing them not to make any payment to the petitioner of the amount claimed to be due by him as price of the limestone supplied. On 19-12-1950 the petitioner filed a third application for injunction restraining Government from interfering with the petitioner's rights (vide Appendix U, p. 153).

50. It may be mentioned that the Collector passed another order on 1-2-1951 directing the petitioner to stop quarrying and removing limestone from two villages in the licensed area. Further an 'ex parte' order was passed under Section 144, Criminal P. C. by the Sub-Divisional Magistrate, Mussoorie, restraining the petitioner from quarrying and removing limestone from three villages. Moreover on that day the petitioner's licence for blasting explosives which he had been blasting since 31-7-1948 was suspended for the first time and on 15-2-1951 the District Magistrate ordered that the stocks of explosives in his possession be seized. The petitioner filed a representation for setting aside the 'ex parte' order of the Sub-Divisional Magistrate on 22-2-1951 and the allegation is that that has not been disposed of so far.

Further on 23-2-1951 an order was passed by the Sub-Divisional Magistrate, Dehra Dun for the attachment of the petitioner's property of Rs. 9,000/- on account of royalty. This, according to the petitioner, was an act unauthorised by law, there being no provision under the terms of the licence for such attachment. On 6-3-1951 the police seized the stock of gypsum which the petitioner had in his possession and the petitioner's allegation is that this was done by the police under the orders of the District Magistrate who ordered the prosecution of the petitioner under Section 379, I. P C. for the offence of theft of gypsum from village Sehra.

51. The petitioner filed the present writ petition on 16-3-1951 claiming the various reliefs mentioned in the opening part of this judgment. I have considered it necessary to narrate the facts stated above

because on the assumption that the petitioner had, apart from any rights under the contract with which we are not concerned, 'also a statutory right to a mining lease', it strikes me that the petitioner's activities so far as the carrying of the limestone and other business is concerned were interfered with only after the Constitution came into force. No final orders by the Governor or Government appear to have been passed on the first application for a mining lease though the position that the State Government took up in the correspondence with him appears to be that he was not entitled to one.

The fact, however, stands out that the petitioner's possession was not actually disturbed until December 1950 and it is contended that it is because such disturbance took place after the Constitution had come into force that he could claim the aid of this Court under Article 226 of the Constitution in respect of an agreement under which by force of statutory rules, the right to a mining lease, though it may have accrued to him before the coming into force of the Constitution, nevertheless subsisted on the date the Constitution came into force and the present application was filed.

Now even if it be assumed that the Government intimated through its letter No. 4/217, W. P./XVIII-245(5) 1948, dated 27-5-1949 addressed to the District Magistrate, Dehra Dun, that it considered the prospecting licence as cancelled, it cannot be said that the controversy between the parties ended finally with that letter. Before its receipt the petitioner appears to have sent a letter on 14-6-1949 for the extension of the prospecting licence in view of the application made by it on 20-9-1948 for a long term lease.

While the official attitude was that the petitioner firm had given up its rights to a mining licence at the meeting of 17-11-1948, the petitioner firm continued to assert that it had not done so and the petitioner's contention is that no final orders were ever passed disposing of its application of 20-9-1948 under Rule 24, Mining. Concession Rules and that the refusal to do so deprives it of its right under Section 52, Mining Concession Rules, 1940 to file a revision, if it becomes so necessary, against the order to the Central Government. In fact it is asserted by the petitioner that the attitude taken up by the Central Government in respect of a representation made by it in or about May 1950 was that the petitioner's representation was premature as the Provincial Government, as it was then called, had not disposed of the petitioner's application dated 20-9-1948.

52. On these facts the first question that we have to consider is whether the petitioner is entitled to any relief under Article 226 of the Constitution in respect of a prospecting licence under which, it is argued for the State, the right to obtain a mining lease accrued, assuming that it was one under statutory rules, both to the petitioner and was denied by the opposite party before the Constitution came into force. Reliance has been placed on the Supreme Court case of -- 'AIR 1951 SC 128 (D)', for the proposition that every statute including a constitutional document is 'prima facie' prospective unless it is expressly or by necessary implication made to have a retrospective operation and that the question of an inconsistency of existing laws with fundamental rights can only arise on arid from the date all those rights came into being.

Other cases to which reference may be made are those of -- 'AIR 1950 Cal 512 (G)', -- 'AIR 1951 Nag 443 (FB) (F)', and -- 'AIR 1952 SC 339 (E)'. It is unnecessary to consider these and other cases in this case in the view that I am taking.

53. Properly speaking, in my opinion, no question of the retrospectivity of Article 226 of the Constitution arises in this case. On the facts which have been set out above, it is clear that there was no disturbance with the petitioner's possession of the quarries until after the Constitution came into force, though it is true that the right to a mining lease accrued to him before the expiry of the prospecting license in 1948 and could be specifically enforced by him under Article 113, Limitation Act within three years. That Article fixes a period of three years for specific performance of a contract from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused.

There is no specific article fixing the time limit for a suit to enforce a statutory liability for specific performance of a contract inferable from a statute or statutory rules. There being no such period fixed by the Limitation Act for such a liability, the article which would govern limitation for such an action would presumably be Article 120, Limitation Act, 1908. Now, even if it be assumed that the right to sue for specific performance of the contract for a mining lease either accrued to him when his application dated 20-9-1948 for a mining lease is said to have been refused under the prospecting licence which was only for a year or his prospecting licence cancelled, the position is that before the expiry of the period within which a suit could have been brought another remedy, namely, that of invoking the writ jurisdiction of this Court under Article 226, provided he could otherwise make out a case for it, became available to the applicant under the Constitution.

The position, as I see it, is that on the allegations made by the petitioner he had a subsisting right at the time the Constitution came into operation which could have been enforced by a regular suit for specific performance. I do not see why, in these circumstance, on the assumption that he had a subsisting right to sue for specific performance for the grant of a contract, either statutory or otherwise for a mining lease, the alternative remedy, if other suitable conditions exist', for the grant of a writ should be deemed to be barred on the mere ground that at the time when the right to the mining lease or its renewal accrued the constitutional remedy provided under Article 226 had not come into existence.

Reference may be made on this part of the case to the case of -- 'AIR 1950 SC 163 (H)'. In that case the petitioner had been carrying on wholesale business in vegetables and fruits at Kairana in the district of Muzaffarnagar in Uttar Pradesh State for two years at a rented shop, there being no bye-laws regulating the sale of vegetables and fruits within the limits of the municipality. Bye-laws having been passed on 19-4-1949 and confirmed on 1-1-1950 by the Commissioner, the respondent board auctioned "the contract for wholesale of vegetables" to the highest bidder, one Habib Ahmad. The application of the petitioner for a licence to carry on his wholesale business was rejected by the respondent board by a resolution on or about 22-12-1949.

The decision, however, was not communicated to the petitioner until 9-2-1950. He was required by the notice served on him of that decision to desist from selling any vegetables. While the bye-law

provided that no person shall establish any new market or place for wholesale business in vegetables except with the permission of the board there was no bye-law authorising the board to issue a licence. Consequently a monopoly having been granted to Habib Ahmad the board found itself unable to grant a licence to the petitioner to carry on wholesale business in vegetables either at the fixed market place or at any other place within the municipal limits of Kairana.

