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PATNA SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT PATNA AND BY THE SUPREME COURT ON APPEAL FROM THAT COURT

REPORTED BY

S. P. JAMUAR, M.A., B.L. (*Reporter*).
R. DAYAL, M.A., B.L. (*1st Assistant Reporter*).
M. K. CHOUDHARY, B.L. (*2nd Assistant Reporter*).

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BIHAR AGRICULTURAL PRODUCE MARKETS ACT, 1960—*concld.*

and processed or finished products. Such construction of a fiscal statute would not be a proper and reasonable construction and would amount to reading in the schedule something by considering as what is the substance of the matter, and then substituting other materials by following the rule of intendment, and then by implication to read that knitting wool, a commodity which is apparently different, would be covered in the expression "wool";

Held, therefore, that the authorities were not justified in insisting upon the petitioners to take out licence, or for the matter of that, follow any of the provisions of the Bihar Agricultural Produce Markets Act, 1960, and the Bihar Agricultural Produce Markets Rules, 1962 and the notices calling upon them to take out licences are liable to be quashed.

Vir Bhan alias *Vir Bhan Nangia & Ors.* v. *The State of Bihar & Ors.*, (1977) I. L. R. 56, Pat. 86

BIHAR CINEMA (REGULATION) RULES, 1974—*rules* 10 *and* 12—*provisions of—permanent licence in existence—period for validity—State Government—whether can give direction to licencing authority to ask Electric Inspector, Bihar and Executive Engineer P. W. D. to inspect and examine structural soundness of Cinema building under rule* 12—*rule* 12, *whether imposes a duty on the licence to pursuade Electric Inspector, Bihar and Executive Engineer P. W. D. to come and inspect Cinema house.*

Rule 10 of Bihar Cinema (Regulation) Rules, makes it abundantly clear that the permanent licence which is in existence shall be valid for a period of three years from the date on which the licence is granted subject to annual inspection and payment of prescribed fee unless revoked earlier by the licencing authority;

Held, therefore, that in the instant case the licence granted to the petitioner on the 16th September, 1974, is to remain valid for a period of three years from that date, i.e. till the 15th September, 1977; subject, of course, to annual inspection as provided under rule 12 of the Rules and payment of prescribed fee.

Under rule 12 of the Rules, the State Government may direct the licencing authority to ask the Electric Inspector, Bihar and the Executive Engineer, P. W. D. to inspect and examine the structural soundness of the Cinema building and to certify that the same can be used without danger to the public. The rule does not very rightly impose a duty on the licensee to persuade the Electric Inspector, Bihar, and the Executive Engineer, P. W. D. (Building) to come and

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BIHAR HIGH SCHOOLS (CONTROL AND REGULATION OF ADMINISTRATION) ACT, 1960 AND BIHAR EDUCATION CODE—*contd.*

committee of school does not carry out the direction of the Board of Secondary Education, has no greater sanction than an administrative order or rule and is not based on any statutory authority or other authority which could give it the force of law. Articles 205 and 206 derive their authority from the D. P. I's letter. They can, therefore, have no statutory force unless they derive their authority from statutory provision or are in exercise of any competent rule making power, Bihar Act XIII of 1960 was brought on the Statute Book to control and regulate the administration of high schools other than schools owned by the State Government and matters connected therewith, as is clear from the Preamble to the Act. Section 2(*b*) of this Act defines a high school to mean "a recognised school imparting instructions in secondary or higher secondary education". This Act has, therefore, nothing to do with the middle schools. Section 8(1) of the Act clearly empowers the State Government to make rules for carrying out the purposes of the Act, which means in the matter of high schools imparting instructions in secondary or higher secondary education; it does not empower the State Government to frame any rule with regard to middle schools;

Held, therefore, that as middle schools or primary schools do not come within the category of either high schools or higher secondary and multipurpose schools, the argument that Articles 205 and 206 of the Code should be treated to be in the exercise of the rule making power of the State Government under Bihar Act XIII of 1960 is wholly misconceived, in so far as it is made to relate to middle schools;

Held, further, that Articles 205 and 206 of the Code can, by no stretch of imagination, be said to be rules framed in exercise of the rule making power of the State Government under section 341(*iii*) of the Municipal Act. There is absolutely no nexus between regulating appointment and salaries of masters and dissolution of the managing committees on the grounds mentioned in Article 205(*e*) of the Code. Apart from the fact that the letter from Shri Rao to the Director of Public Instruction, as published in the Gazette, is not authenticated in the name of the Governor as enjoined by Article 166 of the Constitution of India and, therefore, cannot have the effect of any statutory rule framed by the State Government, there is no source for such authority in section 341(*iii*) of the Municipal Act.

It is one of the settled cannons of construction of statutes and subordinate legislation that generally the initial difference between subordinate legislation and statute law lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that courts of law, as a general rule, will not give effect to the rules made unless satisfied that all the conditions

(1) (1973) A. I. R. (Pat.) 260.

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CIVIL WRIT JURISDICTION

Before Shambhu Prasad Singh and S. K. Jha, JJ.,

1976

August, 5.

MANAGING COMMITTEE OF TOWN MIDDLE SCHOOL, HAJIPUR AND ANR.*

v.

THE STATE OF BIHAR AND ORS.*

Bihar High Schools (Control and Regulation of Administration) Act, 1960 (*Act XIII of* 1960) *and Bihar Education Code, Articles* 205 *and* 206— *scope and applicability of—Middle School and Primary School, whether come within the category of either high Schools or higher secondary and multipurpose Schools—Articles* 205 *and* 206 *of the Code, whether to be treated to be in the exercise of rule-making power of the State Government either under Act XIII of* 1960 *or section* 341(*iii*) *of the Municipal Act—subordinate legislation and statute law—initial difference between—District Education Officer, whether has power to dissolve the managing committee of a proprietary or municipal aided School or to constitute* ad-hoc *committee—A. I. R.* (1973) *Pat.* 260 *held not a good law—Bihar and Orissa Municipal Act,* 1922 (*Act VII of* 1922), *section* 341(*iii*).

Article 205 of the Bihar Education Code, which provides for withdrawing or withholding of recognition in case the managing Committee of a School does not carry out the direction of the Board of Secondary Education, has no greater sanction than an administrative order or rule and is not based on any Statutory authority or other authority which could give it the force of law. Articles 205 and 206 derive their authority from the D. P. I.'s letter. They can, therefore, have no statutory force unless they derive their authority from Statutory

*Civil Writ Jurisdiction Sase No. 2658 of 1975. In the matter of an application under Articles 226 and 227 of the Constitution of India.

provision or are in exercise of any competent rule making power. Bihar Act XIII of 1960 was brought on the Statute Book to control and regulate the administration of High Schools other than Schools owned by the State Government and matters connected therewith, as is clear from the Preamble to the Act. Section 2(*b*) of this Act defines a high School to mean "a recognised School imparting instructions in Secondary or higher Secondary education". This Act has, therefore, nothing to do with the middle schools. Section 8(1) of the Act clearly empowers the State Government to make rules for carrying out the purposes of the Act, which means in the matter of High Schools imparting instructions in Secondary or Higher Secondary education; it does not empower the State Government to frame any rule with regard to middle schools.

Held, therefore, that as middle schools or primary schools do not come within the category of either high schools or higher secondary and multipurpose schools, the argument that Articles 205 and 206 of the Code should be treated to be in the exercise of the rule making power of the State Governmnt under Bihar Act XIII of 1960 is wholly misconceived, in so far as it is made to relate to middle schools.

Held, further, that articles 205 and 206 of the Code can, by no stretch of imagination, be said to be rules framed in exercise of the rule making power of the State Government under section 341(*iii*) of the Municipal Act. There is absolutely no nexus between regulating appointment and salaries of masters and dissolution of the managing Committees on the grounds mentioned in Article 205 (*e*) of the Code. Apart from the fact that the letter from Shri Rao to the Director of Public Instruction, as published in the Gazette, is not authenticated in the name of the Governor as enjoined by Article 166 of the Constitution of India and, therefore, cannot have the effect of any Statutory rule framed by the State Government, there is no source for such authority in section 341(*iii*) of the Municipal Act.

It is one of the settled cannons of constitution of Statutes and subordinate legislation that generally the initial difference between Subordinate legislation and Statute law lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that courts of law, as a general rule, will not give effect to the rules made unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. The courts, therefore, will require due proof that the rules have been made

and promulgated in accordance with the statutory authority. Secondly, if the competent authority, as in this case the State Government, used the powers given under a statute for some purpose wholly uncommented with the provisions of the Act, they cannot justify their action under the statutory power, as the answer would be that they were not acting under it.

Held, also, that as Articles 205 and 206 of the Code have not the force of any rule in so far as the middle schools are concerned, there is no law or rule empowering the District Education Officer to dissolve the managing committee of the school or to constitute any *adhoc* committee and the view taken in *M. M. School's case*(1), is in correct.

The Managing Committee of the Mungraura Middle School Jamalpur v. *The District Education Officer, Monghyr*(2) *held not a good law, Kameshwar Prasad* v. *The State of Bihar*(2), *Dwarkanath Tiwari* v. *State of Bihar*(3), referred to.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of S. K. Jha, J.,

Messrs Braj Kishore Prasad II and Yogesh Chandra Verma, for the petitioners.

Messrs Prabha Shanker Mishra, Ganesh Prasad Singh, Umashankar Singh and *Basant Kumar Singh*, for the respondents.

S. K. JHA, J.—This application under Articles 226 and 227 of the Constitution of India has been made by two petitioners; the first being the managing committee of Town Middle School, Hajipur, represented through one Shri Sheo Kumar Prasad claiming to be the Secretary of the managing committee, the second Shri Kameshwar Prasad who is the Headmaster of the aforesaid school. The prayer made in the application is for issuance of an appropriate writ quashing annexures 1 and 2 to the petition. It is pertinent to note here that, when the application was originally filed, a document purporting to be not exactly

(1) (1973) A. I. R. (Pat.) 260.
(2) (1975) B. B. C. J. 296.
(3) (1959) A. I. R. (S. C.) 249.

annexure 1 was filed due to some inadvertence. Soon after it was detected, an application under section 151 of the Code of Civil Procedure was filed asserting that the true copy of annexure 1 was not as was originally annexed to the petition but as one which was annexed to the application under section 151 and, therefore, a prayer was made in that application to treat the real annexure 1 as the one annexed to the petition under section 151 C.P.C. That prayer was allowed. The net result, therefore, is that the impugned annexure 1 is an order dated 9th October 1975 passed by the District Education Officer, Muzaffarpur, Vaishali and Sitamarhi, respondent 2, whereby in purported exercise of his power under Article 206 of the Bihar Education Code (hereinafter to be referred to as the Code) the petitioner managing committee was dissolved and an *ad hoc* committee consisting of three members was formed, namely, the Subdivisional Officer, Hajipur, Vaishali, respondent 3, as the President, the Chairman of the Hajipur Municipality, respondent 4, as its Secretary and the Deputy Inspector of Schools, Hajipur, respondent 5 as a Member. The impugned annexure 2 is a letter from the Chairman, Hajipur, Municipality, respondent 4 acting as the Secretary of the ad hoc committee aforesaid, addressed to the Headmaster of the school in question directing him to reinstate respondents 6 to 10, who were formely the teachers of the school whose services had been terminated by a resolution of the managing committee, petitioner 1.

2. From the labyrinth of affidavits, counteraffidavits and supplementary affidavits the facts that emerge in this case are very short which I shall hereinafter state and the point of law is very simple, and that is: whether the managing committee of a proprietary or municipal-aided middle school can be dissolved or its functioning interfered with by the District Education Officer. When this case was placed before a learned single Judge of this Court—B. D. Singh, J., finding, as we were informed at the Bar, an apparent conflict between two single Judge decisions of this Court, namely, *The Managing Committee of the Mungraura Middle School, Jamalpur* v. *The District Education Officer, Monghyr*(1) and *Kameshwar Prasad* v. *The State of Bihar*(2), he directed that this case be placed before a Division Bench; and hence this case before us.

(1) (1973) A. I. R. (Pat.) 260.
(2) (1975) B. B. C. J. 286.

3. Before entering into any discussion on the question of law mooted before us, it is advisable to set out the salient facts of the case. According to the petitioners, the school in question is a proprietary school whereas, according to the respondents, it is a municipal-aided school. According to the petitioners' case again, while Shri Sheo Kumar Prasad is the Secretary of the managing committee petitioner 1, according to the respondents, he was merely a Member before it was dissolved and not its Secretary. I have made a special reference to this fact at this stage since it will have some bearing on a preliminary objection raised by the respondents at the hearing of this case with regard to the maintainability of this application at the instance of Shri Sheo Kumar Prasad claiming to be the Secretary of the managing committee of the school. These controversial facts I shall deal with at an appropriate place. But, to continue with the narration of facts, petitioner 2, who was admittedly acting as a permanent Headmaster of the school, on attaining the age of 62 years in the year 1974, applied for extension of the period of his service and the managing committee of the school, taking into consideration his physical and mental fitness, unanimously resolved to grant extension till the completion of 65 years of age. Yet the Duputy Director of Education (Basic and Primary), Bihar, passed an order for retiring petitioner 2 on the ground that he had attained the age of compulsory superannuation, i.e., 62 years and the managing committee had no jurisdiction to grant him any extension under the statutory rules. Both the petitioners 1 and 2 challenged the aforesaid order by filing two writ applications in this Court which were registered as C. W. J. C. Nos. 330 and 427 of 1974. These applications having been admitted were ultimately allowed by judgment and order dated the 20th of September, 1974 passed by H. L. Agrawal, J. This is the judgment which has been reported in 1975 B. B. C. J. 236 reference to which has been made earlier. After the passing of the aforesaid order by this Court, petitioner 2 continued to discharge the functions of the Headmaster of the school. The local Education authorities, however, did not sanction the bills submitted by petitioner 2 in spite of his Court's order and treated respondent 2 Shri Ramprit Mahto as the acting Headmaster of the school. This resulted in petitioner 2 filing an application for issuance of a rule of contempt against the Subdivisional Education Officer, the Deputy Director of Education (Basic and Primary), Bihar, and respondent 9. A rule for contempt was issued by this Court in the case registered as miscellaneous judicial case no. 50 of 1975. Ultimately that case was disposed of on the 3rd of April, 1975 wherein the contemners tendered an unqualified apology and gave a clear understanding in this Court that petitioner 2

was the Headmaster of the school. Motives of *mala fide* have been alleged in the petition on account of the aforesaid facts against some of the respondents. But for the purpose of disposal of this application, it is needless to go into the question of motive. Suffice it to say that the managing committee of the school was dissolved and *ad hoc* comittee was formed under annexure 1. As the petitioners' case is, before passing the order as incorporated in annexure 1, respondent 2 did not ask petitioner 1 to show cause against any charge or allegation on account of which it was sought to be dissolved. By annexure 2, thereafter, as already stated earlier, five of the teachers of the school, namely, respondents 6 to 10, whose services had been earlier terminated by the managing committee, were directed to be reinstated. On these facts, the question that arises for determination is as to whether the District Education Officer, respondent 2, had any legal authority or jurisdiction to dissolve the managing committee of the school and, if none, then, consequentially, the *ad hoc* committee formed had no jurisdiction to issue the direction as contained in annexure 2.

4. The facts as generally stated above may not be controversial. The only fact worth mentioning, which has been controverted, is that Shri Sheo Kumar Prasad was not the Secretary of the managing committee and that, therefore, the petitioners had no *locus standi* to file this writ application: this application was, therefore, not maintainable. All other facts which have been stated in the counter-affidavits filed on behalf of the contesting respondents merely amount to submissions regarding the legality of the orders passed under the two impugned annexures.

5. This then leads us to the first question which was raised by way of preliminary objection on behalf of the respondents with regard to the *locus standi* of the petitioners to move this application. This in its turn entails reference to certain materials on record. In paragraph 3 of the petition it has been asserted that petitioner 1 runs and manages the affiairs of the school with Shri Sheo Kumar Prasad as its Secretary. In paragraph 5 of the counter-affidavit filed on behalf of respondents 2, 3 and 5 it has been stated that the managing committee was constituted with one Shri Satyadeo Narain Singh as its Secretary and Shri Sheo Kumar Prasad was merely one of its members. The petitioners filed an affidavit in reply to the supplementary counter-affidavit duly sworn by Shri Sheo Kumar Prasad on the 26th of February, 1976 asserting in paragraph 1 thereof that he was the Secretary of the managing committee of the school. In paragraph 3

of the same rejoinder it has been asserted that C. W J. C. 427/74 referred to earlier Shri Sheo Kumar Pasad had represented the managing committee as its Secretary and respondents 2, 3, 4, 5 and 9, who were parties to that application, had never questioned his authority and that this Court had allowed the writ application filed by Shri Sheo Kumar Prasad in his capacity as Secretary of the managing committee. It has further been asserted in paragraph 3 of the reply that respondents 9 and 10 themselves had always recognised the managing committee of the school with Shri Sheo Kumar Prasad aforesaid as its Secretary and they have submitted petitions to Shri Sheo Kumar Prasad even as late as on the 26th of July, 1975. True copies of their petitions with endorsement of Shri Sheo Kumar Prasad as Secretary of the school have been marked annexures 3 and 3/1 to the reply to the supplementary counter-affidavit. In this state of affairs, I have no hesitation in holding that the denial in the counter-affidavit with regard to the status of Shri Sheo Kumar Prasad has been made merely for the sake of denial. If in the earlier writ application he was accepted as representing the managing committee as its Secretary and if respondents 9 and 10 as per annexures 3 and 3/1, referred to earlier, had addressed letters to him in his capacity of Secretary of the managing committee, even if the principle of estoppel be not applied, on facts I have no hesitation in holding that Shri Sheo Kumar Prasad is the Secretary of the managing committee of the school duly authorised to act on its behalf. The preliminary objection of the respondents, therefore, must fail and I over rule the contention that the application at the instance of the present petitioners is not maintainable.

5. As hinted at earlier, one of the facts on which the parties were at loggerheads is as to whether the school in question is a municipal-aided school or not. On one hand the petitioners' case is that it is a proprietary school, on the other the respondents' case is that it is a municipal-aided school. The petitioners allege that no direct aid is being given to the school or the managing committee from the municipal funds but they accept that from out of the municipal funds some payment is made to the teachers of the school through the Headmaster Proceeding upon the assumption, therefore, that such a case is true, it is difficult for me to appreciate the stand of the petitioners that the school is not necessarily a municipal-aided school. I may make it perfectly clear that I am not expressing my considered view on this matter since the fate of this case will not turn upon this factor. All the same, the term 'aid' has not been defined anywhere. Therefore, we have to fall back upon the dictionary meaning of the term 'aid'.

The Chambers's Twentieth Century Dictionary says that 'aid' means and includes help, assistance or that which helps. Accepting, therefore, the uncontroverted position that a portion of teachers' salary of the school in question was paid from out of municipal funds through the Headmaster petitioner 2, and not to the school direct—that means to its managing committee, it may still be covered by the term 'aid', for, the sums disbursed to the teachers through the Headmaster certainly do a lot towards helping the institution. In this connection, learned Counsel for the petitioners submitted that in the earlier case reported in 1975 B. B. C. J. 236 it has already been decided that the school is a proprietary school and not a municipal-aided school. This submission is misconceived. Towards the end of paragraph 7 of the judgement in the case of *Kameshwar Prasad*, H. L. Agrawal, J., has stated thus :—

> "I have said enough to show that there was no material on the record to establish that any aid was given to this school out of the District Education Fund which has been constituted under section 56A of the Act. The petitioners on the contrary have claimed that school is a proprietary school. This fact is however controverted by the respondent and it is not necessary for me to enter into this question fordisposing of these cases."

Thus, the question as to whether the school was proprietary in nature or was municipal-aided is still *res integra*. Therefore, I proceed upon the assumption, although not expressing any conclusive opinion on the point, that the school may be said to be a municipal-aided school. Nonetheless, as I have already indicated earlier, in the view that I am going to take in this case the question is merely of academic importance.

6. Starting with the premise that the school in question is a municipal-aided one, the point which is vital for consideration is as to whether there is any statute or statutory rule authorising respondent 2 to dissolve the managing committee of even a municipal-aided school or not and whether he is authorised to constitute an *ad-hoc* committee. It goes without saying that if there is no jurisdiction to dissolve the managing committee and to form an *ad-hoc* one then any action of the *ad-hoc* committee, such as the one taken under the impugned Annexure 2, will, as a necessary corollary, have to be struck down. As already stated earlier, respondent 2 in passing the order as incorporated in

Annexure 1 has purported to act under Article 206 of the Code, which runs as follows :—

> "For reasons specified in clause (*e*) of the aforesaid rule, the President, Board of Secondary Education in respect of Secondary Schools and District Education Officer in respect of Elementary Schools, instead of withdrawing or withholding recognition, may withdraw the approval of the constitution of the Managing Committee and make such arrangement for the management of the school as he considers suitable, pending proper reconstitution of the managing committee. For the purpose of this rule, Elementary Schools will mean 'Primary and Middle Schools'."

Reference to clause (*e*) of Article 205 necessitates the quotation of that clause also. Article 205(*e*) reads as follows :—

> "205.....Recognition shall only be withdrawn for reasons to be recorded in writing on one of the following grounds :—
>
> * * * *
>
> (*e*) that the managing committee of the school is not functioning in a way conducive to the smooth administration of the local affairs or proper maintenance of discipline among the teachers or pupils, is not carrying out the directions of the Board of Secondary Education or any competent authority or is not administering the finance of school properly,....."

The insertion of these two Articles has been noted in the Code on the basis of the D. P. I.'s letter no. 3012, dated the 14th August, 1958. As has been held by the Supreme Court in the case of *Shri Dwarka Nath Tewari* v. *State of Bihar* (1), the Article of the Bihar Education Code which, *inter alia*, provides for withdrawing or withholding of recognition in case the managing committee of a school does not carry out the

(1) (1959) A. I. R. (S. C.) 249.

directions of the Board of Secondary Education, has no greater sanction than an administrative order or rule, and is not based on any statutory authority or other authority which could give it the force of law. As already indicated earlier, Articles 205 and 206 of the Code derive their authority from the D. P. I.'s letter mentioned above. They can, therefore, have no statutory force unless it can be shown that they derive their authority from any statutory provision or are in exercise of any competent rule making power. Mr. Prabha Shanker Mishra, learned Counsel for the respondents, then invited our attention to the Bihar High Schools (Control and Regulation of Administration) Act, 1960 (Bihar Act XIII of 1960) which, he submitted, was merely passed in order to get over the difficulty presented by the decision of the Supreme Court in Dwarka Nath Tiwary's case. Mr. Mishra placed reliance upon section 8 of that Act, which lays down the power to make rules. Section 8(1) of the 1960 Act lays down that the State Government may after previous publication and subject to the provisions of Articles 29, 30 and 337 of the Constitution of India, make rules not inconsistent with this Act *for carrying out the purposes of this Act* (italicising is mine since it will have a bearing upon the question). On the strength of this statutory provision, it was submitted that Articles 205 and 206 as quoted will now be deemed to have been the rules framed under the rule making power of the State Government under the 1960 Act. This argument, in my view, is wholly fallacious. Act XIII of 1960 was brought on the Statute Book to control and regulate the administration of high schools other than schools owned by the State Government and matters connected therewith, as is clear from the Preamble to the Act. Section 2(*b*) of this Act defines a 'high school' to mean "a recognised school imparting instruction in secondary or higher secondary education". This Act has, therefore, nothing to do with the middle schools. The portion underlined under section 8(1) of the Act clearly empowers the State Government to make rules for carrying out the purposes of this Act, which means in the matter of high schools imparting instruction in secondary or higher secondary education; it does not empower the State Government to frame any rule with regard to middle schools. As a matter of fact, Article 6 of the Code itself mentions the different kinds of schools. It is worthwhile to quote a portion of Article 6 in this regard :—

"6. .....Schools are divided into two kinds :—

(*a*) Schools of general instruction.

(*b*) Schools for special instruction.

Schools under (*a*) above are divided into following types :—

(*i*) High Schools.

(*ii*) Higher Secondary and Multipurpose schools including Netarhat Residential School.

* * * *

(*v*) Middle schools, including senior Basic school/Sanskrit Middle schools, if any.

(*vi*) Primary schools, including upper primary and lower primary schools, primary Urdu schools, primary Sanskrit schools and Junior Basic schools."

It will thus be seen that middle schools and primary schools do not come within the category of either high schools or higher secondary and multipurpose schools. The argument put forward, therefore, that Articles 205 and 206 of the Code should be treated to be in the exercise of the rule making power of the State Government under Bihar Act XIII of 1960 is wholly misconceived, in so far as it is made to relate to middle schools.

7. Mr. Prabha Shanker Mishra, when faced with this difficulty, submitted before us that the source of authority of Article 206 of the Code was not the D. P. I.'s letter no. 3012, as mentioned in the Code itself, but it derived its authority from a letter dated 24th July 1958 from Shri N. D. J. Rao, I.A.S., Additional Secretary-*cum*-Special Officer to Government, to the Director of Public Instruction, Bihar, published in the *Bihar Gazette*, Extraordinary dated March 23, 1959, which read as follows :—

"No. VII/R8-01/57-E/3802

GOVERNMENT OF BIHAR
EDUCATION DEPARTMENT

From

Shri N. D. J. Rao, I.A.S.,
Additional Secretary-*cum*-Special Officer to Government.

To

The Director of Public Instruction, Bihar.

Patna, the 24th July, 1958.

SUBJECT.—Revision of rule for the withdrawal or withholding of recognition of schools.

Sir,

I am directed to refer to Government order no. 1230-E., dated the 15th March, 1936 and subsequent notification no. 3167-E., dated the

1st May, 1950, and to say that the State Government have been pleased to amend the existing rules and lay down additional ones regarding withdrawal or withholding of recognition of schools as below :—

Rules

1. *Withdrawal or withholding of recognition.*—Recognition shall only be withdrawn or withheld for reason to be recorded in writing and on one of the following grounds :—

(*a*) that the school does not follow the course of study prescribed or approved by the committee,

(*b*) that it has committed a wilful breach of the transfer rules,

(*c*) that it has not attained or does not attain to a reasonable standard of efficiency,

(*d*) that it does not maintain a satisfactory standard of discipline or employs any teacher who takes part in political agitation directed against the authority of Government or who endeavours to inculcate opinion tending to excite feelings of political disloyalty or disaffection among the pupils, or to create hatred between the different classes of the residents of the Indian Union,

(*e*) that the Managing Committee of the school not functioning in a way conducive to the smooth administration of the school affairs or proper maintenance of discipline among the teachers or pupils, is not carrying out the directions of the Board of Secondary Education or any competent authority or is not administering the finances of the school properly, and

(*f*) that it appears to the authority empowered to grant recognition for any other reason to be injurious to the interest of Education.

NOTE.—These rules apply to such Middle and Primary Schools (including Primary Sanskrit Schools and Primary Urdu Schools) as are not under the control of District Boards and special schools such as Sanskrit toles and Madarsas.

If recognition is refused to a school under the control of a Municipality, a copy of the order should be sent to the Chairman of the Municipality. The recognition of schools, under the control of District Boards, is governed by the statutory rules framed for these bodies.

1-B. *Withdrawal of approval to the constitution of the Managing Committee.*—For reasons specified in clause (*e*) of the aforesaid rule, the President, Board of Secondary Education in respect of Secondary schools and District Education Officer in respect of Elementary schools instead of withdrawing or withholding recognition, may withdraw the approval to the constitution of the Managing Committee and make such arrangements for the management of the school, as he considers suitable pending proper reconstitution of the Managing Committee.

For the purpose of this rule, Elementary schools will mean 'Primary and Middle Schools'.

Yours faithfully,
N. D. J. RAO,
Additional Secretary-cum-*Special Officer to Government.*"

From the initial portion of the gazette aforesaid, it appears that a notification in the Education Department dated the 21st March, 1959 reads as follows :—

"NOTIFICATION,

The 21st March 1959.

No. II/B1-01/59-E.—1050.—The following notifications, resolutions and orders, issued by the Government of Bihar, Education Department, and circulars and orders issued by the Director of Public Instruction, Bihar, are published for general information.

By order of the Governor of Bihar,
R. D. PANDE,
Deputy Secretary to Government."

In the gazette itself, apart from notifications and resolutions of the Government, with which we are not concerned, is incorporated the letter dated the 24th July, 1958 from the Additional Secretary-*cum*-Special Officer to the Government addressed to the Director of Public Instruction. which has been quoted earlier in extenso. It is obvious that Articles 205 and 206 of the Code are the same as the so-called rules 1 and 1-B mentioned in the letter of the Additional Secretary-*cum*-Special Officer referred to above. This document, however, cannot take the place of any rule framed under any statutory authority. As it is apparent, it is merely a letter from the Additional Secretary to the Director of Public Instruction, which is the same thing as an inter-departmental communication. This not being a notification nor any resolution of the Government but merely a piece of correspondence between the two departmental heads cannot take the place of any statutory rule. Learned Counsel for the respondents laid great stress on the beginning portion of the letter in question in which it has been stated "to refer to Government Order no. 1230-E, dated the 13th March, 1936 and subsequent notification no. 3167-E, dated the 1st May, 1950 and to say that the State Government have been pleased to amend the existing rules and lay down additional ones regarding withdrawal or withholding of recognition of schools" and it was submitted on the strength of such reference that it must be presumed that the State Government had duly framed these rules under some statutory authority. When called upon to place before us any statutory provision, empowering the State Government to make such rules in respect of municipal-aided middle schools, learned Counsel for the respondents ultimately had to fall back upon the provisions of section 341 of the Bihar and Orissa Municipal Act, 1922. This, therefore, necessitates a reference to the provisions of section 341 of the Municipal Act, which reads as follows :—

> "The State Government may make rules consistent with this Act—
>
> (*i*) determining the classes of schools which may be maintained or aided by the Commissioners;
>
> (*ii*) regulating the construction and repair of buildings connected with such schools, including hostels;
>
> (*iii*) regulating the appointment and salaries of masters and assistant masters of such schools; and

(*iv*) regulating the establishment of scholarships generally, or for the furtherance of technical or any other special form of education."

Special stress was laid on clause (*iii*) of section 341 which empowers the State Government to make rules regulating the appointment and salaries of masters and assistant masters of such schools. I fail to see how any such statutory provision can embrace within its sweep the matters regarding withholding of recognition or dissolution of managing committee of municipal-aided middle schools. Articles 205 and 206 of the Code can, by no stretch of imagination, be held to be rules framed in exercise of the rule-making power of the State Government under section 341(*iii*) of the Municipal Act. There is absolutely no nexus between regulating appointment and salaries of masters and dissolution of the managing committees on the grounds mentioned in Article 205(*e*) of the Code. Apart from the fact that the letter from Shri Rao to the Director of Public Instruction, as published in the gazette, is not authenticated in the name of the Governor as enjoined by Article 166 of the Constitution of India and, therefore, cannot have the effect of any statutory rule framed by the State Government, there is no source for such authority in section 341(*iii*) of the Municipal Act.

8. It is one of the well settled cannons of construction of statutes and subordinate legislation that generally the initial difference between subordinate legislation and statute law lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that courts of law, as a general rule will not give effect to the rules made unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. The courts, therefore, will require due proof that the rules have been made and promulgated in accordance with the statutory authority. Secondly, if the competent authority, as in this case the State Government, used the powers given under a statute for some purpose wholly unconnected with the provisions of the Act, they cannot justify their action under the statutory power, as the answer would be that they were not acting under it.

9. As I have already stated above, the letter as printed in the gazette extraordinary has *ipso facto* no force of rule. Assuming, however, that the State Government had purported to exercise its power under the rule making authority given to them under section 341, Articles 205 and 206 of the Code are not for any purpose connected with

the provisions of section 341(*iii*) of the Municipal Act and hence on this ground also the impugned Articles cannot have the force of any statutory rule.

10. No other point of law was pointed out before us in order to persuade me to hold that Articles 205 and 206 have the force of any rule in so far as the middle schools are concerned. I am, therefore, constrained to hold that there is no law or rule empowering the District Education Officer, respondent 2, to dissolve the managing committee of the school, petitioner 1, or to constitute any ad-hoc committee.

11. Another point which was canvassed at the Bar in this case was that in the absence of any notice or reasonable opportunity to show cause, the managing committee could not be dissolved by respondent 2 even if he had any such authority. This fact was asserted in the petition in paragraphs 9 and 10 thereof. In the counter-affidavit filed earlier on behalf of the respondents, this fact was not denied. But in a counter-affidavit filed at a rather late stage the fact with regard to the absence of notice was denied. But it is not necessary to go into this controversial question in the view that I have already taken of Articles 205 and 206 of the Code.

12. The main points arising in the case have already been dealt with by me. There, yet, remains one small matter which needs to be gone into. As already observed at the outset, there is a decision of a learned single Judge reported in A.I.R. 1973 Patna 260 supra, in which B. D. Singh, J., has held that the District Education Officer was competent to pass an order withdrawing the approval of recognition of the managing committee of a middle school and constituting an ad-hoc committee in place thereof. Considering the same piece of correspondence, as has been referred to by me, in the gazette extraordinary dated the 23rd March, 1959, the learned Judge has held that it had the force of a statutory rule in view of section 8(2) of Bihar Act XIII of 1960. With very great respect to the learned Judge and having given the matter my serious consideration, I thing the judgment is not good law. In that case, the decision proceeds upon a fallacious reasoning by presupposing that the letter published in the gazette extraordinary should be deemed to be rules duly framed by virtue of section 8(2) of the 1960 Act. As I have already stated earlier, 1960 Act is concerned only with high schools or higher secondary schools and not with middle schools at all. In so far as this point is concerned, I am of the view—and I say so with utmost respect—that the view taken by the learned single Judge in *M. M. School's case* is not correct.

13. No other point was pressed before us. In the result, therefore, I allow this application, quash the orders as incorporated in annexures 1 and 2 and direct that the management of the school in question by the managing committee be, in no way, interfered with except in accordance with law. In the circumstances, however, I shall make no order as to cost.

14. Incidentally I may mention that we were informed at the Bar that respondents 6 to 10 were being sought by the departmental authorities to be provided with teaching jobs in some other schools. If that be the position, this judgment should, in no way, be treated as any obstacle in the way of their absorption elsewhere.

SHAMBHU PRASAD SINGH, J.—I agree.

M. K. C.

Application allowed.

CIVIL WRIT JURISDICTION

Before K. B. N. Singh, C. J. and S. Ali Ahmad, J.,

1976

September, 24.

GANGA RAM BHAGAT AND ORS.*

v.

DEPUTY COMMISSIONER, SANTHAL PARGANAS, DUMKA AND ANR.

Bihar Privileged Persons Homestead Tenancy Act, 1947 (Act IV of 1948), section 18—order passed by Anchal Adhikari acting as Collector—finality of—Deputy Commissioner, whether can review or revise the final order passed by Anchal Adhikari.

*Civil writ Jurisdiction case nos. 1439, 1443, 1444, 1445, 1508, 1509 and 1510 of 1976. In the matter of applications under Articles 226 and 227 of the Constitution of India.
Dwarika Prasad Sah.....Petitioner in C.W.J.C. 1444/76
Ram Kalyan Rai.....Petitioner in C.W.J.C. 1445/76.
Basant Kumar Rakshit.....Petitioner in C.W.J.C. 1443/76.
Prem Sagar Mandal.....Petitioner in C.W.J.C. 1508/76.
Om Prakash Sah.....Petitioner in C.W.J.C. 1509/76.
Surya Narain Sah.....Petitioner in C.W.J.C. 1510/76.

The Deputy Commissioner, although a superior officer, yet being a Collector under the Act, could not review or revise the final order passed by the Anchal Adhikari, an officer subordinate to him, in view of the fact that the latter is also a 'Collector' under the Act, section 18 having given finality to such an order. In view of the fact that in the instant cases the orders passed by the Anchal Adhikari acting as a Collector in favour of the petitioners being final, they were not liable to be reviewed or revised by the Deputy Commissioner who is also a Collector under the Act;

Held, therefore, that the impugned orders of the Deputy Commissioner revising the orders passed in favour of the petitioners by the Anchal Adhikari acting as a 'Collector' under the Act and the notices asking the petitioners to vacate the disputed lands must be quashed.

Bibi Khairunnissa v. *State of Bihar*(1), referred to.

Applications under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of the Court.

Mr. Baleshwar Prasad Gupta, for the petitioner in all cases.

Messrs. S. N. Jha, Standing Counsel no. 2 and *Shardanand Jha, Junior Counsel*, for the respondents in C. W. J. C. 1439 of 1976.

Messrs. S. N. Jha, S. C. II and *Sudhakar Choudhary, J. C.*, for the respondents in C. W. J. C. 1443 of 1976.

Messrs. S. N. Jha, S. C. II and *S. A. Narain, J. C.*, for the respondents in C. W. J. C. 1444 of 1976.

Messrs. S. N. Jha, S. C. II and *B. P. Pandey, J. C.*, for the respondents in C. W. J. C. 1445 of 1976.

Messrs. S. B. N. Singh, Government Pleader no. 2, and *Uma Shankar Singh, Junior Counsel*, for the respondents in C. W. J C. 1508 of 1976.

(1) [1965] B.L.J.R. 205.

Messrs. Md. Khaleel, Government Pleader no. 3, and B. N. P. Gupta, J. C., for the respondents in C. W. J. C. 1509 of 1976.

Messrs. S. Shamsul Hassan, Standing Counsel no. 1 and *R. C. Sinha, J. C.*, for the respondents in C. W. J. C. 1510 of 1976

K. B. N. SINGH, C. J. AND S. ALI AHMAD, J.—In all these seven applications under Articles 226 and 227 of the Constitution of India a common question of law arises and they have been heard together, and are being disposed of by this common order.

2. In all these writ applications the petitioners have prayed for quashing the orders of the Deputy Commissioner, Santhal Parganas, dated the 31st December, 1975, setting aside the orders of the Circle Officer, declaring the petitioners in the writ applications as privileged tenants and fixing or apportioning rent in their favour under the provisions of the Bihar Privileged Persons Homestead Tenancy Act, 1947 (hereinafter referred to as "the Act") A prayer has also been made to quash the notices issued in pursuance of the orders of the Deputy Commissioner, asking each of the petitioners to vacate the lands in dispute. The order of the Deputy Commissioner and the notice issued in pursuance thereof are Annexures 2 and 3, respectively, in C W.J.C. nos. 1439/76, 1444/76 and 1445/76, and Annexures 3 and 4, respectively, in C.W.J.C. nos 1443/76 1508/76, 1509/76 and 1510/76. It may be stated here that the main order of the Deputy Commissioner has been passed in Miscellaneous Case no. 1 of 1975-76, which is under challenge in C.W.J.C. no. 1444 of 1976 and marked as Annexure "2". The orders of the Deputy Commissioner under challenge in other writ applications are based on Annexure "2" of C.W.J C. no. 1444 of 1976.

3. In September 1965 the Circle Officer acting as the Collector under the Act held the petitioners in C.W.J.C. nos. 1444, 1445 and 1510 of 1976 as privileged persons. namely. by order dated 1st September 1965 in C.W.J.C. nos. 1444 and 1510 of 1976 and by order dated 2nd September 1965 in C.W.J.C. nos. 1445 of 1976, and apportioned rent with respect to the land on which they have constructed houses. In all these three cases the jamabandi tenants, on whose land they have built their houses, raised no objection. By order dated 14th September 1968 the petitioner in C.W.J.C. no. 1439 of 1976 and by order dated 30th September 1970 the petitioner in C.W.J.C. no. 1509 of 1976 were held to be privileged tenants. The jamabandi raiyats accepted the

position that they allowed these petitioners to construct houses on their land. By orders in case no. 15 of 1965-66 and case no. 1 of 1969-70 the petitioners in C.W.J.C. nos. 1443 and 1508 of 1976 were held to be privileged persons and Parchas dated 8th February 1966 and 28th March 1970, respectively, were granted in their favour. Shortly put, between 1965 and 1970 all the petitioners in all these writ petitions were declared to be privileged tenants, proportionate rent was fixed in their favour and Parchas granted accordingly. The petitioners in all the writ applications have averred that they have been paying rent regularly up to date to the State of Bihar since grant of Parchas in respect of the disputed land

4. In 1975 the Deputy Commissioner, Santhal Parganas, issued notices on the petitioners to show cause why the order passed in their favour declaring them to be privileged persons be not cancelled on the ground that they were not privileged persons and the Parchas granted to them were invalid. The petitioners filed show cause challenging the maintainability of the proceeding on various grounds, one of the grounds being that the Parcha having been granted by the Circle Officer acting as a Collector under the Act, the Deputy Commissioner has no power under the Act or the Rules to act as an appellate authority or reviewing authority and to cancel it. It was also asserted that the landlords of the holding not having filed any application for cancellation of the order of the Circle Offier or for eviction of the petitioners from the homestead, where the petitioners are living and paying rent to the State of Bihar, the orders became final under section 18 of the Act. The Deputy Commissioner by his orders dated 31st December 1975 overruling the objections of the petitioners set aside the orders of the Circle Officer acting as Collector under the Act declaring the petitioners as privileged tenants as already stated. Thereafter notices have been issued against the petitioners to vacate the land by a particular date mentioned in the notice. After these writ petitions were admitted, the operation of those orders and the notices has been stayed by this Court.

5. A counter-affidavit has been filed on behalf of respondent no. 1 in C.W.J.C. no. 1444 of 1976 stating that the petitioner has got 1 bigha. 5 kathas and 16 dhurs of land in the name of his father Jadu Sah and his brother Surya Narain Sah, petitioner in C.W.J.C. no. 1510 of 1976, and his nephew Om Prakash Sah, petitioner in C.W.J.C. no. 1509 of 1976, have also been granted Parchas. In the affidavit in reply to the counter-affidavit it has been denied that the petitioner has

got 1 bigha, 5 kathas and 16 dhurs of land in the name of his father. It is stated in the counter-affidavit filed in C.W.J.C. no. 1509 of 1976 that petitioner Om Prakash Sah is a financially well to do person having a good residential building worth Rs. 6,000 and his father Surya Narain Sah is a Government servant drawing a salary of Rs. 315. It has been asserted that the Deputy Commissioner, Santhal Parganas, by virtue of his inherent power of superintendence over the lower revenue courts of his district initiated a proceeding and issued notice upon the petitioner to show cause as to why the order of the Circle Officer granting Parcha in his favour illegally should not be set aside. The same facts have been reiterated in the counter-affidavit filed in C.W.J.C. no. 1510 of 1976 and it is also stated therein that Om Prakash Sah is a Mahajan and has got a medicine shop. In the counter-affidavit filed in C.W.J.C. no. 1508 of 1976 it is stated that petitioner Prem Sagar Mandal has got 3 bighas, 3 kathas and 7 dhurs of land and has got a Kirana shop in which he has invested a capital of Rs. 1,000. He has let out his house on rent to Gopal Prasad, Compounder and the provisions of section 30 of the Santhal Parganas Tenancy Act have been ignored while granting Parcha to him. In the affidavit in reply the above statements have been wholly denied. In the counter-affidavit filed in C.W.J.C. no. 1445 of 1976 it is stated that the petitioner Ram Kalyan Rai is an Assistant Teacher in the High School at Ramgarh and has got ancestral property in village Karbindha and he is also a Mahajan. In the affidavit in reply it has been admitted that the petitioner is an Assistant Teacher in the High School at Ramgarh and that he has got ancestral property but his share would be only 2 dhurs. It has been denied that the petitioner is a Mahajan. In the counter-affidavit filed in C.W.J.C. no. 1443 of 1976 it is stated that he has got 19 dhurs of Basburi land for construction of his house as also landed property in village Jamni and that he is a Mahajan and has got cloth shop in Ramgarh Market and his house is worth Rs. 35,000. In the affidavit in reply it has been admitted that the petitioner has got 19 dhurs of Basburi land but he has got nothing in share from the ancestral property. It has been denied that the petitioner is a Mahajan and that his house is worth Rs. 25,000. In the counter-affidavit filed in C.W.J.C. no. 1439 of 1976 it is stated that the father of the petitioner owned 4 bighas, 10 kathas and 17 dhurs of agricultural land and the petitioner has got 19 dhurs of Basburi land and has got a kutcha and tiled roof building which is valued not less than Rs 15,000. In the affidavit in reply it has been denied that the petitioner's father owned 4 bighas, 10 kathas and 17 dhurs of land alone. In all the counter-affidavits averment is also made about the power of the Deputy

Commissioner to revise orders of the subordinate revenue authorities acting as Collector under the Act.

6. The main contention of learned counsel for the petitioners is that the Deputy Commissioner has no jurisdiction to revise the orders passed by the Circle Officer acting as a Collector under the Act holding the petitioners as privileged tenants and issuing Parchas in their favour either fixing or apportioning rent as the Deputy Commissioner has no power to review or revise the orders of the Circle Officer acting as Collector under the Act.

7. Learned counsel appearing on behalf of the State in these cases have, however, contended that the Deputy Commissioner being the head of the revenue administration in the district could revise the order passed by the Circle Officer acting as the Collector under the Act by virtue of Rule 3 of the Board's Miscellaneous Rules, 1958, and reliance in that regard has been placed on a Bench decision of this Court in the case of *Bibi Khairunnisa* v. *State of Bihar*(1).

8. In order to appreciate the contentions raised on behalf of both sides, it would be necessary to refer to some of the relevant provisions of the Act. Section 2(b) defines 'Collector' to include "any officer appointed by the State Government to discharge all or any of the functions of a Collector under this Act". It is not disputed before us that the Circle Officer, while passing orders in favour of the petitioners of these writ applications, was acting as the Collector under the Act. "Privileged person" has been defined as follows :—

> "2(*h*)(*i*) 'privileged person' means a person—
>
> (1) who is not a proprietor, tenure-holder, under-tenure-holder or a mahajan: and
> (2) who, besides his homestead, holds no other land or holds any such land not exceeding one acre."

"Privileged tenant" has been defined to mean "a privileged person who holds homestead under another person and is, or but for a special contract would be, liable to pay rent for such homestead to such

(1) (1966) B.L.J.R. 205.

person." Section 2(*f*) defines 'Mahajan' to mean "a person whose business is money lending". Section 4 of the Act which grants permanent tenancy to a privileged tenant and authorises the Collector to fix rent, in case of dispute, or where there is no valid contract for payment of rent or where rent is unfair or inequitable, reads as follows :—

> "Subject to the payment of such rent as may be agreed upon between a privileged tenant and his landlord, or where there is no contract or no valid contract in respect of rent or where the rent contracted is alleged to be unfair or inequitable, such rent as may be fixed by the Collector under the provisions of section 6, a privileged tenant shall have a permanent tenancy in the homestead held by him at any time continuously for a period of one year."

Section 5 authorises the Collector to restore back the privileged tenant possession of the homestead or part thereof from which he has been ejected under the conditions mentioned therein. Section 6 authorises the Collector to determine fair and equitable rent. Section 7 lays down that rent determined by Collector under section 6 will be rent fixed in perpetuity and shall not be liable to be altered. Section 8 of the Act provides, *inter alia*, that a privileged tenant shall be liable to be ejected on two grounds only and not otherwise, the grounds being misuse of the land rendering it unfit for the purpose of tenancy and non-payment of rent for two years. Ejection of the privileged tenant on those two grounds is also subject to four conditions as laid down in the proviso to sub-section (1) of this section, one of which is that the privileged tenant is liable to be ejected only in pursuance of an order of ejection passed by the Collector as envisaged in that section. Other provisions of this section are not relevant and need not be mentioned. Section 18 gives finality to the order of the Collector and reads as follows :—

> "18. *Orders under this Act to be final.*—All orders passed by the Collector in any proceeding under this Act shall be final, and no suit shall lie in any Civil Court to vary or set aside any such order except on the ground of fraud or want of jurisdiction."

Section 19 gives overriding effect to the provisions of this Act.

9. On a reference to the aforesaid provisions of the Act, it is apparent that the order of the Collector declaring a person as a privileged tenant and determining rent in his favour is a final order and is not liable to be challenged in any Civil Court except on the ground of fraud or want of jurisdiction on the part of the Collector in passing the impugned order.

10. It will appear, on a reference to impugned orders passed by the Deputy Commissioner in these cases, that the learned Deputy Commissioner has not come to the conclusion that any one of the petitioners was either a proprietor, tenure-holder, under-tenure-holder or a Mahajan, or, besides the homestead held any land exceeding 1 acre which would disentitle him to be declared to be a privileged person and consequently, a privileged tenant.

11. The question which the learned Deputy Commissioner posed was as follows :—

> "The main thing that has to be seen is whether it was the spirit of the Act to allow rights over homestead to persons who come in the category of O. P., i.e., who may be privileged tenant according to strict definition given in the Act, but who are otherwise unfit to be given any privilege as per the intention of the Legislature"

This question he has answered by stating that the definition of 'privileged person' was not intended to apply to "persons like the opposite party though well-to-do financially is neither a money-lender nor proprietor or sub-tenure holder", and as such, the learned Deputy Commissioner was of the view that the petitioners can in no way be called privileged tenants. It may be mentioned that the Deputy Commissioner has not recorded any positive finding that at the relevant time when the petitioners were held as privileged tenants between 1965 and 1970 they were well off persons which was necessary even if his interpretation of legislative intent were to be accepted. It is wholly unnecessary for us to go into this question as these writ petitions can be disposed of on the limited question of lack of jurisdiction on the part of the Deputy Commissioner to revise the order of the Circle Officer acting as the Collector under the Act.

12. In the instant case, it is also not necessary to consider whether the learned Deputy Commissioner was right in his aforesaid

view about legislative intent and further rider put on definition of privileged person, in view of the fact that the orders passed by the Anchal Adhikari acting as Collector in favour of the petitioners being final, they were not liable to be reviewed or revised by the Deputy Commissioner, who is also a 'Collector' under the Act. Neither Rule 3 of the Board's Miscellaneous Rules framed by the Board of Revenue, on which reliance has been placed by learned counsel for the State nor the decision in the case of Bibi Khairunnisa *v.* State of Bihar (1965 B.L.J.R. 205) is of any assistance to learned counsel for the respondents. As a matter of fact, the decision in Bibi Khairunnisa's case goes counter to the submission and supports the view we have taken. The Deputy Commissioner, although a superior officer, yet being a Collector under the Act, could not review or revise the final order passed by the Anchal Adhikari, an officer subordinate to him, in view of the fact that the latter is also a 'Collector' under the Act, section 18 having given finality to such an order.

13. Rule 3 of the Board's Miscellaneous Rules may usefully be quoted here :—

> "A higher authority has all the powers of any lower authority and, further, may, with or without appeal, modify or reverse any orders passed by a lower authority in a matter primarily within the competence of the lower authority, unless, by any law, the orders of the lower authority are final."

This rule says that an order will not be liable to be revised by a higher authority, if under any law, the order of the lower authority has been made final, which is exactly the position in the instant cases by virtue of section 18 of the Act, as already discussed above. This rule came to be considered by the Bench deciding *Bibi Khairunnissa's* case (supra), and the Court reiterated the same view as follows :—

> "Thus, on a scrutiny of section 103-A(2) of the Bihar Tenancy Act and rules 1 and 2 made under that Act, along with Chapter III of the Bihar Survey and Settlement Manual, 1959, and Rule 3 of the Board's Miscellaneous Rules, 1958, the following conclusion emerges. The Collector has general powers of supervision and control over the work of a Deputy Collector done under the provisions of the Bihar Tenancy Act, except in respect of those functions which by law are declared to be final and also except where otherwise provided for by law."

14. It is thus manifest that the learned Deputy Commissioner had no power to review or revise the orders passed in favour of the petitioners by the Anchal Adhikari acting as a 'Collector' under the Act and the impugned orders of the Deputy Commissioner and the notices asking the petitioners to vacate the disputed lands must be quashed.

15. In the result, all the writ applications are allowed. In the circumstances of the cases, there will be no order as to costs in any one of the cases.

M. K. C.

Applications allowed.

REVISIONAL CRIMINAL

B. D. Singh and P. S. Sahay, JJ

1976

November, 1.

MAHABIR GOPE.*

v.

LALKISHUN GOPE AND ORS.