On the above facts the Supreme Court came to the conclusion that the bye-laws were void under Article 13(1) of the Constitution. Their Lordships repelled the argument that the bye-laws having come into force on 1-1-1950, i.e., before the Constitution came in force, the petitioner had no right to continue the business and that therefore his case could not be governed by Article 19(1)(g), as that would amount to protecting persons who were carrying on business before the Constitution came into force. I think the principle of that case applies and I am satisfied that the plea that the petition should fail on the ground that it relates to a period anterior to the coming into force of the Constitution has, on the facts established in this case, no basis.

54. I come now to the main part of the petitioner's case. The petitioner's case is that he was under the prospecting licence entitled to a mining lease, that that right was not merely contractual but, having regard to the Mining Concessions Rules which gave a right to the holder of a prospecting licence to a mining lease, essentially one based upon statutory rules, that the licence and the statutory rules vested him with rights of property in the mines prospected by him and that he is, therefore, entitled to seek the assistance of this Court to give him the relief that he seeks under Article 226 of the Constitution. To put it rather differently, the contention of the learned counsel for the petitioner is that, apart from the prospecting licence, he has by virtue of that licence a right under various statutory rules for a mining lease and that inasmuch as there has been a failure to grant it to him he is entitled to the reliefs asked for in this petition.

55. The learned Advocate General denies that the rules on which reliance is placed by the learned counsel for the petitioner have any statutory force and contends that, in any case, these rules have not been made applicable to limestone. His argument is that that being so no prospecting licence given under the rules can give rise to any right to the petitioner as regards limestone. The learned Advocate General's contention is that all that can be said at the most is that contractual obligations arose under the prospecting licence.

If that is so, obviously an application for a writ of mandamus cannot be a proper basis for enforcing them. The case for the State is that mandamus can only be granted where the applicant has a right to the performance of a legal duty and has no other specific or equally appropriate and convenient means of compelling its performance. Obviously that duty should be of an imperative and not a discretionary character. I think that this proposition cannot be disputed and it is unnecessary to quote authorities in support of it. The question, however, is whether the duty in this case was on the facts established in this case, a statutory one and this will be dealt with on a latter part of the judgment.

56. Another line of argument advanced by the learned counsel for the State is that whatever rights might have been possessed by the petitioner were voluntarily given up at the meeting of the 17th

November to which reference has been made.

57. The argument which has been advanced by the learned Advocate General is that the rules on which reliance has been placed by the learned counsel for the petitioner and which are supposed to have given him a statutory right as the holder of a prospecting licence to a mining lease are really departmental rules having no Parliamentary or legislative sanction behind them. In view of this argument it is necessary to examine the origin of the 1940 Rules and determine whether they can be said to have any statutory basis and whether they conferred any statutory rights to the holder of a prospecting license for a mining lease.

58. The learned Advocate General has referred to the paucity of legislation on the question of mines and contended that the only pieces of legislation prior to 1948 with, regard to mining operations were Regulation 2 of 1800 which sought to regulate the working of stone quarries at Chunar, Ghazipur and Mirzapur and the Indian Mines Act, 1923, the main concern of which was the regulation of conditions on labour in Indian mines. Act 4 of 1923 was passed with the object of amending & consolidating the law relating to the regulation and inspection of mines and came into force on 1-7-1924. It has been amended from time to time by the following Acts:

> The Repealing and Amending Act (37 of 1925), The Repealing Act (12 of 1927), The Indian Mines (Amendment) Act (13 of 1928), The Indian Mines (Amendment) Act (21 of 1931), The Indian Mines (Amendment) Act (5 of 1935), The Indian Mines (Amendment) Act (11 of 1936), & The Indian Mines (Amendment) Act (29 of 1937). Barring these Acts, the learned Advocate General contends that there is no Act of the legislature concerning itself with mines or mineral developments. The regulation and the Acts noted above were passed to regulate the conditions of labour on mines and to lay down the duties and responsibilities of owners, agents and managers and did not contain any provisions for the conditions on which prospecting licences might be granted. The argument for the State is that there is no statutory basis for the 1940 Rules, which, it is alleged by the petitioner were made applicable to mines, minerals etc., such as limestone by a separate order by the State Government in 1948 and that the petitioner's case, therefore, being one based upon a contract cannot be the subject-matter of a writ application for mandamus.

59. Before analysing the above argument, I think it desirable to consider the validity of the argument raised by the Advocate General that the Collector had no authority to sign a prospecting licence on behalf of the Governor, that indeed he acted without authority in doing so and that the Governor or Government is not bound by the prospecting licence given by the Collector. I may at once state that I am unable to accept this argument as correct. By Notification No. 765/VII-127-1935, dated 27-1-1938, the Collector was vested with powers of making contracts on behalf of the Governor in respect of matters enumerated therein. That notification reads as follows :

> "In exercise of the powers conferred by sub-s. (3) of S. 175, Government ot India Act, 1935. the Governor of the United Provinces in pleased, in supersession of the resolution of the Government of the United Provinces in the Judicial (Civil)

> Department No. 955/VII-127.1935, dated 15-7-1937, to declare that the undermentioned contracts and assurances of property may be executed as follows :
>
> .....
>
> 3 (a) Contracts and other instruments connected with femes, dues for grazing cattle on places other than canal banks, fisheries, nazul buildings. spontanious products and minerals, execution of works not under the Public works department and the supply of necessaries for depots.

By Collectors and Deputy Commissioners and also all other officers below the rank of depart ments, e. g., heads of local offices who have been or may be empowered to enter into a contract.

P. C. Mogha, Secretary to Government, United Provinces."

This notification was made under Sub-section (3) of Section 175, Government of India Act, 1935, which is to the following effect:

> "Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor General, or by the Governor of the Province, as the case may be, and all such contracts and assurances of property shall be executed on behalf of the Governor General or Governor by such persons and in such manner as he may direct or authorise."

60. It is apparent that under the notification of 27-4-1938, the Governor had authorised the Collector to execute contracts and other instruments connected with spontaneous products and minerals. The prospecting licence having been signed by the Collector on behalf of the Governor must, therefore, be deemed to be a valid prospecting licence and the argument of the counsel for the State has no force on this point.

61-70. The prospecting licence is marked as Appendix A and purports to have been executed on 31-7-1948. It is as pointed out before, in the form of an indenture between the Governor of the United Provinces of the one part and the petitioner firm of the other part and signed by the Collector on behalf of the Government. From a perusal of that document it would appear that the petitioner firm was granted the sole right to enter upon the lands described in the schedule and to mine, quarry, bore, dig, search for, win and work all or any of the minerals lying or being within, under or throughout the said lands. It would further appear that the petitioner had a further right by notice in writing to the Collector made before the expiry of the licence to require an extension of the period of his licence for a further term to either on the date on which such lease shall be granted or to on such other dates as the Collector shall, in his discretion prescribe.

71. The petitioner invoked his right within the period the licence was subsisting after having deposited the requisite security and complying with all the rules of procedure governing

applications of the grant of mineral concessions. On the basis of the clauses referred to above, it is now contended by the learned counsel for the petitioner that the prospecting licence made the grant of the mining lease to the petitioner mandatory. Had this only been the case, the proper remedy no doubt for the petitioner would have been to fight the matter out by way of a regular suit for specific performance of the contract for a mining lease. It is, however, contended that the liability created under the prospecting licence was not of a purely contractual nature but had also a statutory basis, inasmuch, as under the rules having the force of law the petitioner was as of right entitled to a mining lease and the denial by the State Government to comply with those rules entitled him to a mandamus to have that duty performed.

72. The question has, therefore, to be considered whether apart from any right under the prospecting licence for which the proper remedy seems to be a regular suit for specific performance, the petitioner had any rights under any rule having the force of a statute to a mining lease. This involves a consideration of the question whether the rules on which reliance is placed have any statutory basis at all. The learned Advocate General contends, as I have said before, that the rules to which our attention has been invited and which I shall presently notice are merely departmental rules having no legislative sanction behind them. I shall now proceed to deal with this matter,

73. The question, therefore, to which I shall now address myself is whether the United Provinces Mineral Concessions and Mineral Development Rules, 1940, published in the United Provinces Gazette, Part 1-A, dated 28-12-1940, under Industries Department, Miscellaneous, Notification No. 1825/XVIII-319 (L) -- 40, dated 19-12-1940, have any statutory basis. Before doing so I may point out that Rule 3 lays down:

> "No licence to prospect for minerals or lease of mines and minerals shall be granted otherwise than in accordance with these rules, except with the previous sanction of the Provincial Government."

Rule 4 lays down the conditions under which a certificate of approval or a prospecting licence, or a mining lease shall be granted to a person. Rule 6 expressly enacts that-

> "Nothing in these rules shall apply to minor minerals, such as slate building stone, limestone and clay, the extraction of which may be regulated by such separate orders as the Provincial Government may pass in the matter, having regard to the merits of each individual case."

74. It will be noticed that Rule 6 exempts minor minerals such as slate building stone, limestone and clay from the operation of these rules and their extraction is to be regulated by such separate orders as the Provincial Government may pass in the matter, having regard to the merits of each individual case. The controversy in this case is in respect of a minor mineral, namely, limestone and had there been no evidence that Rule 6 was applied subsequently to a minor mineral, the question whether the rules had any statutory basis or not would be immaterial, for even, as the rules stood, the petitioner would have no right to a mining lease in respect of limestone. The argument that the 1940 Rules have statutory authority behind them has taken this shape.

It is contended that they are a continuation, with necessary adaptations, of the earlier rules called the 'Mining Rules and Standard Form of Prospecting Licence and Mining Laws' framed by the Governor-General in Council under statutory authority and published with amendments in 1936. The 1936 Rules were an amendment of the 1913 Rules which were also framed by the Governor General in Council under statutory authority. What is the statutory authority behind these rules? For an answer to this question we have to consider some sections of the Government of India Acts prior to the coining into force of the new Constitution.

75. For very nearly sixty years rules regulating the grant of prospecting licences have existed in this country. The earliest rules on this subject are to be found in the Supplementary Gazette of India, dated 22-12-1894, p. 1887. The 1894 Rules were subjected to a revision in 1899 as is apparent from the Supplement to the Gazette of India, dated 27-5-1899, page 998. A new set of rules superseded the 1899 Rules and they are to be found in the Supplement to the Gazette of India, dated 20-9-1913. It is unnecessary to notice the various amendments to which they were subjected until they were republished by the Governor-General in Council in 1936 with the sanction of the Secretary of State in Council.

76. The Government of India Act, 1859, made the British Crown directly responsible for the government of this country and the powers exercised by or on behalf of the East India Company were transferred to it. By Section 1 of that Act the Governor-General in Council and some other officials were authorised subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of Votes at a meeting shall from time to time prescribe, 'inter alia', to sell and dispose of any real or personal property in India, for the time being vested in Her Majesty under the Government of India Act, 1859 and to make assurances for that purpose. Section 2 of that Act laid down the mode of execution of those contracts and assurances.

77. This Act was amended by the East India Contracts Act, 1870 (33 & 34 Vict. c. 59). In 1915 it became necessary for the British Parliament to pass a statute consolidating the law as amended by various statutes relating to the Government of India between 1859 and 1915. Attention may be drawn to Sub-sections (1) and (2) or Section 30, Government of India Act, 1915, which are to the following effect:

> "30(1). The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

> (2) Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being."

78. It is well known that in 1919 important changes were made in the Constitution of this country. The Act of 1915 was, therefore, amended but there was no amendment of the provision contained in Section 30, Government of India Act, 1915, to which attention has been drawn.

79. The Act of 1919 was intended to give to Provincial Governments and legislatures larger authority, particularly in respect of matters which were to be transferred to the control of ministers responsible to their provincial legislatures. With that end in view Section 45A of the Act made a provision, by the exercise of the rule-making power, for a classification of Central and Provincial subjects and for the devolution of authority in respect of the latter class of subjects to the Provincial Governments. Reference may also be made in this connection to Section 129 of that Act, which lays down that-

> "Where any matter is required to be prescribed or regulated by rules under this Act, and no special provision is made as to the authority by whom the rules are to be made, the rules shall be made by the Governor-General in Council, with the sanction of the Secretary of State in Council, and shall not be subject to repeal or alteration by the Indian Legislature or by any local legislature."

By virtue of the authority given by Section 45A read with Section 129A Devolution Rules came to be made in 1920. They have been in operation in the United Provinces from 23-1-1921 and item No. 25 of these rules, which is to be found in the List of Central subjects enumerated in Part 1 or the Schedule, is in the following terms:

> ('Control of mineral development, in so far as such control is reserved to the Governor-General in Council under rules made by or sanctioned by the Secretary of State, and regulation of mines."
>
> I have made it clear that while the statutory basis, for the rules of 1894 and 1913 is Section 2, Government of India Act, 1859, that of those which came into force in 1933 is to be found in Section 30, Government of India Act, 1915, which was kept in fact by the Act of 1919.

80. It is well known that the Government of India act, 1935 effected a vast modification in the relationship between the Secretary of State and the Government of India. It became necessary, therefore, for the British Parliament to make it clear that laws existing on the date on which the Act came into operation would continue in force until altered, repealed or amended by a competent legislature or other competent, authority or by order in council. Sections 292 and 293 of the Government of India Act, 1935 make that position absolutely clear. The 1936 Rules were with some variations republished in the 1940 Rules and the authority for so doing was the Government of India

(Adaptation of Indian Laws) Order, 1937.

Whether by adaptation the rules could be altogether modified or not is not a question before us. I think for the purposes of this case it is enough to say that to the extent that the 1940 Rules do not depart in any substantial particular from the 1936 Rules there is a statutory authority for these rules. In 1949 the Indian Legislature passed an Act known as the Mines and Minerals (Regulation and Development) Act, 1948. Section 5 of that Act authorised the Government to make rules and under the provisions of that Act the Mineral Concession Rules, 1949, were made. They superseded the rules made in the 1940 Rules. The conclusion at which I have arrived is that the 1940 Rules have a statutory basis.

81. Before parting with this part of the case I may notice the argument of the learned Advocate General that it was not competent to Government to grant a mining lease to the Association as by so doing it would be virtually creating, a monopoly in favour of it limestone being almost entirely comprised in the area specified in the Association's licence. I do not think that we can go into this question as no material has been placed before us which would justify us in holding that they would constitute a monopoly.