Code of Criminal Procedure, 1898 (Central Act V of 1898), section 436—order in revision under, passed by Sessions Judge, whether final order—order of the Magistrate, whether merged in the order of the Sessions Judge—limitation, whether would start running from date of the order of Sessions Judge.

Where on dismissal of complaint by the Magistrate, an application in revision was filed by the complainant before the Sessions Judge for further enquiry which was in turn dismissed by the Sessions Judge;

*Criminal Revision No. 2168 of 1973. Against the order of Sri R. K. Saran, 4th Additional Sessions Judge, Patna dated the 31st July, 1973, confirming the order of Sri M. M. Prasad, Subdivisional Magistrate, Bihar in Islampur, dated the 29th March, 1972.

Held, that the order was passed under section 436 of the Code which empowers the Sessions Judge to pass a final order. The order of the Magistrate had merged in the order of the Sessions Judge. The limitation would start running from the date of the order of the Sessions Judge. In that view of the matter the complainant has filed the application in the High Court within the prescribed period of limitation.

Application by the complainant.

The facts of the case material to this report are set out in the judgment of the Court.

Mahabir Gope v. *Lalkishun Gope and Ors.* (1977) I.L.R. 56 Pat.

Criminal Revision No. 2168 of 1973

Against the order of Sri R. K. Saran, 4th Additional Sessions Judge, Patna, dated the 31st July 1973, confirming the order of Sri M. M. Prasad, Subdivisional Magistrate, Bihar in Islampur, dated the 20th March, 1972.

Mahabir Gope—*Petitioner*

versus

1. Lalkishun Gope
2. Mahabir Gope
3. Tarkeshwar Gope
4. Ram Lagan Gope
5. Keshwar Gope
6. Ramdhan Gope
7. Harihar Gope
8. Parmeshwar Gope
9. Rameshwar Gope
10. Sukhdeo Gope
11. Barhu Gope and
12. Shibu Gope—*Opposite Party.*

Mr. Madhu Sudan Singh, for the petitioner.
None for the opposite party.

B. D. SINGH AND P. S. SAHAY, JJ.—This is an application under sections 435 and 439 of the Code of Criminal Procedure, 1898, (hereinafter to be referred to as the 'Code'), by Mahabir Gope who was complainant in the court below, is directed against the order of Additional Sessions Judge, Patna, passed under section 436 of the Code, whereby he refused to order further enquiry by the Subdivisional Magistrate.

2. In order to appreciate the points involved in this application, it will be necessary to state briefly the facts. The petitioner initially lodged a first information report on the 8th February, 1966, against the opposite party before the officer-in-charge, Islampur police-station making allegations against the opposite party under sections 143, 436 and 379 of the Indian Penal Code. According to the first information lodged by the petitioner on the 9th February, 1966, at about 11 A.M. the members of the opposite party came in a mob to assault the petitioner, but he fled away on which accused Keshwar Gope opposite party no. 5, set the cowshed of the petitioner on fire and also uprooted the potato and mustered seeds from 1 bigha field of the petitioner, and took them away. During the investigation of the case, the petitioner found the police in collusion with the members of the opposite party and did not expect a fair investigation from the hands of the police. Hence, on the 17th February 1976, he field a protest-*cum*-complaint petition Meanwhile, the police submitted final form and also recommended for prosecution of the petitioner under section 211 of the Indian Penal Code. The Subdivisional Magistrate examined the petitioner on solemn affirmation and sent his petition of complaint to Sri K. Sinha, Magistrate, 1st class for enquiry and report. Before Sri K. Sinha, the petitioner examined three witnesses, but the enquiry was recalled and entrusted to Sri R. K. Misra, Magistrate, 1st class, where one more witness was examined in support of the case of the petitioner. Sri R. K. Misra, however, reported that the petitioner had not been able to make out a *prima facie* case. The Subdivisional Magistrate on the basis of the said report dismissed the petition of complaint filed by the petitioner by order dated the 20th March 1972. Being aggrieved by the said order of the learned Magistrate, the petitioner moved the Sessions Judge, Patna, in revision which was registered as Criminal Revision no. 205 of 1972, which was, as mentioned above, decided against the petitioner.

3. The application of the petitioner in this Court had initially been placed for hearing before D. P. Sinha, J., who, by his order dated the 12th March, 1975 was pleased to refer to a Division Bench. This is how it has come before us for hearing and for disposing of the application. The relevant portion of the order under reference reads thus :—

> "Learned counsel for the opposite party has contended that the application is barred by limitation, if limitation is counted from the date of order of the Subdivisional Magistrate dismissing under section 203 Cr. P. C. the complaint of the petitioner. His contention is that although the petitioner had preferred a revision before the court of Session against the order of the Subdivisional Magistrate and the said revision had been rejected, the present application is really one for setting aside the order of dismissal passed by the Magistrate and, that, therefore, the limitation for filing the revision should be counted not from the date of the order of the Sessions Judge but of the Subdivisional Magistrate.
>
> Learned counsels for both the parties have submitted that there is no direct decision of this Court or of any other Court on this point, and the question appears to be one of general importance".

4. Nobody has appeared on behalf of the opposite party before us. However, learned counsel appearing on behalf of the petitioner has placed all the relevant materials before us and his main contention is that the limitation prescribed under Article 131 of the Limitation Act, 1963 would run from the date of the order passed by the learned Sessions Judge. As according to him, the order passed by the Magistrate has merged into the order passed by the learned Sessions Judge and the order, as mentioned above, passed by the Sessions Judge is dated the 31st July, 1973. Therefore, according to him, the limitation would run from that date. Article 131 of the Limitation Act which came into force on the 1st January, 1964, lays down that the period for an application to any court for the exercise of the powers of revision under the Code is 90 days from the date of the decree or order or the sentence sought to be revised. Therefore, the main question is as to whether the date of limitation would run from the date of the order of the Magistrate or from the date of the order of the

learned Sessions Judge. Learned counsel drew our attention to the provisions contained in section 436 of the Code which reads thus :—

> "On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case any person accused of any offence who has been discharged :
>
> Provided that no Court shall make any direction under the section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made."

5. He submitted with reference to the said section that the Sessions Judge is conferred with power to pass final order. Therefore, according to him, if the Sessions Judge had passed the order in the instant case, it was a final order passed under the provisions contained in section 436 of the Code. Our attention was drawn towards an earlier decision passed by this Court in *Abdul Sayeed Khan and others* v. *Jagarnath Nonia and another*(1) where Mahapatra, J. while dealing with the matter passed by the Magistrate under section 145 of the Code held that Article 131 of the Limitation Act, 1963, which provided a period of 90 days for making an application to any court for the exercise of the power of revision under the Code, and this period was to be computed from the date of the order sought to be revised. A similar view was taken by a Bench of this Court in *Sahdev Mandal and others* v. *Hongu Murmu and others*(2) where Ramratna Singh and Anwar Ahmad, JJ in paragraph 6 at page 224 observed :—

> ".....We, therefore, hold that in a case, where a party makes an application in revision to this court for setting aside an order of a Magistrate passed in a proceeding under section 145, Code of Criminal Procedure, the period of

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(1) (1965) B. L. J. R. 427.
(2) (1967) A. I. R. (Pat.) 223.

ninety days prescribed by Article 131 of the new Limitation Act is to be counted from the date of the order of the Magistrate, and that, in such a case, the petitioner is not bound to approach the court at Session before coming to this Court. In other words, we agree to the views expressed by Mahapatra, J., in the case of Abdul Sayeed Khan, 1965 BLJR 427. The present application is, therefore, maintainable".

Learned counsel for the petitioner submitted that the above observations in two cases are not applicable in the instant case, because the present case has not arisen out of a proceeding under section 145 of the Code. He pointed out that in a proceeding under section 145 of the Code, the Sessions Judge has limited power to pass order under section 438 of the Code, namely, to refer the case under section 438 and he cannot pass a final order. He can only refer it to the High Court. In order to find support to his submission, he has relied on *Sakhichand Sahu and another* v. *Ishwar Dayal Sahu and others*(1), where Ramratna Singh and K. K. Dutta, JJ., although dealing with the question relating to a proceeding under section 145 of the Code has observed that where a final order is passed by a Magistrate and if a revision is filed before the Sessions Judge against the said order, the order of the Magistrate merges with the order of the Sessions Judge and if it so happens then in that case the date of limitation would run from the date of the order of the Sessions Judge. It would be pertinent to extract a portion of the judgment in the said case at page 354 of the Report which reads thus :—

"It is true that, in exercise of its wide powers under section 439, the High Court may, instead of asking the Sessions Judge to make a report under section 438, modify or reverse the order of the Magistrate : but, in that case, the High Court will be exercising its powers, not on the application of the party invoking the powers of the High Court, but on account of the fact. that an illegal or improper order of the Magistrate has 'otherwise' come to its knowledge—the third contigency contemplated by section 439 Strictly speaking, in such a contingency, the party's application is rejected and the High Court acts

(1) (1967) A. I. R. (Pat.) 351.

suo motu after starting another revision proceeding, by implication. If this interpretation of the exercise of the wide powers of the High Court be correct—and there should be no doubt about its correctness—can it be argued in the alternative, that the order of the Magistrate and the order of the Sessions Judge are both sought to be raised by an applicant in the High Court? If the answer to this alternative argument be in the affirmative, the result will be that ninety days will be counted from the date of each of the two orders and, in a case where the application has been filed after the expiry of ninety days (plus the time taken in obtaining a copy) from the Magistrate's order, it is time-barred in respect of that order, though it may be in time in respect of the Sessions Judge's order. But such an anomalous situation could not have been contemplated by the Parliament. This anomaly can be overcome only if it be possible to hold that the Magistrate's order merges in the order of the Sessions Judge; but, in as much as the order of the Sessions Judge under section 438 is not a final order, there cannot be such a merger. My concluded opinion, therefore, is that the expression "order sought to be revised" occurring in Article 131 of the new Limitation Act refers to the order passed by the Magistrate under section 145."

In the present case, according to us, the order was passed not under section 438 of the Code, but one under section 436 of the Code, which empowers the Sessions Judge to pass a final order and if he had passed the final order then in that case, according to us, the submission of the learned counsel for the petitioner is well-founded. The order of the Magistrate had merged in the order of the Sessions Judge. Therefore, according to us, the limitation would start running from the date of the order of the Sessions Judge i.e., from 31st July, 1973.

6. The petitioner has filed the revision application in this Court on the 5th November, 1973. Ten days' time was taken in obtaining certified copy of the judgment of the learned Sessions Judge. In that view of the matter, the petitioner has filed the application in this Court within the prescribed period of limitation. The Stamp Reporter has also reported that the application has been filed within time. Therefore, as mentioned earlier, the main point involved in the application, as pointed out in the order of reference, as to whether the time

would run from the date of the order of the learned Sessions Judge or from the date of the order of the learned Magistrate. We have decided this in favour of the petitioner, as pointed out above, we have held that the time would run from the date of the order of the learned Sessions Judge. In that view of the matter, the application of the petitioner should not have been thrown out on the preliminary, ground of objection with regard to the limitation, as it was pointed out by the learned cousel for the opposite party before the learned Single Judge, who had referred the case to Division Bench.

7. Now, the next question which arises for consideration as to whether the petitioner would succeed also on the point of merit. Learned counsel for the petitioner has submitted before us that from the order of the learned Magistrate, it is clear that he had not applied his mind nor he had given reasons while dismissing the protest-*cum*-complaint petition filed by the petitioner. The petitioner has filed a copy of the relevant extract of ordersheet dated the 20th March, 1975, passed by the learned Subdivisional Magistrate which reads thus :—

> "77. 20th March 1975 Informant is absent. No pairvi done. Enquiry report is accepted. The case is dropped.
>
> *Later.*—Final report is accepted and the complaint is dismissed under section 203 Cr. P. C."

The petitioner has also made a grievance about it before the learned Sessions Judge who in paragraph 8 of his order observed :—

> "The learned S. D. M. in his order says that the enquiry report is accepted. Certainly he could not accept the enquiry report without perusing it. He has also stated that final report is accepted. This means that he has given reasons for dismissing the complaint. The reasons are the report of the E. O. and final report of the police. It can not, therefore, be said that the learned S. D. M did not apply his mind or that he was not given reasons in his order".

8. We have no reason to differ from the above observation of the learned Sessions Judge. According to us, while dismissing the complaint the learned Subdivisional Magistrate has complied with the provisions of law. Therefore, the petitioner does not succeed on the question of merit.

9. In the result the application is dismissed.

R. D.

Application dismissed.

APPELLATE CRIMINAL

Before Nagendra Prasad Singh and P. S. Sahay, JJ.

SURENDER SINGH AND ORS.*

v.

THE STATE.

1976

November, 19.

Code of Criminal Procedure, 1898 (*Central Act no. X of* 1898), *section* 288—*earlier statement of prosecution witness before the committing court transferred to the record of Sessions trial—no specific order passed non-reason for such transfer stated by Sessions Judge—section* 342—*the said fact not put to the accused persons in their statement under section* 342—*propriety of—prejudice, whther caused to the accused persons.*

Where neither any specific order was passed by the Additional Sessions Judge saying that the evidence a particular prosecution witness before the committing Magistrate shall be treated as substantive evidence in accordance with section 288 of the Criminal Procedure Code nor did he put the said fact to the accused persons in their statement nnder section 342 of the Code of Criminal Procedure:

Held, that in such cases either there should be an order mentioning the circumstances under which the said evidence of a witness is being admitted in evidence as substantive evidence or, atleast, it should be put to the accused persons so that they may have full knowledge regarding the same. In absence of such a procedure having been followed, the accused, persons are hound to be prejudiced.

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*Criminal Appeal no. 10 of 1972. Against a decision of Shri Siva Kant Jha, 3rd Additional Sessions Judge, Gava, dated the 22nd December 1971 and in the matter of a rule of enhancement issued by this court as per its order no. 2, dated the 6th January 1972 against appellate 2 to 9 of this Criminal Appeal.

Periyasami v. *State of Madras* (1), followed.
Tara Singh v. *The State* (2), referred to Appeal by the accused.

The facts of the case material to this report are set out in the judgment of Nagendrra Prasad Singh, J.

Messrs. K P. Verma. Parmeshwar Prasad Sinha and *A. B. Mathur* for the appellate.

Mr. Jagdish Prasad for the State

NAGENDRA PRASAD SINGH, J.—This is an appeal on behalf of nine accused persons. They have been convicted under different sections by the then 3rd Additional Sessions Judge, Gaya, Appellant no. 1 has been convicted under section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. He has also been convicted along with the other appellants under section 302 read with section 149, but no seperate sentence has been passed under the said head. Appellants 2 to 9 have, however, been sentenced to undergo rigorous imprisonment for five years under section 302 read with section 149. Appellant nos. 2, 3 and 6 have been further convicted under section 323 I. P. C. and they have been sentenced to undergo rigorous imprisonment for three months under that section. The sentences have been directed to run concurrently. As appellants 2 to 9 had been convicted under section 302 read with section 149 I. P. C. and had been sentenced to undergo rigorous imprisonment for a period of only five-years, this Court, at the time of admission of the appeal itself, issued a rule of enhancement of sentence imposed on appellants 2 to 9. A show cause petition has been filed on their behalf.

2.The prosecution case, in brief, is that on 2nd November 1967 at about 5 P.M. the informant (P. W. 5) was returning home after responding to the call of nature. At that very time Nand Kishore Singh (deceased) and Hare Kishun Singh (P. W. 4), who was an employee of Nand Kishore Singh, were going 20 to 25 steps ahead of P. W. 5. When they reached the canal west of the house of one Bagho Dusadh, the accused persons including these appellants suddenly appeared from south. Appellant no. 1 is said to have been armed with

(1) (1967) A. I. R. (S. C.) 1027.
(2) (1951) A. I. R. (S. C.) 441.

a *bhujali*, appellant no. 9 with a *bhala*, appellant no. 8 with a gun, appellants 4 and 5 with *falsa* and the remaining appellants with *lathi*. There was one more accused person named Kuldip Singh who has since been acquitted. According to the case of the prosecution, the accused persons surrounded Nand Kishore Singh and Hare Kishun Singh (P. W. 1) and began to assault them. Nand Kishore Singh fell down due to the assault by lathi and thereafter appellants 7 and 9 caught hold of him and appellant no. 1 cut the throat of Nand Kishore Singh with *bhujali*. P. W. 4, who was raising *hulla*, was also assaulted with *lathi* by appellants 2, 3 and 6, and he also fell down there. P. W. 5, the informant, raised *hulla* and on *hulla* villagers came and the accused persons fled away. P. W. 5 lodged at about 8 P.M. the same day a first information report at Daudnagar police-station on the basis of which a case was registered against those accused persons. The investigating officer (P. W. 6) came to the place of occurence at about 9.45 P.M. He found the dead body of Nand Kishore Singh lying in the field of Kuldip Singh. After investigation he submitted charge sheet against these appellants along with the aforesaid Kuldip Singh and they were in due course put on trial.

3. At the trial the defence of the appellants was that they have been falsely implicated due to enmity. It was also pointed out on their behalf that there were several litigations and disputes relating to land and in the late evening Nand Kishore Singh was assaulted by third persons who have not been identified and these appellants have been falsely implicated in the said case. Appellant no. 8 Dinesh Singh had a special defence of *alibi* saying that on the date of occurrence he was admitted in the Patna Medical College Hospital in connection with an operation. Two other accused persons had also pleaded defence of *alibi*.

4. The prosecution in support of its case examined six witnesses, who are said to be the eye witnesses of the occurrence and they are P. Ws. 1, 2, 3, 4, 5 and 7. Out of these six witnesses, P. W. 5 is the informant and he named only P. Ws. 1, 2 and 4 in the first information report as eye witnesses of the occurrence. P. Ws. 3 and 7 were, however, not named in the first information report. At the trial P. Ws. 1, 2, 4 and 7, however, did not support the case of the prosecution and they were declared hostile and cross-examined on behalf of the prosecution.

5. The learned Judge rejected the evidence of P. Ws. 1, 2, 3, 5 and 7 as being unreliable for one reason or the other. He also rejected the evidence of P. W. 4 in sessions court. But he has convicted and sentenced the appellants, as stated above, on the evidence of P. W. 4 as recorded by the committing Magistrate, and acquitted accused Kuldip Singh. Thus, the conviction of the appellants rests solely on the evidence of P. W. 4 before the committing court.

6. The learned Counsel appearing for the appellants has, however, submitted that the learned Judge should not have placed reliance on the evidence of P. W. 4 before the committing Magistrate. According to the learned Counsel, while doing so, the learned Judge has not followed the mandates of law on the point. P. W. 4, who is alleged to have been injured during the course of the occurrence, for reason best known to him, did not support the prosecution case before the sessions court. In his examination-in-chief, he stated that on the date of occurence he was returning to his home along with Nand Kishore Singh, there was none else with them and when they reached near the house of Ragho Dushadh, ten to twelve persons came and started assaulting them. Thereafter he stated that he did not identify any of the culprits because it was dark. He further stated that when he saw Nand Kishore Singh, he found that his neck had been cut. After that he was declared hostile and was cross-examined on behalf of the prosecution with reference to his statement made before the committing Magistrate. The learned Counsel appearing for the appellants submitted that before treating the statement of this witness before the committing Magistrate as substantive evidence in this case, the learned Additional Sessions Judge should have complied with the requirement of section 288 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the said Code) and should have passed a specific order to that effect. The learned Counsel pointed out that at no stage the learned Judge passed an order that the statement of P. W. 4 before the committing Magistrate shall be treated as substantive evidence in the present case; he has simply made an endorsement on the deposition of P. W. 4 before the committing Magistrate saying "tendered by A. P. P. and admitted in evidence under section 288 Cr. P. C.". Section 288 of the said Code enables a Judge to treat the evidence of a witness duly recorded in the presence of the accused under Chapter XVIII of the Code as evidence in the sessions case for all purposes subject to the provisions of the Indian Evidence Act (hereinafter referred to as the Act). The evidence of a witness before a committing court can be used for two purposes. It can be used for

the purpose of contradicting the witness concerned before the sessions court in accordance with section 145 of the Act. Sometimes, it is also used as substantive evidence at the instance of prosecution. If it is being used by the accused persons for contradicting that witness at the trial, there is no question of prejudice to the accused if a copy of such evidence is tendered and admitted in evidence. But the position will be quite different when it is being done on behalf of the prosecution for being used as a substantive evidence in the case. This may have very far-reaching consequences and has to be read as substantive evidence in the sessions trial ignoring the evidence of the witness at such trial. Perhaps, that is the reason why the Supreme Court pointed out in the case of *Periyasami* v. *State of Madras* (1), as follows :—

"It appears, however, that the practice of this Court is to contradict a witness with the earlier statement and parts thereof, after declaring him hostile and then to use the record of the earlier statement as substantive evidence. It may be stated that it is highly desirable that the court should, before the transfer of the earlier statement to the record of the sessions case under section 288, indicate in a brief order why the earlier deposition was being transferred to the record of the trial. This will make it quite clear to the accused that the earlier statement is likely to be used as substantive evidence against him. If the matter had rested with the use of the earlier statement without this notice to the accused, we would have found it difficult to rely upon the earlier deposition."

In that sase, however, the Supreme Court found that the accused persons were informed during their examination under section 342 of the Code that the evidence of particular witness before the committing Magistrate was being used against them under section 288 of the Code and it was held that in that situation there was no question of prejudice even if there was no specific order to that effect, in the order sheet. In the instant case I find that neither any specific order was passed by the learned Additional Sessions Judge saying that the evidence of P. W. 4 before the committing Magistrate shall be treated as substantive evidence in accordance with section 288 of the Code nor as he put the said fact to the accused persons in their statement under section 342. In that view of the matter, the

(1) (1967) A. I R. (S. C.) 1027.

procedure indicated by the Supreme Court in the aforesaid judgment has not been followed and complied with so far the present case is concerned. In my opinion, in such cases either there should be an order mentioning the circumstances under which the said evidence of a witness is being admitted in evidence as substantive evidence or, at least, it should be put to the accused persons so that they must have full knowledge regarding the same. In absence of such a procedure having been followed, the accused persons are bound to be prejudiced. The learned Counsel appearing for State could not point out anything from the records of the case from which it could be inferred that any of the prosecution had been taken by the learned Judge. This aspect of the matter was also considered by the Supreme Court in the case of *Tara Singh* v. *The State*(1). In such a situation, I am left with no option but to hold that the statement of P. W. 4 made before the committing Magisrate has not been properly brought on the record which can be used as substantive evidence in the case. If the statement of P. W. 4 before the committing Magistrate is excluded from consideration then, on the finding of the learned Judge, there is no other evidence on the basis of which the conviction of these appellants can be sustained.

7. The learned Counsel appearing for the State, however, pointed out that this Cour can reverse the finding of the learned Additional Sessions Judge so far the other witnesses are concerned. It appears that out of the six eye witnesses, the learned Judge has first considered the evidence of P. Ws. 3, 7 and 5, in paragraph 6 of the judgment. P. Ws. 3 and 7 were not named in the first information report. They were examined by the investigating officer about 9 days after the date of occurrence. P. W. 7, during the sessions trial, has not supported the prosecution case and that is why he was declared hostile and cross-examined on behalf of the prosecution. In examination-in-chief he simply stated that he heard a *hulla* but he did not go at the place of occurrence. In this background, the learned Additional Sessions Judge rightly did not place any reliance on these two witnesses. I do not find any reason to take a contrary view. So far P. W. 5, the informant, is concerend, he was aged about 80 years at the time of examination before sessions court. He was suffering from a paralytic attack. He, however, said that he had that attack a year before the date of that occurrence. But then he stated that he had cataract in both the eyes. He could not identify any of the

(1) (1951) A. I. R. (S. C.) 441.

accused persons in the dock from the witness box at the time of his evidence. In cross-examination he has stated that he was about 40 to 50 steps behind the deceased and at the time of occurence it was complete darkness. About the cataract, in paragraph 9 he stated that one eye had become blind due to that and the other eye was three-fourthclosed due to cataract and he had this trouble since before the occurrence. From his evidence, it also appears that he was an accused in a murder case in which appellants 1, 3, 5 and 8 and Kuldip Singh (since acquitted) were witnesses. Appellant no. 4 is the son of the aforesaid Kuldip Singh. There was another proceeding under section 145 of the Code in which some of these appellants were parties, which was decided against P. W. 5, and he had filed a title suit against them. The learned Judge has also mentioned some of these facts while rejecting his evidence. It is well known that trial court has an occasion to mark the demeanour of witnesses and any finding recorded should not be easily disturbed. I do not find any reason for taking a different view so far the evidence of P. W. 5 is concerned.

8. The learned Judge has also rejectd the evidence of P. Ws. 1 and 2. They were declared hostile during the trial because they did not support the case of the prosecution , before the sessions court. On the statement made on their behalf, they cannot be held to be eye witness because on their statement, they reached the place after the occurrence. In my opinion, whatever may be the reason but the evidence of none of the witnesses examined on behalf of the prosecution inspires confidence. It is very difficult to draw a line between what is truth and what is untruth on their statement. In this background, I am left with no option but to hold that virtually there is no evidence on behalf of the prosecution in support of its case.

9. Apart from that I have already pointed out that some of the accused persons had also pleaded *alibi* including appellant no. 8 and in support of the case that on that date he was in the Patna Medical College Hospital, the registers and records of the Patna Medical College Hospital were produced and proved at the trial. Dr. A. A. Hai, who was the Resident Surgeon on the relevant date, was examined as D.W. 1. He has proved the relevant entries. The learned Judge, in a very cryptic manner, has come to the conclusion that from those materials it was not proved that appellant no. 8 had been admitted in the hospital. In my opinion, he was absolutely wrong on that point. The evidence of D. W. 1 is very trustworthy and from the materials on record it appears that one Dinesh Kumar Singh was admitted in the Patna Medical College Hospital on 31st October 1967. It is not

the case of prosecution that there was some other Dinesh Kumar Singh with the same parantage and village. In that view of the matter, I am inclined to hold that appellant no. 8 had been admitted in Patna Medical College Hospital on 31st October 1967, two days before the date of occurrence. In my opinion, the prosecution has failed to prove the charge against these appellants and they are entitled to be acquitted.

10. In the result, the appeal is allowed and the conviction and sentence passed against the appellants are set aside. They are discharged from their bail bond. The rule of enhancement issued by this Court is also discharged.

11. Before I part with the judgment, I must observe that I have not been able to appreciate as to how the learned Judge had convicted appellants 2 to 9 under section 302 read with section 149 of the Indian Penal Code and had sentenced them to undergo imprisonment for five years. It only exhibits lack of elementary knowledge of criminal law.

P. S. SAHAY, J.—I agree.

R. D.

Appeal allowed.

CIVIL WRIT JURISDICTION.

Before Shambhu Prasad Singh and S. K. Jha, JJ.

I. T. C. LIMITED *

v.

THE UNION OF INDIA & ORS.

1976

December, 14.

Central Excises and Salt Act, 1944 (*Act I of* 1944), *section* 4(a)—*scope and true purport of the provision—amount on which excise can be levied—post manufacturing cost and the profit arising therefrom, whether to be excluded.*

*Civil Writ Jurisdiction Case nos. 939, 1203 and 1252 of 1974. In the matter of applications under Articles 226 and 227 of the Constitution of India.

The excise can be levied only on the amount representing the manufacturing cost plus the manufacturing profit and it must, in the fitness of things, exclude post manufacturing cost and the profit arising from the post manufacturing operation, namely, the selling profit. The only relevant consideration for the purpose of excise could be the manufacturing cost plus the manufacturing profit and the Excise authorities shall not be justified in loading the value of product for the purpose of assessment of excise duty under section 4 of the Act with any post manufacturing cost or profit arising from the post manufacturing operation. The price charged ex-factory at the factory gate from the distributors representing the manufacturing cost alone plus the manufacturing profit shall determine the value for the purpose of assessment of excise duty and that could be the only possible construction of section 4 for computing the value of the products assessable to excise duty. It will be manifest that excise duty is levied by the Parliament on tobacco and goods which are manufactured and produced in India under Entry 84 of List I of the 7th schedule to the Constitution of India if any post manufacturing cost is to be included in the price, it will also entail in its turn and embrace within its sweep a certain amount of tax falling under the head sales tax which is exclusively within the domain of the State Legislature under Entry 54 of List II of the 7th Schedule. The excise is a tax on the production and manufacture of goods and hence must necessarily exclude from its sweep any post manufacturing expenses or selling profits.

Held therefore, that in the instant case the respondents have exceeded their jurisdiction in demanding from the petitioner for the purpose of excise duty payable by it price of its products inclusive of any post manufacturing cost and selling expenses.

Case laws reviewed.

Application under Articles 226 and 227 of the Coonstitution of India.

The facts of the case material to this report are set out in the judgement S. K. Jha. J.

The Union of India and others, Respondents.

Messrs. Ranadeb Choudhuri, K. D. Chatterji, Chunni Lal and *U. K. Bhagat*, for the petitioners.

Mr. Ashwini Kumar Sinha, Standing Counsel for the Union of India, for the respondents.

S. K. JHA, J.—The petitioner in all these three applications under Articles 226 and 227 of the Constitution of India is the I. T. C. Limited having its registered office at Calcutta and a factory at, amongst other places, Basudcopur in Monghyr in the State of Bihar. The relevant facts for the disposal of these applications are not at all in dispute.

2. The petitioner carries on the business of manufacturing and selling cigarettes and smoking tobacco of diverse kinds throughout India and owns and operates five cigarette factories in different States including a cigarette factory at Monghyr in this State. With effect from 1st of April, 1974 the name of the petitioner company was changed from 'India Tobacco Company Limited' to 'I. T. C. Limited'. Such change was effected under the provisions of section 21 read with section 23 of the Companies Act, 1956. For all practical purposes it is only the name which has been changed with the petitioner's rights and liabilities remaining as they were before such change. The petitioner follows a uniform pattern and procedure for selling and marketing its products mentioned hereinbefore, in accordance with which the petitioner's products reach the ultimate consumers of its products through a series of sales and re-sales in the following manner. The petitioner, which is the manufacturer, sells to the primary wholesale buyers or dealers otherwise known in the cigarette industry as distributors who, in their turn, sell to secondary wholesalers known in common parlance in such industry as wholesalers. These secondary wholesalers, in their turn, sell to the retailers who pass on the products by selling to the cosumers at large. The petitioner makes all sales of its products to its distributors otherwise known as wholesale buyers or dealers in large bulk entirely on a principal to principal basis. Such sales are evinced by written contracts which represent normal commercial arrangements and are concluded in the usual course of business. During the relevant periods the petitioners never sold its products to any one in the chain set out above other than the distributors. These writ petitions are in respect of products which were and are sold to such distributors who are primary wholesalers buyers or dealers. All the whole sale prices charged by the petitioner from its distributors are the sole consideration for the said sales and are subject to local taxes uniform throughout India. The petitioner does not extend or derive any extra commercial favour or privilage to or from any wholesale buyer or dealer. The transactions between the petitioner and its wholesale buyers and dealers commonly known as distributors, as already stated above, are at arms length and in the usual course of business and do not have any consideration other than price of the products as aforesaid. Admittedly, such transactions

are *bona fide*. Such sales during the relevant periods were completed ex-factory and sometimes outside the said factory. But in any event the products are always capable of being sold on a wholesale basis ex-factory.

3. The question that arises for consideration in all these applications is as to what should be the amount of excise duty assessable against the petitioner under the provisions of section 4(*a*) of the Central Excise and Salt Act, 1944 (hereinafter to be referred to as the Act) prior to its amendment in 1973. We are not concerned with that amendment which, as we are informed at the Bar, came into force with effect from October, 1975.

4. In C. W. J. C. 939/74 the prayer made by the petitioner is for the issuance of appropriate writs quashing the order, dated the 4th of April, 1974 passed by the Assistant Collector of Central Excise, Patna, respondent no. 4, that dated the 8th of May, 1974 passed by the Inspector, Central Excise, Range I. T. Co., Monghyr, respondent no. 5, as also that dated the 14th of June, 1974 passed by respondent no. 6. These three orders are incorporated in annexures 15, 16 and 16/1 to the writ application. A further prayer has been made for the quashing of annexure 16/2, dated the 14th of June, 1974, which is a notice in form D. D. 2 issued by respondent no. 6 under the authority of the Superintendent of Central Excise, I. T. Co., Monghyr, respondent no. 5. The effect of these impugned annexures is that the Central Excise authorities have disallowed the petitioner's claim to deduct the post-manufacturing costs and selling expenses from the price charged by the petitioner from its wholesale dealers to ascertain the assessable value and/or to recover the sum of Rs. 36,90,056.57 which has been demanded as additional excise duty apart from that which has been shown by the petitioner in its return duly filed. A prayer has also been made for the issuance of the writ of prohibition restraining the respondents from proceeding any further in respect of the show cause notices issued by the Central Excise authority (respondent no. 4), dated the 26th of November, 1973 and 21st of December, 1973, copies of which have been marked annexures 6 and 8 respectively. This amount of additional excise duty demanded from the petitioner is in respect of the sales made during the period between the 18th of July, 1973 and the 7th of February, 1974. On 26th June 1974 this writ application was admitted rule issued and an order of injunction was passed restraining the respondents from realising the sum of Rs. 36,90,056.57 till the disposal of this application.

5. In C. W. J. C. 1209/74 a prayer has been made for the issuance of appropriate writs quashing annexures 9, 10, 14 and 15 to the writ application. Annexures 9 and 10 both dated the 19th of July, 1971 are orders and provisional assessments made by the Superintendent of Central Excise, I. T. Co., Monghyr, respondent no. 5. Annexure 14, dated the 20th of July, 1974 and annexure 15, dated the 12th of July, 1974 also purport to enforce the provisional assessments made as per annexures 9 and 10 by the Superintendent of Central Excise, respondent no. 5. The effect of these orders was to provisionally assess sums of Rs. 8,50,475.93 and Rs. 22,491.01 as additional excise duty held by the Excise authority to be payable by the petitioner. This included the marketing, distribution expenses, advertisement expenses, freight, interest, etc. What had happened was that on 3rd March 1974 the petitioner submitted a new price list indicating assessable values computed after eliminating post manufacturing costs and expenses. The Excise authorities allowed the petitioner to remove their goods from the factory on the basis of the said price list under Provisional Assessment procedure. On 20th July 1974 the Excise authorities made final assessment in respect of the returns in form RT. 12 for the month of June, 1974 filed by the petitioner and demanded excise duty on post manufacturing costs and expenses. On 25th July 1974 the Excise authorities returned the two price lists effective from 7th February 1974 and 1st March 1974 submitted earlier by the petitioner purporting to approve the same and directing the petitioner to clear the goods on the basis of the price list by including post manufacturing costs and expenses and to pay duty thereon also. This writ application was thereafter filed to restrain the Excise authorities from collecting excise duty on post manufacturing costs and expenses on the basis of the demands made in the RT. 12 return for the month of June, 1974 and orders passed in relation to the price list effective from the 7th February 1974 and 1st March 1974. On 5th August 1974 this writ application was admitted, rule issued in this case and an injunction was issued restraining the respondents from collecting excise duty on post manufacturing costs and expenses. Despite the injunction order, the Excise authorities issued a demand notice for payment of a sum of Rs. 27,43,015.40. An amendment petition was thereafter filed in this Court, which has been allowed. By the aforesaid amendment petition, prayer has been made for quashing of annexures 16, 17 and 18 which are demand notices issued against the petitioner in pursuance of the orders aforesaid. This assessment and the consequential demands are in respect of the manufacture and sale by the petitioner effected during the month of June, 1974, as stated earlier.

6. In C. W. J. C. 1252/74 the petitioner claims that he had made a declaration of value under section 4 as effective from the 3rd of July, 1974. Such a declaration was made as is contemplated by law. The Superintendent of Central Excise, respondent no. 5, passed orders on such declaration by the petitioner on 3rd August 1974 as contained in annexure 4 and 11th July 1974 as incorporated in annexure 5, where by he has ordered that the wholesale price declared in column 5(c) of of the price list which included post-manufacturing costs and expenses was approved and should be the basis of assessable value as per section 4(a) of the Act. A prayer has been made for issuance of appropriate writs quashing such orders of respondent no. 5 and directing the Excise authorities to make assessment in accordance with law and restraining them from including post manufacturing costs and expenses for the purpose of assessing the Excise Duty.

7. The question arising for determination in these cases as stated earlier, is the scope and true purport of the provision of section 4(a) of the Act. Section 4(a) of the Act reads thus :

> "4. Determination of value for the purposes of duty where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—
>
> (a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists."

As a matter of fact, the scope of the aforesaid provision of the Act was a subject-matter of consideration by the Supreme Court in, *inter alia*, two cases which are reported. It, is, therefore, not necessary to go into any detailed analysis of the scheme and purpose of the statutory provision. Mr. Ranadeb Choudhuri, learned Counsel for the petitioner, invited our attention to the two decisions of the Supreme Court in this connection and a number of decisions of other High Courts.

Before referring to the decisions of the other High Courts, it would be worthwhile to note the principles laid down by the Supreme Court in the two cases of *A. K. Roy* v. *Voltas Ltd.*(1) and *Atic Industries Ltd.* v. *H. H. Dave, Assistant Collector of Central Excise*(2). In the Voltas case (supra), Mathew, J., speaking for the Court, held as follows:

"There can be no doubt that the 'wholesale cash price' has to be ascertained only on the basis of transactions at arms length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, e.g., because he is relative of the manufacturer, the price charged for those sales would not be the 'wholesale cash price' for levying excise under section 4(*a*) of the Act. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis. Once wholesale dealings at arms length are established, the determination of the 'wholesale cash price' for the purpose of section 4(*a*) of the Act may not depend upon the number of such wholesale dealings. The fact that the appellant sold 90 to 95 per cent of the articles manufactured to consumers direct would not make the price of the wholesale sales of the rest of the articles any the less the 'wholesale cash price' for the purpose of section 4(*a*), even if these sales were made pursuant to agreements stipulating for certain commercial advantages, provided the agreements were entered into at arms length and in the ordinary course of business."

It was further held considering the decision of the Judicial Committee of the Privy Council in the case of *Vacumm Oil Co* v. *Secretary of State for India in Council*(3) as follows:

"The price is to be a price for goods, as they are both at the 'time' and 'place' of importation. It is to be a 'cash price', that is to say a price free from any augmentation for credit or other advantage allowed to a buyer it is to be a net price, that is to say it is a price 'less trade discount'. Their Lordships, therefore, held that the words the 'wholesale price' were used in the section in contradistinction to a 'retail price', and that not only on the ground that such is a well recognised meaning of the words but because their association with the

(1) (1973) A.I.R. (S.C.) 225.
(2) (1975) A.I.R. (S.C.) 960.
(3) 59 I.R. 258.

words 'trade discount' indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the word is the 'wholesale price' relieved of the loading representing post-importation expenses which, as a matter of business, must always be charged to the consumer, and which are eliminated."

It has further been held that excise is a tax on production and manufacture of goods. Section 4 of the Act provides that the real value should be found after deducting the selling cost and selling profits and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that is levied only on the "amount representing the manufacturing cost plus the manufacturing profit and excludes post manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit. The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles." In determining such wholesale price, it is not necessary that there should be a large number of wholesales and the quantum of goods sold by a manufacturer on wholesale basis is entirely irrelevant for the purpose. When the matter again came up for consideration in the case of *Atic Industries* (supra) their Lordships of the Supreme Court went further. In that case the sales in question were effected by the manufacturers to ICI and Atul at the price less 18 per cent trade discount. The ICI and Atul were primary wholesalers who, having purchased from the manufacturer, the Atic Industries, in their turn, sold to secondary wholesalers. The facts of that case, therefore, are very much akin to the facts of the instant cases. The question that fell for consideration was as to what should be the price for the purpose of assessment of excise duty whether the price charged from the primary wholesalers, namely, ICI and Atul or that charged from the Secondary wholesalers by ICI and Atul. While overruling the contention put forward on behalf of the Excise Department, Bhagwati, J., speaking for the Court, held as follows :

"Here, on the contrary, no retail sales at all were effected by the appellants and the entire production was sold in wholesale to ICI and Atul under agreements entered into with them. Moreover, it was not in dispute between the parties that the agreements entered into by the appellants with ICI and Atul were made at arms length and in the

usual course of business. It was not the case of the Excise Authorities at any time that specially low prices were charged by the appellants to ICI and Atul because of extra commercial considerations or that the agreements were anything but fair and reasonable or arrived at on purely commercial basis. The wholesale dealings between the appellants and ICI and Atul were purely commercial dealings at arms length and the price charged by the appellants for sales in wholesale made to ICI and Atul less trade discount of 18 per cent was, therefore, clearly 'wholesale cash price' within the meaning of section 4(*a*) and it did not make any difference that the wholesale dealings of the appellants were confined exclusively to ICI and Atul and apart from these two, no independent buyers could purchase the dye-stuffs in wholesale from the appellants." It has further been laid down in the case of Atic Industries that section 4 "makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit. The value of the goods for the purpose of excise therefore must take into account only the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, thus, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the "manufacturer and sells them in wholesale to another dealer were taken as the value of the goods. It would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with the nature of excise." In my view, the ratio of the two Supreme Court decisions referred to above, especially that of the latter case, squarely covers the point at issue in the instant cases. As I have already indicated at the outset the facts are not in controversy. Therefore, it goes without saying that excise can be levied against the petitioner only on the amount representing the manufacturing cost plus the manufacturing profit and it must, in the fitness of things, exclude post manufacturing cost and the profit arising from the post-manufacturing operation, namely, the selling profit. The only relevant consideration for the purpose of excise would be the manufacturing cost plus the manufacturing profit and the Excise authorities shall not be justified in loading the value of product of the petitioner for the purpose of assessment of excise duty under section 4 of the Act with any post-manufacturing cost or profit arising from the post-manufacturing operation. The price charged by the petitioner ex-factory at the factory.

gate from its distributors representing the manufacturing cost alone plus the manufacturing profit shall determine the value for the purpose of assessment of excise duty. Although it is not necessary for me in view of the decisions of the Supreme Court on these points, I think it worthwhile to observe that could be the only possible construction of section 4 for computing the value of the products assessable to excise duty. It will be manifest that excise duty is levied by the Parliament on tobacco and other goods which are manufactured and produced in India under Entry 84 of List I of the 7th Schedule to the Constitution of India whereas if any post-manufacturing cost is to be included in the price, it will also entail in its turn and embrace within its sweep a certain amount of tax falling under the head—sales tax—which is exclusively within the domain of the State Legislature under Entry 54 of List II of the 7th Schedule. This, in my view, reinforces the rationale behind the decisions of the Supreme Court referred to above that excise is a tax on the production and manufacture of goods and hence must necessarily exclude from its sweep any post-manufacturing expenses or selling profits.

8. I may now refer to the decisions of the different High Courts to which our attention was invited by Mr. Ranadeb Choudhuri, learned Counsel for the petitioner, to wit, the case of *Indian Tobacco Company Ltd.* v. *The Union of India* (Miscellaneous Petition 293 of 1974) decided by a Bench of the Bombay High Court on the 15th December 1975. Incidentally, the petitioner in that case was also the Indian Tobacco Company Limited. The other cases referred to at the Bar were those of *The Union of India* v. *I. T. C. Limited* (Writ Appeals 8 and 11 of 1975) decided on the 20th February 1976, in which a Bench of the Karnataka High Court at Bangalore laid down the law to the same effect, so are also a decision of the Andhra Pradesh High Court in *The Vazir Sultan Tobacco Company Limited* v. *The Union of India* (Writ petitions 1748 and 7143 of 1974 and 2274, 2275 and 5136 of 1975) decided on the 19tth December 1975 and that of the Madras High Court in *The Madras Rubber Factory Ltd.* v. *The Superintendent of Central Excise* (Writ Petition 2180 of 1972) decided on the 23rd March 1976. It is needless to multiply the decisions of the various High Courts.

9. Mr. Ashwini Kumar Sinha, learned Standing Counsel for the Union of India, raised a number of points. In his painstaking arguments, he merely repeated, if I may say so with respect, the arguments which were advanced in the different cases both before the Supreme Court and before the various High Courts and which arguments not only did

not find favour but were also categorically repelled and overruled in those decisions and, therefore, it is not necessary to mention his submissions at any length.

10. From the discussion of the law on the subject detailed above, it is clear that the respondents have exceeded their jurisdiction in demanding from the petitioner for the purpose of excise duty payable by it price of its products inclusive of any post-manufacturing cost and selling expenses. It is, however, not possible for us, while deciding these writ applications, to say with any amount of precision as to which particular items represent post-manufacturing cost or selling expenses. These impugned demands (namely, of Rs. 36,90,056.57 in C. W. J. C. 939/74 and of Rs. 27,43,015.40 in C. W. J. C. 1203/74) however, must be and are hereby quashed and the respondents are directed to readless the excise duty in accordance with the principles laid down above oni the value of the products of the petitioner for the purpose of assessment of excise under the provision of section 4(*a*) of the Act and in so doing they are hereby commanded to exclude from the value of its products all post manufacturing cost and selling profits and then arrive at the correct assessable value for the purpose of excise duty in accordance with law.

11. In the result, all these three writ applications are allowed. So far as C. W. J. C. 1252/74 is concerned, all the reliefs prayed for must be allowed, for the petitioner has merely sought for a direction to the respondents to make assessment in accordance with law. In so far as the other two writ applications are concerned, while quashing the orders of the respondents and the consequent demand notices as incorporated in annexures 15, 16, 16/1 and 16/2 of C. W. J. C. 939/74 and those in annexures 9, 10, 14, 15, 16, 17 and 18 of C. W. J. C. 1203/74, I remit all the three cases back in the exercise of our jurisdiction under Article 227 of the Constitution to the competent Excise authority to go into the questions as indicated above and to make his decision in the light of the directions given above and in accordance with law. In the circumstances of the cases, there shall be no order as to costs.

SHAMBHU PRASAD SINGH, J.—I agree.

M. K. C.

Application allowed.

CIVIL WRIT JURISDICTION

Before K. B. N. Singh, CJ. and B. S. Sinha, J.

THE TATA ENGINEERING & LOCOMOTIVE COMPANY LIMITED.*

v.

S. N. GUHA THAKURTA, SUPERINTENDENT OF CENTRAL EXCISE, JAMSHEDPUR & ORS.

1977

January, 5.

Central Excises and Salt Act, 1944 (*Act I of* 1944), *section* 4(1) (*a*) *and* (2)—*scope and applicability of—section* 4(1) (a)—*when attracted—post manufacturing cost or charges, whether to be excluded from levy of excise duty—word "normal price"—meaning of.*

Section 4(1) (*a*) of the Central Excise and Salt Act lays down that the "normal price" will be the price at which the goods are ordinarily sold by the assessee to a buyer in the course of "whole sale trade" for delivery at the time and place of removal, where the assessee and buyer have no interest, directly or indirectly, in the business of each other and the price is the sole consideration for the sale. The first proviso provides for situation where "normal price" in whole sale trade may be different for different classes of buyers under the circumstances mentioned therein;

Held, therefore, that in the instant case it is not disputed that the petitioner's vehicles are sold to buyers in course of 'whole sale trade and it is the whole sale cash price' which will be the "normal price" thereof under the amended provision of section 4(1) (*a*) of the Act and the value of the vehicles for the purpose of charging excise duty will be the said ' normal price".

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*Civil Writ Jurisdiction Case no. 704 of 1976. In the matter of an application under Article 226 of the Constitution of India.

Section 4(2) is a residuary section and it applies only to such cases where the price of any excisable goods at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, which is not the situation in the instant case. What is manufacturing cost and manufacturing profit on which excise duty is to be levied is known in the case of the petitioner's vehicles, even in the case of those which are removed to its Regional Sales Offices. Therefore, section 4(2) will be clearly inapplicable. To attract section 4(1) (*a*) what is required is to determine the "normal price" of an excisable articles which price will be the price at which it is ordinarily sold to a buyer in the course of whole sale trade which is not lacking in the instant case;

Held, further, that section 4(2) does not lay down that only the cost of transportation to the place of delivery shall be excluded from such price. It only emphasises the fact that as goods have to be moved its transport cost must be excluded. On its analogy other post manufacturing cost or charges may also have to be excluded in appropriate cases.

A. K. Roy & Anr. v. *Voltas Ltd.*(1); and *Atic Industries Ltd.* v. *H. H. Dave & Ors.*(2), referred to.

Application under Article 226 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of K. B. N. Singh, C.J.

Messrs. R. J. Joshi and *Chunni Lal*, for the petitioner.

Mr. A. K. Sinha, Standing Counsel, Union of India, for the respondents.

K. B. N. SINGH, C J.—In this writ application the petitioner has prayed for quashing the order, dated the 1st of October, 1975, of the Assistant Collector of Central Excise, Jamshedpur (respondent no. 2), asking the petitioner to furnish price lists in Part IV of the Proforma

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(1) (1973) (A. I. R.) S. C. 225.
(2) (1975) A. I. R. (S. C.) 960.

treating the Regional Sales Offices of the petitioner as "related persons" (Annexures 2) as also to quash his orders on various price lists (Annexures 5 series) refusing the petitioner's claim for deduction of post manufacturing cost for purposes of finding out the assessable value under section 4 of the Central Excises and Salt Act 1944 (hereinafter referred to as "the Act"). The petitioner has also prayed for issuance of necessary directions to the respondents to treat the wholesale cash price ex-works at Jamshedpur as the value for levying excise duty and to refund the excess amount realised as excise duty with effect from the 1st October, 1975, in respect of vehicles cleared by the Regional Sales Offices.

2. The petitioner is the well-known Tata Engineering and Locomotive Company Limited, a company registered under the Indian Companies Act, having its factory at Jamshedpur for manufacturing commercial motor vehicles and carrying on business. The petitioner sells vehicles to its dealers, Government, State Transport Undertakings, the Director General of Supplies and Disposals including Army and various industrial units as well as a few miscellaneous parties (customers). The petitioner also clears vehicles for sale to its various Regional Sales Offices with which we are concerned in this writ petition. Section 3 of the Act provides for levy and collection of excise duty, in such manner as may be prescribed on all excisable goods, which are produced or manufactured in India at the rates set forth in the First Schedule to the Act. In accordance with the rates set forth in the First Schedule, excise duty on the motor vehicles manufactured by the petitioner company is payable at the rate of twelve and half per cent *ad valorem*, as mentioned under Item no. 34. Section 4 of the Act, as amended and in force from the 1st October, 1975, provides for valuation of the excisable goods for the purpose of charging excise duty, the relevant portion of which will be quoted hereinafter. In substance, it provides that where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the assessee and the buyer have no interest, directly or indirectly, in the business of each other and the price is the sole consideration for the sale. This is called to be the normal price.

3. As required by the first respondent on the 15th September, 1975, the petitioner submitted a price list of motor vehicles effective

from the 1st October, 1975, the date of enforcement of amended section 4, with a covering letter of the even date (Annexure 1). In that letter the petitioner stated that from its factory at Jamshedpur, it sells motor vehicles to its dealers, Government parties, transport undertakings, the Director General of Supplies and Disposals including Army and various industrial units as well as a few miscellaneous parties (customers). The petitioner also stated that on payment of excise duty, it cleared motor vehicles from the Jamshedpur works to its Regional Sales Offices, which are twenty-one in number, and dealers in Nepal and for export. By a letter, dated the 1st October, 1975, respondent no. 2 approved the price list in respect of the class of buyers mentioned in the petitioner's letter, but stated that the price list in respect of different Regional Sales Offices should be submitted in Part IV of the Proforma relating to sales to or through "related persons". It was also stated that for day to day work, the price list in respect of the regional sales offices were approved, subject to the condition that fresh price lists in Part IV of the Proforma were submitted on or before the 20th October, 1975 (Annexure 2).