82. I may point out that the Madras High Court in -- 'Sankara Mining Syndicate Ltd. Nellore v. Secretary of State', AIR 1938 Mad 749 (O) treated these rules as statutory rules. Leach C. J., in that case observed that-

> "The Government of India have framed certain rules regulating the grant of mining concessions and the validity of these rules is not in question."

83. On the materials referred to above, I have; come to the conclusion that the 1940 Rules were a continuation of the 1936 Rules with adaptation and modification which in turn can be traced back to 1913 and 1894, that they have a statutory basis and that there is no force in the contention of the learned Advocate General on this point.

84. I come to the interpretation of 1940 Rules, published in the United Provinces Gazette, Part 1-A, dated 28-12-1940, under Industries Department, Miscellaneous, Notification No. 1825/XVIII-319 (L)-40, dated 19-12-1940. Rule 3, which has been quoted before, expressly provides that-

> "no licence to prospect for minerals or lease of mines and minerals shall be granted otherwise than in accordance with these rules, except with the previous sanction of the Provincial Government'.
>
> Rule 4, which has also been quoted before, lays down the conditions under which a certificate of approval of a prospecting licence or a mining lease shall be granted to a person. Rule 6 of the Rules to which attention too has also been drawn before exempts minor minerals such as limestone and clay from the operation of these rules unless the Provincial Government so decides by such separate orders as it may pass having regard to the merits of each case. It will be clear from the rules to which

attention has been drawn that they do not apply to minor minerals such as limestone. It is contended that the word used is not 'limestone' but 'limistone and clay', that the word 'clay' qualifies 'limestone' and, therefore, only means 'limestone used for lime burning' but does not include chemical limestone which is a major mineral.

On this part of the case our attention has been invited to the Mineral Concession Rules, 1949, made under Section 5, Mines and Minerals (Regulation and Development) Act, 1948 (Act 53 of 1948) which treat limestone as a minor mineral. I am unable to accept this argument as correct. I do not think that the word 'clay' qualifies the word 'limestone'. The argument is based on the contention that there is no comma after the word 'limestone' and that the word between 'limestone' and 'clay' is 'and'. Limestone and clay are separate minerals and the word 'and' has been used conjunctively. I do not think that there is any force in this contention. This point has been dealt with by my brother Mootham and I am in agreement with him.

85. I now come to the most vital point in the case. Is there anything to show that the 1940 Rules were subsequently amended by such separate orders as the Provincial Government may pass having regard to the merits of each individual case to include limestone? There is on this part of the case a controversy between the parties as regards exactly what occurred, the case of the petitioner being that these rules were applied by a separate order to limestone.

86. The controversy has centred round the question whether by a separate order limestone was ever included, for the main interest of the petitioner is in the right, which he claims was given to him, of exploiting the commercial possibilities of limestone in the district of Dehra Dun. Exclusive of the affidavit accompanying the petition 16 affidavits have been filed in this case. Some of those affidavits cannot be regarded as proper affidavits at all. It is conceded by the learned Advocate General that the counter-affidavits filed by Sri B.B. Lall and Sri Gyan Prakash on 25-5-1951, and Sri Inder Dutt Saklani on 1-6-1951, and Sri Dharam Vir Singh on 14-6-1951, are not in proper form as they have been neither properly sworn nor affirmed. If they are excluded, then the four affidavits filed by way of rejoinder by Sri Brij Lal Suri on 17-3-1952, and one by Sri Madan Gopal on 29-5-1952, must also be eliminated from consideration.

We cannot also look into the supplementary affidavit filed by Sri Brij Lal Suri on 17-7-1952, as it was filed without leave of the Court. I think that the affidavits filed, and particularly those on behalf of the respondents are not quite satisfactory. I am constrained to observe that the rule that statements made in affidavits, save in interlocutory matters, must be based upon personal knowledge has often been ignored. In fact some of the affidavits in this case read more like arguments than statements of facts. I consider it important to emphasise this point, as I have noticed, that the tendency to file argumentative affidavits not sworn to on personal knowledge has not yet diminished in this Court.

87. Were the rules relating to mining lease contained in the 1940 Rules applied by a separate order to limestone? The position on this, part of the case would seem to be somewhat as follows: Soon after the licence was granted, the then District Magistrate, Dehra Dun, wrote a letter (Appendix J1, p. 193), dated 18-8-1948, to the petitioner that under the U. P. Mining Concessions and Mineral

Development Rules, 1940, no licence could be granted for minor minerals such as slate building stone, limestone and clay, that, the entry relating to limestone from his licence was being deleted and that he should present his licence form for correction. That letter was replied to by the petitioner by a letter (Appendix K1, p. 195), dated 20-8-1948. In it he pointed out that the U. P. Government had already passed orders in respect of Dehra Dun limestone deposits after taking into consideration their importance for the industrial growth and development of these Provinces and had held that prospecting licences and mining leases in respect of these limestone deposits should be granted in accordance with these Rules.

He further pointed out that if the District Magistrate would refer to the correspondence and other papers on the subject, he would be satisfied that a prospecting licence for Dehra Dun limestone could also be granted under these Rules, and that the grant of prospecting licence No. 5 dated 31-7-1948, in respect of limestone was perfectly in order. On 23-8-1948, the Collector wrote to the petitioner (Appendix L1, p, 199) informing him that the entry regarding limestone in this licence was 'in order' as it was within the powers of Government to give him a prospecting licence for minor minerals such as limestone under Rule 6, U. P. Mining Concessions and Mineral Development Rules, 1940. He was further informed that. under the terms of this prospecting licence the Government had conferred on him the sole right subject to the conditions in the licence, to mine, quarry, bore, dig and search for and win, work & carry away the minerals specified therein.

On 6-9-1948, the Collector, Dehra Dun, again wrote to the petitioner (vide Appendix M1, p. 201) stating that Government had ordered that applications for limestone from quarries should be forwarded to Government and that he had referred the whole question to Government. On 10-9-1948, the petitioner wrote a letter to the Minister for Industries and Development, U. P. Government, Lucknow, pointing out that while no doubt Rule 6, U. P. Mining Concessions and Mineral Development Rules, 1940, had laid down that minor minerals such as limestone etc., should not ordinarily be governed by the restrictions and rigorous and other formalities of procedure of those rules, the latter part of that rules had also empowered Government to make rules or pass such separate orders as it deemed fit in respect of those minor minerals after taking into consideration the merits of each individual case.

The petitioner further pointed out that Government had already passed orders in respect of limestone deposits and had thus made the said rules applicable to the Dehra Dun limestone deposits (vide Government Orders Nos. 1296/UP/XVIII, dated 12-4-43 and 2419/L/XVIII, dated 27-7-43). On 16-10-1948, Sri L.M. Bhatia, P. C. S. Under Secretary to Government, Industries (A) Department, U. P. Government, Lucknow (Appendix O1, p. 207) wrote to Sri A.D. Pandit, I. C. S., Collector, Dehra Dun, that the rules only authorised the licensee to prospect for and quarry or mine specified minerals for experimental purposes in order to judge the commercial potentialities of a particular area. If the results so warranted and if the party concerned decided to undertake commercial operations, then it must obtain a mining lease. It would thus be seen that the prospecting licence could be used only for a definite limited end. No party could be allowed to use it for purposes other than those contemplated under the rules. It was further added in the letter that:

> "It is true that the 1940 Rules, as they stand, are not clear cut on this point and leave much room for doubt. Government have, therefore, taken up detailed examination of, the rules 'which are now equally applicable to limestone' with a view to fill up these gaps and suitable instructions in the matter will issue in due course."

This is a very important document as on the basis of this letter it has been argued that the 1940 Rules were made applicable to limestone by a separate order. It is contended by the petitioner that it is not possible for him to produce the order as that is something which is within the possession and special knowledge of Government. He says that he is entitled to rely on this letter for proving that Rule 6 was made applicable to limestone.

88. The question for consideration is whether any presumption can be made on the basis of this letter with safety as to the existence of a separate order making the 1940 Rules applicable to limestone. Undoubtedly, the onus initially is on the petitioner to prove that they were so applied. Though the case for the State is that those rules were not made applicable to limestone, the fact cannot be ignored that the statement that these rules were so made applicable was made in a letter marked as Government Order and signed by an Under-Secretary to Government. It is contended that the obvious inference to be drawn from the letter is that orders were passed for making the rules applicable to limestone. It will be noticed that this letter is prior in date to the meeting of 17-11-1948, at which it is alleged that the petitioner voluntarily gave up his rights under the prospecting licence to a mining lease.

The discussions in the meeting of 17-11-1948, appear to have proceeded upon the assumption that there was a valid prospecting licence which included limestone for no question relating to its validity appears to have been raised at that meeting. Learned counsel for the petitioner contends that this letter coupled with the further circumstance that the validity of the prospecting licence was not questioned by the spokesmen of Government at the meeting of 17-11-1948, should be sufficient to satisfy the Court that he had discharged the burden of proving that the 1940 Rules were made applicable to limestone. I cannot help regretting that important documents which might have thrown light on the facts in this case have not been produced by the State. The contention on behalf of the State is that the statement contained in Sri L.M. Bhatia's letter of 16-10-1948, is incorrect.

It is further urged that no inference should be drawn from the letter as it is somewhat loosely worded and does not mean what it purports to say. Surely evidence could have been produced that the statement in the letter is incorrect. The relevance of the documents throwing light on the existence or otherwise of the rule cannot be disputed. The material question raised by Sri Bhatia's letter is as to the inference to be drawn from it. The petitioner's case is that he has produced Sri Bhatia's letter, that this is all that he could be reasonably expected to do and that it is for the opposite party, in those circumstances, to offer an explanation of the statement contained therein. An affidavit explaining what Sri Bhatia meant could have been produced by the opposite party. Obviously the person indicated for that purpose was Sri Bhatia or some high Secretariat official having personal knowledge of what had actually happened. I cannot help feeling that evidence must be existing as to whether there was an order or not and that it should, have been easy by proper affidavits or otherwise to make it available to the Court.

It is, in my opinion, against sound legal principles for those relying upon a set of facts to withhold from the Court that best evidence in their possession which would throw light on the matter to be investigated by it. For this proposition, I would rely upon the cases of -- 'Murugesam Pillai v. M.D. Gnana Sambandha Pandara Sannadhi', AIR 1917 PC 6 (P) and -- 'Rameshwar Singh v. Bajit Lal Pathak', AIR 1929 PC 95 at p. 99 (Q). Is it, in these circumstances, unreasonable for the court to draw an adverse inference from the failure of a party to produce the best evidence in its possession to prove a fact the initial burden in regard to the proof of which has been discharged by the petitioner? I do not think so. Had the matter rested here, I might have been disposed to hold that the petitioner had discharged the burden of proving that the 1940 Rules were made applicable to him. But there is a further difficulty in the case which I am bound to point out.

Appendix W1, p. 223, is the copy of a Government letter dated 27-5-1949, which purports to be written by the same Sri Bhatia who wrote the letter dated 16-10-1948. It is addressed to the District Magistrate of Dehradun and is irreconcilable with his previous letter. After pointing out that under Rule 6, U. P. Mining Concessions and Mineral Development Rules 1940, Government are competent to frame separate Rules or orders for the regulation and control of minor minerals such as slate building stones, limestone and clay, it goes on to state that the authority to grant such licences vests with Government and the action of the District Magistrate in granting a prospecting licence to Northern India Lime Marketing Association, Dehra Dun, without any reference to Government, must, therefore, be deemed to be ultra vires so far as it relates to limestone.

Nothing, however, is stated in this letter as to whether any such separate order was ever passed toy Government, but the tone of the letter suggests that it probably was not passed. It is to be noted that in the concluding part of the letter there is a direction to the Collector to cancel the licence and that if as a sequence of that cancellation the Association files a suit against Government, to contest it, I find it difficult to reconcile both the letters of Sri Bhatia except on the basis that at one time it was decided to apply the rules and later the decision was probably reversed. In this state of evidence the question whether Rule 6 was made applicable or not by a separate order is not free from doubt.

89. The further question, however, to be considered is whether that being the case, the petition of the petitioner should be dismissed or a further opportunity should be afforded to the parties to prove their respective cases by following the procedure indicated in the order of my brother Mootham. I have come to the conclusion that the latter alternative should be preferred in this case, more particularly for the reason that the case has been argued at considerable length and that the course suggested will enable the controversy between the parties to be settled expeditiously.

90. No doubt there are no rules regarding the issue of peremptory writs and alternative writs by this Court requiring compliance by the persons to whom they are directed. That in exercising the power of issuing mandamus English Courts have resorted to this procedure has been pointed out by my brother Mootham and I do not think it is necessary to dilate on this point. I would like, however, to add that the power given by Article 226 of the Constitution is of a very wide nature.

91. I would further like to point out that the power given under. Article 226 to issue not only the well known writs as obtaining in England but to pass any order or direction which would be appropriate

and effective for the enforcement of not only fundamental rights but also other rights as well to any person or authority including any government within the territories in which the Court exercises jurisdiction is of a most comprehensive nature. To put it differently, in the exercise of this power under this Article this court can issue a mandamus, order or direction for the enforcement of any legal right and the performance of any legal duty. Though this is so, it is incumbent on this Court not to resort to this extraordinary procedure where an adequate remedy is available to the petitioner by ordinary legal process. These principles are so well known that it hardly seems necessary to cite authorities in support of them. Without multiplying authorities I will content myself by referring on this part of the case to three cases. -- 'Bagaram v. State of Bihar', AIR 1950 Pat 387 (FB) (R); -- 'AIR 1951 All 257 (FB) (K)'; and -- 'Asiatic Engineering Co. v. Achhru Ram', ADR 1951 All 746 (FB) (S); I shall discuss this question more fully a little later.

92. Now the respondents contend that under the licence the petitioner had the legal remedy of having all disputes relating 'inter alia', to the rights of the licensee to be referred to arbitration. The provision in respect of this matter has been quoted before. It has been further pointed out that in actual fact an application was filed by the petitioner under Section 20, Arbitration Act. That case came to be numbered as 202 of 1949 and in the plaint the matters in dispute between the parties are enumerated. I have also pointed out what the defence taken in the written objection filed on behalf of the State on 19-12-1949 was? One of the most important pleas taken by the State was that the agreement of 31-7-1948, between the petitioner and the Governor of the Uttar Pradesh had been superseded by a subsequent agreement dated 17-11-1948, under which the petitioner accepted a limited permit in lieu of the agreement dated 31-7-1948, and that as a result of the alleged new agreement dated 17-11-1948, the prospecting licence ceased to have any binding effect on the opposite party.