4. The petitioner, by a letter, dated the 3rd October, 1975, wrote to respondent no. 2 objecting to treating the sales by regional sales offices as sales to or through "related persons" and asserted that the Regional Sales Offices were not different bodies, nor had they separate entity, and that those were parts and parcels of the petitioner's organisation, and sales through them could not be treated as sales through 'related persons', as defined under section 4(3)(*c*) of the Act, and, therefore, the despatch to the Regional Sales Offices should be assessed at the 'nomal price' *ex*-works at Jamshedpur, as are applicable for dealers and other classes of buyers, like the Government, etc. for whom the clearance is directly made from the factory. The petitioner, on the same date, also wrote a letter to respondent no. 3 to the effect that respondent no. 2 was not correct in treating the sales through the Regional Sales Offices as sales through 'related persons'. By a letter, dated the 30th September, 1975, the petitioner also explained to the authorities concerned as to what are the post-manufacturing expenses, which are sought to be deducted from the price of vehicles delivered at various Regional Sales Offices (Annexure 6). They being transport charges to Regional Sales Offices and interest charges from the date the vehicles leave the works up-to-date of sale and selling expenses, etc., could not be subject to excise duty. The price list in respect of sales from the Regional Sales Offices may be

treated for information only. On the 15th October 1975 the petitioner without prejudice to its right prayed for a month's time (Annexure 7). On the 30th of October, 1975, under protest the petitioner filed price lists for sales *Ex*-Regional Sales Offices in Form IV, maintaining that Regional Sales Offices are not 'related persons'. The petitioner in the price lists claimed deduction in respect of transport charges of the vehicles from factory to Regional Sales Offices and other post-manufacturing operational charges as contained in Annexures 5 to 5(*c*). Respondent no. 2 allowed transportation charges and rejected the other post-manufacturing charges by his orders of different dates recorded in Annexures 5 series.

5. The grievance of the petitioner is that the second respondent, while allowing the deduction of transportation charges only, has refused to allow the other post-manufacturing expenses from the gross price to arrive at the assessable value (of sales through the Regional Sales Offices), as contemplated under section 4 of the Act, and has passed orders, dated the 4th, 6th and 16th December, 1975, and 23rd and 25th February, 1976, on respective price lists, which are Annexure 5 series, mentioned above. On the 15th October, 1975, the petitioner, without prejudice to its rights, wrote to respondent no. 2 a letter under protest praying for one month's time to take necessary steps in connection with the letter, dated the 1st October, 1975 (Annexure 7) and the petitioner's representative discussed the entire matter with him. Thereafter the petitioner wrote another letter, dated the 30th October, 1975 [Annexure 7(*a*)], furnishing price lists for sales *ex*-Regional Sales Offices, pointing out that the Regional Sales Offices were not 'related persons' within the meaning of section 4(4)(*c*) of the Act, and are petitioner's own establishments and own departments. The petitioner's case is that there is no difference between *ex*-works whole sale price and *ex*-Regional Sales Office sale price for the purpose of excise duty, as the latter price is a bit higher only adding the cost of transporting and handling charges of the nature of post-manufacturing expenses.

6. In the counter-affidavit filed on behalf of the respondents it was admitted that the Regional Sales Offices of the petitioner are not being treated as "related persons". Transfer of the vehicles from the factory to the various Regional Sales Offices for sale cannot be said to be sales as postulated under section 4(1)(*a*) of the Act. The transfer of motor vehicles under the circumstances from the

factory to the Regional Sales Offices attracts section 4(2) of the Act and as such only cost of transport is to be deducted from the price at which the vehicles are sold by the Regional Sales Offices.

7. In view of the admission made by the respondents in the counter-affidavit, which has also been supported in course of argument on behalf of the respondents, the Regional Sales Offices of the petitioner cannot be treated as "related persons". On the concession made, Annexure '2', asking the petitioner to submit price lists in respect of different Regional Sales Offices in Part IV of the Proforma relating to sales to or through the related persons, must be quashed.

8. Mr. Joshi, learned counsel for the petitioner, has submitted that excise duty is leviable only on manufacturing cost and manufacturing profit, and, therefore, the price to be charged by the manufacturer for the sale of wholesale goods could represent the real value for the assessment of excise duty and post-manufacturing operation cannot be taken into account for purposes of levy of excise duty. Learned counsel has relied on two decisions of the Supreme Court, namely, the case of *A. K. Roy and another* v. *Voltas Ltd.*(1) and the case of *Atic Industries Ltd.* v. *H. H. Dave and others*(2), in support of his submission. The learned Standing Counsel appearing for the Union of India, however, has submitted that as the Regional Sales Offices of the petitioner are own offices of the petitioner, the transfer by the factory to the Regional Sales Offices is not a sale and, therefore, liable to assessment under sub-section (2) of section 4, which permits only deduction of the price of transport where selling price is not known. The rival contention of learned counsel for the petitioner falls for consideration in this case.

9. It will be necessary at this stage to refer to the relevant portions of amended section 1 of the Act:

"Valuation of Excisable Goods for purposes of Charging of Duty of Excise—

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value

(1) (1973) A. I. R. (S. C.) 225.
(2) (1975) A. I. R. (S. C.) 960.

shall subject to the other provisions of this section be deemed to be—

(*a*) the normal price whereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the assessee and the buyer have no interest, directly or indirectly, in the business of each other and the price is the sole consideration for the sale :

Provided that—

(*i*) Where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall subject to the existence of the other circumstances specified in clause (*a*), be deemed to be normal price of such goods in relation to each such class of buyers;

(*ii*) Where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (*iii*) of this proviso, the price or the maximum price as the case may be, so fixed shall in relation to the goods so sold, be deemed to be the normal price thereof.

(*iii*) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail

(b) Where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3."

Sub-section (4) defines "assessee", "place of removal", "related persons", "value" and lastly "wholesale trade" under clause (e), which reads as follows :—

"'wholesale trade' means sale to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail.'

Before the amendment, section 4 read as follows :—

"4. Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) Where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place at any other place nearest thereto.

Explantion.—In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

10. The true scope of old section 4 and what is meant by "wholesale market" and "wholesale cash price" came to be considered by the Supreme Court in the case of *Voltas* (supra) and Mathew, J. held as follows :—

"Excise is a tax on the production and manufacture of goods [see *Union of India* v. *Delhi Cloth and General Mills* (1963) Supp. 1S.C.R. 586=A.I.R. 1963 S.C 791]. Section 4 of the Act, therefore, provides that the real value should be found after deducting the selling cost and selling profits and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit. The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the articles."

* * * *

".....for a wholesale market to exist, it is necessary that there should be a market in the physical sense of the term where articles of a like kind or quality are or could be sold or that the articles should be sold to so-called independent buyers.

10. Even if it is assumed that the latter part of section 4(*a*) proceeds on the assumption that the former part will apply only if there is a wholesale market at the place of manufacture for articles of a like kind and quality, the question is what exactly is the concept of wholesale market in the context. A wholesale market does not always mean that there should be an actual place where articles are sold and bought on a wholesale basis. These words can also mean the potentiality of the articles being sold wholesale basis. So, even if there was no market in the physical sense of the term at or near the place of manufacture where the articles of a like kind and quality are or could be sold, that would not in any way affect the existence of market in the proper sense of the term provided the articles themselves could be sold wholesale to traders, even though the articles are sold to them on the basis of agreements which confer certain commercial advantages upon them. In other words, the sales to the wholesale dealers did not cease to be wholesale sales merely because the wholesale dealers had entered into agreement with the respondent under which certain commercial benefits were conferred upon them in consideration of their undertaking to do service to the articles sold, or because of the fact that no other person could purchase the articles wholesale from the respondent."

* * * *

"19. There can be no doubt that the 'wholesale cash price' has to be ascertained only on the basis of transactions at arms length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, e.g., because he is relative of the manufacturer, the price charged for those sales would not be the 'wholesale cash price' for levying excise under section 4(*a*) of the Act. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis. Once wholesale dealings at arms length are established, the determination of the 'wholesale cash price' for the purpose of section 4(*a*) of the Act may not depend upon the number of such wholesale dealings."

Relying on the decision in the case of *Vacuum Oil Co.* v. *Secretary of State for India in Council*(1), Mathew, J. also held that "the essence of the idea is that the purchase must be a wholesale purchase and not

(1) 59 I. A. 258 = (1932) A. I. R. (P. C.) 168.

a retail one". The said decision was referred with approval in the case of *Atic Industries Ltd.*, and Bhagwati J., who delivered the judgment of the Bench, observed as follows :—

"The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions."

11. Judged in the background of these decisions, the provisions of amended section 4 have to be construed. Section 4(1)(*a*) lays down that the "normal price" will be the price at which the goods are ordinarily sold by the assessee to a buyer in the course of "wholesale trade" for delivery at the time and place of removal, where the assessee and the buyer have no interest, directly or indirectly, in the business of each other and the price is the sole consideration for the sale. The first proviso provides for situation where "normal price" in wholesale trade may be different for different classes of buyers under the circumstances mentioned therein. It is not disputed that the petitioner's vehicles are sold to buyers in course of wholesale trade and it is the "wholesale cash price" which will be the "normal price" thereof under the amended provision of section 4(1)(*a*) of the Act. Undoubtedly, therefore, the value of the vehicles for the purpose of charging excise duty will be the aforesaid "normal price". The learned Standing Counsel on behalf of the Union of India, however, submitted that as the transfer by the petitioner to the Regional Sales Offices is not sale within the definition of that expression as given in section 2(*h*) of the Act, there is no sale at the factory but the sale is at the Regional Sales Offices, and, therefore, section 4(2) will apply and not section 4(1)(*a*) of the Act.

12. Section 4(2) is a residuary section and it applies only to such cases where the price of any excisable goods at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, which is not the situation in the instant case. What is manufacturing cost and manufacturing profit on which excise duty is to be levied is known in the case of the petitioner's vehicles, even in the case of those which are removed to its Regional Sales Offices. Therefore, section 4(2) of the Act will be clearly inapplicable. To attract section 4(1)(a) what is required is to determine the "normal price" of an excisable article which price will be the price at which it is ordinarily sold to a buyer in the course of wholesale trade which is not lacking in the instant case.

13. There is also substance in the contention of Mr. Joshi that even if section 4(2) were to apply, the sub-section does not lay down that only the cost of transportation to the place of delivery shall be excluded from such price. It only emphasises the fact that as goods have to be moved its transport cost must be excluded. On its analogy other post-manufacturing cost or charges may also have to be excluded in appropriate cases. It is not without significance that even in the case of vehicles transferred by the petitioner to its Regional Sales Offices excise duty is collected at the time of the removal of the vehicles from the factory.

14. In the result, the writ petition is allowed and the orders of respondent no. 2 treating the petitioner's Regional Sales Offices as "related persons" in Annexure 2 and refusing deduction of post-manufacturing charges in arriving at the assessable value in Annexure 5 to 5(e) are quashed. The respondents are further directed to refund the excess amount of excise duty already collected in respect of the vehicles cleared from the 1st of October, 1975, onwards. In the circumstances of the case, there will be no order as to costs.

B. S. SINHA, J.—I agree.

Application allowed.

M. K. C.

CIVIL WRIT JURISDICTION

Before S. Sarwar Ali and Gobind Mohan Misra, JJ.

BISHUNPAT SINGH & ORS.*

v.

THE STATE OF BIHAR & ORS.

1977

January, 7.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Act XII of 1962), section 2 (K)—word 'Raiyat'—meaning of—actual physical possession of the land—whether necessary to constitute a person as Raiyat.

Actual physical possession of the land is not necessary to constitute a person as Raiyat. Raiyat as defined means a person holding land for the purpose of cultivating himself or by the members of his family. In the instant case Bhikhari Singh died in 1966 and after 1966 in view of the provisions of the Hindu Succession Act the daughters of Bhikhari Singh became Raiyats in respect of the land which was held by Bhikhari Singh as Raiyat. It is also to be noticed that if only the widow is in possession, her possession is on behalf of the legal heirs of Bhikhari Singh unless there was ouster but in the present case no ouster is pleaded or proved;

Held, therefore, that the seven petitioners and Rama Devi are land-holders in respect of the land and entitled to eight units.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of the Court.

*Civil Writ Jurisdiction Case no. 2244 of 1976. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Messrs. Lakshman Saran Sinha and *Ram Kumar Sharma*, for the petitioners.

Mr. Chandra Mohan Jha, Jr. Counsel to Standing Counsel II, for the respondents.

SAWAR ALI AND G. M. MISRA, JJ.—A proceeding under the provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 was started against Rama Devi widow of Bakhori Singh. In that proceeding apart from Rama Devi the petitioners also filed their objections stating that they along with Rama Devi were each entitled to one unit. They also raised objection regarding classification of land. All the objections were disposed of by the Land Reforms Deputy Collector, Gaya. Under Annexure 3 they had been rejected and only one unit was given to Rama Devi. Against the order aforesaid there was appeal and revision which have been dismissed. The orders are contained in Annexures 2 and 1 respectively.

2. It is not in dispute that Bakhori Singh died in the year 1966 leaving behind his widow Rama Devi and four daughters. Petitioners 1 to 3 are sons of one of the daughters Lakshmi Devi, petitioners 4 and 5 are the daughter and son of the second daughter Bali Devi. Petitioners 6 and 7 are the 3rd and 4th daughters. The claim of the petitioners is that each of the seven petitioners and Rama Devi are entitled to one unit each. Thus the entire family is entitled to 8 units. If that be the position taking in view the classification the family does not hold land in excess of the ceiling area. In the counter-affidavit which has been filed in this case it is stated that the writ petitioners cannot be treated as land-holder and they are not entitled to any unit. Rama Devi the widow of Bakhori Singh was the only legal heir who had been in possession of the properties of Bakhori Singh. It may be stated as the out set that the assertion that Rama Devi was the only heir of Bakhori Singh is clearly unsustainable in law. On the death of Bakhori Singh all the four daughters and the widow jointly inherited the properties of Bakhori Singh and all of them are the legal heirs of Bakhori Singh.

3. The learned Member Board of Revenue dealing with the matter has stated as follows : —

> "Learned Government pleader argued that the widow and the four daughters would no doubt be heirs of late Bakhori

Singh after his death in 1966 under the Hindu Succession Act but in respect of the claim made by the petitioners it would have to be shown that in order to be declared as land-holders they satisfied the definition of land-holders as given in the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961 (Bihar Act II of 1962). Learned Government pleader urged that in the absence of any evidence that the petitioners actually held the land and were in cultivating possession, they would not be entitled to any ceiling unit.

The view of learned Member, Board of Revenue, therefore, appears to be that it is necessary that land should be actually held and cultivated by a person otherwise he cannot be said to be a land-holder within the meaning of the Act. This is not a correct appreciation of the provisions of the Act. Land-holder has been defined in section 2(*g*) of the Act which is as follows :—

> "Land-holder" means a family, as defined in clause (*ee*) holding land as raiyat or as under raiyat and includes a mortgagee of land with possession."

Raiyat has also been defined in section 2(*k*) of the Act which is as follows :—

> "raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating by himself, or by members of his family or by servants or with aid of partners, includes the successors-in-interest of persons who have acquired such a right and includes, in the district of Santhal Parganas, a village headman in respect of his private land, if any, but does not include in the areas to which the Chotanagpur Tenancy Act, 1908 (Bengal Act VI of 1908), applies a Mundari Khuntkattidar or a Bhuinhar".

It is thus clear that actual physical possession of the land is not necessary to constitute a person as Raiyat. Raiyat as defined means a person holding land for the purpose of cultivating himself or by the members of his family. In the instant case Bhikhari Singh died in 1966 and after 1966 in view of the provisions of the Hindu Succession

Act the daughters of Bhikhari Singh became Raiyats in respect of the land which was held by Bhikhari Singh as Raiyat. It is also to be noticed that if only the widow is in possession her possession is on behalf of the legal heirs of Bakhori Singh unless there was ouster. There is no case of ouster to be added or proved in this case. For all these reasons it is clear that the petitioners and Rama Devi are land-holders in respect of the land which was the subject matter of the proceeding. They are, therefore, entitled to eight units. If that be so it is not in dispute that they do not hold land in excess of the ceiling area as prescribed in the Act.

4. In the result we allow this application, quash Annexures 1, 2 and 3 and hold that the petitioners and Rama Devi do not hold lands in excess of ceiling area as prescribed in law. There will be no order as to costs.

Application allowed.

M. K. C.

CIVIL WRIT JURISDICTION

Before Nagendra Prasad Singh and B. S. Sinha, JJ.

DEVENDRA PRASAD GUPTA.*

v.

THE STATE OF BIHAR & ORS.

1977

January, 12.

Bihar Tenancy Act, 1885 (*Act VIII of* 1885) (*as amended by Act I of* 1963), *sections* 103A (3) *and* 104G (1) *and the rules framed thereunder, rules* 63A *and* 76—*scope and applicability of*—*Revenue Officer*—*power of review or revision, whether sanctioned by the Act*—*order passed under sub-section* (3) *of section* 103A—*right of appeal, whether*

*Civil Writ Jurisdiction Case no. 1569 of 1972. In the matter of an application under Articles 226 and 227 of the Constitution of India.

available under sub-section (1) of section 104G—appeal—to whom lies—Commissioner of a Division, whether a Superior Revenue Authority—period of limitation for filing appeal—High Court, whether can direct hearing of appeal on merits under its writ jurisdiction.

By the amendment of the Bihar Tenancy Act by Act I of 1963, the Revenue Officer, who was specially empowered by the State Government, was vested with the power of revision and review. Under sub-section (3) of section 103A, he can review his own order as well as revise any other order passed by any other Revenue Officer, of course, under the terms of that very sub-section (3) he has to pass any such order only after giving a reasonable notice to the parties concerned to appear and to be heard in the matter;

Held, therefore, that in the instant case the order, dated 3rd July 1969 had been passed by the charge officer who was a revenue officer specially appointed by the State Government in exercise of the power under sub-section (3) of section 103A and the Additional Member, Board of Revenue took an erroneous view of law when he held that it amounted to an order of review which was not sanctioned by the provisions of the Act.

A right of appeal is available under sub-section (1) of section 104G even against an order passed under sub-section (3) of section 103A. From sub-sections (1) of section 104G it appears that an appeal can be presented within two months from every order passed by a Revenue Officer prior to the final publication of the record of rights. This will include even an order under sub-section (3) of section 103A. From clause (*c*) of rule 63A it appears that an appeal will lie to the Commissioner of the Division from an order passed under sub-section (3) of section 103A if the same has been passed by the charge officer. On a plain reading of rule 63A it appears that this was introduced along with sub-section (4) of section 103A which had provided an appeal under section 103A itself. But, as this rule 63A does not appear to have been deleted when sub-section (4) of section 103A was deleted, it is clear on proper reading of rule 63A along with rule 76, Commissioner of the Division will be deemed to be superior Revenue Authority before whom an appeal shall lie. There is some conflict in the period of limitation prescribed under rule 63A and under sub-section (1) of section 104G for filing such appeal. It is obvious that the period of two months prescribed under section 104G will prevail;

Held, further, that in view of the aforesaid interpretation in the instant case the appeal filed by respondent no. 6 before the Commissioner of the Division concerned was maintainable and it ought to have been heard on merit. The Board of Revenue was in error in holding that there was no power of revision vested in the charge officer when he passed the order, dated 3rd July 1969 and the Commissioner was also not justified in dismissing the appeals of respondent no. 6 in limine saying that other remedies were open to him.

It is well settled that the writ jurisdiction of the High Court should not be exercised for the purpose of quashing an illegal order the effect whereof will be to revive another illegal order. In such cases the High Court will quash both the orders and direct that the appeals filed before the Commissioner should be heard on merit.

State of Bihar v. *Ram Dayal Missir & Ors.*(1) *and Abdul Majid & Ors.* v. *The State Transport Authority & Ors.*(2), referred to.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of Nagendra Prasad Singh, J.

Mr. Gorakh Nath Singh, for the petitioner.

Mr. Chandreshwar Jha, for the respondents.

NAGENDRA PRASAD SINGH, J.—This is an application under Articles 226 and 227 of the Constitution filed on behalf of the petitioner for quashing a resolution, dated the 21st September, 1972 of the Additional Member, Board of Revenue, a copy whereof is Annexure 1 to the writ application. By the impugned resolution, the respondent—Additional Member, Board of Revenue has set aside an order, dated 3rd July, 1969 passed by the respondent Charge Officer, a copy whereof is Annexure 5 to the writ application.

2. It appears that in the district of Saharsa steps for preparation of record of rights in accordance with the provisions contained in

(1) (1962) B. L. J. R. 385.
(2) (1960) B. L. J. R. 282.

Chapter X of the Bihar Tenancy Act, 1885 (hereinafter to be referred to as 'the Act) were taken and the respondent Assistant Settlement Officer prepared a draft record of rights which was published in the prescribed manner. Respondent no. 6 filed an objection which was heard by the said Assistant Settlement Officer, and he, by his order dated 29th May, 1969, corrected the said draft publication by deleting the name of the petitioner in respect of several plots which had been shown in his possession in the draft publication. A copy of the said order is Annexure 2 to the writ application. Being aggrieved by the said order, this petitioner filed an application which was addressed to the Settlement Officer, Saharsa making a grievance about the order dated 29th May, 1969 and praying therein that he should be given opportunity to produce relevant materials, as the correction on the objection filed by respondent no. 6 had been made without hearing the petitioner. The Charge Officer who was a revenue officer specially appointed by the State Government, on 3rd July, 1969, passed the following order on the application filed by this petitioner:

"Heard.

The A. S. O. is allowed to re-open the case and dispose in accordance with law after hearing all the parties concerned.

(Sd.) P. K. SINGH,
C. O.
3-7-1969."

A copy of the application of the petitioner along with the orders passed thereon, as aforesaid, is annexed to the supplementary affidavit filed on behalf of the petitioner and has been marked as Annexure 5. It is said that this order, dated 3rd July, 1969 was passed by the respondent Charge Officer without hearing respondent no. 6. Respondent no. 6 also filed an application for review of this order before the Charge Officer concerned but before any final order could be passed on that application, the dispute was heard by the Assistant Settlement Officer before whom the petitioner as well as respondent no. 6 appeared and the Assistant Settlement Officer, by his order, dated 25th July, 1969, only partially corrected the draft publication of the record of rights, i.e., he accepted some of the objections raised by respondent no. 6, but rejected the same in respect of the remaining plots. A copy

of the said order is annexed as Annexure 3 to the writ application. The petitioner as well as respondent no. 6 being aggrieved by order dated 25th July, 1969 filed two revision applications before the Charge Officer, under sub-section (3) of section 103A of the Act. The Charge Officer, however, allowed the revision application filed on behalf of the petitioner, but dismissed that filed on behalf of respondent no. 6, by his order dated 1st February, 1971. A copy of the said order is Annexure 4 to the writ application.

3. It is an admitted position that respondent no. 6 filed applications by way of appeals to the Commissioner, Bhagalpur Division as then Saharsa district was within his jurisdiction (we are informed now it is within the jurisdiction of the Commissioner, Kosi Division). It appears that the Commissioner, Bhagalpur Division dismissed the appeals in limine on 30th November, 1971 saying that other remedies were available to respondent no. 6. Thereafter, respondent no. 6 filed a revision applications before the Member, Board of Revenue which were heard by the Additional Member, Board of Revenue who passed the impugned order on 21st September, 1972, as already stated above. The Additional Member, Board of Revenue by the impugned order came to the conclusion that on 3rd July, 1969 (Annexure 5) the Charge Officer could not have remanded the matter to the Assistant Settlement Officer for a fresh consideration after hearing the parties. According to him, this order amounted to an order of review which was not sanctioned by the provisions of the Act. In this connection, it may be mentioned that respondent no. 6 had not moved the Board of Revenue against the order dated 3rd July, 1969. He had approached the Board of Revenue for quashing the order dated 1st February, 1971 passed by the Charge Officer and order dated 30th November, 1971 passed by the Commissioner, Bhagalpur Division.

4. Learned counsel appearing for the petitioner has submitted that there is an error apparent on the face of the resolution of the Additional Member, Board of Revenue when he has held that order dated 3rd July, 1969 was not sanctioned by the provisions of the Act. In support of this contention, learned counsel has placed reliance on the different sections under Chapter X of the Act which relate to preparation of record of rights and settlement of rents. Before I discuss the points at issue, it will be advisable to give the legislative

history of section 103A and certain other sections under that Chapter. Prior to 1963, section 103A was as follows :—

"103A. *Preliminary publication, amendment and final publication of record-of rights.*—(1) When a draft record-of-rights has been prepared, the Revenue Officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to any entry therein, or to any omission therefrom, during the period of publication.

(2) When such objections have been considered and disposed of according to such rules as the State Government may prescribe, and if a settlement of land-revenue is being or is about to be made the Settlement Rent-roll has been incorporated with the record under section 104F. Sub-section (3), the Revenue Officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner : and the publication shall be conclusive evidence that the record has been duly made under this Chapter.

(3) Separate draft or final records may be published under sub-section (1) or sub-section (2) for different local areas, estates, tenures or parts thereof

By Act I of 1963 a new sub-section (3) and a new sub-section (4) were added and the original sub-section (3) was made as sub-section (5). The newly added sub-sections (3) and (4) by Act I of 1963 were as follows :—

"(3) A Revenue Officer specially empowered by the State Government in this behalf, may, on application or of his own motion, at any time after the publication of the draft record-of rights and before its final publication, after reasonable notice to the parties concerned to appear and be heard in the matter, revise any entry in such draft or any order or decision under this section, whether made by himself or by any other Revenue Officer.

(4) An appeal shall lie, in the prescribed manner and to the prescribed officer, from any order passed under sub-section (3)."

In the year 1967, the aforesaid sub-section (3) was again amended by Act I of 1967. The main difference appears to be only this that for filing revision a period limitation of three months was prescribed. In the year 1969, by Act VII of 1969, sub-section (4), which had been introduced in 1963, was deleted. At the relevant time, section 103A was as follows :—

"103A. *Preliminary publication, amendment and final publication of record-of-rights.*—(1) When a draft record-of-rights has been prepared, the Revenue Officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to any entry therein or to any omission therefrom, during the period of publication.

(2) When such objections have been considered and disposed of according to such rules as the State Government may prescribe, and if a settlement of land revenue is being or is about to be made the Sttlement Rent roll has been incorporated with the record under section 104F, sub-section (3), the Revenue Officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner, and the publication shall be conclusive evidence that the record has been duly made under this Chapter.

(3) A Revenue Officer specially empowered by the State Government in this behalf, may, on application made to him within three months of any order or decision on any objection made under sub-section (1) or on his own motion after giving reasonable notice to the parties concerned to appear and be heard in the matter, revise at any time before the final publication of the record-of-rights any such order or decision, whether made by himself or by any other Revenue Officer.

(4) (Omitted by Act VII of 1959).

(5) Separate draft or final records may be published under sub-section (1) or sub-section (2) for different local areas, estataes, tenures or parts thereof."

In view of sub-section (3) of section 103A it has to be held that a Revenue Officer specially empowered by the State Government within three months of any order or decision on any objection may under sub-section (1) or on his own motion revise at any time before the final publication of record-of-rights, any order whether made by himself or by any other Revenue Officer. According to the learned counsel, in view of this sub-section, on 3rd July, 1969, the Charge Officer was within his rights in directing the Assistant Settlement Officer to re-open the case and dispose of the same after hearing all the parties concerned. In my opinion, this contention has to be accepted. The Additional Member Board of Revenue has relied on a decision of this Court in *Ramdeyal Missir and others* v. *The State of Bihar*(1) for the proposition that a Settlement Officer has no power of review. It is well settled that power of review is creature of a Statute. Unless such power is vested by specific provision, a judicial authority cannot exercise any such power for correcting a wrong. The view expressed in the aforesaid Bench decision of this Court was affirmed by the Supreme Court also in the case of *State of Bihar* v. *Ram Dayal Missir and others*(2) where it was observed that the law, as it stood on that day, the Revenue Officers, while exercising judicial powers, or *quasi* judicial powers, have no power of review. But, the Additional Member, Board of Revenue overlooked the fact that by the amendment by Act I of 1963, the Revenue Officer, who was specially empowered by the State Government, was vested with the power of revision and review. Under sub-section (3) of section 103A, he can review his own order as well as revise any other order passed by any other Revenue Officer. Of course, under the terms of that very sub-section (3), he has to pass any such order only after giving a reasonable notice to the parties concerned to appear and to be heard in the matter. Learned counsel appearing for respondent no. 6 pointed out that the Charge Officer, while passing the order dated 3rd July, 1969, did not give him an opportunity of being heard, and, as such, the order dated 3rd July, 1969 was vitiated on that ground alone. It cannot be disputed that while passing the order dated 3rd July, 1969, the Charge Officer did not conform to the procedure prescribed by sub-section (3) of section 103A. But, respondent no 6, except filing an application to recall

(1) (1957) B. L. J. R. 292
(2) (1962) B. L. J. R. 385

the said order, did not take any further steps in the matter, rather he appeared before the Assistant Settlement Officer where the whole matter was heard in presence of both the parties and before the application of respondent no. 6 could be disposed of, the Assistant Settlement Officer passed the order on 25th July, 1969. Respondent no. 6, thereafter, pursued different forums by way of revision and appeal only against the order dated 25th July, 1969. He filed a revision before the Charge Officer; thereafter an appeal before the Commissioner and then the revision before the Board of Revenue. Apart from that, on 3rd July, 1969, the Charge Officer did not pass any final order affecting any right of respondent no. 6. He simply directed the Assistant Settlement Officer to hear both the parties and then to pass an order on the objection of respondent no. 6. In that view of the matter, I am of the view that order of 3rd July, 1969 had been passed by the Charge Officer in exercise of the power under sub-section (3) of section 103A and the Additional Member, Board of Revenue took an erroneous view of law when he held that it amounted to an order of review which was not sanctioned by the provisions of the Act.

5. Learned counsel appearing for respondent no. 6 has submitted that his application before the Board had been allowed only on the ground that the Charge Officer could not have passed an order directing the Assistant Settlement Officer to re-open the matter which had attained finality. According to learned counsel, even if that decision of the Board is held to be bad, respondent no. 6 was entitled to urge either before the Commissioner or before the Board that the order dated 25th July, 1969 passed by the Assistant Settlement Officer and the order dated 1st February 1971 passed by the Charge Officer were bad on merits, and neither the Commissioner nor the Additional Member of the Board of Revenue has examined the legality of those orders on the basis of the materials produced on behalf of the parties. In that connection, learned counsel for respondent no. 6 has also pointed out that his appeal before the Commissioner was a proper remedy provided for him under the Act and the rules framed thereunder and the Commissioner was not correct when he dismissed the same in limine saying that respondent no. 6 had other alternative remedies. I have already pointed out that by Act I of 1963 a new sub-section (4) had been introduced into section 103A which has been reproduced earlier. Under that sub-section (4) an appeal had been provided in the prescribed manner to the prescribed officer from any order passed under sub-section (3). Under this sub-section (4) an

appeal against order dated 1st February, 1971 passed by the Charge Officer was clearly maintainable, but this sub-section (4), as I have already pointed out above, was deleted by Act VII of 1969. We have looked into Act VII of 1969. From the statement of objects and reasons of that Act it appears that sub-section (4) was deleted because a right of appeal was available under sub-section (1) of section 104G even against an order passed under sub-section (3) of section 103A. From sub-section (1) of section 104G it appears that an appeal can be presented within two months from every order passed by a Revenue Officer prior to the final publication of the record-of-rights. This will include even an order under sub-section (3) of section 103A. From clause (c) of rule 63A it appears that an appeal will lie to the Commissioner of the Division from an order passed under sub-section (3) of section 103A if the same has been passed by the Charge Officer. On a plain reading of rule 63A it appears that this was introduced along with the aforesaid sub-section (4) of section 103A which had provided an appeal under section 103A itself. But, as this rule 63A does not appear to have been deleted when sub-section (4) of section 103A was deleted, it has to be held that on proper reading of rule 63A along with rule 76, Commissioner of the Division will be deemed to be superior Revenue Authority before whom an appeal shall lie. There is some conflict in the period of limitation prescribed under rule 63A and under sub-section (1) of section 104G for filing such appeals. It is obvious that the period of two months prescribed under section 104G will prevail.

6. In view of the aforesaid interpretation it has to be held that the appeals filed by respondent no. 6 before the Commissioner of the Division concerned were maintainable and the said appeals ought to have been heard on merit. Accordingly, I hold that the Additional Member, Board of Revenue was in error when he held that there was no power of revision vested in the Charge Officer when he passed the order dated 3rd July, 1969, and I also hold that the Commissioner was not justified in dismissing the appeals of respondent no. 6 in limine saying that other remedies were open to him.

7. Now the question is to what relief the parties are entitled under aforesaid circumstances. If only the resolution dated 21st September, 1972 of the Additional Member, Board of Revenue is quashed, then the effect of this order will be that an illegal order dated 30th November, 1971 passed by the Commissioner will be revived. It is well settled that the writ jurisdiction of this Court should not be

exercised for the purpose of quashing an illegal order the effect whereof will be to revive another illegal order. Reference in this connection can be made to the decision in *Abdul Majid and others* v. *The State Transport Authority and others*(1). Accordingly, I quash the resolution dated 21st September, 1972 of the Additional Member, Board of Revenue as well as the order dated 30th November, 1971 passed by the Commissioner, Bhagalpur Division, and I direct that the appeals filed on behalf of respondent no. 6 should now be heard, on merit by the Commissioner, Kosi Division, because we are informed that now he has the jurisdiction to hear the said appeals. It is, however, made clear that the appeals will be heard and disposed of on the grounds other than the ground that the Charge Officer had no jurisdiction to pass order dated 3rd July, 1969 because I have already decided the said point in favour of the petitioner. It is said that respondent no. 6 had filed three appeals and thereafter he had filed three revisions, before the Board of Revenue and they had been heard and disposed of together by the Commissioner as well as the Additional Member, Board of Revenue. If three appeals had been filed on behalf of respondent no. 6, then the Commissioner will dispose of all the three appeals after hearing the parties. In the circumstances of the case, there will be no order as to costs.

B. S. SINHA, J.—I agree.

... *Application allowed.*

M. K. C.

CIVIL WRIT JURISDICTION

Before K. B. N. Singh C.J. and S. Ali Ahmad, J.

BIRENDRA KUMAR SINHA.*

v.

STATE OF BIHAR AND ORS.

1977

January, 13.

Bihar Cinema (Regulation) Rules, 1974, *rules* 10 *and* 12—*provisions of—permanent licence in existence—period for validity—State Government—whether can give direction to licencing authority*

(1) (1960) B. L. O. R. 282.

*Civil Writ Jurisdiction Case no. 3197 of 1975. In the matter of an application under Articles 226 and 227 of the Constitution of India.

to ask Electric Inspector, Bihar and Executive Engineer P.W.D. to inspect and examine structural soundness of Cinema building under rule 12—rule 12, whether imposes a duty on the licencee to persuade Electric Inspector, Bihar and Executive Engineer P.W.D. to come and inspect Cinema house.

Rule 10 of Bihar Cinema (Regulation) Rules, makes it abundantly clear that the permanent licence which is in existence shall be valid for a period of three years from the date on which the licence is granted subject to annual inspection and payment of prescribed fee unless revoked earlier by the licencing authority.

Held therefore, that in the instant case the licence granted to the petitioner on the 16th September, 1974, is to remain valid for a period of three years from that date, i.e., till the 15th September, 1977; subject, of course, to annual inspection as provided under rule 12 of the Rules and payment of prescribed fee.

Under rule 12 of the Rules, the State Government may direct the licencing authority to ask the Electric Inspector, Bihar and the Executive Engineer, P.W.D. to inspect and examine the structural soundness of the Cinema building and to certify that the same can be used without danger to the public. The rule does not very rightly impose a duty on the licencee to persuade the Electric Inspector, Bihar, and the Executive Engineer, P.W.D. (Building) to come and inspect the Cinema house. The Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) are Government Officials and may not be able under their service conditions to oblige the licensee by inspecting and examining the structural soundness of the Cinema building and by certifying that the same can be used without danger to the public. Possibly on that account the rule provided that the State Government may direct the licencing authority to ask the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) to inspect and examine the structural soundness of the Cinema building to certify that the same can be used without danger to the public In case the licensing authority under the direction of the State Government asks the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) to inspect and examine the structural soundness of the Cinema building and to submit a report the two officials will have no difficulty in making the inspection and examining the structural soundness of the Cinema building.

Held further, that in the instant case the demand for production of certificates from the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) is bad. These two certificates as provided under sub-rule (1)(*a*) of rule 12 of the Rules, is the only requirement besides payment of prescribed fee under rule 10 of the Rules The production of the certificates as asked for by Annexure 2 is also bad.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of S. Ali Ahmad, J.

M/s. Shreenath Singh and G. C. Bharuka, for the petitioner.

M/s. R. B. Mahto (*G. P. IV*), *S. N. Jha* (*S. C. II*) and *B. P. Pandey* (*J. C.*), for the respondents.

S. ALI AHMAD, J —This application under Articles 226 and 227 of the Constitution of India is on behalf of one of the partners of M/s. Veena Theatre (a cinema house) in the town of Patna. The prayer is to declare section 5(2) of the Bihar Cinemas (Regulation) Act, 1954 (hereinafter to be referred to as the Act) and condition no. 8 of the licence (Annexure 1) to be *ultra vires*, illegal and without jurisdiction. It has also been prayed to quash Annexure 2, a notice, dated 24th October, 1975 issued by respondent no. 2.

2. According to the petitioner, a permanent cinema licence, dated 16th September, 1974, was granted to him by the District Magistrate, respondent no. 2, under the powers conferred upon him under section 3 of the Act. The petitioner under that licence has been running the cinema business of M/s. Veena theatre. A copy of the licence along with an endorsement made thereon on 21st February, 1975, has been marked as Annexure 1 to this writ application. It

appears that a notice (Annexure 2) issued by the District Magistrate respondent no 2, was served on the petitioner informing him that the period of the licence was to expire on 31st December, 1975 and, therefore, for the purpose of renewal of the licence for the year 1976, he should produce by 25th November, 1975, the following certificates from :—

(*a*) the Branch Manager, Films Division, Calcutta,

(*b*) the Executive Engineer, P.W.D., Patna, regarding structural soundness of the cinema building,

(*c*) Chief Electrical Inspector, Bihar, Patna,

(*d*) Clearance certificate of entertainment tax,

(*e*) Adhisthan Agnisam Padadhikari, Patna,

(*f*) Treasury Chalan regarding payment of prescribed fee,

(*g*) Municipal tax payment certificate.

3. Mr. Shreenath Singh, learned counsel, appearing on behalf of the petitioner submitted that section 5(2) of the Act and condition no. 8 of the licence, which provided for suspension or cancellation of the licence in case the licensing authority was satisfied that the licensee has violated the provisions of sections 6, 7, 9(5) or 9(6) of the Bihar Entertainment Tax Act, 1948, or of rule 4 or rule 17(4) or rule 23 of the Rules made thereunder were *ultra vires*. Alternatively, he also urged that even in case section 5(2) of the Act and condition no. 8 of the licence were not held to be *ultra vires*, respondent no. 2 had no jurisdiction under the Act and the Rules made thereunder to ask the petitioner to produce the different certificates mentioned in Annexure 2. According to him, the licence granted to him on 16th September, 1974, and renewed on 21st August, 1975, was to be valid for three years from 21st August, 1975, i.e., upto 21st August, 1978, and, as such, there was no question of renewal.

4. No counter-affidavit has been filed on behalf of the State (respondent no 1) or on behalf of the District Magistrate (respondent no. 2) or on behalf of the District Cinema Magistrate (respondent no 3), but the Government Pleader no. IV has opposed the application at the time of the hearing.

5. In view of the submissions made at the bar, it is necessary to keep certain provisions of the Act and the Rules in mind. The Act came into force on 19th April, 1954, repealing Act II of 1918, the

Cinematograph Act, 1918. Under section 5 of the Act, the powers of the licensing authority have been restricted. The section reads as follows :—

"Restrictions of powers of licensing authority :—

(1) The licensing authority shall not grant a licence under this Act, unless it is satisfied that—

(*a*) the rules made under this Act have been substantially complied with; and

(*b*) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of persons attending exhibition therein.

(2) Subject to the foregoing provisions of this section and to the control of the State Government, the licensing authority may grant licences under this Act to such persons as that authority thinks fit and on such terms and conditions and subject to such restrictions as it may determine.

(3) Any person aggrieved by the decision of a licensing authority refusing to grant a licence under this Act may within such time as may be prescribed, appeal to the State Government or to such officer as State Government may specify in this behalf and the State Government or the officer, as the case may be, may make such order in the case as it or he thinks fit.

(4) The State Government may, from time to time. issue, directions to licensees generally or to any licensee in particular for the purpose of regulating the exhibition of any film or class of films, so that scientific films, films intended for educational purposes, films dealing with news and current events, documentary films or indigenous films secure an adequate opportunity of being exhibited, and where any such directions have been issued, those directions shall be deemed to be additional conditions and restrictions subject to which the licence has been granted."

In exercise of the powers conferred by section 9 of the Act, the State Government framed rules which were published in the Bihar Gazette, dated 11th October, 1974 and is known as the Bihar Cinema (Regulation) Rules, 1974 (hereinafter to be referred to as the Rules). Rule 2(v) of the Rules defines 'permanent building'. According to the definition 'permanent building' means a building which is constructed for permanent use with stone, mud brick, mortar, cement or other non-inflammable material. Rule 8 of the Rules provides for grant of licence. Licence under this rule can be granted for running a permanent cinema after the licensing authority has ensured that the applicant has complied with the provision of the Rules and instructions issued from time to time by the State Government and has taken all precautions to provide for the safety of persons attending exhibition in the cinema house. Rule 10 of the Rules provides for the period of validity of permanent licence which may be usefully quoted as follows :—

> "Period of validity of permanent licence.—The licence granted under rule 8 and those permanent licences which are in existance shall be valid for a period of three years from the date from which the licence is granted subject to annual inspection and payment of prescribed fees unless revoked earlier by the licensing authority. For each licence or renewal thereof, a fee shall be charged according to the following rates, namely, ... "

According to rule 11 of the Rules, if any licensee fails to apply for renewal of his licence with the requisite fee within 15 days of the date of expiry of his licence, he shall, at the time of its renewal be required to pay a fine of a sum equivalent to requisite fee for such renewal. Rule 12 of the Rules provides for inspection. According to sub-rule (1)(a) of rule 12 of the Rules before granting or renewing a licence or on expiry of the period of one year, the State Government may direct the licensing authority to ask the Electric Inspector, Bihar and the Executive Engineer, P.W.D., to inspect and examine the structural soundness of the cinema building and to certify that the same can be used without danger to the public.

6. Mr. Shreenath Singh first attacked the validity of section 5(2) of the Act. I have quoted this sub-section earlier which provides that subject to sub-section (1) of section 5 of the Act and to the control of the State Government, the licensing authority any grant licence

under the Act to such person as the authority thinks fit and on such terms and conditions and subject to such restrictions as it may determine. According to learned counsel, this sub-section confers unguided, unbridled, arbitrary and uncanalised power to the licensing authority. According to him, the sub-section was bad on account of excessive delegation also. It was, therefore, contended that the said provision was ultra vires to Articles 301 to 304 of the Constitution of India. This point has already been considered by a Bench of this Court in the case of *M/s. Vishnu Talkies* v. *The State of Bihar* (A.I. R. 1975 Patna 26) wherein it has been held that section 5(2) of the Act is not *ultra vires* either to Article 14 or Artice 19 of the Constitution of India nor on the ground that it had given no guideline for the exercise of discretion by a licensing authority. It has also been held that the sub-section did not confer any rule making power on the licensing authority at all. There was, therefore, no question of any excessive delegation of legislative power to the licensing authority. In view of the aforesaid decision, there is no substance in this argument of learned counsel which is, therefore, rejected.

7. Mr. Singh next submitted that condition no. 8 of the licence which authorises the licensing authority to cancel or suspend the licence in case he was satisfied that the licensee has violated certain provisions of the Bihar Entertainment Tax Act and Rules is bad. During the course of argument, learned counsel for the petitioner informed us that his client has not violated any of the provisions mentioned in condition no. 8 of the licence. He also informed us that the entire amount of tax under the entertainment tax has already been paid. If that be so then the point raised by learned counsel becomes academic in nature and, therefore, need not be decided.

8. Lastly Mr. Singh submitted that the petitioner had been granted a licence on the 16th September, 1974 which was renewed on 21st August. 1975. According to him, under rule 10 of the Rules, the licence granted is to remain valid for a period of three years from 21st August, 1975 and that during the period of the validity of the licence, the demand to get the licence renewed was bad. Learned counsel further submitted that counting three years from 21st August, 1975, the licence will expire on 20th August, 1978 subject to annual inspection and payment of prescribed fee. It is not disputed that the prescribed fee has been deposited by the petitioner. He, therefore contended that the demand for getting the licence renewed and for production of the certificate mentioned in Annexure 2 is bad Learned

Government Pleader no. IV, on the other hand, submitted that on the expiry of one year, the licence has to be renewed and before the licence is renewed, the licensing authority must satisfy himself that the conditions prescribed by the Act and the Rules have been fulfilled for renewal. He, therefore, submitted that the certificates asked for by Annexure 2 are meant to satisfy the requirement of law. Before I proceed to decide this point, it will be desirable to mention some more fact which has been brought on record during the course of argument on 4th January, 1977, by way of supplementary affidavit. It is, *inter alia*, stated in the supplementary affidavit that after the filing of the writ application, the State Government in exercise of the powers conferred on it under the Bihar Cinema (Regulation) Act, 1974 and the Bihar Cinema (Regulation) Rules, 1974, has issued a direction to the District Magistrate, Patna, respondent no. 2, the licensing authority, in the matter of renewal of the petitioner's licence for Veena Cinema. But inspite of the aforesaid direction of the State Government, the licensing authority, in complete disregard, and violation of the said direction, has by a memo., dated 3rd November, 1976 again issued a notice to the petitioner similar to the earlier notice (Annexure 2) to the writ application. A copy of the notice, dated 3rd November, 1976 has been marked as Annexure 4 to the writ application while the direction issued by the State Government under section 5(2) of the Act has been marked as Annexure 3. A perusal of Annexure 3 will show that the State Government approved renewal of a permanent licence for Veena cinema from 5th January, 1976 to 31st December, 1978. It also says that the renewal could be done by the District Magistrate after inspection and on deposit of the prescribed licence fee.

9. Admittedly the petitioner was granted a permanent licence on the 16th September, 1974, which was to remain in force till 31st March, 1975. The Rules came into operation on the 11th October, 1974, and by virtue of rule 10 of the Rules, inspite of the fact that the licence was to remain in force till the 31st March, 1975, its life was extended to a period of three years beginning from 16th September, 1974. I, however, find an endorsement, dated 21st August, 1975 on the licence made by the District Cinema Magistrate (respondent no. 3) whereby he renewed the licence upto 31st December, 1975 on the condition that facility for drinking water of the cinegoers be made by providing a Bahar Cooler. I do not think that the argument of Mr. Singh is correct that the three years have to be counted from 21st August, 1975, for the purpose of counting the period of

validity of the licence as provided under rule 10 of the Rules. As I have mentioned above, the Rules had come into operation on the 11th October, 1974, and by virtue of rule 10 of the Rules, the period of licence had already been extended to 16th September, 1977. There was, therefore, no question of renewal within that period. It might have been done under some misconception, but that will not mean that the period of three years as provided under rule 10 of the Rules has to be counted from that day. I also do not feel impressed by the argument advanced by the learned Government Pleader no. IV that inspite of the validity of the licence for three years; the licence has to be renewed every year. Rule 10 of the Rules makes it abundantly clear that the permanent licence which is in existence shall be valid for a period of three years from the date on which the licence is granted subject to annual inspection and payment of prescribed fee unless revoked earlier by the licensing authority. Rule 12 of the Rules provides for inspection which can be made before granting a licence or renewing a licence or on expiry of the period of one year. If the argument of the learned Government Pleader no. IV is to be accepted then under rule 12 of the Rules, an inspection on expiry of the period of one year becomes absolutely redundant. I am, therefore, of the view that the licence granted to the petitioner on the 16th September, 1974, is to remain valid for a period of three years from that date, i.e., till the 15th September, 1977; subject of course, to annual inspection as provided under rule 12 of the Rules and payment of prescribed fee. Under rule 12 of the Rules, the State Government may direct the licensing authority to ask the Electric Inspector, Bihar, and the Executive Engineer, P.W.D., to inspect and examine the structural soundness of the cinema building and to certify that the same can be used without danger to the public. The rule does not very rightly impose a duty on the licensee to persuade the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) to come and inspect the cinema house. The Electric Inspector, Bihar and the Executive Engineer, P. W. D. (Building) are Government officials and may not be able under their service conditions to oblige the licensee by inspecting and examining the structural soundness of the cinema building and by certifying that the same can be used without danger to the public. Possibly on that account the rule provided that the State Government may direct the licensing authority to ask the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) to inspect and examine the structural soundness of the cinema building and to certify that the same can be used without danger to the public. In case the licens-

ing authority under the direction of the State Government asks the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) to inspect and examine the structural soundness of the cinema building and to submit a report, the two officials will have no difficulty in making the inspection and examining the structural soundness of the cinema building. The demand, therefore, for production of certificates from the Electric Inspector, Bihar and the Executive Engineer, P.W.D. (Building) is bad. These two certificates as provided under sub-rule (1)(a) of rule 12 of the Rules is the only requirement besides payment of prescribed fee under rule 10 of the Rules. The production of the certificates as asked for by Annexure 2 is also bad.

10. In the result, I find that the petitioner's licence granted on the 16th September, 1974, is to remain valid upto 15th September, 1977, subject to payment of prescribed fee and inspection as provided under sub-rule (i)(a) of rule 12 of the Rules. In that view of the matter, Annexure 2 is quashed and the application is allowed to the extent indicated above. On the facts and in the circumstances of the case, there will be no order as to costs.

K. B. N SINGH, C.J —I agree.

M. K. C. *Application allowed.*

CIVIL WRIT JURISDICTION

1977

January, 29.

*Before Hari Lal Agrawal and P. S. Sahay, JJ.**

VIR BHAN *ALIAS* VIR BHAN NANGIA & ORS**

v.

THE STATE OF BIHAR & ORS.

Bihar Agricultural Produce Markets Act, 1960 (*Bihar Act XVI of* 1960) *section* 2(r) *and schedule to the Act and Bihar Agricultural Produce Markets Rules*, 1962, *rule* 71—*knitting wool, whether covered by the expression "wool" in the schedule to the Act—taking out of licences, whether necessary.*

*Sitting at Ranchi.

**Civil Writ Jurisdiction Case no. 49 of 1976(R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

Knitting wool is entirely a different commodity and cannot be covered by the notified commodity "wool" in the schedule of the Bihar Agricultural Produce Markets Act, 1960. Unless a trader transacts any business in any of the notified commodity, he is not obliged to take out a licence. Simply because one parent product of either agriculture, horticulture, animal, husbandry or forest is specified in the schedule without any of its species which may be produced after any processing, then, that by itself would not be sufficient to incorporate and include within its womb all those bye and processed or finished products. Such construction of a fiscal statute would not be a proper and reasonable construction and would amount to reading in the schedule something by considering as what is the substance of the matter, and then substituting other materials by following the rule of intendment, and then by implication to read that knitting wool, a commodity which is apparently different, would be covered in the expression "wool".

Held, therefore, that the authorities were not justified in insisting upon the petitioners to take out licence,' or for the matter of that, follow any of the provisions of the Bihar Agricultural Produce Markets Act, 1960, and the Bihar Agricultural Produce Markets Rules. 1962 and the notices calling upon them to take out licences are liable to be quashed.

Case laws discussed.

Application by the petitioners.

The facts of the case material to this report are set out in the judgment of Hari Lal Agrawal, J.

Messrs. S. B. Sanyal, Keshav Nandan Prasad, N. C. Ganguly and *P. D. Agarwala*, for the petitioners.

Messrs. Lal Narayan Sinha (Soliciter-General), R. B. Mahto, (Government Pleader no. IV), Harendra Prasad and *Vijay Pratap Singh*, for the State.

HARI LAL AGRAWAL, J.—The three petitioners in this writ application are challenging the notices issued to them on different dates by the Secretary of the Agricultural Produce Market Committee,

Ranchi (respondent no. 2), copies of which have been made Annexures 1, 1/*a* and 1/*b* to this writ application, calling upon them to take out licences under the provisions of the Bihar Agricultural Produce Markets Act, 1960 (briefly the 'Act' as they were dealing in 'wool', one of the notified "agricultural produce" under the Act, on the ground that the commodity in which they dealt was not 'wool', but 'knitting wool', an entirely different commercial commodity.