Now it is well known that where the parties have chosen under an agreement to refer their disputes to arbitration, courts will insist that they should have recourse to arbitration before pursuing any other remedy. The contention of the learned counsel for the petitioner however is that under the arbitration clause to which a reference has been made before only disputes or questions regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensees hereunder or as to the amount or payment of any royalty or other money payable by virtue hereof or otherwise hereafter in relation to such presents can be referred to arbitration. The case of the respondents being that the petitioner gave up his right to a mining lease at the meeting of 17-11-1948, no question of arbitration can arise. The dispute had to be with reference to the rights under the licence and assumed the existence of these rights.

Thus it is only the interpretation of the rights or powers and duties and liabilities under the licence that could be the subject-matter of an arbitration suit. No doubt, the application for reference to arbitration in this case was initially presented by the petitioner, but in coming to the conclusion whether the arbitration suit will be a suitable remedy for the petitioner not only the plaint but the pleadings of the parties can also be looked into and for this proposition I would rely upon the principles laid down in regard to this matter by the Pull Bench in the case of -- 'D.N. Rege v. Mohd. Haider', A I R 1946 All 379 (FB) at pp. 381 and 382 (T). On a balance of considerations I have come to the conclusion that the arbitration suit does not provide an effective remedy for the

determination of some of the questions raised by the petitioner in this case.

93. Apart from the considerations to which I have invited attention, there is one other reason why a method should be devised whereby the dispute between the parties should be more speedily and conveniently disposed of. It appears that an application was presented to this Court by the petitioner on 19-9-1951, under Article 228 of the Constitution for the withdrawal of the arbitration case from the arbitration court to the file of this Court on the ground that the questions raised in it related to an interpretation of the Constitution. Simultaneously with the filing of that application an application was moved for an interim order staying further proceedings in the district court. The interim order prayed for was granted by this Court and it stayed further proceedings in the District Court. That interim order is still in operation, the State Government having taken no steps to have it vacated so far.

I am, therefore, driven to the conclusion that the State Government had no objection to the indefinite stay of the arbitration suit. It would, in these circumstances, be hard on the petitioner if after the lapse of this time, he was made to pursue the remedy of the arbitration suit. More than five years have elapsed since the dispute regarding the right of the petitioner to a mining lease arose. During these five years there have been many litigations both in the civil and criminal courts between the parties. If the petitioner is now directed after a full hearing in this case on his writ petition either to pursue his remedy in the arbitration suit or to file, as I think he can, a suit for specific performance of the contract it will be before several years that he will be able to get his rights, which as the case now stands are capable of speedy ascertainment, adjudicated upon by the court.

There is, therefore, in my opinion good reason to think that it will not be in the interest either of the petitioner or the State if the controversy is allowed to continue. I would like in this connection to refer to the case of -- 'Budh Prakash Jai Prakash v. Sales Tax Officer', AIR 1952 All 764 (U). In that case I made the observation that where arguments had covered a wide ground and the material facts on which this court could have ultimately come to its conclusions had been placed before it, it was desirable in order to avoid multiplicity of proceedings and inconvenience to all the parties including the State to deal With the matter itself. This was also the view which commended itself to Agarwala J. On the grounds stated above I am not prepared to dismiss this application on the ground of the availability of an alternative remedy. That alternative remedy cannot, in the circumstances of the case, be now described as equally convenient, beneficial and effectual.

94. I have indicated that, in my opinion, the petitioner has, so far as he is concerned, placed all the material that was in possession regarding the issue of orders in his particular case to cover limestone. I have pointed out that the attitude of the State Government has not been helpful so far as the determination of this question is concerned. A way has been pointed out by my brother Mootham for having the issues between the parties decided expeditiously. It is well known that before the abolition by Section 7, Administration of Justice (Miscellaneous Provisions) Act, 1938, the writ of mandamus except where it was peremptory could be used to command the authority or person to whom it was directed to perform its statutory duty or to show cause to the contrary within the time indicated in the writ for the performance of that duty.

After return disputed questions of fact could be fully investigated by proceedings virtually assuming the form of an action. In those circumstances under that procedure witnesses could be examined and the provisions of Civil P. C. for discovery and inspection utilized. It is unnecessary to refer to English cases, on this point as reference has been made to them by my brother Mootham. I shall in a later part of this judgment revert to this question by citing certain American authorities.

(94a) The procedure adopted by my brother Mootham is based upon the assumption that at the meeting of 17-11-1948, the petitioner did not give up his rights under the lease. It is, therefore, necessary to examine a little closely as to what actually happened on that day.

(94b) On 17-11-1948, there took place a meeting at Lucknow at which the persons present were Sri H.K. Mathur, Industries Department, Dehra Dun, Sri A.D. Pandit, I. C. S. Collector Dehradun, and the petitioner and his son. The record of the proceedings has been produced before us. It is signed, among others, by the petitioner. It is contended that the petitioner agreed to have his licence cancelled at that meeting. Five points have been urged in connection with the minutes of this meeting and their legal effect. They are as follows:

> "(a) That the records of these minutes cannot be construed to constitute a deed of relinquishment or surrender as the decision in them was not embodied in a registered deed of document.
>
> (b). That the petitioner was coerced or intimidated into entering into the arrangement embodied in that agreement by the pressure of the officials present at that meeting.
>
> (c) That there was no consideration to support the arrangement.
>
> (d) That the terms of the agreement, if any, embodied in the minutes of that meeting were never carried out by the State Government, and that that being so the petitioner is absolved from any legal duty adhering to it.
>
> (e) That the agreement itself has no validity as there is nothing to indicate that it had the necessary sanction or approval of the Governor under Section 175, Government of India Act, 1935.
>
> (94c) Before considering each of these questions separately, I would like to say that the meeting appears to have been held as the petitioner firm had been complaining to Government that certain factories had made arrangements for obtaining limestone from other parties and were seeking, with the permission of the zamindars, to work in part of the area covered by its prospecting licence and that Government officials had not been co-operating with the firm in enabling it to exercise that right claimed by it under its licence. Apparently the Association was apprehensive that if that state of affairs continued, it would not be able to fulfil the commitments that it had entered into with sugar factories for the supply of limestone.

At the time when the meeting took place relations between the petitioner firm and the local officials appear to have been strained as apparently the Government view was that it was not open to the Association under its prospecting licence to quarry limestone on a commercial basis. On a fair construction of the agreement arrived at, at that meeting, I think that it can be said that what the parties agreed to was that the Association would be willing to give up the rights it claimed under the prospecting licence and supply one hundred and twentyfive wagons of limestone to one Sri J. S. Oberoi and a hundred to one Har-Kishan Lal, the rate of supply to be determined by the Collector, provided that Government on its own part would grant to the Association a temporary mining lease for the remaining period of the sugar factories session and, after the new mining concession rules had been framed, undertake to examine the Association's application for a mining lease on merits with other candidates.