2. Whereas the first two petitioners are the partners of the firm Messrs Wool Emporium and Wool House respectively, the third petitioner is the proprietor of Shandar Stores, all in the town of Ranchi. In order to appreciate the question raised for our consideration, I shall very briefly indicate the relevant provisions of the Act and the Rules, namely, the Bihar Agricultural Produce Markets Rules, 1962, framed under the provisions of the Act (briefly the 'Rules'). According to rule 71, "no person shall do business as commission agent or trade in agricultural produce in a market except under a licence granted by the Market Committee under this rule". The procedure for applying for licence and the necessary licence fee has also been prescribed thereunder, but they are not relevant for our purpose. The provision of rule 71 makes it obligatory upon every person who carries on any business in any of the agricultural produce in the Market to obtain a licence from the Market Committee. The licensee is exposed to various obligations, such as keeping of books in such form and render such periodical returns and at such time and in such form as the Market Committee may from time to time direct and is also to render such assistance in the collection and prevention of the evasion of fees due under the rules and bye-laws.

The expression "agricultural produce" has been defined in section 2(*a*) of the Act which reads as follows :

> " 'agricultural produce' includes all produce, whether processed or non-processed of agriculture, horticulture, animal husbandry and forest *specified in the Schedule*". (emphasis is mine).

The expressions "trade" and "trader" have also been defined in clauses (*v*) and (*w*) of section 2, but it is not necessary to refer to those expressions as it is not disputed that the petitioners are traders within their meaning. The pertinent question with which we are

concerned in this case is whether the specified commodity "wool" would also include "knitting wool".

3. It is the admitted case that none of the petitioners deal in "wool" as such but trade only in "knitting wool". The contentions that have been mooted from the side of the petitioners is that when wool undergoes a series of processing, it is converted into knitting wool and is rendered an entirely different commodity. According to the contentions of the contesting respondents, however, although knitting wool may assume a different shape, nonetheless, the expression "wool", which is a generic term, would *ipso facto* include "knitting wool" as well. It is this controversy which has to be resolved in this case. From the definition of "agricultural produce", extracted earlier, it is manifest that within this definition, produce of agriculture, horticulture, animal husbandry and forest have also been included, and the same also includes their "whether processed or non-processed" forms. The definition of 'agricultural produce" by fiction of law, therefore, has been provided a very wide net to include in its fold various other kinds of products, otherwise which are not understood to be so included in common parlance within the meaning of "agricultural produce" simplicitor. Nonetheless, in order to be covered under the mischief of the said definition, the produce must be "specified in the Schedule".

The term "Schedule" itself has been defined in clause (r) of section 2 of the Act as "a schedule to this Act".

Section 39 of the Act empowers the State Government "by notification to add, amend or cancel any of the items of agricultural produce specified in the schedule". The original schedule, when the Act was enforced, has been amended and expanded from time to time by the State Government. I shall now refer to the schedule itself to answer the question.

4. The schedule, as it stands at present, has classified the various items mentioned therein under 12 categories, namely, (*i*) cereals, (*ii*) pulses, (*iii*) oilseeds, (*iv*) oils, (*v*) fruits, (*vi*) vegetables, (*vii*) fibres, (*viii*) animal husbandry products, (*ix*) condiments, spices and others, (*x*) grass fodder, (*xi*) narcotics, and (*xii*) miscellaneous. We are concerned in this case with the eighth category, namely, animal husbandry products. There are 14 items in this category, and the item relevant for our purpose is the sixth item, which is "wool", and the twelvth item, which is "fleece".

5. Now I proceed to deal with the two products specified in the Schedule, namely, "fleece" and "wool" and to indicate as to what actually they mean and how "wool" and "knitting wool" are processed and manufactured, in order to appreciate the controversy raised. The petitioners filed a supplementary affidavit to the counter-affidavit filed on behalf of respondents 2 and 3, which I propose to deal with earlier. In this supplementary affidavit, the petitioners have dealt upon the process of manufacturing knitting wool. To this affidavit, they have also annexed a letter, dated July 2, 1976, of the Bengal National Textile Mills Ltd., a leading manufacturer of knitting wool, in reply to a querry made by one of the petitioners, after the controversy arose. It has been stated therein that Marino wool is derived from the clips of fleece, i.e., Australian sheep. The fleece is imported in India in its raw form and then it is accrued and combed by commission combers. The process involves cleaning of wool, removing of grease and other foreign matters and thereafter converting wool into continuous silver. This silver is wound on a machine and converted into ball which in trade is called wool top. This wool top again has to go through "seven processes before it is converted into woollen yarn. This woollen yarn is further processed in special kinds of machines to bleach dye and convert into finished product called knitting yarn". This imported Marino raw wool is said to be marketed in the country only by licensed importers. In course of the discussion and as also stated in the supplementary affidavit, the petitioners produced before the Court for our inspection fleece which is clipped from the sheep and its conversion into raw wool, after treating the fleece by combing process, as indicated above, and the said wool converted into silver.

6. The case of the petitioners is that even though "agricultural produce" includes all products, whether processed or non-processed, every produce intended to be brought in within the purview of "agricultural produce" must be specified therein. Unless it is not done, the authorities will have no jurisdiction to enforce the provisions of the Act in relation to the said article. Their case is that the expression "wool" as such does not cover "knitting wool" which is exclusively used for knitting purpose, such as sweaters, and inasmuch as the petitioners do not deal in "wool" as such, they were not obliged to take any licence. According to their case, in the absence of incorporation of "knitting wool" in the Schedule of the Act, the mischief of the Act has got no application to them. In order to elucidate their point, the petitioners have also made reference to some other

scheduled commodities to show that whenever it was intended to incorporate any species or bye or finished product of any particular commodity, it was specifically brought in under the fold of the schedule. For example, although milk itself has been declared to be an agricultural produce, its processed products *Chhena* and cream prepared out of it, have also been separately declared, and again although various oilseeds have been mentioned in the schedule, their products have been separately mentioned in a separate category of oil, as already indicated above. The petitioners protested to the respondent Market Committee for its insistence to take out licence by them on the above ground, but the Market Committee instead has issued notices to them on 8th of May 1976 to the effect that unless they take out licences within three days therefrom, they would be prosecuted under section 48 read with rule 98(*xii*) of the Rules. Copies of those notices are Annexures 3 to 3(*b*) to the writ application.

7. Counter-affidavit has been filed on behalf of respondents 2 and 3, namely, the Secretary of the Market Committee and the Market Committee itself. The stand taken by these respondents is that the notified agricultural produce "wool" includes all its forms both processed and unprocessed, and thus includes "knitting wool" as well and, therefore, the petitioners are liable to obtain a valid licence as provided under the Rules and market-fee is leviable on the transaction of sale and purchase. The stand taken in the counter-affidavit is that once an agricultural produce was included in the schedule, then *ipso facto* all species, whether processed or unprocessed, would be included in the item, and as "knitting wool" is, in fact, a processed form of "wool", it was included in the expression "wool", as was also understood in common parlance in trade. In order to emphasise this stand, these respondents have also annexed a receipt granted by petitioner no. 1 showing sale of knitting wool where they described the commodity as "sunshine wool". Proceeding further, in paragraph 8, these respondents have rather taken a categorical stand by stating that "it is not necessary to specify all the species of the notified agriculture produce in the Schedule. There are various items given in the schedule where only genus is used and not species, such as wood and tobacco, and wood includes timber, similarly, tobacco includes *biri* tobacco and chewing tobacco, etc ....." With respect to some of the illustrations cited by the petitioners in their writ application for incorporating *Chhena* and cream, when milk was notified, these respondents have pleaded that "that has been done in relation to such products only where trade name of the

product is different and changed from the principal product in order to avoid confusion".

8. As already said earlier, a reply by way of supplementary affidavit has been filed by the petitioners, in which they have stated that wool has to undergo several processes to reach the stage of yarn out of which knitting wool is manufactured, which is an industrial products, having entirely a different and distinctive feature. A plea which has been stated in this supplementary affidavit and which was also pressed at the time of hearing of the writ application is that the Act being a fiscal statute, "its provisions" have to be construed strictly in favour of the subject, and no tax can be imposed by inference or analogy or by trying to probe into the intentions of the Legislature and by considering the substance of the matter. The petitioners have annexed to this supplementary affidavit the various order forms placed with the manufacturers of knitting wool, such as Rymond Woollen Mills Ltd., Swastik Knitting Wools Co., etc., to show that they always mentioned and described the commodity as "knitting yarn" or "knitting wool".

9. It is well established that a fiscal statute has to be strictly construed. The Supreme Court quoted with approval the following observations of Rowlatt, J. in *Cape Brandy Syndicate* vs. *Inland Revenue Commrs.*(1) in the *Commissioner of Income-tax* vs. *The Ajav Products, Ltd.*(2)

> "In a Taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

After quoting the above observations, the Supreme Court itself in a very clear term said that ".....the subject is not to be taxed unless the charging provision clearly imposes the obligation. Equally important the rule of construction is that if the words of a statute are precise and unambiguous, they must be accepted as declaring the express intentions of the legislature". The above view has been reiterated by the Supreme Court in its latest decision in the case of *Diwan Brothers* vs. *Central Bank of India*(3) where it has been observed

(1) (1921) I.K. B. 64.
(2) (1965) A.I.R. (S.C.) 1358.
(3) (1976) A.I.R. (S.C.) 1503.

that in case of a fiscal statute, the provisions must be strictly interpreted giving every benefit of doubt to the subject.

10. A large number of authorities were cited on behalf of both the parties to bring home their respective contentions in regard to various other statutes where some particular commodity was notified for either levying excise duty or some other tax or for exempting the same from such liability, when attempts were made to either exact tax on a connected product of the said commodity or to claim exemption on that as well by the Revenue or the party, in their own turns. In my opinion, as reference to those cases will be of much assistance in coming to the final decision, I will proceed to discuss the same one by one.

11. The first case cited by Mr. S. B. Sanyal appearing for the petitioners is the case of *A. Hajee Abdul Shukoor and Co.* vs. *The State of Madras*(1). This was a case under the Central Sales Tax Act. The question that fell for consideration in that case was as to whether raw hides and skins and dressed hides and skins constituted different commodities or merchandise and, therefore, they could be treated as different goods for the purpose of the Act. The petitioners in that case were dealers in skin, in the State of Madras, and purchased raw skins from places both within and outside the State. They tanned the same and sold them through their agents in Madras. They were assessed to a certain amount of sales-tax, in accordance with the Madras General Sales Tax Act, 1939 and the rules framed thereunder, on the turnover of hides and skins purchased in the untanned condition outside the State, but tanned within the State. Later on, another Act came into force wherein special provisions in respect of tax on sale of hides and skins were made and it was provided that in the case of dressed hides and skins, which were not subjected to tax under the General Sales Tax Act as raw hides and skins, the tax under the said Act shall be levied from the dealer who in the State is the first seller in such hides and skins at certain rate. This provision was challenged by the petitioner of that case and one of the questions raised was that the persons who had purchased raw hides and skins in the State and had paid sales-tax on untanned skin, when those hides after being tanned were sold, as they constituted one commodity, tax could not be levied on the sale of hides and skins. It

(1) (1964) 15 S T.C. 719.

was, however, contended for the State that they were different commodities and constituted two separate categories for the purpose of taxation. The Supreme Court accepted the contention of the State and held that hides and skins in the untanned condition were undoubtedly different as articles of merchandise than tanned hides and skins. The contention urged on behalf of the petitioners before the Supreme Court that tanning was only a preservative process which made no change in the nature of the article itself was rejected.

12. Learned counsel for the petitioner then cited the case of *Mahabir Singh Ram Babu* vs. *Assistant Sales Tax Officer*(1). The question that fell for consideration before a learned single Judge of the Allahabad High Court was as to whether "cinder" was included in the expression "coal". In that case, coal was exempted from sales-tax. The petitioner also claimed exemption from payment of sales-tax in respect of the turnover of cinder on the ground that cinder was also coal. It was held that there was basic difference between "coal" and "cinder". Whereas coal was a mineral dug out of the bowels of the earth without anything more being done to it, cinder was the residue which was left after all combustible property of coal had completely escaped into the atmosphere after burning. Reliance, however, was placed on the dictionary meanings of "coal" and "cinder", where "cinder" was sometime described as "coal". It was observed in that case that in dictionaries, the meaning of one word must be elucidated by reference to other words and the mere fact that words were explained and elucidated by reference to other words, was not the final test of the exact shade of meaning of a particular word.

Reference was made again to a case reported in the same volume in *British India Corporation Ltd.* vs. *State of Uttar Pradesh and others*(2). That was a case under the U.P. Sales Tax Act and the question that fell for consideration before the learned Single Juldge of the Allahabad High Court was as to whether "woollen carpet yarn" was included in the entry "woollen goods and knitting wool" as because "knitting wool", which is a particular kind of woollen yarn, had been specifically added to the general description of "woollen goods", and, therefore, it did not follow that other classes of woollen

(1) (1962) 13 S.T.C. 248.
(2) (1962) 15. S. T. C. 459.

yarn should be deemed to have been excluded from that description. Learned counsel placed reliance upon this decision to show that the expressions "knitting yarn" and "knitting wool" have got different connotations than "wool". For the same purpose, he also placed reliance upon some of the provisions of Woollen Textiles (Production and Distribution Control) Order, 1962, a Central Order issued under section 3 of the Essential Commodities Act. This Order was made "to co-ordinate production of wool tops, woollen yarn or woollen cloth with the needs of the general public". In this Order, all the three classes of commodities ('woolen cloth', 'woollen yarn' and 'wool top') have been separately defined under Clause 2 of the Order. Reference may be made to the two definitions which may be more relevant for our purpose, namely, "woollen yarn" and "wool top". Whereas "wool top" has been defined to mean "combed woollen silver used for spinning woollen worsted yarn", "woollen yarn" has been defined to mean" yarn manufactured either wholly from wool or partly from wool and partly from any other material and includes worsted and shoddy yarn".

13. Reliance was next placed on behalf of the petitioners on the case of *Devgun Iron and Steel Rolling Mills, Gobindgarh* vs. *The State of Punjab and others*(1) decided by a Bench of the Punjab High Court. This was a case under the Central Sales Tax Act, and the question was as to whether when steel is rolled into rolled steel sections, the outcome is a different and a new commodity, and when it is sold, there is a sale of a different commodity, and not a sale of steel over again. In that case the petitioner had claimed immunity from the liability to pay purchase-tax on the rolled steel materials as the nature and character of the commodity did not undergo any alteration. The item mentioned in section 14 of the Central Sales Tax Act (clause *iv*) was "iron and steel" as one of the goods declared of special importance. It was held that when the raw material of iron or steel that the petitioner purchased and rolled the same, is turned into rolled steel sections, this outcome was a new commodity. A similar view has been taken by the Supreme Court in the case of *Devi Dass Gopal Krishnan and others* vs. *The State of Punjab and others*(2), which was again a case under the Punjab General Sales Tax Act, 1948, where it was held that where there is a purchase tax

(1) (1961) 12 S.T.C. 590.
(2) (1967) 20. S. T. C. 430.

on oil-seeds or steel scrap and steel ingots or cotton, and sales tax on oil and oil-cake or rolled steel sections or yarn after manufacture, it could not be said that the same goods are taxed at two stages, since the manufacturer changed the identity of the goods purchased and the goods sold. Proceeding further, it was observed that when oil is produced out of oil-seeds, the process certainly transforms raw material into different article for use and oil-seeds cannot be said to be used in different article and the process whereby scrap iron loses identity and becomes rolled steel sections, is one of manufacture.

Reference in this connection may also be made to another decision of the Supreme Court in the *State of Madras* vs. *Bell Mark Tobacco Co.*(1). The respondents in that case, who were dealers in tobacco and tobacco products, were assessed to sales tax on the turnover from the sales of "chewing tobacco". Chewing tobacco was prepared out of raw tobacco after various processes and applying jaggery juice and flavouring essences as well as generation of heat. It was then packed in special wrappers which were known as "chewing tobacco" packets. It was held that the various processes to which the raw tobacco was subjected amounted to manufacturing process, and, therefore, the chewing tobacco sold by the respondents was not the same commodity as raw tobacco purchased by them.

14. By citation of the above authorities as well as various provisions of the Agricultural Produce Markets Act and the Woollen Textiles (Production and Distribution Control) Order, 1962, Mr. Sanyal strongly contended that in spite of the inclusive definition of the term "agricultural produce" which empowers the State Government to notify various other commodities, which were technically not agricultural produce, but were products of horticulture, animal husbandry or forest, including their finished and unfinished products, in order to attract the provisions of the Act, it was necessary that the specific produce, either in its original form or in any processed form, must be specifically notified, and unless it was so done, any trader dealing in that material was not obliged to submit to the provisions of the Act.

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(1) (1967) 19 S. T. C. 129.

15. In order to meet the contention, learned Solicitor-General who appeared on behalf of two of the respondents, took the stand, as already indicated earlier, that by the inclusion of the commodity "wool" in its most generic and widest form, it was intended by the legislature or, for that, the State Government, to embrace within its fold all the different forms to which the commodity "wool", the basic material, might be reduced or changed by the act of processing, and inasmuch as knitting wool was nothing else than a processed form of wool, it was not necessary to notify this commodity separately in the Schedule. With respect to the other notified commodities under the same group of animal husbandry products, such as Chhena, cream, butter and ghee, etc., which are products of milk, another notified commodity under this category, the learned Solicitor-General contended that if a larger and generic word was used, then it will not be limited by the use of any specific word, that is, when a genus is used without any species, then there was no limitation, and the said genus would include all reasonable species. It was only when a word of limitation was provided, then only it will be limited. In other words, he propounded the same theory which has been set up in the counter-affidavit of the contesting respondents.

16. It is difficult to accept this bald contention of the learned Solicitor-General. In my opinion, if this could be the intention of the legislature then there was no necessity of providing in the definition of "agricultural produce", the power to include all produce "whether processed or non-processed". It has not been disputed before us that knitting wool is not the primary wool, but is a resultant after the wool in its raw form undergoes several treatments and manufacturing processes, as has already been indicated earlier. I have already said earlier that processed and finished products of agriculture, horticulture, animal husbandry and forest have been sought to be included in the definition of "agricultural produce" by giving an artificial and extended meaning to the expression which was, however, open to the Legislature. But I am not prepared to hold that simply because one parent product of either agriculture, horticulture, animal husbandry or forest is specified in the Schedule without any of its species which may be produced after any processing, then that by itself would be sufficient to incorporate and include within its womb all those bye and processed or finished products. Such construction, in my opinion, of a fiscal statute would not be a proper and reasonable construction and would amount to reading in the Schedule

something by considering as what is the substance of the matter, and then substituting other materials by following the role of intendment, and then by implication to read that knitting wool, a commodity which is apparently different, would be covered in the expression "wool".

17. The learned Solicitor-General also cited a few decisions in support of his contention. Firstly, he placed reliance upon the case of *M/s. Tungabbadra Industries Ltd.* vs. *The Commercial Tax Officer*(1). This was again a case under the Madras General Sales Tax (Turnover and Assessment) Rules (1939). The situation in that case was however entirely different. The question involved in that case was as to whether when the raw material ground-nut oil was converted into refined oil after some processing, which is known as hydrogenated oil, or in common perlance vegetable oil, it still continued to be groundnut oil, a commodity notified under the said Rules. The hydrogenated oil was, no doubt, held to be groundnut oil by the Supreme Court on the reasoning that when raw groundnut oil is converted into refined oil, there is, no doubt, processing; but this consists merely in removing from raw groundnut oil that constituent part of the raw oil which is not really oil, rendering the oily content of the oil 100 per cent and there is no use to which the groundnut oil can be put for which hydrogenated oil could not be used. Therefore, "hydrogenated oil still continues to be 'groundnut oil' notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus improving its keeping qualities for those who desire to consume groundnut oil."

The reason for treating the processed and unprocessed oil given by the Supreme Court apparently cannot be of any assistance to the contesting respondents and does not require much elaboration because on the facts of the case on hand, it connot be contended that knitting wool and wool in its raw form are the same thing. The considerations and the principles which prevailed upon the learned Judges of the Supreme Court to declare hydrogenated groundnut oil and groundnut oil in its raw form to be the same thing, cannot be applied to these two commodities.

18. The learned Solicitor-General also placed reliance upon a decision of the Supreme Court reported in the *State of Gujarat* vs. *Sakarwala Brothers*(2). The question that had arisen in this case was as to

(1) (1961) A.I.R. (S.C.) 412.
(2) (1967) 19. S. T. C. 24.

whether *patasa*, *harda* and *alchidana* fell within in definition of "sugar" which was entry no. 47 of Schedule A to the Bombay Sales Tax Act, 1959. Sugar was exempted from payment of sales-tax and the respondents, who were dealers in the above mentioned articles which were prepared out of sugar, also claimed exemption for those items. Although sugar was not separately defined in the Sales Tax Act in question, the Supreme Court referred to its definition as given in the Central Excises and Salt Act, 1944. In that Act, the definition of "sugar" was as under:

> " 'Sugar' means any form of sugar containing more than 90 per cent of sucrose."

On behalf of the State of Gujarat, it was contended before the Supreme Court that the words "any form of sugar" referred to any variety of sugar and that the words did not mean sugar in any form, as according to the State of Gujarat, the word "form" was used to indicate varieties of sugar. Repelling this argument, the Supreme Court, with reference to various other entries, held that the words "any form of sugar" were intended to cover sugar in any form, by whatever name it may be called as the qualifying words were that it must contain more than 90 per cent. sucrose, and, therefore, the entry intended to include within its ambit all forms of sugar, that is to say, sugar of any shape or texure, colour or density and by whatever name it is called.

In my opinion, this decision is quite distinguishable as although it was observed by the Supreme Court that *patasa*, *harda* and *alchidana* bore a distinct and different name of sugar and were not commercially purchased or sold as sugar, but inasmuch as the Legislature in entry no 47 did not use the word sugar simplicitor, but intended to cover sugar in any form which contained more than 90 per cent. sucrose, a definition which referred to the chemical contents of an article. The above observations are enough to distinguish the said case as in the case before us, the relevant entry in the Schedule, the word used is "wool" simplicitor.

19. Reliance as next placed by the learned Solicitor-General on a Bench decision of this Court in the case of the *Singhbhum Tobacco and Biri Merchants' Association and another* vs. *Assistant Superintendent of Sales Tax, Chaibasa, and another*(1). The matter arose

(1) (1960) 11 S. T. C. 808.

out of the Additional Duties of Excise (Levy and Distribution) Act, 1957 and Bihar Sales Tax Act, 1947. On 14th December, 1957, a notification was issued by which the word "tobacco" as defined in the Additional Duties of Excise (Levy and Distribution) Act, 1957, was to include hand-made Biris, i.e., Biris manufactured from tobacco by a process of manual labour and exempting those Biris from payment of sales-tax. On the strength of this notification, the petitioners who were carrying on the business and trade in Biris, claimed exemption. The claim was allowed by this Court with reference to the definition of "tobacco" in the Central Excise and Salt Act, 1944, which was to mean "any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth". The Court, therefore, took into consideration the definition of "tobacco" which was given in very wide terms in the Excise Act. The position, as already indicated earlier, is entirely different in the present case, where "wool" has been described in the Schedule.

20. The learned Solicitor-General then relied upon the dictionary meaning of the word "wool". The meaning assigned to this word in Chambers' Twentieth Century dictionary is as follows:

> "a modification of hair in which the fibres are shorter, curled, and possess an imbricated surface the covering of sheep, and o. : short, thick human hair: any light, fleecy substance like wool: thread or yarn made from animal wool: fabric woven or knitted from it....."

Learned counsel contended that thread or yarn made from animal wool were already included in the expression "wool", the product which was notified in the Schedule and, therefore, they need not be notified separately. In the case of Mahabir Singh Ram Babu (supra) also, reliance had been placed on the dictionary meanings of "coal" and "cinder". In dictionaries, "cinder" is sometimes described as "coal". It was, however, observed in that case *that* in dictionaries, the meaning of one word must be elucidated by reference to other words, but authorities competent to speak on the subject were of the view that strictly speaking, there are no synonyms in the English language and, therefore, the mere fact that in dictionaries words are explained and elucidated by reference to other words, could not be the final test of the exact shade of meaning of a particular word.

The Court takes judicial notice of ordinary meaning of all words spoken and the dictionaries are admitted not as evidence, but only as aids to the memory of understanding of the Court. Dictionaries can hardly be taken as authoritative exponents of the meaning of the words used in the Legislative enactments, for, the plainest words may be controlled by reference to the context. It is established rule of interpretation that general words in statutes should be taken in their usual sense and the rule of *ejusdem generis* must be applied with great caution because it implies a departure from the natural meaning of the words in order to give them a meaning or a supposed intention of the Legislature.

21. Mr. Sanyal invited our attention to the dictionary meaning of "cotton" given in the aforesaid Chambers's dictionary, which includes "the plant itself, individually or collectively: yarn or cloth made of cotton". These meanings given to "cotton" in the dictionary, therefore, also illustrate the view that strictly speaking there are no synonyms in the English language and other words used to elucidate a subject would not determine the final test of the exact shade of meaning of a particular word. I, therefore, hold that it would not be proper to take any assistance from the dictionary meaning of the word "wool".

In this connection, the dictionary meaning of the word "fleece" also may be referred to, which is "a sheep's coat of wool: the wool shorn from a sheep at one time: anything like a fleece". We have seen earlier that "fleece" is also one of the scheduled commodity in the Act, and that is the primary raw material from which raw wool is derived, after some processing, and if the genus theory propounded by the learned Solicitor-General is accepted, then inclusion of "fleece" only in the schedule was sufficient enough to embrace within its fold all the various species, namely, raw wool, wool balls, knitting yarn and knitting wool. As already indicated earlier, at one stage he had argued that if any species was also mentioned after the mention of the genus, then that would amount that the expanse and extent of the genus is curtailed and cut to that extent only. If his contention is accepted, then "fleece", which is undoubtedly the most primary and initial raw material, namely, wool shorn from a sheep, would have been the most generic expression to embrace within its fold all subsequent processed or non-processed products and there was no necessity of notifying "wool" separately. It can-

not be disputed that "wool", like "cotton", is a separate commodity, out of which any kind of fibre can be manufactured, like yarns from cotton, for the purpose of manufacture of a variety of finished products, such as carpets, blankets, wearing apparels and knitting materials. It may well be that in common parlance, and if I may say loosely, for the sake of brevity, knitting yarn or knitting wool, in which the petitioners are dealing, may be understood also in trade by the simpler expression of "wool", but considering the legislative provision, in my opinion, it would not be proper to put such a construction to the said expression, particularly when the legislation is a fiscal statute. In the discussion of the large number of authorities, although they were considering the expressions used in different legislations, but all of them were fiscal statutes, no doubt, the fundamental approach of construction was the same. It has been seen that whenever any commodity or property was described in any schedule, then its different forms, which was commercially different and capable of different and independent use than he said commodity, was held to be a different commodity from the notified one for the purpose of attracting the relevant provision of the legislation in question, which I need not repeat or enumerate again.

22. From all the above discussions, I come to the conclusion that knitting wool, in which the petitioners trade, is entirely a different commodity and cannot be covered by the notified commodity "wool" in the schedule of the Act. As already seen, unless a trader transacts any business in any of the notified commodity, he is not obliged to take out a licence. Respondents nos. 2 and 3, therefore, were not justified in insisting upon the petitioners to take out licence or, for the matter of that, follow any of the provisions of the Act and the Rules.

23. I would, accordingly, allow this application and quash the notices contained in Annexures 1, 1/*a* and 1/*b* and Annexures 3, 3/*c* and 3/*b* issued by respondents nos. 2 and 3. The respondents must also pay the costs of this application to the petitioners. I would, however assess the hearing fee at Rs. 250 only.

P. S. SAHAY, J.—I agree.

S. P. J. *Application allowed.*

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Secretary to Government.

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MISCELLANEOUS CRIMINAL

Before B. D. Singh and P. S. Sahay, JJ.

1976

December, 21.

SURESH SINGH*

v.

THE STATE & ORS.

Code of Criminal Procedure, 1973 (Central Act no. 1 of 1974) sections 173(2)(1) and 173(8)—provisions of—interim or temporary charge-sheet, whether can be submitted during the pendency of the investigation—section 167(2)—remand for a total period of sixty days—investigation not completed within that period—accused, entitled to bail—section 309(2) power of remand under—can be exercised only after cognizance is taken.

Reading the provisions of the section, by no stretch of imagination it can be said that, under section 173(2)(1) or 173(8) of the Code of Criminal Procedure, 1973, charge-sheet, interim or temporary, whatever it may be called, can be submitted even during the pending of the investigation. There cannot be interim charge-sheet on the one hand and simultaneous investigation of the case on the other.

The power of remand under section 167(2) of the code is for a total period of sixty days, and, if the investigation is not completed, the accused persons will be entitled to bail. After the expiry of sixty days, the power of remand is given under section 309(2) of the code and can be exercised only after the cognizance is taken. Detention of a person beyond a period of sixty days, if no cognizance has been taken, will be wholly illegal and unwarranted by the law.

Held, that, in the instant case, investigation has not been completed and the discretion has rightly been exercised by the Sessions Judge in

*Criminal Miscellaneous No. 2394 of 1976. In the matter of an application under section 439(2) of the Code of Criminal Procedure.

granting bail. Admittedly, no cognizance has been taken, and, there could not have been remand after a period of sixty days by the Magistrate under section 309(2) of the code, and in that view of the matter also, the order of the Sessions Judge was justified.

Case law discussed.

Application by the informant.

The fact of the case material to this report are set out in the judgement of Prem Shanker Sahay, J.

Mr. Indra Bhanu Singh, for the petitioner.

Mr. Sheo Kumar Singh, for O. P. no. 2, *Messrs Krishna Prakash Sinha* and *Yogendra Pd. Sinha*, for O. P. no. 3, *Mr. Lala Kailash Behari Prasad*, for the State.

P. S. SAHAY, J.—This application on behalf of the informant for cancellation of bail is directed against an order of Sessions Judge dated the 24th of May, 1976, granting bail to opposite party nos. 2 and 3 in Barhiya P. S. Case no. 19(11)75 under section 302 of the Indian Penal Code. It may be mentioned here that bail has been granted by the Sessions Judge, Monghyr, under the provisions of section 167(2) of the Code of Criminal Procedure, 1973.

2. Short facts are that the petitioner lodged a first information report stating that, on the 26th of November, 1975, opposite party nos. 2 and 3, along with six others who were named in the first information report, mercilessly assaulted the deceased Bilayat Singh on account of previous enmity. A case was registered and investigation was taken up by the police and opposite party nos. 2 and 3 were apprehended in the case. It seems that, after the case was investigated by the police, an interim charge-sheet was submitted on the 24th of January, 1976. The operative portion of the charge-sheet reads as follows :—

> "..... In course of investigation and supervision this case under sections 148/149/302/342. I. P. C. has been found to be true. Two of the accused persons mentioned in column no. 3 have already been arrested and the remaining accused persons are absconding. According to column no. 2, the S. P. has given instruction to submit interim

charge-sheet against the two accused mentioned in column no 3. As a result thereof, this charge-sheet is submitted against the two accused mentioned in column no. 3 for trial under sections 147/148/149/302 I.P.C."

On the 20th of May, 1975, an application was filed on behalf of the prosecution that the charge-sheet had already been submitted against opposite party nos. 2 and 3 and, therefore, cognizance should be taken against them. A rejoinder was also filed on behalf of opposite party nos. 2 and 3 and the learned Subdivisional Magistrate, Lakhisarai, by his order dated 25th May 1975, held that the records of the case had been called for by the High Court and, therefore, it would not be proper to pass any order without looking into all the necessary papers and, thus, rejected the prayer of the prosecution.

3. Opposite party nos. 2 and 3 filed an application for bail before the Subdivisional Magistrate that no charge-sheet had been submitted in this case and they were in custody for more than sixty days and, therefore, they were entitled to bail under the provisions of section 167(2) of the Code of Criminal Procedure, 1973. It was submitted before the learned Magistrate that investigation had not been completed and there was no provision for interim charge-sheet in the Criminal Procedure Code and, therefore, they were entitled to bail The learned Magistrate, however, held that the charge-sheet had been submitted, though it had been wrongly termed as interim charge-sheet and that it was a charge-sheet for all practical purposes and, therefore, opposite party nos. 2 and 3 were not entitled to bail, though they were in custody for more than sixty days.

4. Against the order aforesaid, opposite party nos. 2 and 3 moved the Sessions Judge, Monghyr, in which a prayer was reiterated by them that interim charge-sheet was not warranted by law and, therefore, they were entitled to bail as they have been in custody for more than 60 days and investigation had not been completed. In support of their contention, they relied on a decision of this Court in Cr. Misc. no. 2139 of 1976 (*Shiv Shankar Prasad Sao* v. *The State of Bihar*) disposed of on the 11th May, 1976, which is not reported in 1976 BBCJ N-11. It was held by D. P. Sinha, J., that interim charge-sheet is unwarranted by law and cannot defeat the provisions of section 167(2) proviso (*a*) of the new Code of Criminal Procedure. This was opposed by the Public Prosecutor on the ground that interim charge-sheet was a charge-sheet for all practical purpose and, therefore, no bail should be granted to

opposite party nos. 2 and 3. But the learned Sessions Judge, relying on the decision of the High Court, granted bail to opposite party nos. 2 and 3 and directed that they should be released on bail of Rs. 8,000 each with two sureties of the like amount each to the satisfaction of the Court below.

5. The petitioner, who was the informant in this case, has moved this Court for cancellation of bail of opposite party nos. 2 and 3. This case was admitted and notices were served on the State of Bihar and opposite party nos. 2 and 3 and counter-affidavit has also been filed on behalf of opposite party nos. 2 and 3. The case was listed before a single Judge where a point of law was raised that even if the charge-sheet had been submitted no cognizance had been taken in the case and, therefore, the Magistrate had no jurisdiction to remand the accused persons beyond a total period of sixty days. In view of the importance of the point involved in the case, the learned Single Judge has referred it to a Division Bench and this is how this has come before us.

6. Mr. Indra Bhanu Singh, learned counsel for the petitioner, has submitted that the charge-sheet is a complete charge-sheet so far opposite party nos. 2 and 3 are concerned and, even if it is termed as interim charge-sheet, in law, it will be deemed to be a full fledged charge-sheet and, therefore, the learned Sessions Judge has wrongly exercised his discretion under section 167(2) proviso (*a*) of the Code of Criminal Procedure in granting bail to opposite party nos. 2 and 3 Mr. Shiv Kumar Singh has appeared for opposit party no. 2 and Mr. Krishna Prakash Sinha has appeared for opposite party no. 3 and they have submitted that investigation had not been completed in the case and, therefore, the Sessions Judge had rightly exercised his discretion in granting bail to opposite party nos. 2 and 3 because there was no provision for interim charge-sheet in the Code of Criminal Procedure. The second submission raised on behalf of opposite party nos 2 and 3 is that, even if the charge-sheet had been submitted in this case, no cognizance was taken and, therefore, the order of remand beyond the period of sixty days will be wholly illegal, and unwarranted by law and, in that view of the matter also, the order of the learned Sessions Judge was perfectly justified. It has further been urged that there was no allegation that opposite party nos. 2 and 3 had misused the privilege of bail and, therefore, no ground for cancellation of bail has been made out in the case. Lastly, it has been submitted that the case was instituted on a police report and, therefore, the petitioner, who was the informant a private party, has no *locus standi* to file this

application which should be summarily dismissed. Mr. Lala Kailash Behari Prasad, who appeared on behalf of the State has submitted that he has no instruction in the matter.

7. In view of the submissions made, whether cognizance had been taken or investigation was pending or not, the lower Court records were called for and it took sometime and, therefore, the judgment of the case was delayed. Before I go to the points raised by the parties, I would like to dispose of the preliminary objection raised by Mr. Krishna Prakash Sinha that the petitioner has no *locus standi* to file this application. According to him, it was the State who was competent to file such application and, since the State is not at all interested, the application is not maintainable. In support of his contention, he has relied on a decision of the Supreme Court in the case of *Thakur Ram and others* v. *The State of Bihar*(1) and has relied on a head-note "C" in which it has been stated that, in a case which has proceeded on a police report, a private party has no *locus standi*. No doubt, the terms of section 435 are very wide and the Sessions Judge even can take up the matter *suo motu*. The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person, who, according to that party, had caused injury to it. Barring a few exceptions in criminal matters, the party who is treated as the aggrieved party is the State which is the custodian of the social interest of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book. Mr. Indra Bhanu Singh has, on the other hand, relied on a decision of this Court in Criminal Misc. no. 1346 of 1971 which has been disposed of on 26th February 1973 but this case does not help the petitioner in any way because the facts of that case are quite different from the facts of the present case. Mr. Indra Bhanu Singh has relied on a Bench decision of the Allahabad High Court in the case of *Boreh Singh** v. *The State* in which their lordships had laid down that it was the duty of the Court to cancel bail in proper circumstances under section 497, sub-clause (5) of the Code of Criminal Procedure. No application is required on behalf of any party. If the matter is brought to the notice of the Sessions Judge by the complainant, it is open to the Sessions Judge to pass an order under section 497, sub-clause (5). Therefore, according to him, somehow or the other, the matter was before us and, therefore, the technical objection raised on behalf of the opposite party nos. 2 and 3 should not be allowed to stand.

(1) (1966) A.I.R. (S.C.) 911.

8. There is another decision of the Supreme Court in the case of *Pratap* v. *State of U. P.*(1), in which it has been laid down that the High Court can exercise powers *suo motu* and all that a person filing a revision petition under section 439, Criminal Procedure Code, does is to draw the court's attention to an illegal, improper or incorrect finding, sentence or order of a subordinate court. Such powers are not affected by the fact that the revision petition is filed by a private person and not by the Government. Therefore, when this matter has come to our notice, it should not be thrown out simply on the ground that the application has been filed by the informant and not by the State. Moreover, it is a case of general importance which will cover a number of cases there being no decision on this point and, therefore, it is all the more necessary that it should be decided once for all. The objection raised on behalf of opposite party nos. 2 and 3 is, therefore, rejected.

9. Now, I take up for consideration whether the charge-sheet submitted, which has been termed as an interim charge-sheet, is a complete charge-sheet or not. Before I do so, it is necessary to refer to some facts which have been brought in the counter-affidavit filed on behalf of opposite party nos. 2 and 3. In the said counter-affidavit, it has been stated that the case was supervised by the D. S. P. and he, after supervision, had given instructions to be followed up by the Investigating Officer. He further suggested that the interim charge-sheet should be submitted against opposite party nos. 2 and 3, so that they may not avail of the benefit of section 167(2) of the Code of Criminal Procedure, and similar directions were given by the S. P., Monghyr, which have not been complied with by the Investigation Officer and, in the meantime, charge-sheet was submitted. It has also been brought to our notice that Indo Singh, uncle of opposite party no. 2, filed a petition before the Additional I. G. of Police, Bihar, Patna, and, at his intervention, the investigation was taken from the hands of the Investigating Officer and was made over to Shri H. K. Jha, Inspector, C. I. D., who latter made over charge to Shri Bhola Prasad, Inspector of Police, C.I.D. Shri Bhola Prasad sent letter to the Chief Judicial Magistrate, Monghyr, on the 7th May, 1976, stating that he had taken up the investigation of the case and he had to follow up certain directions given by the superior officers. In the counter-affidavit filed on behalf of the opposite party no. 2, similar

(1) (1973) A.I.R. (S.C.) 786.

statements had been made that investigation was not complete and certain directions given by the superior officers had to be complied with and the interim charge-sheet had been filed only with the sole purpose that opposite party nos. 2 and 3 may not be released on bail. Shri Indra Bhanu Singh has drawn our attention to section 173 of the Code of Criminal Procedure and specially to sub-clause (2) (i) and, according to him, all the requirements of the said sub-clause had been complied with in the charge-sheet submitted by the Investigating Officer. He has also drawn our attention to sub-clause (8) of section 173 which is a new provision and gives power to the police officers to collect materials even after the charge-sheet had been submitted. His contention is that charge-sheet had been submitted and further investigation, if any, which is being done, is under the provisions of sub-clause (8) of section 173. Therefore, the charge-sheet submitted is complete so far O. P. nos. 2 and 3 are concerned and, in that view of the matter, the discretion has been wrongly exercised by the Sessions Judge in granting bail to opposite party nos. 2 and 3. In support of his contention, he has relied on a decision of the Supreme Court in the case of *Tara Singh* v. *The State*(1) in which it has been stated that, after the investigation is complete as required under section 173(1) of Chapter 14, the police should forward to the Magistrate a report in the prescribed form giving the names of the parties, the nature of the information and the persons acquainted with the case. Where, therefore, the first report made by the police to a magistrate, though called incomplete challan, contains all these particulars and a second report called a supplementary challan is filed subsequently, giving the names of certain witnesses who are merely formal witnesses, the first report is, in fact, a complete report as required by section 173(1)(*a*) and it is not necessarily vitiated by the mere fact that a supplementary challan is subsequently filed. But, in this case, the supplementary challan was a formal thing and investigation had already been completed and final form had been submitted. In the instant case, according to the police officers themselves, the investigation was still continuing and the charge-sheet was submitted and a number of directions had been given by the superior officers which had to be followed up by the Investigating Officer. The facts of the case in the Supreme Court are quite different from that of the instant case.

10. In another decision of the Supreme Court in the case of *R. K. Dalmiya and others* v. *The Delhi Administration*(2), it has been

(1) (1951) A.I.R. (S.C.) 441.
(2) (1962) A.I.R. (S.C.) 1821.

held that the charge-sheet is hardly a complete or accurate thesis of the prosecution case. Clause (*a*) of sub-section (1) of section 173 requires the Officer-in-charge of the Police-station to forward to the Magistrate empowered to take cognizance of the offence on police report the police report in the prescribed form stating the names of the parties, the nature of the information and the persons acquainted with the case. Nothing further need be said on this point. The contention is that the charge-sheet, which was submitted in the case, was in the prescribed from and in which all the formalities had been complied with and, from and in which all the formalities had been complied with and, therefore, though it is termed as interim charge-sheet it was a complete charge-sheet. But the difficulty in accepting his contention is that the superior officers themselves had given directions for further investigation in the matter and, therefore, it cannot be said that the investigation had been completed. Mr. Krishna Prakash Sinha, learned counsel for opposite party no. 3, has relied on a decision of the Supreme Court in the case of *H. N. Rishbud and another* v. *State of Delhi*(1) in which it has been held as follows :—

> "Thus, under the Code investigation consists generally of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (*a*) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (*b*) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under section 173.
>
> The scheme of the Code also shows that while it is permissible for an officer-in-charge of a police-station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these

(1) (1955) A.I.R. (S.C.) 196.

steps is that of the person in the situation of the officer-in-charge of the police-station, it having been clearly provided in section 168 that when a subordinate officer makes an investigation he should report the result to the officer-in-charge of the police-station. It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer-in-charge of the police-station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under section 551."

His submissions is that it is the Investigating Officer who has to form his opinion and after completing all the formalities he has to submit final form in the case. If he thinks that prima facie case has been made out, he will submit a charge-sheet and if, according to him, no case is made out, he will submit final report. Therefore, in the instant case, the interim charge-sheet was filed at the instance of Superintendent of Police and without the opinion of the Investigation Officer which is a necessary in such matters.

11. Another decision in the case of *Bandi Kotayya* v. *State and others*(1) has been relied upon in which it has been laid down that all reports under section 173 are police reports but all police reports need not be reports under section 173. That being the position, a preliminary charge-sheet is, no doubt, a police report but the Magistrate holding enquiry under section 207A cannot take cognizance of the offence mentioned in that report and proceed with the enquiry upon receipt of the report. He must wait for the report under section 173 forwarded to him by the police after completion of the investigation. In view of the decisions which have been cited about, it is absolutely clear that it is the Investigating Officer who can submit final report in the case and that also after closing of the investigation. In my opinion, there is no provision for interim charge-sheet and a charge-sheet should be complete as required by law after all the formalities had been complied with. Mr. Sinha has drawn our attention to 167(1) of the Code of Criminal Procedure which reads as follows :—

"167(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed

(1) (1966) A.I.R. (A.P.) 377 .

> within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police-station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate."

He has also drawn our attention to section 173 and has urged that section 167 speaks of investigation and there is no mention of any charge-sheet or final form and, if investigation is not completed, the accused persons after the expiry of sixty days will be entitled to bail as a matter of right under proviso 2(a) to section 167. He has drawn our attention to a decision of the Supreme Court in the case of *Natabar Pariada and others* v. *State of Orissa* (AIR 1975 SC 1965) and has submitted that everywhere the word "investigaton" had been used and there is no mention about the charge-sheet and has relied on a portion of the judgment wherein it has been held that it may not be possible to complete investigation within a period of sixty days and even on a serious and ghasty types of crime the accused will be entitled to be released on bail. Therefore the contention raised on behalf of the opposite party nos. 2 and 3 is well-founded and must be accepted. The investigation is still continuing and it has not been completed and the Sessions Judge has rightly granted bail to opposite party nos. 2 and 3 ignoring the interim charge-sheet which is unknown to law.

12. Another interesting point of law has been raised by Mr. Krishna Prakash Sinha that, even if the charge-sheet has been submitted, no cognizance has been taken in the case and, therefore, the order of remand beyond the period of sixty days will be wholly illegal He has drawn our attention to section 309(1) of the Code of Criminal Procedure which reads as follows :—

> "309(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time :

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing."

His submissions are that the power of remand has been given under section 167 of the Code of Criminal Procedure for a total period of sixty days and after that, if investigation is not completed, accused person will be entitled to bail and, when investigation is completed, the Magistrate after taking cognizance can only remand the accused under the provisions of section 309, sub-clause (2), which has been quoted above. It has been vehemently argued that, even if the charge-sheet had been submitted, the position which is not accepted by opposite party nos. 2 and 3 no cognizance has been taken and, therefore, the remand beyond a period of sixty days will be without jurisdiction. In order to verify whether cognizance has been taken records were called for and I have gone through the lower court records and find from the ordersheet dated 2nd July 1976, 9th October 1976 and 20th November 1976 that the Magistrate has written that final form had not been received and 17th December 1976 was fixed in the case on the last date, i.e., 20th November 1976. Thus, the position is clear that no cognizance has been taken. In the case of *Natabar Pariada and others* v. *State of Orissa* (supra), it has been held that 309(2) is attracted only after the cognizance of offence has been taken or the commencement of the trial has proceeded. It may be mentioned that, under the Code of Criminal Procedure, 1898, under section 344, power was given to the Magistrate to remand an accused to jail custody in cases where investigation and collection of evidence were going on and the power was meant to be exercised, whenever necessary, to collect further evidence. There is no such provision in the new Code

of Criminal Procedure. There may be cases in which charge-sheet is submitted but no cognizance is taken, for some reason or the other, and, therefore, remand of an accused person under section 309, sub-clause (2), will be wholly illegal and he may demand his release without furnishing any bond. This may lead to an awkward situation. No doubt, there is a lacuna and it is for the law makers to correct the same but we have to interpret the law as it is.

13. Since the opposite party nos. 2 and 3 have succeeded on the points of law, it is not necessary to consider whether they have misused the privilege of bail in this case. Thus, on a careful consideration of the points raised in the case, I am of the opinion that there is no provision for interim charge-sheet in the Criminal Procedure Code. Charge-sheet can be submitted only after the investigation has been completed. Section 173(8) also does not confer any special power on the Investigating Officer to submit a report under section 173(2)(1) for a limited purpose and to continue the investigation because the very opening words of sub-section (2) (1) read as follows :—

> "(2)(1) As soon as it is completed, the officer-in-charge of the police-station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—
>
> (*a*) the names of the parties;
>
> (*b*) the nature of the information;
>
> (*c*) the names of the persons who appear to be acquainted with the circumstances of the case;
>
> (*d*) whether any offence appears to have been committed and, if so, by whom;
>
> (*e*) whether the accused has been arrested;
>
> (*f*) whether he has been released on his bond and, if so, whether with or without sureties;
>
> (*g*) whether he has been forwarded in custody under section 170."

Therefore, in my view, such reports can be filed only after completion of the investigation. Section 173(8), which has been introduced in the new Code, gives power to the Investigating Officer to re-open investigation even after the investigation has been completed and final form

may be charge-sheet or final report is submitted. There may be cases in which even after submission of charge-sheet or final report it may come to the knowledge of the Investigating Officer that some material evidence has been overlooked or some other persons who should have been in the category of the accused or witnesses had been left by mistake. It is only in this contingency that fresh report can be filed under section 173(8). It may not be out of place to mention that it was the settled view under the old Code that investigation, once completed, can only be re-opened after the direction of the superior police officers under section 551 of the old Code which is equivalent to section 36 of the new Code. By virtue of this new provision, the officer-in-charge of police-station has been given free hand to re-open investigation at his own instance even without any direction by the superior officers. Therefore, reading the sections by no stretch of imagination, it can be said that, under section 173(2)(1) or 173(8), charge-sheet, interim or temporary, whatever it may be called, can be submitted even during the pendency of the investigation. There cannot be an interim charge-sheet on one hand and simultaneous investigation of the case on the other. I further hold that the power of remand under section 167(2) is for a total period of sixty days and, if the investigation is not completed, the accused persons will be entitled to bail. After the expiry of sixty days, the power of remand is given under section 309(2) of the Code of Criminal Procedure and can be exercised only after the cognizance is taken. Detention of a person beyond a period of sixty days, if no cognizance has been taken, will be wholly illegal and unwarranted by the law. In the instant case, investigation has not been completed and the discretion has been rightly exercised by the learned Sessions Judge in granting bail to opposite party nos. 2 and 3. Admittedly, no cognizance has been taken and, therefore, there could not have been remand after a period of sixty days by the Magistrate under section 309 (2) of the Code Criminal Procedure and, in that view of the matter also, the order of the Sessions Judge was justified.

14. Thus, there is no merit in the application which is accordingly dismissed.

B. D. SINGH, J.—I agree.

R. D.

Application dismissed.

LETTERS PATENT.

Before Shambhu Prasad Singh and S. K. Jha, JJ.

1976

December, 21.

THE MANAGING COMMITTEE, HIGH SCHOOL, JAMUI & ORS.*

v.

SHRI SHEONANDAN SINHA 'VIKAS' AND ORS.

Constitution—Article 226—*issuance of writ in the nature of* mandamus or certiorari—*managing committee of a school not having been created by a statute or under the provision of statute, whether a statutory body—writ, whether can lie to such a body—Article* 12—*state, definition of —managing committee of a school, whether coverec by definition of state under Article* 12—*Bihar High Schools (Control and Regulation of Administration) Act*, 1960 (*Bihar Act no. XIII of* 1960) *and Bihar High School (Service Conditions) Rules*, 1972—*provision of.*

There is a distinct connotation of a statutory body in contra-distinction to a body which has been created under the operation of a statute. A Managing Committee of a school having been created under the operation of a statute, although not by the statute or under the provisions of statute itself shall not be amenable to the issuance of a writ under the provisions of Article 226 of the Constitution;

Held, that the Managing Committee of the High School, Jamui is not a statutory body in the sense that it is neither a creation of the statute nor it has been created under the provisions of the statute. The Bihar High School (Control and Regulation of Administration) Act, 1960 and the Bihar High School (Service Conditions) Rules, 1972 together merely lay down the limits which such Managing Committees

*Letters Patent Appeal no. 6 of 1976. Against a decision of Madan Mohan Prasad, J., dated the 3rd February, 1976.

are not to transgress in order to invoke the penal clause for their being suspended or dissolved by the Board of Secondary Education, Bihar;

Held, further, that no writ of mandamus or certiorari can lie against the Managing Committee which is a body created neither by the statute nor under the provisions of the statute;

Held, also, that if the Managing Committee of a school is not a statutory body or a public authority, deriving its powers from statutory provisions, it will be too much to say that it can still fall within the definition of State under Article 12 of the Constitution.

P. R. Jodh v. *A. L. Pande*(1) and *Sirsi Municipality* v. *Cecelia Kom Francis Tellis*(2) distinguished.

Vaish College (Society) Shamli v. *Lakshmi Narain*(3) held, overruled by Supreme Court.