I have no difficulty in coming to the conclusion that a temporary mining lease cannot mean, as contended for by the State, a permit. It, in my opinion means mining lease of a short duration. I have also difficulty, however, in coming to the conclusion that the words 'on merits with other candidates' simply mean not that priority as between the Association and other applicants would be determined according to any new rules framed by Government but that it would be for Government to grant or refuse the Association's application after considering it on the merits, i.e., its capacity and experience, as compared with other applicants.

(94d) I shall first consider the objection that the minutes do not constitute a deed of surrender or relinquishment as the decision in them was not embodied in a registered deed or agreement. The notion of a 'profit-a-prendre' is that of rights appurtenant to land supplemented by the right to enjoy the profits of the land over which they are exercised. In English law a 'profit-a-prendre' is regarded as something taken from the soil or the right to take a part of the soil or the produce of the soil.

(94e) In his well known work 'The Law Relating to Easements in British India'; 3rd edition, Mr. Peacock explains that in English law:

> "Whilst an easement is merely the right appurtenant to land to do something, or require something not to be done, on the land of another, a profit a 'prendre' is not, merely the privilege to do, but the right to take and use, and is, therefore, something more than an easement." (page 4).
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> He further points out that;
>
> "While an easement can never import an interest in land, a profit a 'prendre' which gives a right to take away a portion, or the produce, of anothers' soil, may be said to that extent to be an interest in land, or a possessory right." (para 4).
>
> He further observes that:
>
> "A profit a 'prendre', considered as a right, is an incorporeal hereditament equally with an easement, but considered as a tangible thing taken from the soil is a

corporeal thing.

Another point of difference between profits a 'prendre' and easements is that the former cannot, but the latter can, be claimed by virtue of a custom.

Further, unlike an easement proper, an exclusive profit a 'prendre' such as a right of fishing, is capable of being trespassed upon." page 5).

Now the separate existence of 'profit-a-prendre' in English law is founded upon the distinctions quoted above. In India, however, the definition of the word 'easement' as contained in Section 2, Sub-section (5), Limitation Act (Act 9 of 1882) includes a 'profit-a-prendre'. The word 'easement' is used in the statutes of this country in a very wide sense for it not only includes 'beneficial enjoyment', but also a possible convenience, remote advantage and even a mere amenity. Now Mr. Peacock explains that :

"Easements in India are capable of being exercised not only over actual land itself, but over things permanently attached to the land, such as houses or buildings of any kind, or over anything growing on, or attached to, or subsisting upon, land, such as woods, tanks or rivers". (Pages 8 and 9 of the Law Relating to Easements in British India, 3rd edition.) The position appears to me to be clear that the terra 'easement' as used in Indian Law "includes even a right to enjoy profits arising out of the soil of another owner, and may be acquired in the same way as ordinary easement rights are acquired."

(See page 23 of 'Easements and Licenses' by K.N. Joshi, 1st edition.) It is quite obvious that the term 'easement' as used in the Indian Law includes 'profits-a-prendre' in gross which are unappurtenant to any dominant tenement and are enjoyed solely for the benefit of an individual. See on this point -- 'Chundee Churn Roy v. Shib Chunder Mundul', 5 Cal 945 (V), -- 'Chinnanam Pillay v. Manu Puttur', 1 Mad LJ 47 (W); and -- 'Bhabadeb Chatterjee v. Bhusan Chandra', AIR 1926 Cal 507 (X).

95. The question whether the relinquishment of a 'profit-a-prendre' requires registration or not raises a difficult question having regard to the pro-

visions of Sections 17 and 47, Registration Act. It is, however, unnecessary to go into it as, in my opinion, the minutes would not constitute a release or waiver of any rights possessed by the petitioner, but represent a mere narration of a transaction which took place between the petitioner and certain senior officials representing Government. It is nothing more than a recital of certain events which occurred at one time in the history of relationship between the parties. I think, therefore, that the document can be looked into by this Court.

96. I come now to the question whether Sri Brij Lal Suri, who was representing the Association, entered into this agreement by coercion or duress on the part of the officials of Government. It is clear that there was a difference of opinion between the Government and Brij Lal Sun as regards the

latter's claim that he had a right to a commercial exploitation of the mineral. Sri Suri's version is that Sri Pandit told him that unless he signed the memorandum, Government would not help him in his difficulties as a prospector. Sri Suri is an intelligent businessman quite capable of looking after his own interests & I find it impossible to believe that the two officials or Government could, or did in fact, dominate his will. It may be that the arrangement arrived at was not to his liking. But Sri Brij Lal Suri appears to have discovered that only after he had left the meeting and given his blessings to it. For one reason or another he was a consenting party to it and there is no force in the plea that he signed it under coercion or duress.

97. The next point to be considered is whether the so-called agreement has any consideration to support it. The petitioner possessed under the prospecting licence the sole right to a mining lease and on an application made before its expiry to an automatic extension of the licence pending the execution of a mining lease. That this was so is clear from Clause (1) of Part 4 of the licence and also Rule 33 which is important for the purposes of deciding this case. Rule 33 specifically lays down that:

> "On or before the determination of his licence, the licensee shall have a right .....to a mining lease in accordance with the terms contained in the rules for mining leases...."

The petitioner had a clear right to a mining lease as soon as an application was made by him within the period of his licence in the prescribed manner. By the mere fact that the licence for the mining lease was not issued during the period of the mining lease or that the authorities failed to issue it before it expired the right to this right would not disappear. The right to an extension of the period of the prospecting licence is, if an application is made within the time, an automatic one. For a licence for a mining lease to which the petitioner was entitled he agreed to accept a temporary mining lease provided certain conditions were fulfilled.

No doubt, Government issued to him on 22-11-1948, a temporary permit which was to remain valid upto 31-3-1949, authorising him to extract 20,000 tons of limestone. The argument of the State is that this was the temporary running lease referred to in the agreement. I cannot look upon this permit as constituting any consideration for under the terms of the prospecting licence the Association possessed a right to a mining lease, as will be evident from Clause (1) of Part 1 of the prospecting licence which is in accordance with Rule 14 of the 1940 Rules. According to this rule, as also from the clause referred to above, the petitioner firm had "the sole right subject to the conditions contained in the licence, to mine, quarry, bore, dig and search for, win, work and carry away only specified minerals or, in the event of no minerals being specified, all minerals lying, or being within, under or throughout the land specified in the licence."

Under the licence the Association had acquired the sole right to extract limestone within its area and the fact that the permit permitted it to do so cannot constitute a consideration for the agreement.

98. Lastly, in any case, in my opinion, the State did not carry out the undertaking that it would, grant a temporary mining lease for the permit cannot be looked upon as a mining lease. An application having been made for the extension of the licence during the term of the licence the

petitioner clearly became entitled under the rules & the licence to a mining lease, and the fact that the authorities did not choose to grant it to him within time cannot affect his right to it.

99. The last point forcibly urged by Mr. Dhawan is that the agreement is of no effect as it was not only implemented by Government and agreed to by the Association without consideration but it was also not in the form required by Section 175(3), Government of India Act, 1935, which has been quoted in an earlier part of this judgment. There is nothing before us to show that the two senior officials, who were representing Government had the authority of the Governor of the Province to enter into the arrangement. The so-called agreement arrived at between some officials of Government and the petitioner did not purport to have been made in the name of the Governor. It, therefore, violates the provisions of Section 175(3), Government of India Act, 1935, inasmuch as it seeks to modify or alter the previous grant made by the Governor on the one part and the petitioner on the other part.