Harijendra Singh v. Selection Committee, Kakotiya Medical College, Warrangal(4) not followed and held, not to be correct law by Supreme Court. *Shri Ram Narain Ojha* v. *Shri Madhusudan Chaturvedi*(5) and *Baleshwar Prasad Singh* v. *State of Bihar*(6) held, not to be good law. *Executive Committee of Vaish Degree College* v. *Lakshmi Narain*(7) and *Aryavidya Sabha Kashi* v. *Krishna Kumar Srivastava*(8)—followed. *Vidya Ram Mishra* v. *The Managing Committee, Sri Jai Narain College*(9) and *Executive Committee of U. P. State Warehousing Corporation Ltd.* v. *Chandra Kiran Tyagi*(10)—*referred* to.

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(1) (1965) 2 S. C. R. 718.
(2) (1973) A. I. R. (S. C.) 855.
(3) (1974) A. I. R. (All.) 1.
(4) (1975) A. I. R. (A. P.) 35.
(5) (1964) M. J. C. 739 of 1962, decided on October 9, 1964.
(6) (1973) C. W. J. C. 115 of 1973, decided on May 15, 1973.
(7) (1976) A. I. R. (S. C.) 888.
(8) (1976) A. I. R. (S. C.) 1073.
(9) (1972) A. I. R. (S. C.) 1450.
(10) (1970) A. I. R. (S. C.) 1244.

Appeal under clause 10 of the Letters Patent.

The facts of the case material to this report are set out in the judgment of S. K. Jha, J.

Messrs. B. C. Ghose, Abhijit Sinha, S. K. Ghosh and *Animesh Chandra Ghose*, for the appellants.

Messrs. J. N. P. Verma, Umakant Verma, Vijayeshwar Prasad, Prabha Shankar Mishra and *Krishna Murari*, for the respondents.

S. K. JHA, J.—This is an appeal under clause 10 of the Letters Patent arising from the judgment of a learned Single Judge of this Court dated the 3rd of February, 1976 in C. W. J. C. no. 693 of 1974. In that application under Articles 226 and 227 of the Constitution of India, respondent no. 1 Shri Sheonandan Sinha 'Vikas' was the petitioner whereas the two appellants here were respondents 3 and 4 respectively. Respondents 2, 3, 4 and 5 to this appeal were respondents 1, 2, 5 and 6 respectively in the aforesaid writ application. Originally a number of prayers had been made in that application, but ultimately the application was confined to the issuance of a writ for quashing annexure 4 to the writ application. By the impugned judgment, that annexure which is the resolution of the Managing Committee of the High School, Jamui, Monghyr (hereinafter to be referred to as the school), appellant no. 1, dated the 8th of May, 1973 was quashed. By that resolution, the Managing Committee had resolved that, in view of the State Government's decision to abolish the system of higher secondary education in schools, the posts of the Principal and the Vice-Principal were also being abolished and the position as was obtaining before the coming into vogue of the system of higher secondary education was to continue thenceforth. The practical effect of that resolution was that appellant no. 2 Shri Nand Kishore Prasad, who was, prior to the introduction of the aforesaid scheme or system of education, the Assistant Headmaster of the school while the school was a mere secondary school, was permitted to act as the Headmaster of the school whereas respondent no. 1, who was the writ petitioner and who had been acting as the Vice-Principal of the school during the continuance of higher secondary education system, was reverted to his original post of an Assistant Teacher.

2. There is not much controversy with regard to the facts obtaining in this case. The points of law, which have been raised in support

of this appeal, are short but one of the points is not free from difficulty. Mr. B. C. Ghose, learned Counsel for the appellants raised two points in support of this appeal. The first and the most vital point that was raised is as to whether a writ could issue to the Managing Committee of the school or not. Although the fact as to whether the school in question was an absolutely private school or a Government-aided school is not clear from the records of the case, learned Counsel for the appellants proceeded upon the assumption that the school was an aided school. It was contended that the Managing Committee of the school was neither the creature of any statute nor under it but was merely governed by some statutory provisions in discharge of its functions. In other words, the submission was that the Managing Committee not being a statutory body, this Court had no jurisdiction to issue a writ in exercise of its power under Articles 226 and 227 of the Constitution of India. The other point that was canvassed at the Bar was that, since the scheme of education known as higher secondary education in the school was itself abolished, the posts of Principal and Vice-Principal should automatically be deemed to have been abolished and with the abolition of these posts, there could not be said to be any legal right vested in respondent no. 1, who was the writ petitioner, to claim to continue on the post of Vice-Principal or to his promotion as the Principal or the Headmaster as a matter of legal right. It was contended that, since there was a cessation of the post, there was a cessation of work, and that being so, there could not be said to have been any infirmity in the impugned resolution of the Managing Committee.

3. I propose to dispose of the second point raised by Mr. Ghose first. Reliance was placed by Mr. Ghose on the decisions of the Supreme Court in *N. Ramanatha Pillai* v. *The State of Kerala*(1) and *State of Haryana* v. *Shri Das Raj Sangar*(2). The principle established by these decisions is that the power to create, continue and abolish any civil post is inherent in every sovereign Government. It is a policy decision exercised by the executive and is dependent on the exigencies of circumstances and administrative necessity. The abolition of a post

(1) (1976) A. I. R. (S. C.) 2041.

(2) (1976) A. I. R. (S. C.) 1199.

may have the consequence of termination of service but such termination is neither dismissal nor removal within the meaning of Article 311 of the Constitution. The abolition of a post is not a personal penalty imposed on any Government servant. As long as the decision of the Government regarding the abolition of a post is taken in good faith, the same is not questionable in a court, for it is not open to the court to go behind the wisdom of the decision and substitute its own opinion for that of the Government on the point as to whether a post should or should not be abolished. These decisions can be of no avail to the appellants on the facts and in the circumstances of the instant case. In this connection annexure 3 to the writ application must be noticed as it was relied upon by learned Counsel for both the parties. Annexure 3 is a memo. of the State Government issued by the Director of Public Instruction to all the school authorities throughout the State. The memo. is dated the 10th of November, 1971. It was conveyed through that memo. that, in view of the Government Resolution no. 1188, dated the 27th of March, 1977, the scheme of higher secondary education had been abolished and the State administration had taken a decision that all such higher secondary and multi-purpose schools should be treated as mere high schools and that in future the appointments of teachers and other personnel in the schools should be made in accordance with the pattern of high schools on the approved pay scale for such posts. It was, however, further communicated that the teaching staff appointed in higher secondary and multi-purpose schools, whose appointments had been approved by the competent authority, shall not, in any way, be prejudicially affected either by termination of their service or by changing their pay scale and status. Mr. Ghose for the appellants contended that this was merely an executive and administrative instruction having no binding force and that, therefore, the abolition of the system of higher secondary or multi-purpose schools amounted to an automatic cessation of work of the Principals and Vice-Principals appointed during the period that such system of education was in vogue. This argument, to my mind, is fallacious. Such instructions issued by the Director of Public Instruction were in confirmity with the rules framed by the State Government under the rule-making power vested in it under section 8 of the Bihar High Schools (Control and Regulation of Administration) Act, 1960 (hereinafter to be referred to as the Act). And, such rules relevant for the present purpose were framed being termed the Bihar High School "Service Condition Rules", 1972 (hereinafter to be referred to as the Service Condition Rules). The instructions or circular issued

(Annexure 3) are in consonance with rule 12 of the Service Condition Rules, the English version of which (translation rendered by me) runs thus—

> "Any post of any teacher in a school shall not be abolished nor a post abolished can be re-created or reviewed without the prior approval of the competent authority in any case, the competent authority shall inform the Board with regard to the ultimate decision taken in this behalf either in relation to abolition of a post or for re-creating an abolished post."

And, a 'teacher' has been defined in rule 2 (xxxiii) as including an assistant teacher, an assistant headmaster and a headmaster. Rule 2(*xii*) defines a 'Headmaster' as including a Principal or any person duly appointed by the competent authority in any school in that behalf while rule 2(*ii*) defines an Assistant Headmaster as including a Vice-Principal. It was not debated at the Bar that the Service Condition Rules aforesaid have the force of law having been duly framed by the State Government under its rule-making power under section 8 of the Act. In that view of the matter, learned Counsel for the appellants in his submission became a little lukeworm in so far as this second point is concerned. For the reasons aforesaid and for the cogent reasons given by the learned Single Judge in this regard. I do not find any substance in this contention of Mr. Ghose. This contention must, therefore, be repelled.

4. Apropos the first point raised by Mr. Ghose, as I have indicated earlier, although the point *prima facie* seems to be not free from difficulty, after due deliberation and on a careful consideration of the matter, I think the decisions of the Supreme Court cited at the Bar are in no way contrary to each other nor irreconciliable. Before referring to the various cases cited by learned Counsel for either party, it is worthwhile to take note of the decision on this point of the learned Single Judge and the case law in support of his finding, and in that connection it will also be noteworthy to first take notice of certain decisions which have been sought to be distinguished in the impugned judgment. The point was raised by learned Counsel for the appellants before the learned Single Judge by way of a preliminary objection to the effect that a writ cannot issue against the Managing Committee of the school, appellant no. 1, it being not a statutory or

public body or public authority. Before the learned Single Judge reliance had been placed in support of this proposition on the decision of the Supreme Court in the case of *Vidya Ram Mishra* v. *The Managing Committee, Sri Lal Narain College*(1) and that of *Subh Narain Sinha* v. *Hari Singh Havalkha*(2). The learned Single Judge, while distinguishing these two decisions, relied upon a number of decisions for coming to the conclusion that—

"The Managing Committee thus undoubtedly is a public body bound by certain rules having the force of law and a writ can, therefore, undoubtedly issue against the Managing Committee."

The decisions which have been pressed into service for coming to such a conclusion are those of the Supreme Court in the case of *P. R. Jodh* v. *A. L. Pande*(3), *Sirsi Municipality* v. *Cecelia Kom Francis Tellis*(4) and a Full Bench decision of the Allahabad High Court in the case of *Vaish College (Society) Shamli* v. *Lashmi Narain* (5) and that of a Full Bench of Andhra Pradesh High Court in the case of *Harijender Singh* v. *Selection Committee, Kakatiya Medical College, Warrangal*(6) and 2 unreported decisions of this Court, one such unreported decision being that of a Division Bench in the case of *Sri Ram Narayan Ojha* v. *Shri Madhusudan Chaturvedi* (M.J.C. 733 of 1962) decided on 9th October, 1964 and the other being of the learned Single Judge himself in the case of *Baleshwar Prasad Singh* v. *State of Bihar* (C.W.J.C. 115 of 1973) decided on 15th May, 1973. In my view for the reasons hereinafter given the decisions relied upon by the learned Single Judge, which were also vehemently relied upon by learned Counsel for the respondents before us, cannot come to the aid of the respondents. So far as *P. R. Jodh's* case (supra) is concerned, the facts of that case were that the appellant before the Supreme Court was a teacher in a college affiliated to the University of Saugar and managed by the governing body established under clause 3 of the 'College Code' which was an Ordinance made under the provisions of the University of

(1) (1972) A. I. R. (S. C.) 1450.
(2) 70 C. W. N. 672.
(3) (1965) 2 S. C. R. 715.
(4) (1973) A. I. R. (S. C.) 855.
(5) (1974) A. I.R. (All.) 1.
(6) (1975) A. I. R. (A. P.) 35.

Saugar Act. The Principal of the college served upon the appellant a charge-sheet and asked him to submit his explanation. The charges were denied and request was made for particulars on which the charges were based to be furnished. This request, as it was alleged, was turned down by the governing body which terminated his services allegedly without holding any enquiry. The High Court was moved for an appropriate writ quashing the order of the governing body and for Jodh's reinstatement. The case of P. R. Jodh was that the governing body had passed the order of discharged inviolation of the provisions of the College Code. The High Court rejected that contention of Jodh on the ground that the conditions of his service were governed not by the College Code but by the contract made between the governing body and himself. The High Court also took the view that provisions of the College Code were merely conditions prescribed for affiliation of colleges and no legal rights were created by the College Code in favour of the teachers of the affiliated colleges as against the governing body. When the matter went up to the Supreme Court, the Supreme Court observed at page 715 of the Reports—

"The High Court rejected the contention of the appellant on the ground that the conditions of service of the appellant were governed not by the 'College Code' but by the contract made between the Governing Body and the appellant. The High Court also took the view that provisions of the 'College Code' were merely conditions prescribed for affiliation of colleges and no legal rights were created by the 'College Code' in favour of lecturers of the affiliated colleges as against the Governing Body."

The main question which presented itself for consideration before the Supreme Court was whether the High Court was right in taking the view that the College Code merely prescribed conditions for affiliation of colleges and no legal rights were created by the 'College Code' with regard to teachers of affiliated colleges. It has to be borne in mind, as Ramaswami, J., speaking for the Court and himself, put it at page 715 that that was the sole point for consideration before the Supreme Court. While dealing with that point, at page 718 it was held—

"It is not disputed on behalf of the respondents that the 'College Code' has been made by the University in exercise of statutory power conferred by s. 32 and under s. 6(6) of the Act. It is also conceded on behalf of the respondents that the 'College Code' is *intra vires* of

the powers of the University contained in s. 32 read with s. 6(6) of the Act. In our opinion, the provisions of Ordinance 20, otherwise called the 'College Code' have the force of law. It confers legal rights on the teachers of the affiliated colleges and it is not a correct proposition to say that the 'College Code' merely regulates the legal relationship between the affiliated colleges and the University alone. We do not agree with the High Court that the provisions of the 'College Code' constitute power of management. On the contrary we are of the view that the provisions of the 'College Code' relating to pay scale of teachers and their security of tenure properly fall within the statutory power of affiliation granted to the University under the Act.....On the other hand, we are of opinion that the provisions of Clause 8 of the Ordinance relating to security of the tenure of teachers are part and parcel of the teachers' service conditions and, as we have already pointed out, the provisions of the 'College Code' in this regard are validly made by the University in exercise of the statutory power and have, therefore, the force and effect of law. It follows, therefore, that the 'College Code' creates legal rights in favour of teachers of affiliated colleges and the view taken by the High Court is erroneous."

This, in my opinion, is the entire *ratio decidendi* of *P. R. Jodh's* case. As a matter of fact, as may be noticed from page 719 of the Reports, it had been contended before the Supreme Court on behalf of the respondents that the governing body of the college was not a statutory body performing the public duties and no writ in the nature of mandamus could, therefore, be issued to the governing body of the college. It was conceded, however, that such an objection had not been pressed before the High Court and in that view of the matter the Supreme Court expressed its inability to entertain the preliminary objection at that stage and overruled the same on that ground alone. As a matter of fact, the distinguishing features of *P. R. Jodh's* case have been clearly and succinctly, if I may say so with great respect, pointed out by the Supreme Court in its decision in the case reported in A. I.R. 1972 S. C. 1450 (supra). The learned Single Judge has tried to distinguish the case of *Vidya Ram Mishra*(1). But, to my mind, the points of distinction pointed out—and, if I may say so with respect—are erroneous and fallacious. In *Vidya Ram Mishra's* case, when the decision of the Supreme Court in *Jodh's* case was pressed

(1) (1972) A. I. R. (S. C.) 1450.

into service, Mathew, J., speaking for the Court, pointed out in paragraphs 12 and 13—

"Whereas in the case of *Prabhakar Ramkrishna Jodh* v. *A. L. Pandey* (1965) 2 S.C.R 713, the terms and conditions of service embodied in clause 8(*vi*)(*a*) of the 'College Code' had the force of law apart from the contract and conferred rights on the appellant there, here the terms and conditions mentioned in Statute 151 have no efficacy, unless they are incorporated in a contract. Therefore, appellant cannot found a cause of action on any breach of the law but only on the breach of the contract."

And, apart from this,—

"Besides, in order that the third exception to the general rule that no writ will lie to quash an order terminating a contract of service, albeit illegally, as stated in 1961-3 S.C.R. 55 : (A.I.R. 1964 S.C. 1680) might apply, it is necessary that the order must be the order of a statutory body acting in breach of a mandatory obligation imposed by a statute. The college, or the Managing Committee in question, is not a statutory body....."

It was argued in the case of *Vidya Ram* by Mr. Setalvad that it should be held that the Supreme Court has *sub silentio* sanctioned the issue of writ under Article 226 to quash an order terminating services of a teacher passed by a college similarly situate in *P. R. Jodh's* case. Such a contention was categorically repelled and it was pointed out that the Supreme Court had expressly stated in the judgment in *Jodh's* case that no such contention having been raised in the High Court, it could not be allowed to be raised in the Supreme Court.

5. The next case relied upon by the learned Single Judge is that of *Sirsi Municipality* (supra). In that case, an order of dismissal by the municipality with reasonable opportunity for defence hearing was challenged by the dismissed employee. While contesting the proposition that a writ could issue against the municipal authority as it was in violation both of the statutory provisions as also of the principle of *audi alteram partem*, it was argued that the case fell within the third category of cases out of the three exceptions mentioned in *Executive Committee of U. P. State Warehousing Corporation Ltd.* v. *Chandra*

Kiran Tyagi(1). It was argued that termination or dismissal of what is described as a pure contract of master and servant could not be declared to be a nullity, however, wrongful or illegal it might be. While repelling such contention, the Supreme Court held in paragraph 19—

"The courts keep the State and the public authorities within the limits of their statutory powers. Where a State or a public authority dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is thus distinguished from private employment in pure cases of master and servant."

It will be seen from the facts of the *Sirsi Municipality* case that the municipality in question against which a writ was prayed for and ordered to be issued was governed by the Bombay District Municipalities Act, 1901 and section 46 of the Act provided that the municipality shall make rules in respect of matters enumerated in that section and clause (*g*) of section 46 of that Act empowered the municippality to frame rules regulating, *inter alia*, the period of service, the conditions of service, etc., and relevant rules in that behalf were framed by the subordinate legislation-making authority. The municipal council was, in such circumstances, held to be certainly a public authority which was bound to be governed in exercise of its statutory powers by the limits set forth in the relevant statutory provisions and the rules which had the force of law. It was not a case of termination or dismissal of what is usually described as a pure contract of master and servant. The facts of the Sirsi Municipality case bear definite distinguishing features which cannot make that authority available in support of the case of the respondents here. The learned Single Judge, and, I say so with respect, has rightly observed that—

"It is upon the facts of each case and the statutes which are relevant that one has to decide as to whether or not the body is statutory and the law which creates or governs it is of statutory character."

In so far as the Full Bench decision of the Allahabad High Court reported in A. I. R. 1974 Allahabad 1 (supra) is concerned, on which

(1) (1970) A. I. R. (S. C.) 1244.

strong reliance has been placed by the learned Single Judge, suffice it to say that this case has been expressly reversed and the principle enunciated therein overruled by the Supreme Court in *Executive Committee of Vaish Degree College, Shamli* v. *Lakshmi Narain*(1). I think it is meet and proper in the circumstances to deal with this decision of the Supreme Court. It has been held in that case by S. M. Fazl Ali, J., speaking for self and on behalf of Khanna, J., that before an institution can be called a statutory body, it must be created by or under a statute and owe its existence to a statute: this must be the primary thing which has got to be established. A distinction must be made in the matter of an institution which is not created by or under a statute but is governed by certain statutory provisions for proper maintenance and administration of the institution. There have been a number of institutions which, though not created by or under any statute, are obliged to adopt certain statutory provisions but that by itself is not sufficient to clothe such an institution with a statutory character. As has been said by the Supreme Court in *Vaish Degree College* case, the crux of the matter is to pose a question as to whether, if there were no statute, would the institution have any legal existence? If the answer be in the negative, then it is a statutory body. If, however, an institution has a separate existence of its own without any reference to the statute concerned, but is merely governed by the statutory provisions, it cannot be said to be a statutory body. The entire case law on the subject has been reviewed by the Supreme Court in this case. On such a review, it was held that the executive committee of degree college which was affiliated to the Agra University and subsequently to the Meerut University was not a statutory body merely because it was affiliated to the University or was regulated by the provisions of the University Act or the statutes made thereunder. The fact that the degree college was registered under the Registration of Co-operative Societies Act, although a distinguishing feature of that case had no bearing on the ratio of the decision. For, it was held that by co-opting the principal of the college as a representative of teachers as one of the members of the Managing Committee it did not lose its independent status but continued to remain as non-statutory and autonomous body. In cases of such non-statutory body, it was not debated at the Bar nor could it have been so debated as the principle is well established by numerous decisions both of the Supreme Court as also of the House of Lords in England and that well-settled

(1) (1976) A. I. R. (S. C.) 888.

principle is that a contract of a personal service cannot ordinarily be specifically enforced and a court would not give a declaration that the contract subsists and the employee, even after having been removed, can be deemed to be in service against the will and consent of the master. This rule has again 3 well-recognised exceptions. One is where a public servant is sought to be removed in contravention of the provisions of Art. 311 of the Constitution, the second exception is where a worker is sought to be reinstated under the law of industrial adjudication and the third is where a statutory body acts in breach or violation of the mandatory provisions of a statute. We are not concerned with the first two exceptions mentioned above. All that has to be seen in the instant case is as to whether the Managing Committee of the school in question can be said to fall under the third exception. Tests have been laid down by a catena of decisions of the Supreme Court and various High Courts to examine whether a body is a statutory body and whether it has acted in violation of the statutory provisions or not. I assume for the sake of argument that some mandatory statutory provisions may have been violated but that again, in my view, will not be sufficient to attract the third exception. For, before going into the question with regard to the breach or violation of any mandatory statutory provision, the first thing that has to be seen is as to whether such a kind of infraction of mandatory statutory provisions has been purported to be made by a body which can be termed a statutory body. In other words, unless the Managing Committee of the school in the instant case can be said to be a creature of some statute or created by or under any such statute, no writ can issue against it. It is needless to multiply the decisions in this regard and it was, perhaps, if I may venture to say so, on that account that the Supreme Court in the case of *Arya Vidya Sabha, Kashi* v. *Krishan Kumar Srivastava*(1) did not embark upon any exploration as to the well-established principles to be applied in such cases and relying upon its own decision in *Vaish Degree College* case (supra) it was held that Dayanand Mahavidyalay Degree College, Varanasi, which was an institution affiliated to the Banares Hindu University was not a creature of statute but had entity like a company or a co-operative society or other body which has been created under the operation of a statute. The point which I want to highlight is this. There is a distinct connotation of a statutory body in contra-distinction to a body which has been created under the operation of a statute. A Managing

(1) (1976) A. I. R. (S. C.) 1073.

Committee of a school, assuming for the sake of argument, having been created under the operation of a statute, although not by the statute or under the provisions of statute itself, shall not be amenable to the issuance of a writ under the provisions of Article 226 of the Constitution. Before I refer to the two unreported decisions of this Court—one of the Division Bench and another of the learned Single Judge himself—I may point out the salient features of the case in A.I.R. 1975 A.P. 35. In that case, the Full Bench of that Court held that the ambit of certiorari can be said to govern even cases in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting the subjects provided, always, that it has a duty to act judicially. In that case it was also held in paragraphs 85 and 86 that even if a college was not a statutory body, in an appropriate case a writ of certiorari can go against a private college. It was further held that the rules of affiliation even if taken to be non-statutory but mere administrative instructions issued by the University or the grant in aid code by the Government, they would not come in the way of issuance of such a writ. A writ, it was held, can issue against a non-statutory body even if it violates administrative or executive directions or instructions or acts in violation of principle of natural justice. I beg to differ from the view taken by the Full Bench of the Andhra Pradesh High Court with regard to the latter part of the judgment, the principle of which has been extracted above. Without going into any further discussion of the case law on the subject, it is sufficient to say the least that in view of the latest decisions of the Supreme Court in the *Vaish Degree College* case and the case of *Arya Vidya Sabha*, the aforesaid decision of the Andhra Pradesh High Court does not seem, in my view, to lay down the correct law.

6. Since the two unreported decisions of this Court referred to above are with regard to Managing Committees or governing bodies judged in the light of the provisions of the Act and the Bihar High Schools (Constitution, Powers and Functions of Managing Committee) Rules, 1964 duly framed by the competent rule-making authority under the powers vested by section 8 of the Act, it is worthwhile to refer to the provisions which had fallen for consideration in those cases and were also placed before us. Learned Counsel for the respondents invited our attention to sections 4, 5 and 8 of the Act and rules 37, 38 and 39 of the Rules. Before dealing with the aforesaid provisions of the Act and the Rules, I must state at the outset that it is not

the case of either party that without the Act or the Rules as a matter of fact there could not have been Managing Committee of a proprietary or an aided school. That being the factual position, adverting to the aforesaid statutory provisions, it will be noticed that section 4 of the Act merely lays down the functions of the Board of Secondary Education (shortly called the Board). That provision is of no significance here in so far as the point under consideration is concerned. Section 5 of the Act speaks about the Managing Committee. Sub-section (1) thereof says that for every high school there shall be a Managing Committee constituted in such manner as may be prescribed and sub-section (2) of section 5 lays down that if the Board is of the opinion that the Managing Committee of a school is not functioning in a way conducive to the maintenance of discipline among its teachers and pupils and is not carrying out the directions of the Board or administering the finances of such school properly, it may, by an order, after giving the Managing Committee a reasonable opportunity of being heard, suspend for a period not exceeding six months or dissolve the Managing Committee. The proviso excepts from the operation of the aforesaid statutory provision such high schools as are administered by minority based on religion or language. Sub-section (3) of section 5 enjoins that in case the Board suspends or dissolves the Managing Committee under sub-section (2), the powers and duties of the Managing Committee shall be exercised and performed by such person or persons as may be appointed by the Board until the expiry of the period of suspension or the reconstitution of the Managing Committee, as the case may be. Sub-section (4) provides that where a Managing Committee is dissolved under the provisions of sub-section (2), a new Managing Committee shall be constituted in accordance with the rules made in this behalf within one year of such dissolution. No other provision of the Act is relevant for the present purpose. As I have already indicated above, so far as section 8 of the Act is concerned, it merely empowers the State Government to make rules in accordance with which the 1964 Rules as well as the Service Condition Rules, 1972 mentioned at the outset have been framed. The main question that arises for consideration is that merely because section 5(1) of the Act says that for every high school there shall be a Managing Committee and that such Managing Committee shall be constituted in the manner prescribed by the Rules, can it be said that the Managing Committee of every school is a statutory body, namely, that it is a creature of, or has been constituted under, the provisions of section 5(1)? To my mind, the answer is clearly in the negative. It merely

lays down the manner in which the Managing Committee is to be constituted, and I shall presently refer to the relevant provisions of the Rules which say that such Managing Committee shall act in accordance with such manners as are enjoined in the Rules themselves. The relevant rules may be scanned thus. Rule 3 occurring in Chapter III of the Rules speaks of the manner in which the Managing Committee of a school other than a proprietary school shall be constituted. Eight categories of members forming the Managing Committee have been laid down. As a matter of fact, the entire Chapter III of the Rules deals with the constitution of the Managing Committee of a school other than a proprietary school and, *inter alia*, lays down as to who can be hereditary members and life members, who can be teachers' representative to be appointed a member of the Managing Committee, what shall be their respective terms of membership, how the election of donors to be included in the Managing Committee has to take place, how co-option of members shall be made, how the President and the Secretary of the Managing Committee of a school other than a subsidised and proprietary school shall be held, how the selection of the guardians' representatives shall be made, how the President, the Secretary or the members of the Managing Committee can be suspended or removed and what shall be quorum for the meeting for co-option of members and election of the President or the Secretary of the Managing Committee, etc. Similarly, Chapter IV of the Rules deals with different problems of allied nature in respect of constitution of Managing Committee of a proprietary school and Chapter V lays down general provisions applicable to Managing Committee of school, be that a proprietary or a non-proprietary school. Chapter VI of the Rules lays down the powers and functions of a Managing Committee. Sub-rule (2) of rule 31 deserves special notice in this regard. For, it lays down the matters in particular and without prejudice to the generality of the powers conferred on the Managing Committee under sub-rule (1), it (Managing Committee) shall exercise such powers, *inter alia*, including the power to create with the approval of the Board teaching, administrative, ministerial and inferior posts and to make appointment thereto in accordance with the rules laid down in that regard, and clause (*xiv*) of rule 31(2) empowers the Managing Committee to appoint teaching and other staff in vacancies in the existing posts, to grant extension of service and to impose penalties on members of the staff in accordance with the rules laid down in that regard and clause (*xv*) thereof further empowers the Managing Committee to exercise administrative and disciplinary control

on the members of the teaching and other staff of the school subject only to the rules prescribed in that regard. Clause (*xviii*) empowers the Managing Committee to enter into any agreement for and on behalf of the school. Chapter VII of the Rules which is not very relevant for the present purpose, deals with the authorities of the Managing Committee and their powers and functions, namely, the President, the Secretary and the Headmaster, etc. Rules 38 and 39, to which our attention was particularly invited merely lay down that the Managing Committees functioning in schools on the date on which the 1964 Rules, as modified by the State Legislature, are published in the official gazette, shall cease to function after a period of two years from the date of publication of the said Rules and on the day a Managing Committee is constituted under these Rules. Rule 39 merely provides that where a Managing Committee is not constituted in accordance with Rules within a period of 2 years from the date of publication of the Rules as envisaged in rule 37, the powers of the Managing Committee, President and the Secretary shall, until its constitution in accordance with the Rules is complete, may be exercised and performed by such persons as may be appointed by the President of the Board for the purpose. As I have already indicated earlier, so far as section 5 of the Act is concerned, that by itself, does not create the Managing Committee of a school. This view of mine is reinforced by, and finds support from, rule 38 of the Rules itself. As I have already given the contents of rule 38 above, it will be seen from them that the Act and the Rules contemplated that the Managing Committees were functioning in different schools of the State before the Rules came into force. All that rule 38 emphasises is that such Managing Committees as were functioning in the schools on the date on which the 1964 Rules, as modified by the State Legislature, were published in the official gazette, shall cease to function. But after that what! The answer is provided in rule 38 itself that if a Managing Committee is not constituted in accordance with the Rules, within a period of 2 years of the Rules or publication thereof, then a Managing Committee has to be constituted under the Rules of 1964, that means, in accordance with and in the manner as prescribed in the Rules. Such Managing Committees, therefore, are created under the operation of a statute as distinct from 'by or under the statute itself'. That makes the whole distinction. Both the Bench and the Single Judge in the unreported decisions referred to above have merely proceeded upon the footing that even if the Managing Committees constituted in the manner as prescribed in the Rules were creatures not of the statute but were governed by the

Rules under the stature or were constituted in the manner under the operation of the Rules having the force of law, they may yet be termed statutory bodies. With great respect. I think, in view of the two Supreme Court decisions in *Vaishya Degree College* and *Arya Vidya Sabha* cases, these decisions cannot be held to be any longer good law.

7. For the reasons stated above, I am constrained to take the view that the Managing Committee of the High School, Jamui, with which we are concerned, is not a statutory body in the sense that it is neither a creature of the statute nor has it been created under the provisions of the statute. The Act and the Rules together merely lay down the manner in which a Managing Committee can be constituted; and the Rules certainly lay down the limits which such Managing Committees are not to transgress in order to invoke the penal clause for their being either suspended or dissolved by the Board. In my view, an analogy was rightly drawn by Mr. Ghose appearing for the appellants in this regard by referring to the provisions of sections 253, 256 and 261 of the Companies Act, 1956. Section 253 of the Companies Act prescribes that only individuals can be directors and section 254 thereof prescribes that in default of and subject to any regulations in the articles of a company, subscribers of the memorandum who are individuals, shall be deemed to be the directors of the company until the directors are duly appointed in accordance with section 255 which lays down the mode of appointment of directors and the proportion of those who are to retire by rotation. Section 256 lays down the provisions with regard to the ascertainment of directors retiring by rotation and filling up of vacancies while section 261 recognises the powers of the public company or its managing agent to appoint director to the Board. The provisions of the Companies Act like the provisions of the Act in question lay down that a company shall have a Board of Directors constituted in a particular manner and also provide for procedure in which the vacancy, as and when occurring either by rotation or otherwise, shall be filled up and it has never been held that a Board of Directors of a company, although formed and created under the operation of this statutory provisions, is a statutory body. On the contrary, the decisions of the Supreme Court in the case of *Arya Vidya Sabha, Kashi* v. *Krishna Kumar Srivastava*(1), referred to above, has expressly taken the view that such companies cannot be called statutory body at all.

(1) (1976) A. I. R. (S. C.) 1073.

8. For these reasons, I find sufficient force in the first contention of Mr. Ghose that no writ of mandamus or certiorari can lie against the Managing Committee, appellant no. 1, which is a body created neither by the statute nor under the provisions of the statute.

9. Before parting with the case, I must also take note of a few submissions made by Mr. Prabha Shanker Mishra, learned Counsel for the Board, Mr. Mishra submitted that even if it be held that the Managing Committee in question is not a statutory body, it should be held that it is covered by the term 'State' within Article 12 of the Constitution. This argument is stated merely to be rejected. For, if the Managing Committee of a school is not a statutory body or a public authority, deriving its powers from statutory provisions, it will be too much to say that it can yet fall within the definition of State under Article 12. Yet another contention, technical in nature as it is, was raised by Mr. Mishra, namely, that the appellants in the present appeal had no *locus standi* to maintain this appeal. It was urged that the old Managing Committee, which had been made a party respondent to the writ application before the learned Single Judge, ceased to function after the arguments in that case were over and before the judgment was delivered—near about 6 months later—and that a new Managing Committee under the law in force, namely, Bihar Secondary Education Board (Second) Ordinance, 1976 (Bihar Ordinance 124 of 1976) published in the *Bihar Gazette* Extraordinary on the 22nd of April, 1976 came into existence. This question is of mere academic importance, for, it cannot be denied nor, of course, was it argued seriously that appellant no. 2 had no *locus standi* to maintain this appeal. As a matter of fact both the appellants were aggrieved by the impugned judgment of the learned Single Judge. Whatever may be the position with regard to the then Managing Committee which may since be said to have become defunct, there is no gainsaying the fact that appellant no. 2 has been prejudicially affected by the impugned judgment. That appellant no. 2 is a person aggrieved was not even half-heartedly canvassed by Mr. Mishra. I thus find no merit in this technical objection on behalf of the respondents either. Learned Counsel in support of the technical objection relied on a decision of the Supreme Court in the case of *Jasbhai Motibhai Desai* v. *Roshan Kumar, Haji Bashir Ahmad*(1), especially on paragraph 38 thereof. All that the Supreme Court decision above mentioned says is that a writ can lie only at the instance of a person concerned or aggrieved

(1) (1976) 1 S. C. C. 671.

by the act which is complained of. In view of what I have said above, the application of that decision is not warranted.

10. Mr. Mishra also raised a contention that the position as it obtained under the 1960 Act or the 1964 Rules cannot be said to hold the field now in view of the two successive Ordinances duly passed in this behalf. One of the Ordinances I have already referred to, namely, Bihar Ordinance 124 of 1976. The other Ordinance which has succeeded the aforesaid Ordinance is the Bihar Secondary Education Board (Third) Ordinance, 1976 (Bihar Ordinance 169 of 1976). I make it clear that we have not been addressed in this case in relation to the provisions of the two Ordinances aforesaid and whatever has been said in the preceding paragraphs of this judgment cannot in any way said to be deciding matters relating to institutions as may be set up under the provisions of the aforesaid two Ordinances. Therefore, the apprehension of Mr. Mishra is without any foundation.

11. For the aforesaid reasons I am constrained to hold that this appeal must succeed and the order of the learned Single Judge must be set aside on the ground that no writ can issue against the Managing Committee and the writ application itself was not maintainable in this regard. On the facts and in the circumstances of this case, however, I shall make no order as to costs.

SHAMBHU PRASAD SINGH, J.—I agree and wish to make a few observations of my own. It is well settled by the decisions of the Supreme Court elaborately discussed in the judgment of my learned Brother delivered just now that in a case like the one under consideration before us a writ cannot issue to Managing Committee of a school or college unless it is a statutory body. A public or local body is not necessarily a statutory body. It can be statutory body only if it is created by or under a statute. If the body is created under the operation of some provisions of the statute then it is not a statutory body. My learned Brother has referred to the relevant provisions of the Bihar High Schools (Control and Regulation of Administration) Act, 1960 and the Bihar High Schools (Constitution, Powers and Functions of Managing Committee) Rules, 1964 and the Bihar High Schools (Service Condition) Rules, 1972 and has rightly held that the Managing Committee of the school concerned cannot be said to be statutory body! it is merely a body created under the provisions of the statute and the rules framed under it.

Appeal allowed.

R. D.

REVISIONAL CIVIL.

Before D. P. Sinha and C. N. Tiwary, JJ.

PATNA MUNICIPAL CORPORATION.*

v.

HADI ALI ASKARI IMAM *alias* TOOTU IMAM.

1977

January, 11.

Patna Municipal Corporation Act, 1951 (*Bihar Act no. XIII of* 1952) *section* 132 *sub-section* (2)—*Provisions of*—*Corporation, whether could impose latrine tax on the owner, if he was not in occupation of the holding*—*power to impose the tax, whether depends on the existence of the jurisdictional fact as to who was in actual occupation of the holding*—*tax imposed on person not in occupation of the holding*—*imposition* ultra vires *of section* 132 *sub-section* (2) *of the Act*—*the imposition of the tax, whether can be challenged in a suit before Civil Court.*

It is manifest from the provisions of sub-section (2) of section 132 of Patna Municipal Corporation Act. 1951 that the corporation has no power to impose on or levy latrine tax from a person even though he may be the owner of the holding if he is not in actual occupation of the holding. The idea behind this provision is obviously to make the person in actual occupation liable for the latrine tax, whether or not he is owner of the holding.

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1. *Civil Revision no. 1273 of 1972 and Appeal from Appellate Decree nos. 428 and 429 of 1970.

C. R. no. 1273 of 1972 : Against the decision of Shri Kashi Nath Prasad, 3rd Subordinate Judge, Patna, dated 29th January, 1971 arising out of the decision of Shri S. K. Prasad, Munsiff 3rd, Patna dated 27th March, 1968.

2. Second Appeal nos. 428 and 429 of 1970. From the decision of Shri Radhey Shyam Prasad, 4th Additional Subordinate Judge, Patna dated 8th May, 1970 arising out of the decision of Shri R. R. Prasad, 3rd Munsif, Patna, dated 23rd December, 1967.

In view of the provisions of sub-section (2) of Section 132 of the Act, the jurisdiction of the Corporation to impose latrine tax on a person depends upon the fact that the said person is in actual occupation of the holding. It is on the existence of the basic or jurisdictional fact that the power to tax arises. If the Corporation imposes the tax a person other than the person in actual occupation of the holding, the imposition is *ultra vires* the provisions of sub-section (2) of section 132 of the Act and there is no reason why such an imposition cannot be challenged in a suit before a competent Civil Court. If by a wrong assumption of finding of that jurisdictional fact which in reality does not exist, the authority assumes jurisdiction and taxes the owner not in occupation and not the person in actual occupation it undoubtedly acts without jurisdiction and against the express provisions of the law. Such an act being *ultra vires* of the express provisions of section 132(2) of the Act, it is open to such an owner institute a suit for declration that the imposition of the tax is without jurisdiction and that it cannot be realised from him. He may also raise that plea by way of defence in a suit instituted by the Corporation for realisation of the tax from him and the Civil Court will be competent to investigate the fact. There is no provision under the Act which expressly or by necessary implication debars a Civil Court from determining the existence or otherwise of the jurisdictional fact, that is, the fact whether the assessee was in actual occupation of the holding at the relevant time.

Case law discussed.

Appeals and application by the plaintiff.

The facts of the case material to the report are set out in the judgment of D. P. Sinha, J.

Messrs. B. P. Samaiyar, Jitendra Prasad Shukla and *A. K. Samaiyar*, for the petitioner in C. R. 1273 of 1972 and appellant in both the appeals.

Messrs. S. S. Asghar Hussain and *Abdus Salam*, for the opposite party in C. R. 1273 of 1972 and respondents in both the appeals.

D. P. SINHA, J.—Civil Revision no. 1273 of 1972 and Second Appeal nos. 428 and 429 of 1970 arise out of Title Suit nos. 132, 126

and 131 of 1964 respectively, instituted by the Patna Municipal Corporation against Hadi Ali Asgari Imam for realisation of latrine tax for the 1st quarter of 1958 to 4th quarter of 1963-64 in Title Suit no. 132 and in Title Suit nos. 126 and 131 for the period from the 1st quarter of 1959-60 to the 3rd quarter of 1963-64 in respect of holding nos. 132/99, 318/24 and 320/245 respectively, situate in circle no. 6 within the Patna Municipal Corporation (hereinafter referred to as 'the Corporation'). Hadi Ali Askari Imam, the sole respondent, is the admitted owner of the three holdings. His contention in the suits was that at all relevant times, the holdings were in occupation of different tenants and that under the Municipal Corporation Act, the latrines tax was realisable from the persons in actual occupation of the holdings and not from him who was not in occupation of the holdings at any time. His defence was upheld and the suits were dismissed by the trial court. The Corporation preferred appeals which were also dismissed on the same ground.

2. The appeals having been dismissed the Corporation has filed the civil revision and the two second appeals. In all these cases the only contention raised by the learned counsel for the Corporation was that the name of the respondent, Hadi Ali Askari Imam having been entered in the assessment list prepared under the Municipal Corporation Act, 1951 (hereinafter referred to as 'the Act') it was not open to him to dispute his liability for payment of the latrine tax and that the question as to whether or not he was in actual occupation of the holdings could not be raised or agitated before the Civil Court.

3. According to the learned counsel, the assessment in question had been made in 1959-60 after proper notice and if the respondent was not liable to pay the tax by reason of the fact that he was not in occupation of the holdings, he should have made an application for review under section 150 of the Act and since he did not prefer to do so the assessment became final. He further argued that the respondent did not even resort to the provisions of section 139 of the Act which provided for amendment and alteration of the assessment list and that, therefore, the decision of the Corporation contained in the assessment list with regard to the liability of the respondent to pay the latrine tax in respect of the three holdings was sacrosanct and it could not be challenged by the respondent in the suits instituted by the Corporation and that the courts below had fallen into error and exceeded their jurisdiction in holding that the tax was not payable by the respondent because he was not in actual occupation of the holdings.

4. In view of the common question of law raised in all the three cases and the fact that the parties thereto are the same, they have been heard together and this judgment will govern them all.

5. The three cases had been placed for hearing before a learned Single Judge of this Court who has referred them for decision by a Division Bench in view of the above contentions raised by the learned counsel for the Corporation, who had cited before him the decisions in the cases of *Patna Municipal Corporation* v. *Raja Ram Chandra Prasad*(1), *Gulabi Devi* v. *Commissioners of the Hazaribagh Municipality*(2) and *Kamini Devi* v. *Chairman of Buxar Municipality*(3), in support of his contention that it was the duty of the owner namely, the respondent to resort to the provisions of the Act for getting the name of the occupier entered and that as he had failed to do so, he could not be permitted to challenge his liability in the suits. Another contention raised before the learned Judge was that since the column in the assessment list meant for showing the name of the occupier was blank, it must be assumed that the onwar was occupier. It may be mentioned that this contention was raised, though faintly, before this Court also.

6. I shall first consider the contention that the Civil Court had no jurisdiction to decide and it was not open to the respondent to raise in the suits the plea that he was not liable to pay the latrine tax which had been duly assessed against him in accordance with the relevant provisions of the Act on the ground that he was not in actual possession of the holdings in question.

7. The Act has laid down in section 132(2) by whom the latrine tax is payable. Sub-section (2) of section 132 provides as follows :—

> "(2) The latrine tax or drainage tax shall, subject to the provisions of section 225, be payable by the person in occupation of the holding within the Corporation."

The provisions of section 225 are not relevant for the purpose. It is manifest from the provisions of sub-section (2) that the Corporation

(1) (1962) B. L. J. R. 801.
(2) (1964) B. L. J. R. 861.
(3) (1966) B.L.J.R. 943.

has no power to impose on or levy latrine tax from a person even though he may be the owner of the holding if he is not in actual occupation of the holding. The idea behind the said provision is obviously to make the person in actual occupation liable for the latrine tax, whether or not he is the owner of the holding. It is not in dispute, rather it is admitted, that at all relevant times the holding in question were in actual occupation of tenants and not the respondent. As such on a plain reading of sub-section (2) of section 132, the respondent cannot be held to be liable unless it be held that the assessment of the tax and the liability of the respondent to pay the tax even though he was not in actual occupation of the holdings could not be challenged in a suit before the Civil Court.

8. In view of the provisions of sub-section (2) of section 132, the jurisdiction of the Corporation to impose latrine tax on a person depends upon the fact that the said person is in actual occupation of the holding. It is on the existence of this basic or jurisdictional fact that the power to tax arises. If the Corporation imposes the tax on a person other than the person in actual occupation of the holding, the imposition is *ultra vires* the provisions of the said sub-section (2) and there is no reason why such an imposition cannot be challenged in a suit before a competent Civil Court. If by a wrong assumption of finding of that jurisdictional fact which in reality does not exist, the authority assumes jurisdiction and taxes the owner not in occupation and not the person in actual occupation it undoubtedly acts without jurisdiction and against the express provisions of the law. Such an act being *ultra vires* the express provisions of the law [section 132(2) of the Act], it is open to such an owner to institute a suit for a declaration that the imposition of the tax is without jurisdiction and that it cannot be realised from him. He may also raise that plea by way of defence in a suit instituted by the Corporation for realisation of the tax from him and the Civil Court will be competent to investigate the fact. It has already been pointed out that there is no provision under the Act which expressly or by necessary implication debars a Civil Court from determining the existence or otherwise of the jurisdictional fact, that is, the fact whether the assessee was in actual occupation of the holding at the relevant time.

9. Learned counsel for the Corporation has relied upon three decided cases of this Court in support of his contention that the Civil Court has no jurisdiction. They are the *Patna Municipal Corporation*

v. *Raja Ramchandra Prasad*(1), *Gulabi Devi* v. *The Commissioner of Hazaribagh Municipality*(2) and *Rai Brij Raj Krishna and another* v. *Messrs. S. K. Shaw and Brothers*(3). The first two cases related to the Bihar and Orissa Municipal Act, 1922 (hereinafter referred to as the 'B. & O. Act') and the third was a case under the Bihar Building (lease, rent and eviction) Control Act, 1947 (Bihar Act III of 1947) (hereinafter referred to as 'the Control Act').

10. The B. & O. Act in section 100(2) provides as follows :—

> "(2) The latrine tax shall subject to the provisions of section 135, be payable by the person in actual occupation of holding within the municipality."

11. In the case of *Patna Municipal Corporation* v. *Raja Ramchandra Prasad* which was decided by a Division Bench of this Court, reliance has been placed on the following observations at page 805 :—

"There is no doubt that under section 100 of the Act, the liability for latrine tax rests upon the occupier of the holding. The question is if the occupier does not approach the Corporation for assessment of the latrine tax in his name, or if the owner does not make a similar prayer, what should be the duty of the Municipal Corporation in such a case. It is, plain, I think, that the occupier cannot be sued for latrine tax unless his name is also mentioned in the assessment list. When the alteration was made in the assessment list persuant to the provisions of section 107 of the Act in presence of defendant no. 1 it was his duty to contest his liability to pay the latrine tax, and, for this there is a clear provision in section 116 of the Act. When the assessment was made in his presence and after hearing him, and he did not dispute his liability to pay the latrine tax and allowed the assessment list to be made in his name in respect of all the liabilities, he cannot subsequently turn round and challenged the assessment on the ground of lack of liability on his part. It is true that the occupier is liable for latrine tax, but if the occupier or owner does not raise this question and allow the assessment list to be altered or amended in

(1) (1962) B. L. J. R. 801.
(2) (1964) B. L. J. R. 861.
(3) (1951) A. I. R. (S. C.) 115.

the name of the owner himself, I think, the matter is concluded and that cannot be heard subsequently, as it is not a question of jurisdiction of the Commissioners. The Commissioners had jurisdiction to make the assessment and to fix the liability also, and, if once that liability has been determined, that question cannot be re-agitated in a Court of law, as it cannot be said that the amendment or the alteration of the list was without jurisdiction. I think, therefore, that in this particular case, the owner was liable for payment of the latrine tax."

12. It, however, appears that in the above case the principle decided by a Division Bench in the case of *Commissioners of Darbhanga Municipality* v. *Jyotindra Nath Sen and another*(1) and by a Full Bench of this Court in the case of *Patna Municipal Corporation* v. *Ram Bachan Lal*(2), had not been noticed.

13. *Gulabi Devi's* case(3) had been decided by a learned Single Judge of this Court. Reliance has been placed on the observations at page 862 of the report which supports the contention that the assessment of latrine tax had become final under the B. & O. Act and that the liability to pay the tax could not be challenged collaterally in a suit before the Civil Court. It appears that neither the decision in A. I. R. 1945 Patna 153 nor that in A. I. R. 1961 Patna 142 had been noticed by the Division Bench in 1962 B. L. J. R. 801. Of the said two cases only A. I. R. 1945 Patna 153, had been brought to the notice of the learned Judge who had decided *Gulabi Devi's* case(3) and it had been pointed out that in that case the Division Bench had held that the Civil Court did have jurisdiction to inquire as to whether the person concerned was an occupier of the holding within the municipality and that if the Civil Court came to the conclusion that the person who had been assessed to personal tax was not an occupier of the holding in the sense of the word, then the assessment of the personal tax on him under section 82(1)(*a*) of the B. & O. Act was without jurisdiction. The learned Judge declined to follow that decision because in his opinion the principle decided in that case had no application to the facts of the case before him. The distinction

(1) (1945) A. I. R. (Pat.) 113.
(2) (1961) A. I. R. (Pat.) 142.
(3) (1964) B. L. J. R. 861.

had been made presumably because the name of the owner was entered in the column meant for entering the owner's name as back as in the column meant for entering the name of the occupier. All the same, the question involved in both the cases was as to whether the assessee could prove before a Civil Court that he was not an occupier within the meaning of section 82(1)(*a*) in so far as it related to the case in A. I. R. 1945 Patna 153 and within the meaning of section 100(2) of the B. & O. Act in the other case. As such with great respect to the learned Judge I am of the view that the distinction made was without a difference as would appear from the following details of the case in A. I. R. 1945 Patna 153.

14. In A. I. R. 1945 Patna 153, the plaintiff assessee had brought a suit for a declaration that the assessment of personal tax on him under section 82(1)(*a*) of the B. & O. Act, by the Darbhanga Municipality was *ultra vir s* as the plaintiff as not in occupation of the holding within the Municipality whereas under the express provision of the said section the liability to pay the tax rested on the person or persons in occupation of the holding within the municipality. One of the contentions raised on behalf of the Municipality was that the Civil Court had no jurisdiction to decide whether the assessment on the person concerned was *ultra vires* on the ground that he was not an occupier of any holding within the municipality. It was held that the Civil Court did have such jurisdiction, it was pointed out that the mere fact that the plaintiff did not seek the remedy of review under section 116 of the B. & C. Act which was an alternative remedy, could not clothe the Municipality with any jurisdiction which it otherwise did not possess to assess the plaintiff and deprive the plaintiff of his right to seek redress in Civil Court or oust the jurisdiction of the Civil Court to entertain the suit. It was further observed that the finality given under section 117(3) of that Act to the decision of the Committee was the finality between the Commissioners and the Committee and that section 117(3) did not bar the jurisdiction of the Civil Court to entertain a suit to set aside the assessment made under section 81(1)(*a*) on the ground that the assessee did not occupy the holding within the municipality.

15. The third case relied upon by the learned counsel was that of *Rai Brijraj Krishna*(1), a case relating to the Control Act. The

(1) (1951) A. I. R. (S. C.) 115.

question which had arisen for decision was whether the Civil Court could question the order of the Controller directing eviction of the defendant for non-payment of rent. It was held vide paragraph 7 of the report that the Act had entrusted the Controller with a jurisdiction which included the jurisdiction to determine whether there was non-payment of rent or not, as well as the jurisdiction, on finding that there was non-payment of rent, to order eviction of a tenant and that therefore, even if the Controller wrongly decided the question of non-payment of rent and ordered eviction of the tenant, his order could not be questioned in a Civil Court.

16. The decision in A. I. R. 1945 Patna 153 and *Rai Brijraj Krishna's* case(1) had been considered along with a number of other decisions in the Full Bench case of *Patna Municipal Corporation* v. *Ram Bachan Lal*(2). That was also a case under the B. & O. Act as in A. I. R. 1945 Patna 153. It is necessary to state a few relevant facts of that case for a proper appreciation of the principles decided therein. At the time of the general assessment of 1950 a house standing in holding no. 137 of Circle no. 44 was unoccupied. A Deputy Magistrate assessed it to a quarterly municipal tax of Rs. 48-12-0. The plaintiff who was the owner thereafter, made improvements in the house by providing water and electric connections and let it out on rent to an advocate on a monthly rent of Rs. 75. Thereafter he received a notice from the Patna Municipality (as it then was) under section 7(2) read with section 107(1)(*c*) of the B. &. O. Act, stating that it was proposed to enhance the valuation of the holding and that the plaintiff could file objection. The plaintiff, accordingly, filed an objection which was heard by the Special Officer of the Municipality who inspected the holding and came to the conclusion that an incorrect valuation and assessment had been made by reason of fraud and misrepresentation. He, accordingly, rejected the objection and assessed the holding on the basis of a monthly rent of Rs. 155 to a tax of Rs. 151-4-0 *per* quarter. The case of the Corporation was that the holding was let out to the advocate on a monthly rental of Rs. 155 and not Rs. 75. The Additional Munsif who tried the suit held that the advocate paid a rent of Rs. 75 per month, and that there was no fraud misrepresentation or mistake at the time of general assessment

(1) (1951) A. I. R. (S. C.) 115.
(2) (1961) A. I. R. (Pat.) 142.

of 1950 and that the Municipality was not justified in taking action under section 107(1)(*c*). He, therefore, decreed the suit. The Municipality took an appeal to the District Court which was heard by an Additional Subordinate Judge who agreed with the findings of the Munsif that the Municipality had not made out a case of fraud or misrepresentation which alone would have entitled it to revise the assessment and that it had not even pleaded any mistake. He further held that the plaintiff's objection should have been disposed of by a Committee constituted under section 117 of the Act and not by the Special Officer alone who would, under section 386, merely exercise and perform the powers and duties of the Commissioners. On these findings, he dismissed the appeal. Against that order of dismissal the Patna Municipality took an appeal to the High Court. The appeal was placed for hearing before a learned Single Judge. It was argued before him that the authorities of the decisions of this Court in the cases of *Darbhanga Municipality* v. *Jyotindra Nath*(1), *Arrah Municipality* v. *Jatendra Chandra*(2) and *Ram Chor Prasad* v. *Bakshi Ram Krishna Sinha*(3) had been weakened by the decision of the Supreme Court in *Rai Brijraj Krishna* v. *S. K. Shaw and Brothers*(4). The learned Judge thought that this raised an important question of law and therefore, he referred the case to a Division Bench which in its turn referred it to a larger Bench. That was how the matter came before the Full Bench.

17. The learned Advocate General who appeared on behalf of the Corporation raised two points before the Full Bench. First, that it was entirely within the jurisdiction of the Municipality or the Special Officer, who was in charge of it, to decide all the facts which required determination for exercise of the power to enhance the valuation or assessment of any holding under section 107(1)(*c*), and that his decision on those facts was final and the Civil Court had no jurisdiction to investigate those facts or to interfere with the decision. The second point urged was that an objection filed in pursuance of a notice issued under sub-section (2) of section 107 had, under sub-section (3), to be disposed of by a Committee constituted as provided in section 117,

(1) (1945) A. I. R. (Pat.) 153.
(2) (1946) A. I. R. (Pat.) 167.
(3) (1951) A. I. R. (Pat.) 536.
(4) (1951) A. I. R. (S. C.) 115.

but the Special Officer appointed under section 386 alone took the place of the Committee referred to in that section when the Municipality was superseded under section 385 of the Act. Dealing with the first point the Full Bench pointed out that the first principle which must be kept in view was that the Civil Court was a court of plenary jurisdiction and was competent under section 9 of the Code of Civil Procedure to try all suits of a civil nature except suits of which cognizance had either expressly or impliedly been barred. A number of English decisions were also referred to and the decision of the Court of Appeal in *R. V. Shoreditch Assessment Committee*, (1910) 2 KB 859 was held to have very clearly and succinctly laid down the correct principle in the following paragraph :—

"No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratice, not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the wards of Chepe."

18. The observations of Lord Esher in (1888) 21 QBD 318 at page 319-20 had also been considered by the Full Bench. It had been pointed out that of the two types of cases referred to by Lord Esher at the said pages, the first type was the ordinary type in which the jurisdiction of a local authority or a tribunal of limited jurisdiction depended upon the existence of some preliminary or jurisdictional facts. In such a case, while the tribunal must arrive at its own conclusion on those facts for the purpose of deciding whether it is necessary for it to exercise the jurisdiction vested in it, its decision on those facts is not final. The Civil Court or the High Court can undoubtedly

enquire into the correctness of its decision in order to determine whether the tribunal had acted in excess of its powers or had refused to exercise its jurisdiction where it was necessary for it to exercise it. It was pointed out that once it was held that the tribunal's decision on the jurisdictional facts was correct, the Civil Court could not enquire into the correctness of its decision on the merits of the matter within its jurisdiction and that even the High Court could interfere by issue of a writ on such matter only in some special circumstances like the existence of manifest error apparent on the face of the record.

19. As to the second type of cases envisaged by Lord Esher it was pointed out that the said type referred to those cases in which the tribunal of limited jurisdiction had not only been given power to do certain thing or to pass certain order but had also been given the power exclusively to decide the facts on which its jurisdiction depended. In such cases the existence of facts which attracted its jurisdiction was also final and was not open to inquiry by the Civil Court. The Full Bench further pointed out that the Supreme Court itself, after a consideration of the aforesaid observations of Lord Esher, had held in *Rai Brijraj Krishna's* case(1) that the case fell within the second category mentioned by Lord Esher because the Control Act had entrusted the Controller with a jurisdiction which included the jurisdiction to determine whether there was non-payment of rent or not as well as the jurisdiction, on finding that there was non-payment of rent, to order eviction of a tenant and that, therefore, even if the Controller could be assumed to have wrongly decided the question of non-payment of rent, his order could not be questioned in a Civil Court. The Full Bench held that the case of the Patna Municipality fell within the first category referred to in Lord Esher's observation. In support of that view a number of other decisions including the decision of the Supreme Court in *Choubey Jagdish Prasad* v. *Ganga Prasad Chaturvedi*(2) were considered and it was held that the Civil Court did have jurisdiction to investigate the correctness of the Special Officer's decision on jurisdictional facts upon which his power to enhance the valuation of assessment of holding in question under section 107(1)(c) of the B. & O. Act

(1) (1951) A. I. R. (S. C.) 115.
(2) (1959) A. I. R. (S. C.) 492.

depended. It was held that it was clear that the point under consideration had been rightly decided in A. I. R. 1945 Patna 153 and A. I. R. 1951 Patna 536 and that the decision of the Supreme Court in A. I. R. 1951 Supreme Court 151, did not in any way affect their authority.

20. In the case on hand the jurisdiction of the Corporation to assess the respondent to latrine tax depended upon the existence of the jurisdictional fact, that is whether the holding was in actual occupation of the respondent. Its decision, if any, on that fact was not final as this was a type of case which fell within the first category of cases pointed out by Lord Esher and the Full Bench. As such, the Civil Court did have the jurisdiction to investigate and determine that jurisdictional fact on the basis of which the Municipality could impose and levy the latrine tax under section 132(2) of the Act. Moreover, it appears that the Municipality or the assessing authority did not apply its mind to that preliminary fact i.e. as to whether the respondents was or was not in actual occupation. The respondent's name was not entered in the assessment register in the column meant for entering the name of the occupier. His name stood recorded in the column meant for entering the name of the owner. Learned counsel for the Corporation argued that in case of owner it had to be presumed on the basis of the entry of his name in the owner's column that he was in actual occupation of the holding, if no other person was mentioned as occupier in the column meant for entering the name of the occupier. I do not think this argument is sound. The owner may or may not be in actual occupation. If he is not in actual occupation of a holding, the latrine tax cannot be realised from him in view of the express provisions of sub-section (2) of section 132 of the Act according to which the incidence of the tax must fall on the person in actual occupation of the holding. Both the Courts have concurrently held and it is not disputed that at all relevant times persons other than the respondent were in occupation of the building as tenants.

21. It would thus appear that there is no merit either in the Civil Revision or in the two Second Appeals. They are accordingly, dismissed with costs. Hearing fee Rs. 50 in each of the three cases.

C. N. TIWARY, J.—I agree.

Application dismissed.
Appeals dismissed.

R. D.

CIVIL WRIT JURISDICTION

*Before S. K. Choudhuri and Shivanugrah Narain, JJ.**

SARUP SINGH *alias* SWARUP SINGH.**

v.

THE STATE OF BIHAR THROUGH LABOUR AND EMPLOYMENT DEPARTMENT OF THE GOVERNMENT OF BIHAR, PATNA, AND ORS.

1977

January 18

High Court at Patna (Establishment of Permanent Bench at Ranchi) Act, 1976, (Act LVII of 1976) section 2—counsel for the parties obtaining orders from the Ranchi bench from time to time fixing the date for hearing of the case from time to time subsequent to transfer of the case to Ranchi bench—Ranchi bench, jurisdiction of, to hear the case—whether can be challenged—Ranchi bench, whether lacks in inherent jurisdiction to decide the case—Industrial Disputes Act, 1947, (Act XIV of 1947) sections 10 and 12(5)—dispute raised—failure report in conciliation proceeding submitted—question for decision being whether dispute should be referred to the Industrial Tribunal or not—appropriate Government, whether can consider merits of the dispute.

Where a writ application was filed before the High Court at Patna and admitted there and later on, after promulgation of the High Court at Patna (Establishment of permanent Bench at Ranchi) Act, 1976, this case had been transferred for hearing at Ranchi and after the said transfer several orders were passed by Ranchi Bench from time to time at the instance of the counsel for the parties and with their consent and then, at the time of hearing a preliminary point, namely, that the Ranchi Bench had no jurisdiction to hear the writ application was raised by the petitioner;

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*Sitting at Ranchi.

**Civil Writ Jurisdiction Case No. 1347 of 1972. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, that a part of the cause of action, in the instant case, having arisen at Jamshedpur (District Singhbhum), the Ranchi Bench has jurisdiction to hear the present application and it cannot be said that the Ranchi bench lacks in inherent jurisdiction to decide this case. In view of the orders passed by Ranchi Bench from time to time at the instance of the counsel for the parties by which date was fixed from time to time for its hearing, it must be taken that both the parties waived their right to question the jurisdiction of Ranchi Bench and acquiesced in the order of transfer of the case to Ranchi Bench and further the petitioner is prevented from arguing that the petitioner having choice of the forum, the Ranchi Bench cannot hear this writ application against the will of the petitioner.

Narsiruddin v. *S T. A. Tribunal*(1) referred to.

Held, further, that the appropriate Government can go into the merits of the dispute while making a decision as to whether the dispute should be referred or not.

Bombay Union of Journals and others v. *The State of Bombay and Anr.* (2), *Guhi Ram Das* v. *Union of India and Ors.*(3) relied on.

Workmen of the South India Saiva Sidhanta Works Publishing Society, Tirunelveli Ltd. Madras v. *Government of Madras*,(4);

Held, deemed to have been over-ruled by the Supreme Court.

Application by the dismissed workman.

The facts of the case material to this report are set out in the judgment of S. K. Choudhuri, J.,

M/s. Rash Bihari Singh, Vijay Pratap Singh, for the petitioner.

M/s. Rameshwar Prasad No. 2, K. K. Jhunjhun Wala, R. L. Saraiwala, K. N. Prasad, for the respondent no. 2.

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(1) (1976) A.I.R. (S.C.) 931.
(2) (1964) A.I.R. (S.C.) 1617.
(3) (1973) B.L.J.R. 497.
(4) (1963) A.I.R. (Mad.) 142.

M/s. Md. Khaleel, G. P. 3, *S. Hoda, J. C. to G. P,* 3, for the respondent nos. 1, 3 and 4.

S. K. CHOUDHARI, J.—The petitioner has filed this writ application for quashing the order contained in Annexure '3' dated 16th August 1972 passed by the State of Bihar (respondent no. 1) refusing to refer the dispute under section 10 of the Industrial Disputes Act (hereinafter referred as 'the Act').

2. That petitioner was appointed as a truck driver in Auto Transport Department of the respondent company, namely respondent no. 2 on 19th December, 1963. It appears from the averment made in the petition that a charge-sheet dated 21st January 1969 was served upon the petitioner on 23rd January 1969 under sub-clause 24(*X*) of respondent Company's Works Standing Order no. 24 mentioning the following misconducts :—

> Clause 24(*X*)—Theft, fraud or dishonesty in connection with company's property. Description of the incidents in the charge-sheet as follows :—
>
> "On 2nd January 1969 at about 12.30 A.M. you, in company with three others were unloading stearing assembly units from Pick-up no. 73, in a ditch near the compresser House situated on the south Foundary Wall of the main works. You have indulged in the said activity for your wrongful gain."

The petitioner was accordingly suspended with effect from 24th January 1969. After the charge-sheet was served upon the petitioner, he filed a show cause and, thereafter, a domestic enquiry was held in which the petitioner was found guilty and accordingly he was dismissed from service with effect from 24th January 1969.

2. It appears from the petition that the petitioner, thereafter, filed an application before the Presiding Officer, Labour Court, Chotanagpur Division, Ranchi which was numbered as B. S. Case no. 17 of 1969 under section 26 of the Bihar Shops and Establishment Act. The said application was, however, subsequently withdrawn by the petitioner. A copy of the withdrawal order has been made Annexure '1' to the application. Thereafter, on 4th April 1971 the petitioner raised a dispute before the Labour Superintendent, Chotanagpur

Division, Jamshedpur, challenging the dismissal order to be illegal and demanding reinstatement in service with back wages. A copy of the said application has been made Annexure '2' to the writ application. Respondent no. 4, who was the Labour Superintendent, before whom the dispute was raised by the petitioner held conciliation proceeding on 15th June 1971 at Jamshedpur but ultimately he submitted a failure report to the Secretary of the Labour and Employment, State of Bihar (respondent no. 1).

3. An allegation has been made in the writ petition that the Labour Commissioner (respondent no. 3) held further enquiry in the matter. It appears that after the aforesaid failure report was submitted the respondent no. 1 considered the matter and passed an order refusing to refer the dispute to the Industrial Tribunal on the ground that the allegation of theft made against the petitioner was not baseless and that the dispute raised by the petitioner was not based on solid grounds. The said order of refusal dated 16th August 1972, as already stated above, has been made Annexure 3 to the writ application. Being aggrieved by the aforesaid order of refusal to make the reference the petitioner has filed the present application.

4. A counter affidavit has been filed on behalf of respondent no. 2, the Company. In the said counter-affidavit this respondent has denied the allegations made in the writ petition. It has been stated that the order contained in annexure 3 is a valid order and, that the said orders contained good reasons for refusal to make a reference. The other allegations in the writ petition, namely, that enquiry was not held in accordance with law and that proper opportunity was not given to the petitioner, have also been denied in the counter-affidavit.

5. Mr. Rash Bihari Singh, learned counsel appearing in support of this application raised at the initial stage of his argument a preliminary point, namely, that this Bench has no jurisdiction to hear this writ application. It will be relevant to state here that this writ application was originally filed at Patna on 30th October 1972. The ordersheet shows that it was admitted at Patna by order dated 9th November 1972. The ordersheet further shows that the case became ready for including the same in the weekly list. We are informed that this case has been transferred for hearing at Ranchi along with many other cases. After the aforesaid transfer was made it appears from the ordersheet that on 19th November 1976 a petition under section 151

of the Civil Procedure Code on behalf of respondent no. 2 was put up for orders. The order of that date runs as follows :—

> "Put up on 24th November 1976, as prayed for under the heading "to be mentioned".
>
> Mr. Vijay Pratap Singh has filed Vakalatnama on behalf of the petitioner. His name should also appear in the Daily List."

The next order is dated 24th November 1976 which shows that a prayer was made to put up the case for hearing subject to part heard on the 15th December 1976. By the next order dated 21st December 1976 it appears that Mr. Rameshwar Prasad no. 2 with the consent of other side prayed for adjournment of the case to 17th January 1977 which prayer was allowed. Thereafter, the present case was put up for hearing before us on 17th January 1977.

6. Mr. Rameshwar Prasad no. 2 appeared on behalf of the Company (respondent no. 2) and he, however, conceded that both the Ranchi Bench as well as the Patna Bench have jurisdiction to hear this writ case but in view of the aforesaid orders though option for filing and prosecuting the case lay with the petitioner, it should be taken that the parties have submitted to the jurisdiction of this Court and they are now estopped from challenging its hearing at Ranchi. Mr. Rash Bihari Singh in support of his argument relied upon the Act known as the High Court at Patna (Establishment of Permanent Bench at Ranchi) Act, 1976 (Act 57 of 1976). Section 2 of the said Act runs as follows :—

> "*Establishment of a permanent Bench of High Court at Patna at Ranchi.*—There shall be established a permanent bench of the High Court at Patna at Ranchi, and such Judges of the High Court at Patna, being not less than three in number, as the Chief Justice of that High Court may, from time to time, nominate, shall sit at Ranchi in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum;
>
> Provided that the Chief Justice of that High Court may, in his discretion, order that any case or class of cases arising in any such district shall be heard at Patna."

The learned counsel relying upon the words of this section namely, "in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum:" argued that the Ranchi Bench has no jurisdiction to hear this case as the order contained in Annexure 3 passed by the State Government (respondent no. 1) was made at Patna which gave a cause of action to the petitioner to file the present writ application there. Learned counsel relied upon a decision in *Nasiruddin* v. *S. T. A. Tribunal*(1) particularly paragraph 36 of this report and contended that even if it is assumed that a part of the cause of action arose at Jamshedpur when the petitioner raised the disputed before the Conciliation Officer and a part of the cause of action arose at Patna, in view of the fact that the order contained in Annexure 3 was passed at Patna the option lay with the petitioner to file his writ petition either at Patna or at Ranchi and the petitioner having exercised option to file the same at Patna and posecuting the same there, the hearing of the present case cannot be taken up at Ranchi by the Ranchi Bench. The Supreme Court decision has dealt with the Act known as United Provinces High Courts (Amalgamation) Order, 1948 under which the Allahabad High Court and the Chief Court in Oudh were amalgamated and constituted one High Court. While considering paragraphs 7 and 14 of the said order their Lordships of the Supreme Court have stated in paragraph 36 as follows :—

> "The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action" is wellknown. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of

(1) (1976) A.I.R. (S.C.) 931.

action arises wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh, it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action."

7. The conclusion have been summarised in paragraph no. 37 which reads as follows :—

"To sum up, our conclusions are as follows. First there is no permanent seat of the Hight Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to paragraph 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso

to paragraph 14 of the Order be directed to be heard at Allahabad. Fourth, the expression "cause of action with regard to a civil matter means that it should be left to the litigant to institute case at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the cause of action arises wholly within Oudh areas than the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises out side the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place."

8. It is not disputed before this Court that a part of the cause of action arose at Jamshedpur (District Singhbhum). It is further not disputed that a part of the said cause of action also arose at Patna and, therefore, the litigant, namely, the petitioner of this case who was dominuslitis had the option to file the writ application either at Patna or at Ranchi and the choice was according to the aforesaid Supreme Court decision, with the petitioner but the question is as to whether after the case was transferred to Ranchi Bench for its hearing, in view of the several orders passed by this Court from time to time at the instance of the counsel for the parties and with their consent, the petitioner should be allowed to raise the point of jurisdiction to the Ranchi Bench for hearing this writ application. It has already been stated above that it was not disputed at the bar that a part of the cause of action having arisen at Jamshedpur (district Singhbhum), this Court has jurisdiction to hear the present application and it cannot be said that the Ranchi Bench lacks in inherent jurisdiction to decide this case. In view of the aforesaid orders to which I have already quoted above passed by Ranchi Bench from time to time at the instance of the counsel for the parties by which date was fixed from time to time for its hearing it must be taken that both the parties waived their right to question the jurisdiction of this Court and

acquiesced in the order of transfer of the case to Ranchi Bench and further the petitioner is prevented from arguing that the petitioner having choice of the forum this Bench cannot hear this writ application against the will of the petitioner. The preliminary point raised by the learned counsel for the petitioner, in my opinion, therefore, has no substance and accordingly I reject the same for the reasons mentioned above.

9. It was next argued by Mr. Rash Bihari Singh, that the order contained in Annexure 3 is had in law as no reason has been assigned by respondent no. 1 in passing the said order. He contended that the dispute was under section 12(5) of the Industrial Disputes Act and it was the statutory duty of respondents no. 1 to record reasons for refusal to make a reference and to communicate the same to the parties concerned. In this case according to the learned counsel, except the order contained in Annexure 3 nothing was communicated to him.

10. Mr. Rameshwar Prasad no. 2 appearing for respondent no. 2, however, contended that Annexure 3 itself contains the reasons which are required to be given under section 12(5) of the Industrial Disputes Act and the reasons given in the said Annexure are (1) the allegation of theft according to the State Government (respondent no. 1) was not baseless and (2) that the dispute raised by the petitioner was not based on solid grounds. It appears after hearing the learned counsel for the parties that the proposition of law has been well settled by the Supreme Court in *Bombay Union of Journals and others* v. *The State of Bombay and another*(1), the relevant portion of which appears at paragraph 8 of the said judgment. It was argued in the said Supreme Court case on behalf of the appellantts that the reasons given for refusing to make a reference was that the State Government considered the merits of the dispute and came to the conclusion that the reference would not be justified and, therefore, the State Government acted illegally and improperly. The said argument was rejected. It has been held *inter alia* in that case that, ".....in dealing with an industrial dispute in respect of which a failure report has been submitted under section 12(4) the appropriate Government ultimately exercises its power under section 10(1), subject to this that section 12(5) imposes an obligation on it to record reasons for not making the reference when the dispute has gone through conciliation and a failure report

(1) (1964) A.I.R. (S.C.) 1617.

has been made under section 12(1). This question has been considered by this Court in the case of the *State of Bombay* v. *K. P. Krishna*,(1) (1961) 1SCR 227 : (AIR 1960 SC 1223). The decision in that case clearly shows that when the appropriate Government considers the question as to whether any industrial dispute should be referred for adjudication or not, it may consider, *prima facie* the merits of the dispute and take into account other relevant considerations which would help it to decide whether making a reference would be expedient or not." But it would not be possible to accept the plea that the appropriate Government is precluded from considering even *prima facie* the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under section 10(1) read with section 12(5), or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take it at into account in deciding whether a reference should be made or not. It must therefore, be held that a *prima facie* examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute under section 10(1), and so, the argument that the appropriate Government exceeded its jurisdiction in expressing its *prima facie view* on the nature of the termination of services of appellants 2 and 3, cannot be accepted."

Thus it is clear from the aforesaid decision that the appropriate Government can go into the merits of the dispute while making a decision as to whether the dispute should be referred or not. This case was followed by a Bench of this Court in *Guhi Ram Das* v. *Union of India and Ors.*(2). On the basis of the dictum laid down by the aforesaid Supreme Court decision this Court held in *Guhi Ram Das* case that the annexure by which the appropriate Government refused to exercise discretion to make a reference was validly exercised.

11. Mr. Vijay Pratap Singh, in absence of Mr. Rash Bihari Singh, senior counsel appearing for the petitioner, replied to the argument put forward on behalf of respondents and relied upon a case *Workmen*

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(1) 1961(1) S.C.R. 227=(1960) A.I.R. (S.C.) 1223.

(2) (1973) B.L.J.R. 497.

of the South India Saiva Sidhanta Works Publishing Society, Tirunelveli Ltd., Madras v. *Government of Madras*(2). This decision is a single Judge decision wherein it has been held that the Government assumed jurisdiction to sit in judgment over the propriety of the dismissal and, therefore, the order refusing to make a reference was not justified. This decision is against what has been laid down in the aforesaid Supreme Court decision and it should be deemed that this decision stands ever ruled by the said Supreme Court decision wherein it has been expressly held that the appropriate Government may consider, *prima facie* the merits of the dispute and take into consideration relevant considerations while deciding the question as to whether the reference should be made or not.

12. Learned counsel for the petitioner also relied on a decision in *M/s. Hochtief Gammon* v. *State of Orissa and others*(2) which is clearly distinguishable. In that case it has been expressly held that "the Government's order really amounted to an outright refusal to consider relevant matters and the Government also misdirected itself in point of law in wholly omitting to take into account the relevant considerations. In that view of the matter the Supreme Court allowed the appeal and directed the Government to consider the matter. In that case it has been further held that if the appropriate Government gives reasons which are not good reasons the Court can direct them to reconsider the matter from the light of relevant matters. It has not been argued in this case by Mr. Rash Bihari Singh that the reason given in Annexure 3 were not good reasons. I have already mentioned above that his attack on Annexure 3 was on the ground that Annexure 3 did not disclose any reason which was required under section 12(5) of the Industrial Disputes Act while refusing to make the reference.

13. In the result the application has no merit and it is accordingly dismissed, but in the circumstances of the case I propose to make no order as to costs.

S. NARAIN, J.—I agree, but as one of the questions raised is that this Bench has no jurisdiction to hear the case and it involves a question of interpretation of the High Court at Patna (Establishment of Bench at Ranchi) Act, 1976 (hereinafter referred to as 'the Act') which is *res integra* I wish to express in my own words the reason for my opinion why this challenge to the jurisdiction must fail.

2. I may state at the out set that the objection to the jurisdiction of this Bench to hear the case was raised by the petitioner alone.

(1) (1963) A.I.R. (Mad.) 142.
(2) (1975) A.I.R. (S.C.) 2226.

Sri Rameshwar Prasad no. 2, Advocate for respondent no. 2 was at first inclined to support the contention but he subsequently changed his position and prayed that this Bench should decide the case. It is not in dispute that this case has been transferred for hearing by the Bench at Ranchi in pursuance of an administrative order passed by his Lordship the Chief Justice. Section 2 of the Act provides for the establishment of a permanent Bench of the High Court of Patna at Ranchi and lays down that a number of Judges not less than three in number as the Chief Justice of that High Court may from time to time nominate, shall sit at Ranchi" in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of case arising in the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum". The proviso to the section confers upon the Chief Justice power to direct that any case or class of cases arising in any such district shall be heard at Patna.

2 Shri Rash Bihari Singh contended that as in the present case the inpugned order was passed by the State of Bihar at Patna the case arose in the district of Patna and not in one of the districts specified in the Act, the cases arising in which are to be determined by the Ranchi Bench. This argument, in my opinion, is heardly untenable. The question when can a case be said to arise within a particular territory come up for determination by the Supreme Court in *Nasiruddin* v. *Sate Transport Appellate Tribunal and Anr.*(1). In that case their Lordships of the Supreme Court had to consider the meaning of same expresion occurring in paragraph 7 of the United Provinces High Court (Amalgamation) Order, 1948 which required that a certain number of Judges of the new High Court created by the amalgamation of old Allahabad High Court and the Chief Court at Oudh "shall sit at Lucknow in order to exercise, in respect of cases arising in such areas in Oudh the jurisdiction and power vested in the new High Court". The High Court at Allahabad held that if the right of the petitioner arise at any place out side any area in Oudh the Lucknow Bench would not have any jurisdiction even if the subsequent orders in the revisional or appellate stage were passed by an authority within an area in outh. The Supreme Court over ruled the aforesaid view of the High Court and laid down as follows :—

> "The conclusion as well as the reaso-ning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Article 226 would be as

(1) (1976) A.I.R. (S.C.) 331.

the expression is understood and if the cause of action arose because of the appellate order or the ravisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action" is well known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arise wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in Oudh and partly out side the specified. Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action."

3. It is, therefore manifest that according to the Supreme Court a case including a writ application under Article 226 of the Consitution arises in the local territory in which the cause of action arises either wholly or in part though in a case where the cause of action arises within the jurisdiction of two Benches the litigant who is dominus litis has the right to choose the Bench. Now as their Lordships pointed out in that case the expression 'cause of action' is well known. In *Read* v. *Brown* (1), Lord Esher M. R., defined "cause of action" to mean :—

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the

(1) (1888) 22 Q.B.D. 128.

judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

The aforesaid definition was quoted with approval by Das, C. J. speaking for the Supreme Court in *The State of Madras* v. *C. P. Agencies and another*(1). In this instant case, the relief claimed by the petitioner is the quashing of an order of the State Government refusing to make a reference upon consideration of a report on failure of conciliation proceeding conducted under section 12 of the Industrial Disputes Act, 1947. The ground on which the order is compigned are non recording of reasons for refusing to make a reference or giving of reasons which are extrenuous to the decision of the question whether or not a reference should be made. Now under section 12 the State Government is required to give reason for not making a reference in a case in which conciliation proceedings have failed and the officer holding the conciliation proceedings has submitted a failure report. In order to succeed in his application the petitioner, therefore, has to prove if traversed that a conciliation proceeding had been held and that the Conciliation Officer had submitted a failure report. Admittedly, the Conciliation proceedings were held by Officer at Jamshedpur. It is, therefore, manifest that a part of the cause of action arose within the district of Singhbhum, therefore, in view of the decision of the Supreme Court referred to above it is a case arising partly in the district of Singhbhum and, entertainable by the Ranchi Bench.

4. Shri Rash Bihari Singh further contended that as the petitioner had made his choice that the case be heard at Patna by filing the application at Patna and the petitioner was dominus litis the case should not be heard at Ranchi. As my learned brother has pointed out, subsequent to the transfer of the case to the Ranchi Bench the petitioner obtained orders from the Ranchi Bench fixing the case for early hearing on a specific date. It must, therefore, be held that the petitioner acquiesced in the order of transfer of the case made earlier and had also expressed opinion that the case may be tried by the Ranchi Bench. He cannot now be permitted to go back upon that position and to submit that this Bench has no jurisdiction to hear a case in which there is no inherent lack of jurisdiction in this Bench.

S. P. J.

Application dismissed.

(1) (1960) A.I.R. (S.C.) 1309, at p. 131.

CIVIL WRIT JURISDICTION

Before Shambhu Prasad Singh and S. K. Jha, JJ.

M/S. GOPILAL JAIN & ORS.*

v.

STATE OF BIHAR & ORS.

1977

February, 9.

Bihar Cotton, cloth and yarn Control Order, 1956, clause (6) and Constitution of India (as it stands after amendment), Article 226, clause (3)— scope and applicability of—pending petitions under Article 226—whether to be governed and dealt with in accordance with the provision of amended Article 226—notice to show cause, whether causes any injury—writ application against notice to show cause— maintainability of—alternative remedy under clause (6) of Control order not availed of—writ application, whether can be entertained—Constitution (42nd Amendment) Act, 1976 section 58.

According to section 58 of the Constitution (42nd Amendment) Act 1976 which has amended Article 226 of the Constitution of India even the pending petitions under Article 226 are to be governed and to be dealt with in accordance with the provision of that Article as it stands after amendment. So long the licence of the petitioners in the present case has not been cancelled, no injury has been caused to them. Really the notice is for their benefit following the rule of natural justice. If no such notice would have been issued, they would have come and made a grievance that the rule of natural justice has not been followed;

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*Civil Writ Jurisdiction Cases no. 2283, 2290, 2652, 2685 and 2387 of 1976.
In the matter of applications under Articles 226 and 227 of the Constitution of India.
C. W. J. C. 2290/76 : M/s. Gopalrai Ramchandra, Bhagalpur
" " " " 2652/76 : M/s. Binod Kumar Arun Kumar, Bhagalpur } Petitioners.
" " " " 2385/76 : M/s. Lalchand Banarsilal, Bhagalpur
" " " " 2387/76 : M/s. Sheo Kishan & Co., Bhagalpur

Held, therefore, that the writ applications of the petitioners are not maintainable.

Clause (6) of the Bihar Cotton, cloth and yarn control order provided an appeal against an order cancelling a licence but the petitioner did not avail of that alternative remedy;

Held, that in view of clause (3) of Article 226, his writ application cannot be entertained.

Applications under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of the Court.

Messrs. B. C. Ghose and *Krishna Mohan*, for the petitioners in all cases.

Messrs. Kameshwari Nandan Singh (*S. C. IV*) and *M. M. Prasad Singh* (*J. C. to S. C. IV*), for respondents in C. W. J. C. 2283/76.

Messrs. K. N. Singh (*S. C. IV*) and *M. N. Verma* (*J. C. to S. C. IV*), for respondents in C. W. J. C. 2290/76.

Messrs. K. N. Singh (*S. C. IV*) and *Shashank Kumar Singh* (*J. C. to S. C. IV*), for respondents in C. W. J. C. 2652/76.

Messrs. K. N. Singh (*S. C. IV*) *and R. C. Sinha* (*J. C. to S. C. IV*), for respondents in C. W. J. C. 2385/76.

Messrs. K. N. Singh (*S. C. IV*) and *Jawahardhari Singh* (*J. C. to S. C. IV*), for respondents in C. W. J. C. 2387/76.

SHAMBHU PRASAD SINGH & S. A. JHA, JJ.—These five civil writ jurisdiction cases have been heard together and are being disposed of by a common judgment. C. W. J. C. no. 2652 of 1976 is for quashing Annexure 2, an order dated the 8th November 1976 cancelling the licence of the petitioner of that case, as well as the notice (Annexure 1) dated the 11th October, 1976, calling upon him why his licence should not be cancelled. In the other four cases prayer has been for quashing

notices calling upon the petitioner in each case to show cause why his licence be not cancelled. The petitioner of all the cases are dealers in cloths and licensees under Bihar Cotton, Cloth and Yarn Control Order, 1956. It appears that godown of one Banwari Lal Sah was raided on 1st April, 1974 and 392 bales of cotton cloth and five bales of woolen cloth were seized. The petitioners claim that most of these bales belonged to them. They had stored them in the godowns of Banwari Lal Sah as they had no sufficient space in their shop which are situated in Sujaganj Bazar in the town of Bhagalpur. The ground given in the notices for cancelling the licences of the petitioner is that there was a criminal case pending against the petitioners for they had not notified the place where they had stored their cloths. Learned counsel appearing on behalf of the petitioner have urged that there is nothing in the Cloth and Yarn Control Order or in the contents of licences issued to the petitioner requiring them to notify the place of storage of their stock and as such the notices were misconceived and the authorities issuing them had no jurisdiction to issue them.

2 It has been urged on behalf of the State that in view of clause 3 of the said Order read with the licence in Form B, the petitioners were required to notify the place of storage of their stock and that was to be stated in the licence itself. It has been pointed out that according to clause 4(3) of the Order the petitioners were required to have a licence in Form B. It has further been urged on behalf of the State that in view of Article 226, as it stands after the recent amendment (42nd amendment of the Constitution) which has come into effect from 1st February, 1977, the writ applications of the petitioners were not maintainable and no relief could be granted to them. As in our opinion there is substance in the contention that the writ applications of the petitioners are not maintainable after the amendment of Article 226, we do not consider it necessary to go into the question whether the petitioners were required to notify the place of storage of their stocks and their licenses issued to them were

liable to be cancelled on the ground that they were storing stock of their cloth at a place which was not notified and not mentioned in the licence. Under Article 226(1) of the Constitution (as it stands after amendment), a High Court can issue a writ—

> "(*a*) for the enforcement of any of the rights conferred by the provisions of Part III; or
>
> (*b*) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or
>
> (*c*) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (*b*) where such illegality has resulted in substantial failure of justice."

3. Clause (3) of the amended Article 226 provides that—

> "No petition for the redress of any injury referred to in sub-clause (*b*) or sub-clause (*c*) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force".

According to section 58 of the Constitution (42nd Amendment) Act, 1976 which has amended Article 226 as aforesaid even the pending petitions under Article 226 are to be governed and to be dealt with in accordance with the provision of that Article as it stands after amendment. We assume in favour of the petitioner that there has been an illegality in the proceedings which has been started against the petitioners by calling upon them to show cause why their licences should not be cancelled but we do not think that such illegality has

resulted in any injury to the petitioners much less any substantial failure of justice except perhaps in the case of petitioner of C. W. J. C. no. 2652 of 1976 whose licence already stands cancelled. So long the licence of the petitioners of others of other cases has not been cancelled, no injury has been caused to them. Really the notice is for their benefit following the rule of natural justice. If no such notice would have been issued, they would have come and made a grievance that the rule of natural justice has not been followed. The writ applications of the petitioners other than C. W. J. C. no. 2652 of 1976 are therefore, not maintainable. It has been vehemently urged on behalf of the petitioners that there has been substantial failure of justice in the cases as the notices were issued after application of the petitioners for quashing the criminal prosecution started against them were admitted by this Court and stay was granted in them. We do not think that the admission of the criminal cases of the petitioners for quashing criminal prosecution against them by this Court has got anything to do with injury to the petitioners on account of issuing show cause notice to them or any substantial failure of justice.

4. C. W. J C. no. 2652 of 1976 is also not maintainable on account of the fact that clause (6) of the said Order provides for an appeal against an order cancelling a licence and the petitioner of that case has not availed of that alternative remedy. In view of clause (3) of Article 226, his writ application can not be entertained. Similar would have been the case of the petitioners of other cases even if their licences would have been cancelled. Their writ application also could not have been entertained by this Court unless they would have availed of the alternative remedy of appeal against the order of cancellation.

5. For the reasons as started above, we find that all these applications cannot be entertained and they are accrdingiv dismissed. There will be no order as to costs.

M. K. C.

Applications dismissed.

MISCELLANEOUS CRIMINAL

Before B. D. Singh and C. N. Tiwary, JJ.

SARDAR DILIP SINGH*

v.

The STATE OF BIHAR.

1977

February, 9.

Code of Criminal Procedure, 1973 (Central Act no. I of 1974) Section 173(2) and 173(8)—provisions of—preliminary charge-sheet submitted by police and cognizance taken by Chief Judicial Magistrate on the basis of the same—materials contained in the preliminary charge-sheet, sufficiency of—satisfaction of the Chief Judicial Magistrate—preliminary charge-sheet, if contains all the information required under section 173 (2) (II), whether the real charge-sheet.

Where the accused pleaded to be released on bail under the provisions of section 167(2) of the code of Criminal Procedure, 1973, on the ground that investigation was incomplete and it was for that reason that police submitted preliminary charge-sheet;

Held, that, simply because in the charge-sheet the heading is 'preliminary charge-sheet' it can not be said that it does not contain all the materials necessary in a charge-sheet as contempleted under section 173 of the Code of Criminal Procedure, 1973. It is well settled that the form does not matter, it is the substance which matters, and if the charge-sheet contained materials, it was up to the Chief Judicial Magistrate to be satisfied as to whether the materials were sufficient or not. In the instant case the Chief Judicial Magistrate was satisfied and on the basis of that very charge-sheet he took cognizance.

According to Code of Criminal Procedure, 1973, under section 173 a specific provision has been made in sub-section (8) for making further investigation and submitting further report, after submission of a

*Criminal Miscellaneous no. 4052 of 1976. In the matter of an application under section 439 and 440 of the code of Criminal Procedure.

report under sub-section (2) of the section. In that view of the matter it could not be said that the report submitted by the investigating officer under section 2 (*ii*) of section 173 of the code has a sense of finality. What is required under section 173 (2) (*ii*) is that its must contain all the information mentioned in the sub-section. If it so contains then it is a real charge-sheet as contemplated under section 173 of the code although it is terned as a preliminary charge-sheet.

Held, further, that the application for bail of the accused is rejected.

Bandi Kotayya v. *State*(1) and *Ramsetty Butchaiah and Ors.* v. *State* (2), *R. R. Chari* v. *The State of Uttar Pradesh*(3) *and Supdt. and Remembrancer of Legal Affairs, W. B.* v. *Abani Kumar*(4) distinguished.

Application by the accused.

The facts of the case material to this report are set out in the judgment of the court.

M/s. Shashi Shekhar Dwivedi and *Binod Shankar Tiwary*, for the petitioner.

M/s. Prabha Shankar Misra, Ganesh Prasad Singh, Kameshwari Nandan Singh, S. C. IV & G. P. Jaiswal, J. C., for the opposite party.

B. D. SINGH, AND C. N. TIWARY, JJ.—This application by Sardar Dilip Singh under sections 439 and 440 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') has been filed against an order dated 17th July 1976 passed by the Sessions Judge, Siwan, refusing bail to the petitioner. The application of the petitioner had earlier been placed before the learned Single Judge, who by his order dated 24th September 1976 was pleased to refer it to the Division Bench. This is how this case has been placed before us.

2. Learned counsed for the petitioner submitted that the learned Session Judge ought to have granted the petitioner bail under the

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1) (1936) A. I R. (A. P.) 377.
(2) (1969) Cr. L. J. 542.
(3) (1951) A.I.R. (S.C.) 207.
(4) (1950) A. I. R. (Cal.) 437.

provision of section 167(2) of the Code. In the instant case he pointed out that the petitioner was arrested on the 25th April, 1976. According to the petitioner as the investigation itself was incomplete and, therefore, the police submitted preliminary charge-sheet on the 24th June, 1976, on the basis of which on the same date the Chief Judicial Magistrate, Siwan is purported to have taken cognizance, the relelvant portion of which reads thus :

> "Charge-sheet received under section 364 and 302 I. P. C. perused, cognizance taken of the offences under section 364 and 302 I. P. C. Let the case be made over to the file of Sri G. S. Poddar, Judicial Magistrate for commitment according to law. The transferee magistrate should also dispose of the pending bail petition, if moved on the date fixed".

3. Learned counsel for the petitioner has raised two points for consideration by this Court : (*i*) that the charge-sheet itself, having mentioned that it is preliminary charge-sheet, goes to show that the investigation was not completed and, therefore, according to him, it was a pretence of completing charge-sheet within 60 days in order to prevent the petitioner from utilising the privilges granted to him under section 167(2) of the Code and (*ii*) that the cognizance which the Chief Judicial Magistrate is alleged to have taken on the 24th June, 1976, is not a cognizance at all as required under law.

4. It will be convenient to deal with point no. (*i*) first. In our opinion, simply because in the charge-sheet the heading is 'preliminary charge-sheet' it cannot be held that it does not contain all the materials necessary in a charge-sheet as contemplated under section 173 of the Code. It is well settled that the form does not matter, it is the substance which matters, and if the charge-sheet contained materials, it was up to the Chief Judicial Magistrate to be satisfied as to whether the materials were sufficient or not. In the instant case, as mentioned earlier, the Chief Judicial Magistrate was satisfied and on the basis of that very charge-sheet he took cognizance on the 24th June, 1976. Simply because the charge-sheet is headed as 'preliminary' it would not be considered as bad, and the substance and not the form will matter has already been decided by a Division Bench of this Court in *Rajoo* alias *Rajkishore Singh and another* v. *The State of Bihar and another*, Cr. W. J. C. no. 25 of 1976(R) with Cr. Misc. No. 591 of 1976(R).

Therefore, according to us there is no merit in the submission of the learned counsel for the petitioner under point no. *(i)*. Learned counsel for the petitioner, however, has relied on a decision in the case of *Bandi Kotayya* v. *State*(1) where it was observed that all reports under section 173 were police reports, but all police reports need not be reports under section 173. That being the position, a preliminary charge-sheet was no doubt a police report, but the Magistrate holding an inquiry under section 207A cannot take cognizance of the offence mentioned in that report and proceed with the inquiry upon receipt of the report. He must wait for the report under section 173 forwarded to him by the police after completing their investigation. In our opinion the observations made by their Lordships are not applicable in the instant case. Learned counsel for the petitioner in the instant case has not been able to point out by reference to the charge-sheet that it did not contain some of the necessary materials required under section 173 of the Code. Their Lordships have also said that it depends upon the facts and circumstances of the case. Their Lordships have not laid down a general proposition of the law, but only mean as it has to be decided whether in substance it is a charge-sheet or not. Besides, in that case their Lordships were not considering the case where the cognizance was also taken on the basis of the said charge-sheet. Learned counsel pointed out that *Bandi Kotayya's* case (supra) was also followed in *Ramsetty Butchaiah and others* v. *State*(2) where it was observed that sections 169, 170 and 173 must be read together. Section 173 deals only with the final report of the police and such a report was submitted only after the entire investigation was completed. Although a preliminary charge-sheet might have been filed, but that preliminary charge-sheet did not indicate in any manner the termination of investigation. But on the other hand it indicates that something was further to be investigated in order to enable the police to complete the investigation and file the report as visualised under section 173. The report under section 173 is a report on the results of investigation made under Chapter XIV. In our opinion, this observation also is of no avail in the instant case. It may be noticed that their Lordships were considering Old Code of Criminal Procedure. Now, according to the New Code of Criminal Procedure under section 173 a specific provision has been made in sub-section (8) for making further investigation and submitting further report, after

(1) (1966) A.I.R. (A.P.) 377.
(2) (1969) Cr. L. J. 542.

submission of a report under sub-section (2) of section 173 of the Code, which reads thus :

> "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police-station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed, and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)".

In that view of the matter it could not be said that the report submitted by the investigating officer under sub-section (2)(*ii*) of section 173 has a sense of finality as contended by the learned counsel for the petitioner. What is required under section 173(2)(*ii*) is that it must contain all the infformation mentioned in section 173(2)(*ii*). If it so contain, then according to us, it is a real charge-sheet as contemplated under section 173 of the Code although it is termed as a pareliminary charge-sheet.

5. Now we advert to consider point no. (*ii*) of the learned counsel. He has submitted as mentioned earlier that the learned Chief Judicial Magistrate has not taken cognizance in the eye of law. In support of his submission he has relied upon a decision in the case of *R. R. Chari* v. *The State of Uttar Pardesh*(1) where their Lordships in paragraph 9 has approved the observation made in *Supdt. and Remembrancer of Legal Affairs, W. B.* v. *Abani Kumar*(2) wherein it was held as followos :

> "What is taking cognizance has not been defined in the Cri. P. C. and I have no desire to attempt to define it. I

(1) (1951) A.I.R. (S.C.) 207.
(2) (1950) A.I.R. (Cal.) 437.

seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under section 190(1)(*a*), Cri. P. C. he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding, in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter but for taking action of some other kind e.g., ordering investigation.....under section 156(3), or issuing a search warrant....."

In our opinion, the above observations are of no avail in the present case. According to us, the learned Chief Judicial Magistrate has taken cognizance in accordance with law. Learned counsel for the petitioner, however, pointed out that his subsequent orders would show that he had not taken cognizance on 24th June 1976. He referred to various order passed on 21st July 1976 onwards. The order dated 21st June, 1976 reads thus :

'अकेला अभियुक्त कारागार में प्रस्तुत हुए । दिनांक ३ अगस्त १९७६ को अंतिम प्रतिवेदन की प्रतीक्षा में प्रस्तुत करें ।"

In our opinion, this order and the other orders dated 3rd August 1976, 19th August 1976, 6th September 1976, 22nd September 1976 and 19th October 1976 are the orders passed in accordance with law. In our opinion, these orders appear to have been passed under the provision of Explanation 1 to section 309 of the Code and obviously these orders are after taking of the cognizance. Therefore, in our opinion, there is no merit in the submission of the learned counsel for the petitioner and the point no. (*ii*) either.

6. In the result the application for bail of the petitioner is rejected, and the impugned order of the learned Sessions Judge is affirmed.

Application dismissed.

APPELLATE CRIMINAL

Before Hari Lal Agrawal and Chaudhary Sia Saran Sinha, JJ.

SURJU MARANDI AND ANOTHER*

1977

February, 23.

v.

STATE OF BIHAR.

Penal Code, 1860 (*Central Act No. XLV of* 1860) *section* 84, *provisions of—accused of unsound mind at the time of the commission of offence—whether protected under the section.*

Where the consistent evidence of the prosecution witnesses right from the statement recorded by the Police was that the accused was of an unsound mind at the time of occurance and the attending circumstances that followed also support the plea of his insanity so much so that after the commission of crime, he did not attempt to run away and rather conveniently pointed out the dead body;

Held, that the accused was protected under section 84 of the Penal Code, and he being a person of unsound mind, his act would not amount to an offence under the law.

Appeal by accused persons.

The facts of the case material to this report are set out in the judgment of the court.

Mrs. Sabitri Mishra (*Amicus Curiae*), for the appellants.

Mr. Vinod Chandra, for the respondent.

*Criminal Appeal No. 109 of 1972. From the judgment and order of Mr. Sunil Kumar Sen, 2nd Additional Sessions Judge, Bhagalpur dated 29th December, 1971.

HARI LAL AGRAWAL AND CH. SIA SARAN SINHA, JJ.—The two appellants, namely, Surju Marandi and Rijha Marandi, related as brothers, were tried by the 2nd Additional Sessions Judge, Bhagalpur, for committing the murder of their own youngest brother Sukhu Marandi aged about 12 years only, have been convicted under asection 302 of the Indian Penal Code and each of them has been sentenced to rigorous imprisonment for life. They have filed the present appeal from the Jail.

2. The occurrence giving rise to this appeal is said to have taken place in the night of 14th/15th of March, 1968 in the house of the appellants in village Chatarhan in the district of Bhagalpur. Mosst. Nuni Hunsda (P. W. 3), mother of the appellants, lodged a report at the Belhar Police-Station on 15th March 1968 at about 10 P.M. stating that her eldest son, namely, Surju Marandi (appellant no. 1) was suffering from insanity (*Dimag Kuchh Kharab Ho Gaya Tha*) since last 10 and 12 days and on that account she and other family members including the wives of appellants and the deceased started residing in the house of Karma Manjhi (P.W. 2), a co-villager and had given up residing in their own house. Rijha Marandi (appellant no. 2), her second son, was working in Bakula Colliery. He was sent for by her by a telegram and had come to the village only two days before the occurrence.

3. On the 14th March, 1968 appellant no. 2 came to her and asked Sukho to take the buffaloes to their own house and tie them there, saying that appellant Surju would not do any harm. Thereupon Sukho went there with the buffaloes and remained there in the night along with the two appellants. In the next morning, i.e., 15th March, 1968 at about 6 A.M. P. W. 3 went to her house to call her three sons but found that the door of the house was bolted from inside and in spite of her repeated and loud calls, she did not receive any response from inside the house. She kept waiting till about 10 A.M. but having failed to receive any response, she went to the neighbours and told them of the above facts. The neighbours, however, suggested her to go to the police and accordingly she went to Karmatarn and told the matter to P. W. 19 Lagan Mehra, a constable, who met her. She returned to her village at about 4 P.M. along with him. Some other prosecution witnesses, namely, Lachman Hasda (P. W. 1), Tejo Modi (P. W. 4), Chhotan Murandi (P. W. 5), Jaipla Manjhi (P. W. 7), Jesai Marandi (P. W. 10) and Mitan Pandit (P. W. 14) also came there and then both the appellants opened the door and came out of the room of the

house. On being asked about Sukho, appellant no. 1 is said to have stated that he had killed him. It was further stated that he also pointed out a gunny bag containing the dead body of Sukhu tied with a rope in the ceiling of the room. P. W. 19 and other prosecution witnesses saw the dead body. Some blood was also found in the court-yard which was washed with cow-dung. P. W. 19 thereupon tied the appellants and sent their mother (P. W. 3) along with P. W. 8 to the police-station for reporting the matter. She then lodged the first information report (Ext. 2) before the Belhar police—alleging that the appellants had killed her son Sukho Marandi. Both the appellants were sent up for trial and ultimately convicted as already said above.

4. The investigation in this case was conducted by Abdul Razaque, the officer-in-charge of Belhar police-station (P. W. 17) who had reached the place of occurrence at about 8 A.M. on 16th March, 1968, having received the report of the occurrence from P. W. 3 blood marks in the *angan* and also recovered one *Farsa*, one *Gaila* and one *Rukhani* from the house which were said to contain some blood marks. He also held inquest on the dead body of Sukhu and thereafter sent it to Banka Hospital for post-mortem examination. The post-mortem examination was held by Dr. B. K. Jha (P. W. 15) on 17th March 1968 at about 8.30 P. M. in the Banka Subdivisional Hospital and he found the following antimortem injuries on the dead body :—

"1. One lacerated injury on head affecting the parietals and occipitals in an area of 6″ × 4″ with communitated fractures of parietals and occipitals, with prolapsed brain matter.