100. I shall now briefly notice an argument which was only advanced by learned counsel for the petitioner, Sri Dhawan. It was contended by him that the right to a mining lease arose out of a demise or grant which gave him an exclusive right and entitled him to sustain an action for trespass. Now it may be conceded that having regard to the definition of an easement in the Indian Easements Act the licence constituted the grant of a right in gross. Thus the petitioner came to acquire a right of property before the Constitution came into force. It is contended that Article 19(1)(g) which guarantees a right to acquire, hold and dispose of property merely recognises a right to property which was in existence in this country before and did not confer any new rights.

On the basis of this argument Sri Dhavan contends that the contingent right which had accrued to him under Section 21, T. P. Act became a vested right and must be regarded as a fundamental right within the meaning of the Constitution. Being a fundamental right it is entitled to be enforced by the Constitution. It may be that there is force in this contention but I do not think it necessary to consider it at any length as in the view that I am taking he had a statutory right to a mining lease under rules framed by Government capable, if other suitable conditions exist, of enforcement by Article 226. The question to my mind which is of importance in this case is whether that statutory right included a right to a mining lease including limestone. That, as I have pointed out, on the evidence before us is a matter involving some doubt.

I have pointed out before that I am not satisfied with the attitude taken up by the State in this case. No evidence indicating that the statement contained in Sri Bhatia's letter dated 16-10-1948, does not state the facts correctly or is, at all events, based upon a misunderstanding has been produced before us. I have already referred. to the fact that it is not easy to reconcile the statement contained in Sri Bhatia's earlier letter so far as the applicability of the 1940 Rules with his later letter regarding limestone is concerned. In these circumstances I do not think that we have sufficient material before us to justify us in holding definitely one way or the other that either by any general order or special order made by the Provincial Government the 1940 Rules were applied to limestone. In these circumstances the right claimed for by this writ is of a doubtful character and the question that has to be considered is that of the course we should adopt in these circumstances.

101. Insisting upon the petitioner having his dispute settled by a regular suit for specific performance would involve inconvenience and delay undesirable from many points of view. I have, therefore, been driven to the conclusion that the proper course for us in this case is to issue what is known as a Writ of mandamus in the alternative so that on its return the issue between the parties may be finally decided.

102. The Rules of this Court do not lay down the procedure to be followed on the issue of a Writ of mandamus. It must be assumed, however, that the 'founding fathers' were conversant with the difference between a peremptory and, an alternative writ of mandamus and that the right to mandamus contemplated by them was analogous to that which obtains in Britain as also that in the United States of America. Reference has been made by my brother Mootharm to the practice of the English courts prior to 1938, I would like to point out that in the United States an alternative writ, according to the law as stated in Corpus Juris Secundum, Vol. 55, Section 312, page 550, is "in the nature of an order to show cause and directs the respondent to do the act required! or to show why he should not do it."

It appears that:

> "After its issuance respondent may comply with its terms or contest its issuance up to the time of a hearing on the peremptory writ. An alternative writ also operates as process. The function of the writ is to give respondent the benefit of a return and an opportunity for the ascertainment of the facts before a judgment is pronounced and to give petitioner or relator an opportunity to establish his right to a peremptory writ. It does not affect a substantial right because it settles nothing against respondent or in favour of the relator except questions as to the jurisdiction of the Court, and moreover, its scope and character may not be modified by stipulations, at least as far as the rights of third persons may be affected. The alternative writ may be dispensed with by statutes providing a different procedure.
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> The effect of an alternative or preliminary writ is to preserve the existing status until the court can hear the parties and determine the issues between them." (p. 550) (See p. 550 of 55 Corpus Juris Secundum). The practice in that country would appear to be:
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> "To issue an alternative writ before the issuance of a peremptory writ. Indeed, except where the alternative writ is abolished by statute, no peremptory writ of mandamus may ordinarily be granted before the issuance of an alternative writ, specially is this true where the legal right to the writ is not clear, and material facts are in controversy. In other words, the petition and order to show cause cannot be substituted in lieu of the alternative writ, except by consent of the parties and of the court. Nevertheless, in most jurisdictions, a peremptory writ may be granted in the first instance after notice where there are no disputed questions of fact and a clear case is presented; but, if it appears that there are disputed questions of fact and a clear case is not presented, an alternative, rather than a peremptory, writ may, and

ordinarily should, be issued."

(See p. 609 of 55 Corpus Juris Secundum). It may be further pointed out that after the issue of the alternative writ the practice, as it obtains in the United States, is that general rules relating to evidence in civil actions ordinarily apply in mandamus proceedings initiated by the alternative writ. So the position is that where an alternative writ is granted the respondent must either perform the act directed or appear to show cause within the time indicated in the writ why he does not do so.

103. The position, as explained by Ferris in his 'Extraordinary Legal Remedies', 1926 edition, is that;

> "A peremptory mandamus issues in the first instance only where there is a clear, undisputed legal right--where there is no dispute as to the material facts requiring the intervention of a jury; only an alternative writ can issue where there is a question of fact. So, where an issue of fact on a material question requiring evidence to sustain it is presented, which fact, is true, would be a defence, it is error to sustain a motion for judgment on the pleadings. (page 288).
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> .....
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> The mandatory clause of the alternative writ commands respondent to perform such act as prayed for by the petitioner, or else to show cause why it should not be done. That is, respondent must either obey or show proper excuse for not doing so. Where he elects to obey the writ, it is sufficient to set forth this fact by way of return, averring with sufficient certainty and clearness his compliance with the mandate of the court. He should substantially follow the mandatory clause of the writ, stating his performance of the duty as by the writ commanded. Where respondent complies with the alternative writ, it is, of course, unnecessary to proceed, and the proceeding will be dismissed. (p. 292).
>
> .....
>
> Where respondent elects not to obey the writ, he must show in his return that petitioner has no clear legal right to demand obedience, or that no corresponding duty exists which he can be compelled to perform. This he may do by questioning the sufficiency of the writ in law by a demurrer, or in fact by a plea or answer." (pp. 292 and 293).
>
> It will be clear from the statement of the law, as given by me regarding mandamus in the United States, 'that even there an alternative writ can be issued where the right is not clear or the facts are not clear in order that the right may be tried, upon the return.'

104. Now in this case it is clear that the prospecting licence itself was as of a right renewable if the application was made before the expiry of the original prospecting licence and that there is evidence

which has not been explained by the respondent to show that the statutory rules which, while exempting limestone from their operation, gave authority to the provincial Government by a separate order to apply them to limestone and that they were possibly so applied.

I think it can also reasonably be said that it is undesirable for this litigation to continue indefinitely, that the arbitration clause proceeded, upon the assumption that only matters covered by these presents would be the subject-matter of arbitration, that the arbitration suit could not bar a suit for specific performance, that its trial having been stayed by this Court by an interim order and the respondents not having had vacated it so far, requiring them to have resort to it now after the matter has been discussed at length before us would not be to provide the petitioner, with an equally beneficial and effective remedy. For the reasons given above I concur in the order proposed to be made by Mootham J.

105. The position in regard to the other reliefs claimed has been explained by my brother Mootham and I have nothing to add.