2. One clean-cut incised wound 4″ × 2¼″ × 1½″ on neck.

3. One clean-cut incised wound 3″ × 1½″ X joint cavity deep with fracture, dislocation of distal end of humerus on right elbow joint, centrally with prolapse of lower end of humerus through the wound. It was a compound fracture dislocation.

4. One clean cut incised wound 2″ × 1″ joint cavity deep or right wrist with fracture. It was also a compound fracture dislocation.

5. One clean cut incised wond 2½″ × 1″ joint cavity deep on left elbow joint end of left humerus. The wound was also a compound fracture with dislocation.

6. A simple fracture, both radius and ulna, of left fofrearm.

7. One clean cut incised wound 3" × 1" joint cavity deep on right ankle posteriorly.

One clean cut incised wound 2" × 1" joint cavity deep on left ankle posteriorly.

9. One clean cut incised wound 6½" × 2½" abdominal cavity deep from right hypochondrium to elbow umbilicus, with prolapse stomach, small intestine, and large intestine with rent in small intestine leading to contamination of abdominal cavity and collection of blood cloths."

According to his opinion injury nos. 1 and 6 were caused by hard blunt weapon, such as iron rod and the rest of the injuries were caused by sharp cutting weapon, such as *Pharsa* and *Rukhani*, and the death was caused due to shock and haemorrhage, as a result of the above mentioned multiple injuries which were sufficient in ordinary course to cause death. He fixed the time of death within 72 hours from the time of his examination.

5. The defence of the appellants was the plea of innocence and false implication. The further plea of appellant no. 1 was that he was insane at the time of the occurrence and, therefore, in any view of the matter, he could not be convicted. Appellant no. 2 further pleaded as his defence that he was not in the village when the deceased was killed and had come to the village only on the day following the night of the occurrence.

6. From the facts stated above, it is obvious that there is no eye witness of the occurrence in this case and both the appellants have been convicted by the trial court only on the basis of some circumstances appearing against them. The circumstances which were relied upon by the trial court and were referred to before us are these :—

1. Appellant no. 2 had gone to the house of P. W. 2 and had asked Sukho (the deceased) to come to their own house with the buffaloes and the deceased had gone there with the buffaloes and had slept along with the appellants in the same room on the fateful night;

2. When the mother (P. W. 3) went in the morning to the house, it was found bolted from inside and was not opened by the appellants for several hours inspite of repeated and loud calls until the police and some other neighbours assembled;

3. When ultimately appellant no. 1 opened the door, both the appellants came out of the house and when asked, appellant no. 1 is said to have admitted that he had killed Sukho and he had pointed out the dead body of the deceased, which was found hanging from the ceiling of the room in a gunny bag; and

4. Some blood marks were also found in the Angan of the house.

It was contended on behalf of the prosecution that these circumstances were sufficient to establish the guilt of the appellants.

7. Mrs. Sabitri Mishra, who appeared well prepared as amicus curiae for the appellants, contended that the aforesaid circumstances had neither been established nor they were such as could lead to the conclusion that the murder of the deceased was committed by any of the appellants. She further contended that appellant no. 1 was insane and was, accordingly, entitled to the benefit of the exception provided under section 84 of the Indian Penal Code. She also contended that there was no motive for commission of the offence by appellant no. 2. Lastly, she contended that the trial was vitiated as the procedure laid down under section 465 of the old Code of Criminal Procedure was not followed by the learned Additional Sessions Judge.

8. In all, nineteen witnesses were examined in this case on behalf of the prosecution. Out of them P. Ws. 1, 2, 5, 6, 7, 9, 10, 12 and 13 are the residents of the village and they had seen the appellants coming out of the room of the house in which they were sleeping, after the arrival of the constables (P.W. 19) in the afternoon.

9. On the own showing of the prosecution, appellant no: 2 was working in a colliery and a telegram was sent to him by his mother to come to the village as the appellant no. 1 had become insane and on receipt of the said telegram he is said to have come to his village two days before the occurrence. The deceased was a young boy aged about 12 years and was reading in a Mission school in another village

Basmata and he is said to have come to the village three days before the alleged occurrence.

As regards the first circumstances that appellant no. 2 had gone to her mother (P. W. 3), then living in the house of P. W. 2, in the evening of the 11th March 1968, there is merely the statement to this effect in the first information report (Ext. 2). In her evidence before the committing Court, she did not make any such statement. There she only stated that the appellant no. 2 and the deceased had also come before the occurrence and in the night of the occurrence, all her three sons had slept in a room of her house. In her evidence in the trial court, however, she did not support the above statement, and stated that she could not say as to at what time the deceased had come from village Basmata in the night of occurrence. She also contradicted her earlier statement and stated that appellant no. 2 had come to his village at 8 A.M. on 15th March, 1968 and that he was not in the village in the night of the occurrence.

10. All the prosecution witnesses mentioned above have admitted that apprellant no. 1 had become insance, so much so that Chhotan Marandi (P. W 5), an uncle of the appellants, admitted that appellant no. 1 had become insane since about 4-5 days to the occurrence and he used to threaten anyone who went near him Kalia Marandi (P. W. 12) stated that appellant no. 1 was kept under fetters at the relevant time, a fact which is also admitted by P. W. 3. The village chaukidar (P. W. 8) also stated that appellant no. 1 used to assault the female members of the house and as such they had been sleeping in the house of another person of the village. The fact of insanity of appellant no. 1 has been admitted by each one of the prosecution witnesses mentioned above, so much so that this fact has been stated by P. W. 3 in her *fard-beyan* itself. The degree of his insanity can be well imagined from the fact that none of the female members were prepared to live along with him, not even his wife, and they had shifted to the house of a neighour (P. W. 2). Appellant no. 2 was sent for by P. W. 3 by a telegram only on this account. No prosecution witness had seen the deceased or appellant no. 2 together or going inside the house, much less appellant no. 2 taking the deceased with him in the preceding evening. None of the prosecution witnesses had seen appellant no. 2 in the village until the door of the room was opened on the next day in their presence. In view of such state of evidence in our opinion, the prosecution has not established that appellant no. 2 was even present in the village and had slept in the same house from which the dead body of Sukho was recovered.

11. The fact that the appellants had come out of the room and even assuming that they were also present when Sukho was killed, would not necessarily establish that it was appellant no. 2 who committed the offence. P. W. 3, the mother, in her evidence at the trial stated that appellant no. 2 was not present at that time in the village and had come only the following morning. Even assuming that she being the mother, retracted from her earlier statement that he had already come to the village, in the absence of any other incriminating circumstance appearing against him, particularly when there could be no possible motive for him to kill his own younger brother, so young and innocent, especially when the mother (P. W. 3) says in her evidence that the relation between all the three brothers was cordial, we do not feel satisfied that this circumstance, even if accepted, unerringly points towards the guilt of appellant no. 2 as the person responsible for the murder of the deceased.

12. The Supreme Court quoted with approval the following observations by Baron Alderson in *Reg*-v. *Hedge*, (1838) 2 Lewir 227 in two cases, namely, *Palvinder Kaur* v. *The State of Punjab*(1) and *Hanumant Govind Nargundkar and another* v. *State of Madhya Pradesh*(2) :—

> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

In A. I. R. 1952 Supreme Court 343, the Supreme Court observed that in dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there was always the danger that conjectures or suspicion may take place of legal proof, and, therefore, where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn

(1) (1952) A.I.R. (S.C.) 354.
(2) (1952) A. I. R. (S. C.) 343.

should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

The Court, therefore, should safeguard itself against the danger of basing its conclusion on suspicions however strong they may be.

13. The aforesaid view has been reiterated by the Supreme Court successively in a large number of later decisions. In the case of *Eradu and others* v. *State of Hyderabad*(1), four persons were charged for abducting one Muneem Lachiah and killing him thereafter due to enmity, by hitting him with stick and spear. There was no eye-witness in the case, but the accused were convicted only on circumstantial evidence. There was evidence that the four accused had gone to the house of the deceased in the evening of the day in question and accosted him asking him to accompany them to a well, a fact duly established. The deceased was found hanging in the backyard of his house. There was no evidence at all of any further movement of the accused nor there was anything to connect them with the crime, except the recoveries made at their instance, as evidenced by the various documents. The motive alleged against the accused was not satisfactorily established by the prosecution. The Supreme Court set aside the judgment of conviction recorded by the High Court and the trial court on the ground that these circumstances were not complete, without anything more to connect the accused with the crime.

14. The circumstance that appellant no. 2 remained in the house along with appellant no. 1 where the murder of the deceased is said to have taken place and opened the door only after several hours of insistence, may have various explanations. He might be sleeping in

(1) (1956) A. I. R. (S. C.) 316.

another room of the house and be not even aware of the death which might have been caused by the insane-appellant no. 1. He might himself be frightened on seeing the death of his younger brother or be himself kept under terror by appellant no. 1. The conduct of the appellants that they did not attempt to run away at any time, either before the arrival of their mother, or even subsequently, when she went away to Karnatarn and the house remained unguarded, is also an important circumstance not consistant with the hypothesis of the guilt of the appellants. No human blood was found by the Serologist in his reports (Exts. 5 and 8/1) on the three weapons which were recovered from the house and seized by the police which are said to be used for commission of the offence. In our opinion, therefore, the chain of evidence is not so far complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the appellants.

15. The Supreme Court in *Sarwan Singh Rattan Singh* v. *State of Punjab*(1) has observed that there may be an element of truth in the prosecution story against the accused, but between "may be true" and "must be true" there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.

16. We, accordingly, feel inclined to hold in agreement with the contention of the learned counsel for the appellants that the prosecution has not established the entire chain of evidence to sustain the charge against the appellants beyond all reasonable doubt.

17. So far of the case of appellant no. 1 is concerned, there is yet another factor in his favour. The consistent evidence of all the prosecution witnesses is that he was insane at the time of the occurrence and his mental condition was upset to such an extent that none of the members of the family was prepared to live with him and he had to be left all alone in the house keeping him under fetters. In our opinion, therefore, he is entitled to the benefit of the provision of section 84 of the Indian Penal Code. Against this appellant, however, another positive circumstance appears which cannot be applied against appellant

(1) (1957) A. I. R. (S. C.) 637.

no 2, and that is that he was present in the house all through in the night from which the dead body of the deceased was recovered. Even assuming that this circumstance may be considered against him, he is entitled to the exception provided under section 84 of the Indian Penal Code. Section 84 of the Indian Penal Code provides that an act of a person of unsound mind who, at the time of doing it, by reason of unsoundness of his mind, is incapable of knowing the nature of the act, is not an offence. The trial Court has rejected this plea on the sole ground of burden of proof and has relied upon section 105 of the Evidence Act. It is, no doubt, true that this section provides the prosecution with an additional support, namely, that the prosecution case would be judged on the presumption that no exception existed. The trial Court has, however, held that this presumption has not been rebutted in this case. On appraisal of the evidence, indicated above, we are not prepared to accept this view. As held by this Court in *Kamla Singh* v. *The State*(1) that the presumption under section 105 is rebuttable, if any fact sufficient to rebut the presumption has been proved by the defence, and the moment that presumption is rebutted by the defence and the Court is brought to a point where it becomes doubtful of the fact or when it cannot positively be held that the prisoner was not then of unsound mind and was capable of knowing the nature of the act alleged against him, the onus under section 105 has to be taken as discharged, for, by reason of the neutralisation of the force of presumption, the prosecution is thrown back to its original position where it has to discharge its onus beyond reasonable doubt. The defence, therefore, has not to prove affirmatively beyond reasonable doubt that the person was of unsound mind and that by reason of unsoundness of mind was incapable of knowing the nature of the act. In other words, the defence has only to demolish the aforesaid presumption laid down

(1) (1955) A. I. R. (Pat.) 209.

against the accused under section 105, and not to prove beyond reasonable doubt, the opposite of that presumption.

18. The same view has been taken by the Supreme Court in *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*(1), where it was observed that when a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of section 84 of the Penal Code can only be established from the circumstances which preceded, attended and followed the crime.

19. The consistent evidence of the prosecution witnesses right from the statement recorded by the Police is that appellant no. 1 was of unsound mind at the time of the occurrence, so much so that none of the family members dared even to live with him and had shifted to another house. It is thecase of the prosecution itself that for that purpose in order to look after appellant no. 1, a telegram was sent by P. W. 3, the mother, to appellant no. 2 to come back to his village. The preceding circumstances, therefore to the occurrence are completely in favour of appellant no. 1. The attending circumstances that have followed also, in our opinion, support the plea of insanity. We have seen that appellant no. 1 did not attempt to run away after committing the alleged crime when he had sufficient and convenient opportunity to do so. He did not make any attempt even thereafter and conveniently pointed out the dead body. On these materials we feel satisfied that even assuming that the offence was committed by him, he is protected under section 84 of the Indian Penal Code, and he being a person of unsound mind, his act would not amount to an offence under the law.

(1) (1964) A.I.R. (S.C.) 1563.

20. Now remains for consideration the last contention advanced by Mrs. Mishra that the trial was vitiated on account of non-compliance of the procedure laid down under section 465 of the Code of Criminal Procedure.

We do not find any substance in this argument. Section 465 applies to a person who appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, and not to a person who is not so at the time of the trial but suffered such an incapacity at the time of commission of the offence. The distinction between incapacity at the time of doing the act charged and incapacity at the time of trial, therefore, is apparent. While both are induced by unsoundness of mind, the former is substantive which excludes the offender under section 84 of the Indian Penal Code, the latter only affects the procedure and merely postpones the trial which must be resumed when the incapacity disappears on a future date. As a preliminary condition to the applicability of section 465, it must appear to the Court before which an accused is brought that he is of unsound mind and, consequently, incapable of making his defence. If no such abnormality is disclosed, the Court should proceed with the trial and no action under sections 464 and 465 of the Code of Criminal Procedure is called for. No such plea was advanced on behalf of appellant no. 1 at the time of the trial and there is no material to suggest that he appeared to be of unsound mind to the trial Court when the trial had started.

21. From the above discussions we come to the conclusion that the prosecution has failed to bring home the charge against the appellants or any one of them beyond all reasonable doubt for killing Sukho Marandi and in asmuch as we have held that appellant no. 1 was insane at the time of the alleged offence, his case comes under the exception of section 84 of the Indian Penal Code and he is entitled to an acquittal on that account. So far as appellant no. 2 is concerned, for the reasons discussed above, we would give him the benefit of doubt.

22. In the result, the appeal succeeds and the judgment and order of the trial Court is set aside. The appellants are directed to be set at liberty at once, if not otherwise required.

R.D.

Appeal allowed.

CIVIL WRIT JURISDICTION

*Before S. K. Jha and Muneshwari Sahay, JJ.,**

RAJENDRA KUMAR **

v.

THE CHANCELLOR, UNIVERSITY OF RANCHI AND ORS.

1977

February, 23.

University Regulations of the Ranchi University, regulations 38 *and* 69, *Chapter III and Rules of Punishment for the use of unfair means, as adopted by the University, rule* 4(*ii*)(*a*)—*scope and applicability of—rule* 4(*ii*)(*a*), *whether applies to a candidate escaping detection of use of unfair means in course of the examination but use of unfair means detected subsequently—term*, "*opportunity of being heard*", *true connotation of—principle of audi alteram* partem, *whether violated.*

Opportunity to be heard did not always mean a hearing at a personal interview. It is not the essential requirement of the principle of natural justice that the petitioner should have been granted a personal interview. Opportunity to be heard merely means opportunity of presenting his case or stating his case. The position may be different when a person makes a request that he be personally heard in the matter in order to give any effective reply.

Held, therefore, that on the facts and in the circumstances of the instant case, it cannot be said that there has been any violation of principle of *audi alteram partem* and all that was required of the principle of natural justice, namely, that the petitioner did have reasonable opportunity of representing his case, he did know the nature of the accusation made and that he actually availed of the opportunity to state his case, had been fulfilled. *Hira Nath Mishra and ors.* v. *The Principal,*

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*Sitting at Ranchi.

**Civil Writ Jurisdiction Case no. 21 of 1977 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

Rajendra Medical College, Ranchi and Anr. (1); *Russell* v. *Duke of Norfolk*(2), *Byrne* v. *Kinematograph Renters Society*(3), referred to.

Held, further that the provisions of Rule 4*(ii)(a)* of the Rules of Punishment for the use of unfair means and Regulations 68 and 69 of Chapter III of the Regulations of the University would show that Rule 4 *(ii)(a)* applies equally to the case of candidates found copying in course of the examination or found to have copied from any paper book or notes even subsequently and that if a candidate has escaped from being detected using unfair means in course of the examination he does not become immune from imposition of any penalty for having used unfair means at the examination detected subsequently.

Application by the examinee.

The facts of the case material to this report are set out in the judgment of the Court.

Mr. Arun Kumar Sinha, for the petitioner.

Mr. Satyeshwar Roy, for the respondents.

S. K. JHA AND MUNESHWARI SAHAY, JJ.—In this application under Article 226 of the Constitution of India the petitioner challenges the validity of the order of the Vice-Chancellor, respondent no. 2, as communicated by the Controller of Examination, Ranchi University, respondent no. 2, purporting to cancel the examination taken by amongst others, the petitioner in the final M.B.B.S. Part I examination, 1976 on the ground that the petitioner had been found guilty of using unfair means at the examination and further debarring him from appearing at any examination before the year 1977. In other words while the petitioner's examination of final M.B.B.S. Part I in 1976 has been cancelled he has been made eligible to appear at the examination to be held in the year 1977. That order of respondent no. 2, as communicated by respondent no. 3 incorporated in Annexure 6 to the application.

2. Against the aforesaid order as incorporation in Annexure 6 the petitioner's stand in the supplementary affidavit is that he had

(1) (1973) P.L.J.R. 442.
(2) [1949 (1) All England Report 109].
(3) [(1958) All England Report 579].

already filed a representation before the Chancellor, the Governor of Bihar, respondent no. 1, by sending the same under certificate of posting to his Raj Bhavan address at Patna. A subsequent reminder was also sent under certificate of posting. A copy of the representation as also the reminder has been annexed with the supplementary affidavit. The petitioner's case is that in spite of his reminder nothing was heard by him from the Chancellor and ultimately treating his representation to have been rejected by the Chancellor, the petitioner was compelled to file this application. Learned counsel for the University also proceeded upon the assumption that the representation of the petitioner has not been entertained by the Chancellor. In that view of the matter learned counsel for the respondent nos. 2 and 3 also did not press the point regarding abatement of this application. Learned counsel for the petitioner also did not press his submission that the power of the Chancellor to annul the proceedings of the University authorities as conferred on him by section 8(4) of the Bihar State Universities Act, 1960 or for that matter section 9(4) of Bihar State Universities Act, 1976 (Bihar Act XXIII of 1976) or the corresponding provisions in the intervening ordinances was not a prescribed statutory remedy so as to attract the provisions of clause (3) of Article 226 as it stands today. We do not, therefore, detain ourself on the question regarding the maintainability of the application under the amended provisions of the Constitution and proceed upon the footing that the petitioner has already exhausted all remedy that was available to him under the law for the time being in force.

3. Turning to the merits of this application, the facts can be stated within a very narrow campus. The petitioner, a student of Rajendra Medical College Hospital, Ranchi within the Ranchi University passed the first M.B.B.S. examination sometime in the year 1973. In the year 1976 he appeared at the final M.B.B.S examination Part I. There are four subjects in which a candidate has to pass for the purpose of passing that examination. Those subjects are—

(*i*) Pharmacology including Pharmaco-therapeuties and Toxicology. A course, including practical work, should be taken concurrently with cource of clinical instruction;

(*ii*) Forensic Medicine including Medicolegal Toxicology and attendance at Medicolegal post mortem in atleast ten cases;

(*iii*) Preventive and Social Medicine;

(*iv*) Pathology and Microbiology.

The petitioner who appeared at the 1976 M.B.B.S. Part I examination was allotted roll number Ranchi 140. According to his case after the results of that examination were published the petitioner obtained his marks from the office of the Principal of the College, a copy of which was forwarded by the University authorities after the publication of the results. Admittedly the petitioner was declared to have passed at that examination. From the cross list (by cross list the petitioner means the list of failed candidates) available in the office of the Principal, respondent no. 4, it is stated that he came to know that he had secured the following marks :—

Subjects.	Full marks.	Pass marks.	Marks obtained by the candidate.
Pathology (Sec. A) / Pathology (Sec. B).	100	100	Sec. A—26 / Sec. B—21
Viva	100	100	Viva—36
Practical	100	50	52
Pharmacology (Theory).	100	100	Sec. A—33 / Sec. B—29
Viva	100	100	Viva—60
Practical	100	50	50
F.M.T. (Theory)	100	100	Sec. A—33 / Sec. B—27
Viva	100		67
P.S.M. (Theory)	100	100	Sec. A—27, / Sec. B—19
P.S.M. (Viva)	100		Viva—62
			G.T.—542.

On the basis of the aforesaid marks it is submitted that the petitioner having obtained 50 per cent or more marks in three subjects, namely, all the subjects except in Pathology and Microbiology in

which also he obtained more than 30 per cent marks he was required to appear afresh only in the subject of Pathology in accordance with the Regulation of the University. Accordingly, the petitioner filled up his form and took all necessary steps for sitting at the ensuing examination in the year 1976 which examination has already been held on the 31st of August, 1976. The petitioner's application form for sitting only at the Pathology examination is also said to have been forwarded by the Principal, respondent no. 4, who also happens to be the Centre Superintendent of the examination of the University. The petitioner, however, was not issued any admit card for the purpose of sitting at the examination. It transpires that subsequently a notice was sent to the petitioner's home address which was received by his father. That notice was issued by the Controller of Examinations respondent no. 3 on the 4th August, 1976. A copy of that notice has been marked Annexure 4, to the writ application. The petitioner's father sent that show cause to the petitioner at his Ranchi address but before that was sent the petitioner was informed by his father that a notice to the effect that he had used unfair means at the Forensic Medicine examination section B on the 28th April, 1976 calling for his reply on the point had been sent. In the absence of the show cause notice itself the petitioner made an application on the 20th August, 1976 as contained in Annexure 3. In that application filed before the Controller of Examinations the petitioner prayed for some time as he had not received the show cause notice which had been sent to his home address. Time was, accordingly granted. Then the petitioner filed the show cause as incorporated in Annexure 5 It is worthwhile to mention here the contents of the notice (Annexure 4) and the petitioner's reply *in situ* (Annexure 5). The notice that the petitioner admittedly received states that it had been reported that the petitioner had used unfair means at the final M.B.B.S. examination, 1976(I) in Forensic Medicine Section B on the 28th of April, 1976. It was further stated in the notice that the petitioner was found in possession of a printed page of a book which was found inside his answer book and the same was relevant to the subject of examination and he had made use of it during the above examination. He was, therefore, called upon to show cause why he should not be debarred from appearing at any University Examination prior to 1978 as provided under the Rules. In reply to the aforesaid allegations the petitioner made the following submissions :—

(*i*) That the allegation that the petitioner had used unfair means in his examination in section B of Forensic

Medicine on the 28th of April, 1976 by copying from a printed page which was found in his answer book was absolutely baseless and wrong and that the petitioner had not used any sort of unfair means in the examination. No such allegation was made or report submitted in course of the examination against the petitioner by any of the invigilators.

(*ii*) That in view of the fact that the petitioner had been shown in the mark list available in the office of respondent no. 2 as having obtained 50 per cent or more marks in that paper there could not be any question of failing in that paper as the petitioner was, under the Regulations, required to appear only in the subject of Pathology in which he had obtained less than 50 per cent but more than 30 per cent marks.

According to the petitioner's case after the submission of his reply to the show cause notice the impugned order Annexure-6 was issued by the Controller of Examinations, respondent no. 3, as ordered by the Vice-Chancellor, respondent no. 2. Though the notice had called upon him to show cause as to why he should not be debarred from appearing at any examination prior to 1978, the final order as contained in Annexure-6 debarred him only from appearing at one examination which has already been held in 1976 and he has been made eligible to appear at the examination in the year 1977 which we are informed at the Bar will commence in the second week of April, 1977.

4. A counter-affidavit has been filed on behalf of respondents 2 and 3. The counter-affidavit has been sworn by the Controller of Examinations, respondent no. 3 himself. It has been stated therein that no exemption list as claimed by the petitioner was issued by the University at all. The answer book of the petitioner in Forensic Medicine Section-B was not evaluated by the examiner as a printed page of a book containing matters relevant to the subject of examination was found in his answer book by the examiner and he had copied from the same. The examiner, therefore, returned the answer book of the petitioner unexamined and reported the matter to the University for suitable action. A copy of the letter of the examiner dated the 18th of May, 1976 has been marked Annexure-A to the counter-affidavit. In Annexure-A the name of the examiner concerned has not been shown as according to learned counsel for respondents 2 and 3, it was not thought

prudent and advisable to give out the name of the examiner. All the same the original of that report of the examiner was produced before us and was also shown to the learned counsel for the petitioner. Excepting the name of the examiner who has made the report as contained in Annexure-A all other things are verbatim reproduction of the original report. It is not necessary to give the name of the examiner concerned. Suffice it to say he was an external examiner and no allegation of any animus or *mala fide* has been made against him. The report (Annexure-A) reads as follows:

"From.....
External Examiner,
Part I Examination in Forensic Medicine, May, 1976.

To

The Controller of Examinations,
Ranchi University, Ranchi.

Dear Sir

This is to report that a leaf containing the page nos. 103 to 104 of one "Notes on Jurisprudence", incorporating parts from the Chapter on 'Death from Asphyxia (Hanging and stangulation, etc.)', were found inside the Answer Book bearing the Code no. 70 of Rajendra Medical College, Ranchi. As such no marks have been assigned to the Answer Book and the same is being forwarded to you along with the leaf in question pasted on the Answer Book as it was found, for favour of suitable action in the matter at your end.

Thanks.

Yours faithfully,
(Sd.) ILLEGIBLE.

Encl: As above

External Examiner for Final M.B.,B.S. Part I Examination in Forensic Medicine, May, 1976.

Dated Ranchi:
18*th May*, 1976"

In paragraph 6 of the counter-affidavit respondent no. 3 has stated that at the hearing of this application the original answer book of the petitioner with the printed page at the relevant place would be produced in this Court. When called upon to produce the original learned counsel for respondents 2 and 3 did produce before us the original answer book of the petitioner after learned counsel for the petitioner also had a look at it. The statement that the answer book has not been marked and that the leaf from a printed book at the relevant place pinned up bears out the correctness of the statement of respondent no. 3 in the counter-affidavit. It has further been stated that the relevant answer book of the petitioner not having been evaluated at all, the marks shown against Forensic Medicine Section-B as 27 must have been made due to inadvertance. In view of the report of the examiner dated the 18th of May, 1976 as contained in Annexure-A the petitioner's matter was referred to the Unfair-means Scrutiny Committee as contemplated by rule 13 of the Rules of Punishment for use of unfair-means (hereinafter referred to as the Unfair-means Rule for the shake of brevity) prescribed by the authority. It may be mentioned here that when the answer books of the candidates are sent to the examiners the first cover is removed and kept by the University itself whereas on the second cover a corresponding code number is given for every candidate so that any examiner may not be in a position to know as to which particular answer book belongs to which particular candidate. Accordingly, as it now transpires from the statement of the University the code number which was assigned to the petitioner in the concerned examination was code number 70. Accordingly, Annexure-A, the report of the examiner merely specifies the code number of the answer book which belonged to the petitioner. The further case of the contesting respondent is that the Unfair-means Scrutiny Committee recommended debarring of the petitioner from appearing at any examination prior to 1978 but the Vice-Chancellor reduced the period of disbarment and the petitioner was untimately debarred by the impugned order, Annexure-6, from appearing at any examination prior to 1977 only.

5. Having satisfied ourselves as already stated above that the statement of respondent no. 3 on affidavit to the effect that the petitioner's answer book in Section-B of Forensic Medicine had not been evaluated by the examiner at all and that the examiner had sent a report that the petitioner had used unfair-means at the said examination in the aforesaid answer book is true, it is surprising as to how in the list of failures and the marks obtained by them from which the

petitioner made a note of the marks obtained by him showed 27 marks against section-B of Forensic Medicine subject of the petitioner. It is not for us to make any comment in this regard. To say the least the stand taken by respondents 2 and 3 is that it must have been due to some sort of inadvertance. This stand seems to be fully justified.

6. These being the facts on record learned counsel of the petitioner urged two main points in support of this application. In the first place it was submitted that under the Rules of Punishment for the use of unfair means as adopted by the syndicate on the 7th of November, 1961 there is no provision for punishment of such erring candidates who have not been caught using unfair means in course of the examination and that, therefore, imposition of any penalty when such use of unfair means has been detected later on, is without jurisdiction. The submission has been stated merely to be rejected. Rule 4(*ii*)(*a*) of the aforesaid Rules lays down :

> "4(*ii*) If a candidate is found :
>
> (*a*) copying or to have copied from any paper, book or notes;.....
>
> he shall be debarred from the examination in that year and in two subsequent years."

A plain reading of the aforesaid provision would show that it applies equally to the cases of candidates found copying in course of the examination or found to have copied from any paper, book or notes even subsequently. Learned counsel for the contesting respondents also invited our attention to Regulations 68 and 69 of Chapter III of the Regulations of the University. Regulations 68 and 69 of Chapter III read as follows :—

> "68. The Examination Board shall have power to quash or revise the result of a candidate after it has been declared if—
>
> (*a*) he is disqualified for using unfair means in the examination, or
>
> (*b*) a mistake is found in his results; or
>
> (*c*) it is found that he was in-eligible to appear at the examination.

69. In any case where the result of an examination has been ascertained and published, and it is found that such result has been affected by any error, malpractice, fraud, improper conduct or other sufficient cause, the Examination Board shall have power to amend such result and make such declaration as it shall consider necessary in that behalf."

It is worthwhile to mention that at the relevant point of time Ordinance 207 of 1976 which had followed the Bihar Ordinance 98 of 1976 was in force and at the present point of time the Bihar State University Act, 1976 (Bihar Act 23 of 1976) is applicable. Section 29 of the aforesaid Act corresponds to section 29 of the Ordinance in question. It lays down that the Examination Board shall make its recommendations to the Vice-Chancellor with regard to the matters concerning conduct of the examination, appointment of examiners and question setters, moderation and preparation of the results and publication of such results along with their report to the Academic Council as also any other suggestions with regard to mode and manner of assessment of the marks to the Vice-Chancellor who shall be competent to take the final decision in the matter excepting that in so far as the appointment of the question setters and examiners are concerned the Vice-Chancellor shall have to make a choice of such names from out of the list prepared by the Examination Board. The admitted position, therefore, is that by the law it is the Vice-Chancellor who has to take the final decision as has been done in this case. Rule 13 of the Unfair-means Rules prescribes that the Examination Board shall appoint every year a Committee to deal with cases of misconduct and use of unfair-means at the examination. If the Committee is unanimous, its recommendatons will be reported to the Examination Board and Syndicate. Since there is no Syndicate at the moment nor was there any at that time the powers of the Syndicate are vested in to the Vice-Chancellor and the ultimate decision in matters relating to the examination has to be taken by the Vice-Chancellor according to the Regulations as they stood at the relevant time and as they stand today also. I have explained this position here in order to dispel any misgivings as to how the Vice-Chancellor could have passed the impugned order when the Examination Board has been said in the Regulation, to be competent to quash or revise the result of the examination of a candidate after it had been declared. Be that as it may, the provisions of Rule 4(*ii*)(*a*) of the Unfair-means Rules

referred to above and Regulations 68 and 69 of Chapter III of the Regulations expose hollowness of the submission of the learned counsel for the petitioner that if a candidate has escaped from being detected using unfair-means in the examination he becomes immune from imposition of any penalty for having used unfair-means at the examination detected subsequently.

7. The only other point which has been raised in support of the application is that there has been violation of the principle of natural justice because as the learned counsel submits that the show cause notice (Annexure-1) is vague and indefinite and because no personal interview was granted to the petitioner. The relevant facts available from the records of the case have already been stated earlier. The answer book of the petitioner in Section-B of Forensic Medicine subject was not evaluated by the examiner and sent with his report as contained in Annexure-A to the Controller of Examinations, respondent no. 3. The matter having been referred to the Scrutiny Committee the petitioner was called upon to show cause in relation to the precise facts that he had used unfair-means in Forensic Medicine Section-B on the 28th of April, 1976 in final examination 1976 (I) and that the petitioner was found in possession of a printed page of a book which was found inside his answer book and the same was relevant to the subject of examination and he had made use of it during the above examination. In the show cause which the petitioner submitted (Annexure-5) all that the petitioner has said is that the allegation was unfounded and wrong and that the petitioner had not used any sort of unfair-means at the said examination. The only other ground that has been taken in the show cause of the petitioner is that since he has been shown in the list of failed candidates having obtained more than 50 per cent marks in the subject of Forensic Medicine Section-B, he was called upon under the Regulations to appear at the ensuing examination in the subject of Pathology only. The petitioner having submitted his application form for appearing at the examination of that subject only, which had been duly forwarded by the Principal of College, respondent no. 4, the University had no authority to reopen the matter so as to debar the petitioner. Evidently the first part of the show cause relating to the merits of the allegation has been answered as best as the petitioner could answer in that regard. All that the petitioner had to show and has to say here is that he had not used any unfair means. On the facts detailed earlier it cannot be said that the petitioner did not understand the nature and contents of the allegations made against him and that he was, therefore, in any way prevented on account of any handicap from making

any explanation. The petitioner understood the allegations all right and did give out in his defence all that he had to say. The Unfair-means Scrutiny Committee accepted the report of the examiner and having found that the petitioner had actually used unfair-means in view of the torn leaf from a book found inside his answer book from which he had copied there does not seem to us to be any question of principle of natural justice having been violated. In view of the provisions in the Regulations and the Unfair-menas Rules extracted above the legal submission with regard to the question of estoppel on the part of the University is wholly misconceived. So far as the factual side is concerned, namely, whether the petitioner did actually use unfair-means or not. Even for the sake of argument there could have been materials which could have been taken into consideration by the Scrutiny Committee or the Vice-Chancellor we could not have sat as a court of appeal, much less so in view of the available facts.

8. On the facts and in the circumstance of the instant case it cannot be said that there has been any violation of principle of audi *alteram partem*. As has been observed by the Supreme Court in the case of *Union of India and another* vs. *P. K. Roy and others*(1) the extent and application of the doctrine of natural justice cannot be imprisoned within the straight jacket of a rigid formula. In the case of *Hira Nath Mishra and others* vs. *The Principal, Rajendra Medical College Ranchi and another*(2) the Supreme Court while reterating the aforesaid observation also approved the observation made in the case of *Russell* vs. *Duke of Norfolk*(3) and that of Harman, J. in the case of *Byrne* v. *Kinematograph Renters Society*(4). In the case of Rueesl Tucker L. J. observed :

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of

(1) (1968) A.I.R. (S.C.) 850.
(2) (1973) P.L.J.R. 442.
(3)[1949 (1) All England Report 100].
(4) [(1968) All England Report 570].

natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have reasonable opportunity representing his case."

The observation of Harman, J., in *Byrne* v. *Kinematograph Renters Society Ltd.*(1) is as follows :

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the Tribunal should act in good faith I could think that these really is anything more".

The petitioner did have a reasonable opportunity of representing his case. He did know the nature of the accusation made. He actually availed of the opportunity to state his case. There is no allegation whatsoever of any *mala fide* either against the examiner nor could there indeed be for the examiner was an external one, nor is there any such allegation against the Unfair-means Scrutiny Committee. Learned counsel for the petitioner submitted that in order to fulfill the requirement of natural justice it was essential that the petitioner should have been granted a personal interview. According to learned counsel's submission opportunity to be heard always meant a hearing at a personal interview. I am afraid learned counsel has not correctly appreciated the true connotation ef the term "opportunity to be heard", Opportuniy to be heard merely means opportunity of presenting his case or stating his case. The position may be different when a person makes a request that he be personally heard in the matter in order to give any effective reply. That, however, is not the case here. All that was required of the principle of natural justice has been fulfilled. Indeed the learned counsel for the respondents has rightly invited our attention to a decision of the Supreme Court in the case of *Board of High School and Intermediate Education, U. P. Allahabad and another* vs. *Bagleshwar Prasad and another*(2). That was also a case of a University student who had been proceeded against for having adopted unfair-means at the examination. In an application under Article 226 the Allahabad High Court had interferred with the decision of the University

(1) [(1968) All England Report 579].
(2) (1968) A.I.R. (S.C.) 875.

authorities. While disapproving of such a course of action Gajendragadkar, J., as he then was, speaking for the Court held that in dealing with writ petitions against the orders of the Universities or Education Boards, cancelling the examination results of candidates who were declared to have been passed, it is necessary to bear in mind that educational institutions like the Universities or the Boards, set up Enquiry Committee to deal with the problem posed by the adoption of unfair-means by candidates, and normally it is within the jurisdiction of such domestic tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of adoption of unfair-means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, Courts should be slow to interfere with the decisions of domestic tribunals appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by the Universities under Article 226, the High Court is not sitting in appeal over the decision in question; its jurisdiction is limited and though it is true that if the impugned order is not supported by any evidence at all. The High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiries held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the Tribunals must scrupulously follow rules of natural justice, but it would not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary Courts of law. Where no animus is suggested and no *mala-fides* have been pleaded and the enquiry has been fair and the student has had an opportunity of making his defence, the High Court cannot be justified in interfering with the order passed against the student cancelling his examination result by which he was declared to have passed the examination. The principle anunciated by the Supreme Court in the case of Bagleshwar Prasad (Supra) applies squarely to the facts of the instant case.

9. Learned counsel for the petitioner invited out attention to a single Judge decision of the Kerala High Court in the case of *Babu*

Ahmad Kabir vs. *The Principal Medical College, Kozhikode and another*(1) and a Bench decision of the Rajasthan High Court *Ranjeet Singh* vs. *The University of Rajasthan and other*(2). In the Kerala case Mathew, J., who was dealing with altogether a different set of facts; the petitioner of that case had not been asked to submit any show cause. On the contrary, one fine morning he had been summoned without any intimation as to for what purpose he had been summoned by the Enquiry Committee. In such circumstances the stand taken by him that he had not been given sufficient and reasonable opportunity to cross-examine the witnesses who had deposed against him before the Enquiry Committee found favour with the learned Judge, who held on the facts of that case that a reasonable opportunity had not been given and the principle of natural justice had thus been violated. The facts of the Rajasthan case are also entire distinct. The petitioner of that case Ranjeet Singh who sat at the second year examination of B. A. held by the Rajasthan University was found to have used unfair-means by using a piece of paper containing solution of one question of mathematics paper was found in his answer book. According to the petitioner of that case the piece of paper did not belong to him and it was thrown by one else. The university without making any enquiry into the matter cancelled his examination for a period of three years. On those facts it was found that principle of natural justice had not been followed. The facts of the present case do not attact the principle laid down in those two decisions. There is thus no substance in this point of learned counsel either.

10. In the result, therefore, I do not find any merit in this application. It is, accordingly, dismissed. There will be, however, no order as to costs.

S. P. J. *Application dismissed.*

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(1) (1967) A. I. R. (Ker.) 121.

(2) (1966) A. I. R. (Raj.) 228.

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Secretary to Government.

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March, 1977

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BIHAR AGRICULTURAL PRODUCE MARKETS ACT, 1960—*contd.*

Under section 18(2) (*ii*) of the Bihar Agricultural Produce Markets Act, 1960, the Market Committee has "to issue licenses in accordance with the rules to traders, brokers, weighmen, measurers, surveyors ware-housemen, and other persons, including persons or firms engaged in the processing, storing, or pressing of an agricultural produce concerned operating in the market area.";

Held, that, in view of section 18(2) (*ii*) of the Act, the Market Committee has to "control, regulate and run the market in the intrests the agriculturists and licensees in accordance with the provisions of the Act and the rules and the bye-laws made thereunder". Thus under clauses (*ii*) and (*iii*) of sub-section (2) of section 18 of the Act, there is specific reference to traders and licensees which will include the writ-petitioner also.

From section 27 of the Act it is clear that the Market Committee has been authorised to levy and collect market fees on the agricultural produce bought or sold in the market area. No exception has been made in favour of any trader. In view of proviso to section 27 any agricultural produce which has been imported from outside the market area for being processed or exported as is the case of the writ-petitioner but is not exported within 21 days. Then the presumption is that it has been brought or sold in the market area. In that view of the matter, it is difficult to hold that the transactions made by the writ-petitioners are not covered by the provisions of the Act:

Held, that, the provisions of the Act are applicable even when a trader sells any article which he has not purchased from any agriculturist in the market area, but, having imported it from outside, sells it in the market to an agriculturist or to any other buyer including a trader.

From the scheme of the Act, as well as the counter-affidavit filed on behalf of the State, it is obvious that several facilities have been provided to the traders and agriculturists who sell or purchase articles in the market. Every person cannot derive equal benefit from any particular regulatory or compenstory enactment. Some may derive more benefit while others who can protect themselves, may not be benefited to that extent. But, that will not be ground for holding that the realisation of market fee amounts to a restriction on the freedom of the writ-petitioner to carry on trade, commerce and intercourse. Although the writ-petitioner might be purchasing articles from outside the State or outside the market area, yet when it is carrying on its business within the market area and selling its goods to persons coming to the market, it also derives the benefit of the arrangements made by the Market Committee, and it cannot be said that such provisions are in any way impediments on its freedom of trade.

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Under the different sections of the Bihar and Orissa Municipal Act a distinction has been drawn between unauthorised construction on one's own private land and the constructions made on the land of the Municipality and it has a rational basis. So far as the construction on one's own private land is concerned, the Municipality is stopped from taking any action on rule of stoppel having sanctioned the plan, but so far as the construction over the road or public drain and lands of the Municipality is concerned, section 191 of the Municipal Act is neither applicable nor it gives any protection. Any person making such constructions has to obtain a written permission as contemplated by section 179 in respect of projection on the road and a licence under section 180 for making erection of platform over public road and drain, in absence whereof actions under sections 196 to 198 of the Municipal Act can be taken.

It is difficult to conceive that a construction according to the sanctioned plan can be demolished even without affording any opportunity to the person concerned to show cause that the construction is not in contravention of any of the provisions of the Municipal Act or the rules and bye-laws framed thereunder. Under section 198 of the Act, before the Magistrate concerned orders demolition of the constructions, he has to give an opportunity to show cause to the person concerned then any breach of this procedure will amount to breach of the provision of section 198 itself so as to attract clause (*b*) as well as clause (*c*) of Article 226(1), if the inquiry caused by such contravention or breach is of substantial nature or has result in failure of justice.

Held, therefore, that in the instant case it cannot be urged that if a statutory authority constituted under the Act passes an order in contravention of section 198 of the Municipal Act ordering demolition of the house or constructions of a citizen, it will not amount to

In order to authorise the Collector to make an order of confiscation, he has to take some essential preliminary steps which are in the nature of condition precedent and have been very clearly indicated in separate clauses, namely, clauses *(a)*, *(b)* and *(c)* of section 6*B* of the Essential Commodities Act, 1955, that is, he has to give a notice in writing to the owner of the essential commodity in question or the persons from whom it is seized. Then he has to give an opportunity of making a representation in writing and a further reasonable opportunity of being heard in the matter. After completing these formalities and hearing the offender, if the Collector comes to a conclusion that there has been a contravention of any order under section 3 of the Act in relation thereto, then alone he may order confiscation of the Essential Commodity so seized.

Confiscation is deprivation of the property rights of a person and in order to deprive him of such rights, the Parliament in its wisdom has provided a regular machinery for adjudicating to same, keeping in view the principles of natural justice by affording sufficient opportunity to the person concerned of representing his case and of being heard and also if aggrieved by the order, to appeal against that before the prescribed authority.

It is obligatory upon the authority concerned to issue notice on the owner of the essential commodity as a matter of course. The provisions of section 6B may be deemed to be fully complied with if the notice is issued to the person from whom the essential commodity is seized. The intention of providing the issuance of any show cause notice under section 6B is with a definite purpose; the purpose being to enable the authority to see as to whether there has been a contravention of any order made under section 3 of the Act or not, and with that end in view, a regular representation and hearing has been provided for. Therefore, where a person from whose possession such a property has been seized, has in essence no cause to show on the merits, where it was simply stated by him that he had no concern with the property and the persons concerned were different and informed the authority concerned as to who are the alleged owners of the commodity then, in that situation, that is, where a person from whom any essential commodity is seized, pleads no concern with the commodity, asserts to be simply a custodian and the real owners are disclosed to the authority who is to hold the enquiry, then in that situation, it is desirable to issue show cause notice to such persons,

CIVIL WRIT JURISDICTION

Before S. Sarwar Ali and Nagendra Prasad Singh, JJ.

MESSRS. B. & K. TRADERS & ORS*

v.

THE STATE OF BIHAR & ORS.

1974

November, 20.

Bihar Agricultural Produce Markets Act, 1960 (*Bihar Act no. XVI of* 1960), *section* 18, *sub-section* (2), *clauses* (ii) *and* (iii)—*provisions of—traders, whether included—section* 27—*applicability of, in respect trader who having imported the article from outside, sells the same to an agriculturist or any other buyer including a trader—Constitution—Articles* 301 *and* 304(b)—*provisions of Bihar Agricultural Produce Markets Act being regulatory and compensatory in nature, are not effected by Article* 301 *or* 304(b) *of the Constitution—imposition of market fee are reasonable restriction in the interest of*

*Civil Writ Jurisdiction Case nos. 1084 of 1974 with C.W.J.C. nos. 545, 677, 808, 809, 810, 812, 1172, 1173, 1212, 1296, 1354, 1355, 1359, 1360 and 1363 of 1974. In the matter of applications under Articles 226 and 227 of the Constitution of India.

C.W.J.C. no. 545: Messrs. Satya Narain Om Prakash.
C.W.J.C. no. 677: Messrs. Shankar Brothers.
C.W.J.C. no. 808: Messrs. Bisesarlal Sitaram & Others.
C.W.J.C. no. 809: Messrs. J. Prasad & Co. & Others.
C.W.J.C. no. 810: Messrs. Mahabir Bhandar & Others.
C.W.J.C. no. 811: Messrs. Shri Laxmi Oil Mills & Others.
C.W.J.C. no. 812: Messrs. Pannalal Binjraj & Others.
C.W.J.C. no. 1172: Messrs. Ramji Ram & Others.
C.W.J.C. no. 1173: Messrs. Pansari Trading Company & Others.
C.W.J.C. no. 1212: Messrs. Harnath Prasad Prithwi Chand Others.
C.W.J.C. no. 1296: Messrs. Jagannath Durgadutt & Others.
C.W.J.C. no. 1354: Messrs. Shri Lakshmi Rice & Oil Mills & Others.
C.W.J.C. no. 1355: Messrs. Shri Durga Dal & Oil Mills & Others.
C.W.J.C. no. 1359: Messrs. Ram Dayal Sah & Others.
C.W.J.C. no. 1360: Messrs. Hiralal Gopal Ji Jain & Others and
C.W.J.C. no. 1363: Messrs. Gangr. Pd. Mahesh Pd. & Others—petitioners.

general public—Constitution-Articles 19(6)—*Bihar Agricultural Produce Markets Act*, 1960—*sections* 31A, 31B *and* 31C—*provisions of—not unreasonable restrictions over the right of freedom of trade—section* 30—*realisation made by Market Committee, whether fees—Constitution—Seventh Schedule, List II, Entry* 28—*competence of State Legislature to legislate over matters contained in Entry* 28.

Under section 18(2)(*ii*) of the Bihar Agricultural Produce Markets Act, 1960, the Market Committee has "to issue licenses in accordance with the rules to traders, brokers, weighmen, measurers, surveyors, warehousemen, and other persons, including persons or firms engaged in the processing, storing, or pressing of an agricultural produce concerned operating in the market area;"

Held, that, in view of section 18(2)(*ii*) of the Act, the Market Committee has to "control, regulate and run the market in the interests the agriculturists and licensees in accordance with the provisions of the Act and the rules and the bye-laws made thereunder". Thus under clause (*ii*) and (*iii*) of sub-section (2) of section 18 of the Act, there is specific reference to traders and licensees which will include the writ-petitioner also.

From section 27 of the Act it is clear that the Market Committee has been authorised to levy and collect market fees on the agricultural produce brought or sold in the market area. No exception has been made in favour of any trader. In view of proviso to section 27 any agricultural produce which has been imported from outside the market area for being processed or exported as is the case of the Writ-petitioner but is not exported within 21 days, then the presumption is that it has been bought or sold in the market area. In that view of the matter, it is difficult to hold that the transactions made by the writ-petitioners are not covered by the provisions of the Act;

Held, that, the provisions of the Act are applicable even when a trader sells any article which he has not purchased from any agriculturist in the market area, but, having imported it from outside, sells it in the market to an agriculturist or to any other buyer, including a trade.

Mangal Chand Ramchandra v. State of Bihar & Ors. (1), *Satyanarain & Co.* v. *Kishanganj Agricultural Produce Market Committee & Ors*(2), followed.

(1) (1971) B.L.J.R. 1088.
(2) (1971) B.L.J.R. 1011.

From the scheme of the Act as well as the counter-affidavit filed on behalf of the State, it is obvious that several facilities have been provided to the traders and agriculturists who sell or purchase articles in the market. Every person cannot derive equal benefit from any particular regulatory or compensatory enactment. Some may derive more benefit while others who can protect themselves, may not be benefited to that extent. But, that will not be a ground for holding that the realisation of market fee amounts to a restriction on the freedom of the writ-petitioner to carry on trade, commerce and intercourse. Although the writ-petitioner might be purchasing articles from out side the State or outside the market area, yet when it is carrying on its business within the market area and selling its goods to persons coming to the market, it also derives the benefit of the arrangements made by the Market Committee, and it cannot be said that such provisions are in any way impediments on its freedom of trade;

Held, that the provisions of the Act in question are regulatory or compansatory in nature and the provisions of Article 301 or 304(b) of the Constitution are not effected;

Held, further, that even if the provisions regarding imposition of market fee and license, etc., be taken to be restrictions, they are reasonable restrictions in the interest of the general public within in the meaning of Article 19(6) as well as Article 304(b) of the Constitution.

The provisions contained in sections 31*A*, 31*B* and 31*C* of the Act are incidental for exercise of proper control by the Market Committee and for the purpose of stopping evasion of market fees, and they cannot be held to be either restriction or unreasonable restrictions over the exercise of right of freedom of trade by the petitioner.

The Bihar Agricultural Produce Market Act is in pith and substance meant for establishment of markets in different parts of the State and for regulating sale and purchase of agricultural produce within such markets so that the agriculturists, traders, and other purchasers can derive benefit;

Held, that the State legislature was competent to legislate over those matters under entry no. 28 of list II of Seventh Schedule of the Constitution.

Municipal Committee, Amritsar & Anr. v. *The State of Punjab & Ors*, (1), followed.

A bare reference to section 30 of the Act shows as to how the fund of the Market Committee is to be appropriated, which leads to the irresistible conclusion that it is fee and not tax. It is of little consequence as to who is deriving more facilities or requires them. If the amount realised is to be spent for the facilities of the sellers and buyers within the market area, which will include traders also, then it has to be held that there were sufficient *quid pro quo* for levies and they satisfy the test of 'fee'.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are set out in the judgment of Nagendra Prasad Singh,, J.,

Messrs. A. K. Sen, S. B. Sanyal, G. C. Bharuka and *Bijoy Pratap Singh*, for the petitioners in all the application.

Mr. Lalnarayan Sinha, Solicitor-General of India, Mr. Birendra Prasad Sinha, Government Pleader no. 1, and *Mr. Surendra Narain Jha, Guru Sharan Sharma, Shreenath Singh, R. B. Mahto* and *Rama Raman*, for the Respondents in all the applications.

NAGENDRA PRASAD SINGH, J.—The petitioners in these writ applications are either firms or partners of firms carrying on business in foodgrains, edible oils, vegetable oils, etc., and they are licensees under the Bihar Foodgrains Dealers' Licensing Order, 1967 (hereinafter referred to as the "Foodgrains Licensing Order"), or the Bihar, Edible Oil wholesale Dealers' Licensing Order, 1956 (hereinafter referred to as the "Edible Oil Licensing Order"), or the Bihar Vanaspati Dealers' Licensing Order, 1967 (hereinafter referred to as the "Vanaspati Licensing Order"). By these writ applications they have challenged the vires of the different provisions of the Bihar Agricultural Produce Market Act, 1960 (hereinafter referred to as the "Markets Act") and the legality of the different communications issued by the different Market Committees established under the Markets Act.

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(1) (1969) A.I.R. (S.C.) 1100, 1113.

2. As common questions of law are involved in these writ applications, and even the facts alleged are, more or less, similar, they have been heard together with the consent of the parties and this judgment will govern them all. C.W.J. C. no. 1084 of 1974 has been taken up as the first case. I, therefore, propose to deal with this case in the first instance.

3. According to the petitioner, it carries on business mainly in edible oils and Vanaspati at Muzaffarpur, and, as such, it is a licensee under the provisions of the edible oil Licensing Order and Vanaspati Licensing Order. In exercise of the powers conferred by section 6 of the Markets Act, the State Government established a Market Committee in the town of Muzaffarpur by a notification, dated the 19th September, 1963, and declared paddy, rice, mustard oil, gram, maize, etc., as notified agricultural produce for the said area. Out of the notified agricultural produce, the petitioner-firm deals only in mustard oil, which it imports into the market area from oil mills situate in the States of Uttar Pradesh, Rajasthan and Haryana and Delhi and sells them within and outside the market area to different dealers and consumers, either on its own account or as commission agent of the concerned mills.

4. The petitioner-firm was served with a notice, dated the 25th April, 1974, issued by the Secretary, Agricultural Produce Market Committee, Muzaffarpur (respondent no. 2), informing the petitioner that, in pursuance of the amendment made in the Markets Act by the Ordinance, market fee on sales and purchases of all notified agricultural produce would be realisable at the rate of one per centum and return showing purchase and sale of each transaction of agricultural produce should be filed within 7 days of the day of transaction. A copy of the said notice is annexure 1 to the writ application.

5. After having received the said notice (annexure 1), the petitioner sent a reply to the Market Committee saying that it did not deal in mustard oil produced or purchased in the market area, and, as such, it was not liable to pay any market fee, or to file any return in relation thereto. According to the petitioner, in spite of the aforesaid objection, the petitioner has been served with a notice of assessment, dated the 11th May, 1974, saying that, as the petitioner had not submitted any return in Form A for the period mentioned therein, the petitioner should appear on the next day fixed,

otherwise, *ex parte* assessment would be completed against it and it will also be liable to pay the penalty. A copy of the said notice is annexure 2 to the writ application. The petitioner, under protest, deposited a sum of Rs. 500 with the Market Committee, asserting that it was not liable to pay any market fee under the provisions of the Markets Act. A copy of the said letter, dated the 25th June, 1974, is annexure 3 to the writ application. But, the Secretary (respondent no. 2), by his letter, dated the 5th July, 1974, asked the petitioner to file the return within a week from the date of receipt of the said letter. A copy of the said letter is annexure 4 to the writ application.

6. According to the petitioner, the Market Committee has no authority to realise any market fee from the petitioner, or to direct it to submit any return, as directed. In the main writ application, no grievance has been made by the petitioner regarding the realisation of market fee in relation to Vanaspati Oil, the reason being that at that time Vanaspati Oil (vegetable oil) had not been notified as an agricultural produce for the market of Muzaffarpur. It has, however, been stated during the course of arguments that, during the pendency of the writ application, Vanaspati Oil has also been so notified. This fact was not denied by counsel appearing for the Market Committee (respondent no. 3). As such, the petitioner-firm deals in two commodities, that is, mustard oil as well as vegetable oil, which are notified agricultural produce within the meaning of the Markets Act in the Muzaffarpur Market.

7. The Markets Act came into force on the 6th August, 1960. It has been amended by Ordinance no. 41 of 1974, which was published in an issue of the Bihar Gazette, dated the 17th January, 1974. The said Ordinance was replaced by another Ordinance, No. 88 of 1974. Again, by Ordinance no. 124 of 1974, some of the sections of the Markets Act have been amended. The preamble of the Act states as follows :—

> "An Act to provide for the better regulation of buying and selling of agricultural produce and the establishment of markets for agricultural produce in the State of Bihar and for matters connected therewith."

8. Section 2 of the Act defines the following expressions in these words :

"(*a*) 'agricultural produce' includes all produce, whether processed or non-processed of agriculture, horticulture, animal husbandry and forest specified in the Schedule:

(*b*) 'agriculturist' means a person who ordinarily by himself or by his tenants or hired labour or otherwise is engaged in the production or growth of agricultural produce, but does not include a trader or broker in agricultural produce notwithstanding that such trader or broker is also engaged in the production or growth of agricultural produce;

(*h*) 'market' means a market established under this Act for the market area and includes a principal market yard and sub-market yard or yards, if any;

(*i*) 'market area' means any area declared to be a market area under section 4;

(*j*) 'market committee' means a committee established under section 6;

(*v*) 'trade' means any kind of transaction of sale and purchase or any kind of remuneration on sale and purchase of any agricultural produce;

(*w*) 'trader' means a person ordinarily engaged in the business of buying and selling agricultural produce as a principal or as a duly authorised agent of one or more principals and includes a commission agent or a person ordinarily engaged in the business of processing of agricultural produce;"

9. Section 3 provides that the State Government may, by notification, declare its intention of regulating the purchase, sale, storage and processing of such agricultural produce and in such area as may

be specified in the notification. Sub-section (1) of section 3 is in these words :—

> "(1) Notwithstanding anything to the contrary contained in any other Act for the time being in force, the State Government may, by notification, declare its intention of regulating the purchase, sale, storage and processing of such agricultural produce and in such area, as may be specified in the notification."

10. Section 4(1) provides that, after the expiry of the period specified in the notification issued under section 3, and, after considering such objections and suggestions as may be received before such expiry, and, after holding such enquiry as it may consider necessary, the State Government may, by notification, declare the area specified in the notification under section 3 or any portion thereof to be a market area for the purposes of the Act in respect of all or any of the kinds of agricultural produce specified in the notification under section 3. Sub-section (2) of section 4 states that, on and after the date of publication of the notification under sub-section (1), no municipality or other local authority, or other person, notwithstanding anything contained in any law for the time being in force, shall, within the market area, or within a distance thereof, to be notified in the Official Gazette in this behalf, set up, establish or continue or allow to be set up, established or continued any place for the purchase, sale, storage or processing of any agricultural produce so notified, except in accordance with the provisions of this Act, the rules and bye-laws. Under section 6, for every market area the State Government shall, by notification, establish a Market Committee. Section 15 of the Act, which is relevant for the purposes of this case, reads thus :

> "(1) No agricultural produce specified in the notification under sub-section (1) of section 4, shall be bought or sold by any person at any place within the market area, other than the principal market yard or sub-market yard, or yards established therein, except such quantity as may in this behalf be prescribed for retail sale or personal consumption."
>
> (2) The sale and purchase of such agricultural produce in such area shall notwithstanding anything contained in

any law, be made by means of open auction or tender system except in cases of such class or description of produce as may be exempted by the Board."

It may be mentioned here that traders in foodgrains have been exempted by an order of the Bihar State Agricultural Marketing Board, dated the 15th May, 1974, and they need not be sold by means of open auction.

11. Under section 18, the powers and duties of the Market Committee have been specified. Sub-section (2) of section 18 reads thus :

"(2) Without prejudice to the generality of the foregoing provisions, a Market Committee may :—

(*i*) when so required by the State Government, to establish a market for the market area providing for such facilities as the State Government may, from time time to time, direct in connection with the purchase and sale of the agricultural produce concerned;

(*ii*) where a market is established under sub-clause (*i*), to issue licenses in accordance with the rules to traders, brokers, weighmen, measurers, surveyors, warehousemen and other persons, including persons or firms engaged in the processing, storing or pressing of agricultural produce concerned operating in the market area;

(*iii*) to maintain and manage the principal market yard and sub-market yards and, to control, regulate and run the market in the interests of the agriculturists and licensees in accordance with the provisions of this Act, and the rules and the bye-laws made thereunder;

(*iv*) to act in the prescribed manner as mediator, arbitrator or surveyor, in all matters of difference, disputes, claims, etc., between licensees *inter se* or between them and persons making use of the market as sellers of agricultural produce;

(*v*) to control and regulate the admission of persons and vehicular traffic to the principal market yard or sub-market yard or yards, to determine the conditions for the use of market and to check and prosecute persons trading without a valid license in the market area.

"(*vi*) to bring, prosecute or defend, or aid in bringing, prosecuting or defending any suit, action, proceeding, application or arbitration in regard to any matter on behalf of the committee, or otherwise when directed by the Board;

(*vii*) to enforce the provisions of this Act, the rules and bye-laws; and

(*viii*) to perform such other duties and exercise such other powers as are imposed or conferred upon it by or under this Act, the rules or the bye-laws."

12. Under section 27 the Market Committee has been empowered to levy and collect market fees on the agricultural produce bought or sold in the market area, at the rate of rupee one per Rs. 100 worth of agricultural produce. Sub-section (2) of section 27 prescribes that the market fee chargeable under sub-section (1) shall be payable by the buyer in the manner prescribed. Sub-section (3) lays down that the fee chargeable under Sub-section (1) shall not be levied more than once on a notified agricultural produce in the same notified market area. Section 27A provides the mode of submission of return and assessment of the market fee.

13. Under section 52 of the Act, the Bihar Agricultural Produce Markets Rules, 1962 (hereinafter referred to as the "Rules") have been framed. Rule 71(1) of the Rules provides that no person shall do business as commission agent or trader in agricultural produce in a market area except under a license granted by the Market Committee under this rule. Sub-rules (2) to (4) of Rule 71 prescribe the conditions under which a Market Committee may grant a license to the applicant. Under rule 72, the Market Committee can suspend or cancel such license.

14. According to the petitioner-firm, the object of the enactment of the Act was to provide for the better regulation of buying and selling of agricultural produce, and the different provisions made under the Act are for achieving the said object. It is for the benefit of the agriculturists and for providing them a market where they could sell their agricultural produce at a reasonable price, eliminating unhealthy competition and loss due to malpractices prevailing in the market and the fees are charged for providing those facilities to the agriculturists concerned. According to the petitioner, it is neither an agriculturist nor does it purchase any article from any agriculturist, and, as such, the provisions of the Act and the rules cannot be made applicable to the transactions entered into by the petitioner. In this connection, learned counsel for the petitioner has drawn our attention to the preamble of the Act as well as to sub-section (1) of section 3 of the Markets Act; and has submitted that from the preamble and sub-section (1) of section 3 it will appear that the Act purports to regulate the buying and selling of agricultural produce, and, by necessary implication, it purports to regulate the transactions entered into by agriculturists within the market area. It is difficult to accept this submission, because neither in the preamble nor under sub-section (1) of section 3 there is anything from which it can be inferred that the Act is to operate only over transactions entered into by the agriculturists. As already noticed, under section 4 of the Markets Act, the State Government has power to declare the area specified in the notification under section 3 or any portion thereof to be a market area for the purposes of the Act in respect of all or any of the kinds of agricultural produce specified in the notification under section 3. From section 6 it appears that a Market Committee has to be established, for every market area, by the State Government, the duties whereof have been specified in section 18 of the Markets Act. Under section 18(2)(*ii*), the Market Committee has "to issue licenses in accordance with the rules to traders, brokers, weighmen, measurers, surveyors, warehousemen and other persons, including persons or firms engaged in the processing, storing or pressing of agricultural produce concerned operating in the market area." In view of section 18(2)(*iii*) the Market Committee has "to control, regulate and run the market in the interests of the agriculturists and licencees in accordance with the provisions of this Act, and the rules and the bye-laws made thereunder." Thus, under clauses (*ii*) and (*iii*) of sub-section (2) of section 18, there is specific reference to traders and licensees, which will include the petitioner also.

15. From section 27 of the Markets Act it will appear that the Market Committee has been authorised to levy and collect market fees on the agricultural produce bought or sold in the market area. No exception has been made in favour of any trader. Once any of the articles notified is "bought or sold" within the market area, by whomsoever it may be, the market fee becomes payable. The proviso to section 27 is also important in that connection. It lays down that when any agricultural produce brought in the market area for the purpose of processing or export is not processed or exported therefrom within twenty one days from the date of its arrival therein, it shall, until the contrary is proved, be presumed to have been bought or sold in the market area. In view of this proviso, any agricultural produce which has been imported from outside the market area for being processed or exported, as is the case of the petitioner, but is not exported within twenty one days, then the presumption is that it has been bought or sold in the market area. The petitioner, admittedly, sells some of such articles, which it has imported from outside the market area, within the market area concerned. In that view of the matter, it is difficult to hold that the transactions made by the petitioner are not covered by the provisions of the Markets Act. Sub-sections (2), (5), (6) and (7) of section 27A contain provisions regarding submission of return by every licensed trader and assessment of the market fee leviable on such traders. Sub-sections (8) and (9) of section 27A prescribe imposition of penalty on the defaulting trader and for suspension or cancellation of his licence. Section 27B contains provisions regarding appeal by any trader who is aggrieved by any order passed against him. Section 31B of the Markets Act enables the Secretary or any officer duly authorised to require any person carrying on business in any kind of notified agricultural produce to produce before him accounts and other documents and to furnish any information regarding the agricultural produce. Rule 71 of the Rules prescribes that no person shall do business as a trader in agricultural produce in a market area except under a licence granted by the Market Committee, and the procedure and conditions under which a license can be granted. In view of the aforesaid specific provisions relating to the transactions made within the market area by traders, it cannot be urged that the provisions of the Markets Act are not applicable to traders. The markets relate to agricultural produce and as such the agriculturists in general are likely to be more benefited. But, it cannot be said that the sole object of the Act is only to regulate the buying and

selling of agricultural produce, when transactions are entered into between one agriculturist and another or between an agriculturist and a trader. In my opinion, the provisions are equally applicable even when a trader sells any article which he has not purchased from any agriculturist in the market area, but, having imported it from outside, sells it in the market to an agriculturist or to any other buyer, including a trader. I am supported in this view by two Bench decisions of this Court, in *Mangalchand Ramchandra* v. *State of Bihar and others*(1) *and Satya Narain and Co.* v. *Kishanganj Agricultural Produce Market Committee and others*(2).

16 It was next contended that, if it is held that the Act is to apply even to such traders who do not purchase the agricultural produce in the market, but import it from outside and sell it in the market, then the provisions regarding realisation of market fee and grant of license will be *ultra vires*, because it will amount to an unreasonable restriction over the freedom of trade guaranteed under the Constitution. According to learned counsel for the petitioner, such restrictions cannot be saved under clause (6) of Article 19 of the Constitution and they will also be hit by Article 301, which guarantees that trade, commerce and intercourse throughout the territory of India shall be free. Article 304(*b*) enables the Legislature of a State by law to "impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest." According to the petitioner, the realisation of market fee from the petitioner for such transactions cannot be held to be a reasonable restriction on such freedom of trade even within the meaning of Article 304(*b*) of the Constitution, as it is not in the interest of the public in general. It has been further submitted that whenever a person shows that certain enactment amounts to a restriction over the fundamental right guaranteed under Article 19(1)(*g*) or on his right under Article 301, the onus shifts on the State to show that the said restriction is reasonable within the meaning of Article 19(6) and under Article 304(*b*). In this connection a reference has been made to the case of *Saghir Ahmad and another* v. *State of U. P. and others*(3) and *Khyerbari Tea Co. Ltd and another* v. *State of Assam and others*(4). In the

(1) (1971) B.L.J.R. 1038.
(2) (1971) B.L.J.R. 1011.
(3) (1954) A.I.R. (S.C.) 728.
(4) (1964) A.I.R. (S.C.) 925.

case of Khyerbari Tea Co. Ltd., with reference to the case of *Saghir Ahmad*, it was observed :—

> "In our opinion, the said decision is a clear authority for the proposition that once the invasion of the fundamentar right under Art. 19(1) is proved, the State must justify its case under clause (6) which is in the nature of an exception to the main provision contained in Art. 19(1) The position with regard to the onus would be the same in dealing with the law passed under Art. 304(*b*). In fact, in the case of such a law, the position is somewhat stronger in favour of the citizen, because the very fact that a law is passed under Art. 304(*b*) means clearly that it purports to restrict the freedom of trade. That being so, we think that as soon as it is shown that the Act invades the right of freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in the public interest within the meaning of Art. 304(b). This enquiry would be of a similar character in regard to clause (6) of Art. 19." (page 929).

17. Learned Solicitor-General, however, has not disputed that once it is shown by any citizen that his rights guaranteed under Article 19(1)(*g*) or under Article 301 have been restricted, the State has to justify the restriction to be reasonable; but has submitted that the realisation of market fee cannot amount to a restriction on the freedom of trade guaranteed to the petitioner under Article 19(1)(*g*), nor can it amount to a restriction on the said right under Article 304(b) : the provisions are either regulatory or compensatory in nature. He has further submitted that, in any event, restrictions if any, are reasonable. The provisions regarding the realisation of market fee, as they now stand, have been introduced by Bihar Ordinance no. 124 of 1974, that is, during the continuance of declaration of emergency by the President of India. According to learned Solicitor-General, in view of Article 358 of the Constitution, even if it is held to be a restriction on the fundamental right of trade and business, the right under Article 19 being under suspension, the provisions of the Markets Act cannot be tested on that account. Learned Solicitor-General has, however, conceded that the declaration of emergency will not affect the right of the petitioner under Articles

301 and 304 of the Constitution. The Supreme Court in *The District Collector of Hyderabad and others* v. *M/s. Ibrahim and Co.*(1) held that, during the continuance of the proclamation of emergency the State was competent to enact legislation notwithstanding that it impaired the freedom guaranteed by Article 19 of the Constitution and that the State was also competent to take executive action which the State would, but for provisions contained in Article 19 of the Constitution, be competent to take. Their Lordships, however, tested the reasonableness of the said order in the light of Articles 301 and 304, as to whether it was a reasonable restriction. If the provisions of the Markets Act and the Rules are held to be restrictions, then, even during the continuance of the proclamation of emergency, the State has to satisfy that the impugned provisions are not hit by Article 301 or Article 304 of the Constitution.

18. I have already referred to the different provisions of the Markets Act and the Rules, from which it appears that the State Government has established markets for the sale and purchase of agricultural produce, a list whereof is mentioned in the Schedule to the Act. For proper supervision of the markets, there are Market Committees and Agricultural Marketing Board. Section 18(2) of the Act, quoted above, illustrates some of the duties and functions of the Markets Committees. Section 30 of the Act prescribes as to how the fund of the Market Committee shall be spent, and it includes acquisition of sites for the market; for maintenance and improvement of market, construction and repairs of buildings, check-posts, etc., necessary for the purpose of such markets and for the health, convenience and safety of persons using them.

19. In the counter-affidavit filed on behalf of the respondents it has been stated that the petitioner, besides making purchases from outside the State or other places in the State, makes local purchases of agricultural produce within the market area in question and they are again sold in the market, and, as such, market fee is payable by it on the first sale or purchase taking place within the market. In paragraph 7 of the counter-affidavit it has been set out in detail as to how market yards, as contemplated under the Act, have been established, information centre has been provided, where the prevailing prices of notified agricultural produce are displayed in the

(1) (1970) A.I.R. (S.C.) 1275.

market area for the benefit of the traders and agriculturists and as to how the committee is rendering various regulatory market services and has so far eliminated prevailing mal practices, such as, realisation of market charges under different names. From the said paragraph it also appears that the committee has set up a dispute sub-committee for settling disputes between the buyers and sellers, and there is regular inspection over the weights and measures which are to be used in the market. Muzaffarpur area has been selected for development under the World Bank Project and the committee is soon developing the market at a cost of about rupees 35 lakhs and several lakhs of rupees are going to be spent for construction of roads, buildings, godowns, bank, post-office, waiting-sheds, cattle-sheds, etc. In that view of the matter, according to the respondent State, the realisation of market fee or the provision relating to grant of license cannot be said to be restrictions within the meaning of Article 304(b) of the Constitution. In my opinion, there is force in the submissions made on behalf of the respondents. The scope of Articles 301 and 301 of the Constitution has been considered by the Supreme Court, and reference can be made to the cases of *Atiabari Tea Co. Ltd.* v. *The State of Assam and others*(1) and *Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan and others*(2). In the case of *Automobile Transport*, while examining the question as to whether the realisation of taxes on motor vehicles under the provisions of the Rajasthan Motor Vehicles Taxation Act, 1961 amounted to a restriction within the meaning of Article 304(b) of the Constitution, inasmuch as it imposed a restriction on carrying on trade, commerce and intercourse within the territory of India, it was held that the taxes in question were just regulatory measures or measures imposing compensatory taxes for the use of the trading facilities and it did not come within the purview of restrictions contemplated under the said Article. In that case, it was observed :—

> "Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Art. 301. They are excluded from the purview of the provisions of Part XIII of the

(1) (1961) A.I.R. (S.C.) 232.
(2) (1962) A.I.R. (S.C.) 1406.

Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them."

Subba Rao, J. (as he then was), summarising the points at issue relating to Articles 301 and 304 of the Constitution, observed at page 1436 thus:—

"(*i*) Art. 301 declares a right of free movement of trade without any obstruction by way of "barriers, inter-State or intra-State or other impediments operating as such barriers (2). The said freedom is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, wharfs, etc., with or without compensation. (3) Parliament may by law impose restrictions on such freedom in the public interest; and the said law can be made by virtue of any entry with respect whereof Parliament has power to make a law. (4) The State also, in exercise of its legislative power, may impose similar restrictions, subject to the two conditions laid down in Art. 304(*b*) and subject to the proviso mentioned therein. (5) Neither Parliament nor the State Legislature can make a law giving preference to one State over another or making discrimination between one State and another, by virtue of any entry in the Lists, infringing the said freedom. (6) This ban is lifted in the case of Parliament for the purpose of dealing with situations arising out of scarcity of goods in any part of the territory of India and also in the case of a State under Art. 304(*b*), subject the conditions mentioned therein."

20. From the scheme of the Markets Act as well as on the counter-affidavit filed on behalf of the respondent State, it is obvious that several facilities have been provided to the traders and agriculturists who sell or purchase articles in the market. Every person cannot derive equal benefit from any particular regulatory or compensatory enactment. Some may derive more while others, who can protect themselves, may not be benefited to that extent. But, that will not be a ground for holding that the realisation of market fee

amounts to a restriction on the freedom of the petitioner to carry on trade, commerce and intercourse. Although the petitioner might be purchasing articles from outside the State or outside the market area, yet when it is carrying on its business within the market area and selling its goods to persons coming to the market, it also derives the benefit of the arrangements made by the Market Committee, and it cannot be said that such provisions are in any way impediments on its freedom of trade. I am inclined to take the view that the provisions in question are regulatory or compensatory in nature and the provisions of Article 301 or 304(*b*) are not attracted.

21. In view of my finding above, there is no necessity to decide as to whether, even if the provisions amount to restrictions, they are reasonable and in the interest of the general public. But, assuming for a moment that those provisions amount to restrictions, in view of the fact that the Act purports to establish markets in different areas of the State with avowed object that agricultural produce can be bought or sold at a reasonable price in a healthy atmosphere, where different facilities are provided to buyers and sellers, eliminating malpractices and hardship of trade, it cannot be said that the provisions are unreasonable and not in the interest of the general public. Section 18(2) of the Markets Act prescribes the functions and duties of the Market Committee, and section 30 provides as to how the fund of the Market Committee will be spent and for what purpose. It is apparent that the provisions are in the interest of the traders and agriculturists in general.

22. While testing the reasonableness of a provision, the interest of the public in general has to be taken into consideration. The provision will not become unreasonable only because the petitioner does not need any protection by any enactment as it is quite competent to look after its own interest. The petitioner in this case, or the petitioners in the other cases, may be in that position but the market has been organised to serve the interest of different sections of the people.

23. Learned counsel for the petitioner has also drawn our attention to some of the judgments of the Supreme Court as well as of this Court in order to show that this Act and similar other Acts passed by the several States in India have been upheld because, on proper construction, it had been held that they are meant to serve

the interest of the agriculturists. Reference in this connection was made to the cases of *Thakur Prasad Gupta and others* v. *State of Bihar and another*(1); *Sri Krishna Coconut Co.* v. *East Godavari Coconut and Tobacco Market Committee*(2), *Lakhan Lal and others* v *State of Bihar and others*(3) and *Mangalchand Ramchandra* v. *State of Bihar and others*(4). In my opinion, from the aforesaid judgments it does not appear that the Act is meant only for the benefit of the agriculturists and it will become *ultra vires* once it is held that its provisions are applicable even to the transactions entered into by traders. In the case of *Mangalchand Ramchandra*, in paragraph 13 at page 1050, it was observed :—

> "An agricultural produce which is mentioned in the notification issued under Sec. 4(1) may be brought by a trader from a distant place much outside the market area—may be even outside the State of Bihar. If such agricultural produce brought by the trader is also processed to the first sale under Sec. 15 and is subjected to the levy of fee under Sec. 27, it eliminates the chances of a conspiracy among the traders to keep the bid at the auction at a low figure for purchase of the agricultural produce from the agriculturists. The dealer who will be bringing the said commodity from outside will not allow such a combination to fructify among his co-traders as against him. To test it with reference to the passage which I have quoted above from the judgment of Patanjali Sastry, C.J., as to whether such a restriction on the trader would be an unreasonable one—not sustainable under Art. 19(6) of the Constitution—it is necessary to emphasise that keeping in view the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the restriction is not disproportionate to the purpose and is well connected with it. On the other hand, I am inclined to think that it will be unreasonable to pass on the burden of levy of fee to the agriculturist alone as it is permissible under Sec. 27(2) and exempt altogether the trader from such a burden."

(1) (1965) A.I.R. (Pat.) 267, 270.
(2) (1967) A.I.R. (S.C.) 973, 977.
(3) (1968) A.I.R. (S.C.) 1408, 1412.
(4) (1971) B.L.J.R. 1038, 1049.

In that view of the matter, I am inclined to hold that even if the provisions regarding imposition of market fee and license, etc., be taken to be restrictions, they are reasonable restrictions in the interest of the general public within the meaning of Article 19(6) as well as Article 304(*b*) of the Constitution.

24. In the beginning there was some controversy as to-whether or not the previous sanction of the President had been taken in accordance with the proviso to Article 304 of the Constitution. But, during the course of arguments, it has been admitted on behalf of the petitioner that previous sanction of the President had been taken before the introduction of the bill as well as before the promulgation of the Ordinance in question by which the provisions of the Markets Act have been amended.

25. On behalf of the petitioner a grievance was made regarding the provisions of sections 31*A*, 31*B* and 31*C* of the Markets Act. Under section 31*A*, the Market Committee may set up check posts, market gates and other fixtures at any place in the market area, with a view to prevent evasion of market fees payable under the Act; under section 31B, the Secretary or any officer duly authorised by the Market Committee may require any person carrying on business in any kind of notified agricultural produce to produce before him the accounts and other documents; and section 31*C* empowers any officer or servant of the Market Committee empowered in that behalf by the Chairman of the Market Committee to stop any vehicle or other conveyance and such officer can be allowed to examine the contents of the vehicle or the conveyance and to inspect all records relating to the notified agricultural produce. In my opinion, these provisions are incidental for exercise of proper control by the Market Committee and for the purpose of stopping evasion of market fees, and they cannot be held to be either restrictions or unreasonable restrictions over the exercise of right of freedom of trade by the petitioner.

26. It was then submitted on behalf of the petitioner that the Markets Act is repugnant to the provisions of the Central Act, that is, the Essential Commodities Act, 1955 and orders made thereunder, and, as such, to that extent, in view of Article 254 of the Constitution, it is void. According to the petitioner, the relevant entries are entry no. 26 of List II and entry no. 33 of List III of Seventh Schedule. Under entry no. 26 trade and commerce within the State is in

the State List, subject to the provisions of entry no. 33 of List III. Relevant portion of entry no. 33 of List III reads as follows :—

> "Trade and commerce in, and the production, supply and distribution of—
>
> * * *
>
> (*b*) foodstuffs, including edible oilseeds and oils"

According to learned counsel for the petitioner, the petitioner in this case is a dealer in edible oil and the other petitioners are dealers in foodstuffs, and, as such, the State Government cannot legislate for regulating the trade and commerce in foodstuffs, including edible oils, as it has purported to do under the present Act. According to the petitioner, the Essential Commodities Act has been enacted by Parliament in exercise of its power under the said entry no. 33 and trade and commerce in the articles in question are controlled by the provisions of the said Act and the orders made thereunder, and the whole field on the subject has been occupied by the Central Act and the orders made thereunder and there was nothing for the State Government to legislate under entry no. 26 of List II. In this connection again reference was made to the preamble of the Act as well as section 3(1) of the Act to show that the object of the Act is to regulate the buying and selling of agricultural produce, and, as such, it is an enactment relating to trade and commerce in foodstuffs and edible oils. In principle, it has to be held that, if the Act has been enacted under entry no. 26 of List II and the Essential Commodities Act has completely occupied the field of trade and commerce in foodstuffs and edible oils, then the State Act will be repugnant and as such void. But, the question is as to whether there is any such repugnancy between the two Acts. In this connection on behalf of the respondents it has been pointed out that there is no question of repugnancy between the Essential Commodities Act and the impugned Act, as the latter has been enacted under entry no. 28 of List II, which is exclusively State subject.

27. Under the Government of India Act, 1935, entry no. 27 of the Provincial Legislative List was as follows :—

> "Trade and commerce within the province; markets and fairs; money-lending and money-lenders."

In the Constitution they are under three entries—entry no. 26 is trade and commerce, entry no. 28 is markets and fairs and entry no. 30 is money-lending and money-lenders etc. If, on a proper construction, it is held that the Markets Act is covered by entry no. 28, that is, markets and fairs, then the State is fully competent to legislate on the subject and any provision which incidentally regulates the business and trade within such markets will not be beyond its competence so as to make the Act itself void. This aspect of the matter is settled by the judgment of the Privy Council in *Prafulla Kumar* v. *Bank of Commerce Ltd.*(1) and several judgments of the Supreme Court, including *A. S. Krishna and others* v. *State of Madras*(2).

28. I have already set out in detail the scheme of the Act and the different provisions thereof. The preamble of the Act itself shows that the Act is meant to regulate buying and selling of agricultural produce and establishment of markets for agricultural produce in the State of Bihar. The notification unter sub-section (1) of section 3 is in the nature of a preliminary notification by which the State Government declares its intention of regulating the purchase, sale, storage and processing of such agricultural produce in such area, as may be specified in the notification. But, after objections are filed, suggestions are made and considered by the State Government, the market is established, in exercise of the powers under sub-section (1) of section 4, by the State Government. All the provisions thereafter are meant for constitution of Market Committee, mode of sale of agricultural produce in the market, elimination of undesirable elements, provisions regarding availability of facilities to the sellers and purchasers in the market, the duties and responsibilities of the Market Committee and the Chairman of the Market Committee; the utilisation of the fund of the Market Committee for the benefit of the market and the visitors thereto, constitution of Bihar State Agricultural Marketing Board to supervise the functions of the different Market Committees, from which it is obvious that the market is to be established under the provisions of the Act with the object of regulating the sale and purchase of notified agricultural produce in the interest of the general public. As such, it is difficult to hold that the Act is meant for regulating trade and commerce falling under entry no. 26 of List II. In this connection, reliance has, however, been placed on behalf of the petitioner on a Special Bench decision of the Calcutta High Court in

(1) 74 I.A. 23.
(2) (1957) A.I.R. (S.C.) 297.

Bhuwalka Brothers Ltd. v. *Dunichand Rateria*(1). In that case, the plaintiff was a merchant who had been carrying on business in jute goods and had entered into several contracts in connection with the said trade. The Government of West Bengal passed an Ordinance for prevention of dealing in jute goods futures. According to the defendants in that case, the settlement contracts, having been made after the promulgation of the Ordinance, were void and unenforceable. In that connection questions arose as to whether the said Ordinance could have been promulgated by the Governor by virtue of the power conferred on him by section 88 of the Government of India Act and as to whether by the Ordinance in question contracts in general were meant to be affected. It was held that the Ordinance was really aimed at jute trade, which was covered by entry "Trade and Commerce" in List II, that is, Provincial List, and to regulate trade it was necessary to make certain contracts void, and, as such, it was *intra vires*. In my opinion, the said decision is not of much help to the petitioner. From that judgment it is obvious that the Ordinance in question never purported to regulate all contracts, but it wanted to affect only the contracts relating to jute trade. I have already observed that the present Act never purported to regulate trade and commerce in general, but purports only to establish markets for agricultural produce where trade relating to agricultural produce can be regulated.

29. Learned counsel for the petitioner has referred to the following passage from Halsbury's Laws of England, Fourth Edition at page 762 :—

> "(1) Marketing.
>
> 1401. *Marketing legislation.*—The scope of the legislation relating to marketing of agricultural and horticultural produce is briefly as indicated below :
>
> (1) there is legislation under which the marketing of agricultural or horticultural products by the producers thereof may be regulated by schemes administered by marketing boards;"

The said passage simply refers to the corresponding Agricultural Produce Markets Act of England in which also there is a provision for

(1) (1952) A.I.R. (Cal.) 740.

establishment of markets relating to agricultural produce, and it does not in any manner support the case of the petitioner that the appropriate entry in the instant case is entry no. 26, and not 28, of the State List.

30. In my opinion, the present Act is, in pith and substance, meant for establishment of markets in different parts of the States and for regulalting sale and purchase of agricultural produce within such markets so that the agriculturists, traders and other purchasers can derive benefit. As such, it has to be held that the State Legislature was competent to legislate over those matters under entry no. 28 of List II. I am supported in this view by the observation in the judgment of the Supreme Court in *Municipal Committee, Amritsar and another* v. *The State of Punjab and others*(1), where it was observed that the enactment regarding "the fair in question was covered by entry no. 28 of the State List."

31. In view of my finding above, there is no need to consider as to whether the whole field on the subject has been occupied by the Essential Commodities Act. But, as arguments have been advanced on both sides, I propose to indicate the contentions raised. It has been contended on behalf of the petitioner that, under section 3(1) of the Essential Commodities Act, the Central Government, "for maintaining or increassing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices.....may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein." Sub-section (2) of section 3 provides that, without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide for regulating by licenses, permits or otherwise the storage, transport, distribution and disposal of any essential commodity; for controlling the price at which any essential commodity may be bought or sold and for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters. It has been further contended that, in exercise of these powers, Control Orders have been made which regulate the sale and purchase of foodgrains, edible oils and vegetable oils, and no field is left for the State Government to legislate covering such matters. Reference to different clauses of different orders made under the Essential Commo-

(1) (1969) A.I.R. (S.C.) 1100, 1103.

dity Act have been made to show that the provisions have been made to safeguard the interest of the general public and to regulate the transactions in such essential commodities. Learned counsel for the petitioner has also cited the judgment of the Supreme Court in *Baijnath Kedia* v. *The State of Bihar and others*(1), where it was held that the provisions of the Mines and Minerals (Regulation and Development) Act, 1957, which had been framed under entry no. 54 of the Union List, completely cover the legislative field in relation to minerals, including minor minerals, and no scope was left for enactment of the second proviso to section 10 of the Land Reforms Act touching that field.

32. Learned Solicitor-General, however, urged that both the Acts can operate in their respective fields. He has submitted that no order containing all the provisions of the present Act could have been framed in exercise of the powers under section 3 of the Essential Commodities Act. He has argued that the orders framed under section 3 of the Essential Commodities Act are made to meet situations of emergency and scarcity, by regulating supply and distribution of essential commodities, whereas the object of the impugned Act is to establish markets which are permanent in nature and part and parcel of the scheme of development of social economy. Under the Essential Commodities Act, the authorities concerned or the Central Government are not concerned with any facilities which need to be provided to the sellers, buyers and traders. In my opinion, in view of my aforesaid finding that the Act is covered by entry no. 28 of List II, there is no need to record any finding on this point.

33. Learned Solicitor-General has also submitted that, even if it is assumed that there is any such repugnancy in the instant case, there has been substantial compliance with the provisions of sub-Article (2) of Article 254 of the Constitution. Admittedly, the Bill had been introduced in the Legislature of the State with previous sanction of the President and, before issuing the different Ordinances amending the provisions of the Markets Act, previous sanction of the President had been taken; and, according to learned Solicitor-General, that sanction should amount to assent of the President, as required by Sub-Article (2) of Article 254. This argument had been advanced as an alternative argument, and there is no need to decide it in view of my finding on the legislative competence of the State Legislature.

(1) (1970) A.I.R. (S.C.) 1436.

34. It was lastly submitted on behalf of the petitioner that, although section 27 of the Markets Act speaks of levy and collection of market fees on the agricultural produce bought or sold in the market area, yet, in substance, it is a tax at least so far as the petitioner and similar other traders are concerned. According to the petitioner, it is not deriving any benefit from the provisions of the Act, nor does it require any protection, and, unless there is corresponding benefit, the amount realised has to be hold as 'tax'. This question has been decided by several decisions of the Supreme Court where it has been held that market fees realised under the Agricultural Produce Market Act are fees, and not taxes, and a reference can be made to the judgment of the Supreme Court in *Lakhan Lal and others* v. *State of Bihar and others*(1), which relates to the Act in question. The distinction between 'fee' and 'tax' was also pointed out in *Mohammad Hussain Gulam Mohammad* v. *The State of Bombay*(2) and *Sri Krishna Coconut Co.* v. *East Godavari Coconut and Tobacco Market Committee*(3). In the *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*(4) it was indicated that fee is generally defined to be a charge for special service rendered to the individual by some Governmental agency, whereas tax is levied as part of the common burden. It was further pointed out that, if the money paid is set apart and appropriated specifically for performance of works which are for special benefit of certain types of individuals and is not merged in the public revenues for the benefit of general public, it could be counted as fees and not tax. A bare reference to section 30 of the Markets Act will show as to how the fund of the Market Committee is to be appropriated, which leads to the irresistible conclusion that it is fee and not tax. I have already held that it is of little consequence as to who is deriving more facilities or requires them. If the amount realised is to be spent for the facilities of sellers and buyers within the market area, which will include traders also, then it has to be held that there was sufficient *quid pro quo* for levies and they satisfy the test of 'fee'.

35. During the course of arguments it was brought to our notice on behalf of the petitioner that, although under section 8(3) of the Markets Act the term of office of the members, including the Chairman and the Vice-Chairman, of the first Market Committee is one

(1) (1968) A.I.R. (S.C.) 1408.
(2) (1962) A.I.R. (S.C.) 97.
(3) (1967) A.I.R. (S.C.) 973.
(4) (1954) A.I.R. (S.C.) 282.

year and that of the second and subsequent market committees is three years under section 9(5) and the old market committee is to continue only till new market committee is constituted, yet in some cases the market committees constituted more than a decade ago are still continuing and no steps have been taken for constitution of new market committees. Learned Counsel appearing for the respondents did not challenge this statement. The authorities concerned should have taken steps for constitution of the subsequent market committees after expiry of the term of the members, the Chairman and the Vice-Chairman of the earlier market committees. It is expected that within six months the new market committees will be constituted in accordance with the provisions of the Markets Act. In case no such market committees are constituted within the aforesaid period, it will be open to the petitioners or to anyone else concerned with the market in question to move this Court for an appropriate order or direction.

36. On a consideration of the facts and the circumstances, in my opinion no case for exercise of the powers of this Court under Articles 226 or 227 of the Constitution has been made out by the petitioner.

37. So far as the petitioners in the other writ applications are concerned, no separate argument was advanced on their behalf, and the arguments advanced on behalf of the petitioner in C.W.J.C. no. 1081 of 1974 were adopted on their behalf also. As mentioned above, in some of the writ applications the petitioners are dealers in food-grains and some are dealers in edible oils. Same questions of law have been raised on their behalf and the facts are practically identical, making a grievance that no facility is provided on behalf of the Market Committees to them. In the counter-affidavits filed on behalf of the respective Market Committees it has been stated that the provisions of the Markets Act are being implemented by providing different facilities in the market areas concerned and very soon other facilities are going to be provided. It is always open to any aggrieved person to move the Bihar State Agricultural Marketing Board and other authorities when any of the market committees fails to perform the functions enjoined on it by the statute; but some time is required before the general public can derive full benefit of the scheme under the Markets Act.

38. In the result, all these writ applications are dismissed; but, in the circumstances, there will be no order as to costs.

SARWAR ALI, J.—I agree.

R.D. *Application dismissed.*

APPELLATE CRIMINAL

Before D. P. Sinha and Muneshwari Sahay, JJ ,

1976

December, 15.

RAMESH RAUT *

v.

STATE OF BIHAR.

Criminal trial—evidence of prosecution witnesses not believed with respect to some of the accused, whether renders their evidence unacceptable with regard to the other accused—part of evidence rejected if relates to insignificant part, will not destroy the other portion relating to main part or substratum of the prosecution case—Penal Code, 1860 (*Central Act XLV of* 1860) *section* 97—*provisions of.*

The mere fact that the trial court had not accepted the evidence of prosecution witnesses with regard to the weilding of lathis by the co-accused, cannot by itself render their evidence unacceptable also with regard to act of the appellant. It is open to a court to accept that part of evidence of a witness which, for reasons to be stated by him, appeared to be true and to reject the other part which does not appear to be true beyond reasonable doubt. If, however, the part rejected relates to the substratum or the main part of the prosecution case then the evidence of the witness should not be accepted for convicting the accused. In case however, it relates into to the embellishment part or to an insignificant or minor part of the prosecution case, it cannot operate to destroy that portion of the evidence of the witness which is otherwise acceptable with regard to the main part or the substratum of the prosecution case;

Held, that the trial court was justified in the circumstance of the case in not giving any weight to the contradiction pointed out in the evidence of the two eye witnesses.

*Criminal Appeal no. 226 of 1973. From the decision of Shri Jagannath Prasad Singh Sessions Judge, Saran, dated 30th June, 1978.

The evidence of the witnesses has always to be judged in the light of the facts and the circumstances of the case and the broad probabilities and with reference to their antecedents and particularly on the intrinsic worth of their evidence.

It is manifest from the provisions of section 97 of the Penal Code that the right of private defence is available to a person for defending his own body, the body of any other person against any offence affecting the human body and also for defending the property of himself or any other person against any of the acts mentioned therein;

Held, that in the instant case there was no question of any exercise of the right of private defence of body. The prosecution party did not carry any weapon and there is no evidence to show that any assault was made or attempted by the deceased or by any of the others of his party. Similarly, there was no question of any invasion by the prosecution party on any property moveable or immoveable belonging to or in possession of appellant or of any of the other co-accused.

Karuna Karan v. *State of Tamil Nadu* (1), *Prem Singh* v. *State of Punjab*(2) and *Balaka Singh & Ors.* v. *State of Punjab*(3), distinguished.

Appeal by the accused.

The facts of the case material to this report are set out in the judgment of D. P. Sinha, J.,

Messrs. Nageshwar Prasad, Subodh Kumar Sinha, P. K. Verma and *Sarda Nand Jha*, for the appellant.

Mr. Vinod Chandra, for he State.

D. P. SINHA, J.—Ramesh Raut, the appellant, has been convicted under section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life by the Sessions Judge of Saran, for having intentionally caused the death of Lachhuman

(1) (1976) S.C.C. 434.
(2) (1976) S.C.C. 804.
(3) (1975) B.B.C.J. 559.

Raut on the 9th March, 1970 at about 7 P.M. in village Dhanawra, Tola Simra, within the jurisdiction of Basantpur police-station, in the district of Saran.

2. The short facts of the prosecution case are as follows: At about 7 P.M. on the 9th March, 1970 Halimat Raut the informant (P.W. 5) was sitting by the fire-side at his house while Lachhuman Raut, the deceased was milking a she-buffalo there. Just then Chandradeep Raut (P.W. 2) a son of the said Lachhuman Raut came there and informed them that a motor-car had trespassed through their field causing damage to the wheat crop. Halimat Raut and the deceased then started for the field to see the damage. On the way they met Mahendra Raut (P.W. 1) a nephew of their's and they all went to the field and saw the damage. From there they went to the house of Gorakh Raut, the father of appellant. Lachhuman demanded of him as to why the vehicle been brought through the Rabi field when there was already a passage set apart for the purpose. An altercation followed in which tempers rose high and Gorakh ordered assault whereupon the appellant who had in the meantime armed himself with a *bhala* gave a blow with the *bhala* on the chest of Lachhuman as a result of which he fell down and died then and there. It was alleged that about a year before the occurrence there was a litigation between the deceased and Gorakh Raut in respect of land and the *rasta*. Information of the occurrence was lodged by Halimat (P.W. 5) at Basantpur police-station which is at a distance of about six miles from the place of occurrence, at about 11.30 P.M. on the same day (vide F.I.R. Ext. 2/1). The police registered a case and after investigation sent up the appellant, his brother Bindeshwari, his father Gorakh Raut and one Ambika Raut, a relation of their's for trial. While the appellant was convicted and sentenced as already stated, the remaining three were acquitted.

3. The defence of the appellant and the co-accused was one of alibi. It had been suggested to P.W. 1 that the prosecution party had attacked the Jeepwalas (the driver and the Khalashi) for having damaged its wheat crop and the Jeepwalas had inflicted the *bhala* blow as a result of which Lachhuman had died.

4. Mr, Nageshwar Prasad, eminent counsel appearing on behalf of the appellant raised the following contentions: The prosecution case with regard to the giving of order by Gorakh Raut was not

accepted by the court and Gorakh Raut was acquitted. Similarly Bindeshwari and Ambika were also acquitted as the allegation that they had wielded *lathis* was not accepted. There were only two eye witnesses, namely, Mahendra Raut (P.W. 1) and Halimat, the informant (P.W. 5). The evidence shows that Mahendra Raut is a nephew of Halimat and the deceased. There was documentary evidence of enmity between the family of the informant and Gorakh as such their evidence should not have been accepted. The defence version was probable and the trial court should have accepted it. The circumstances showed that the appellant had no intention to cause death as such the offence alleged to have been committed by him was not one of murder. Lastly, it was argued that the evidence and the circumstances indicated that the act of the appellants fell within the Fourth exception to section 300 of the Indian Penal Code and as such the offence committed by him was one of culpable homicide not amounting to murder, punishable under section 301 Part II of the Indian Penal Code.

5. The following facts proved to the statisfaction of the trial court are not in dispute. The assault on the deceased had taken place a little after the arrival of the Jeep at the *Darwaza* of Gorakh Raut. While coming to his Darwaja the Jeep had caused damage to the wheat crops standing in the field of the deceased. The assault took place at about the time alleged by the prosecution and it took place almost adjacent north of the varendah of Gorakh's house which faces west where the dead body of Lachhuman was lying.

6 There are two eye witnesses to the occurrence. They are Mahendra Raut (P.W. 1)) and Halimat, the informant (P.W. 5). The account of the occurence given by both these witnesses in substantially the same as has been stated earlier. We were taken through the evidence of the witnesses but nothing was pointed out to indicate that the said witnesses had not told truth or that their evidence was not above suspicion. Mahendra Raut (P.W. 1) and Halimat (P.W. 5) had both accompanied the deceased to the wheat field and from there to the house of Gorakh. The evidence shows that the houses of the deceased Mahendra Raut and Gorakh Raut are situate in the same locality and are quite close to each other In the circumstances it was not surprising that Mahendra Raut had also accompanied the deceased and Halimat. His field had also been damaged by the wheels of the Jeep.

7. It was argued that the evidence of Mahendra (P.W. 1) and Halimat (P.W. 5) should not have been accepted because they had made statements contrary to what they had stated before the Investigating Officer (P.W. 1). The contradiction referred to by the counsel were that at the trial Mahendra Raut had stated that when there took place exchange of abuses between the deceased and Gorakh Raut, Gorakh Raut's son, Bindeshwari (acquitted) and Ambika (acquitted) a relation of Gorakh Raut's wielded their *lathis* against the deceased, Mahendra and also against him (P.W. 1) but the *lathi* did not fall on them. Halimat (P.W. 5) had stated that after the altercation took place, Gorakh Raut ordered assault and thereupon the accused persons wielded their *lathis* against the deceased but the *lathis* did not fall on him. It was said that they had made no such statements before the Investigating Officer (P. W. 10). This appears to be so but if at all all those omission be considered to be contradictions these contradictions do not appear to be of a material nature. It would, however, appear that there is no allegation that the said co-accused had caused any hurt to any one by their *lathis*. In the circumstances the mere fact that the trial court had not accepted the evidence of the said witnesses with regard to the wielding of the lathis by the co-accused, cannot by itself, render their evidence unacceptable also with regard to the each of the appellant. It is open to a court to accept that part of the evidence of a witness which, for reasons to be stated by him, appear to be true and to reject the other part which does not appear to be true beyond reasonable doubt. If, however, the part rejected relates to the substratum or the main part of the prosecution case then the evidence of the witness should not be accepted for convicting the accused. In case, however, it relates only to the embellishment part or to an insignificant or minor part of the prosecution cases, it cannot operate to destroy that portion of the evidence of the witness which is otherwise acceptable with regard to the main part or the substratum of the prosecution case. The learned trial court was justified in the particular circumstance of this case in not giving any weight to the contradictions pointed out in the evidence of the two eye witnesses for the reasons mentioned by him.

8. The evidence of Mahendra Raut (P.W. 1) is corroborated by that of Sheonandan Pandey (P.W. 6) who was chowkidar of Dhanawra at the relevant time. He has stated that at about 8 P.M. Mahendra Raut (P.W. 1) came to his house and told him that Ramesh Raut, the appellant had assaulted Lacchuman (deceased) as

a result of which he had died. Thereupon he went to the Darwaza of Gorakh Raut accompanied by Mahendra (P.W. 1) and saw the deadbody of Lachhuman lying on the northern *Sahan* of Gorakh Raut's house. There was a wound on the chest from which blood was ozzing out. Halimat (P.W. 5) and one Lacchuman Mistry (not examined) were present there. Thereafter he (P.W. 6), Mahendra (P.W. 1) and Halimat (P.W. 5) proceeded to Basantpur police-station where the Officer Incharge (P.W. 10) recorded the statement of Halimat (Ext. 2/1). The occurrence took place at 7 P.M. and Mahendra (P.W. 1) had given an account of it to the chowkidar (P.W. 6) at about 8 P.M. Thus Mahendra had given the gist of the prosecution version very soon after the occurrence. The evidence of the Chowkidar shows that his house is at a distance of about half a mile from that of Gorakh Raut. It must have taken about 30—40 minutes for covering the distance both ways and a few minutes must have been spent by Mahendra in talking to the chowkidar before starting from his place to Gorakh Raut's house. The first information report (Ext. 2/1) had also been lodged quite promptly. The *thana* was at a distance of about six miles from the place of occurrence and the first information report was lodged at 11-30 P.M. The gist of that report was also the same as had been given by Mahendra to the Chowkidar (P.W. 6).

9. Another important circumstance which has to be kept in mind is that the Chowkidar (P.W. 6) was examined then and there at the *thana*, i.e., immediately after the first information was recorded by P.W. 10 and there is no allegation that there was any contradiction between his evidence at the trial and the statements made by him before the Investigating Officer (P.W. 10).

10. There was no doubt enmity existing between the prosecution party and Gorakh Raut and even at the time of the occurrence a case was pending between the deceased and Gorakh Raut. In fact, it was on account of this enmity that the quarrel with regard to the damage caused by the Jeep took a serious turn. The fact that the bride of his son had just been brought in the Jeep and she was to be received in his house with ceremonies befitting the occasion and that the quarrel had been raised at such an auspicious time had added to the gravity of the situation and whipped up the temper of Gorakh Raut and the appellant as a result of which the incident took place as shown by the evidence are not in dispute.

11. The plea of *alibi* which had been set up by all the accused persons and has been rejected by the trial Judge for a very valid reason was rightly not pressed before this court as the same does not appear to be true. The allegation that the assault had been committed by the Jeepwalas and not by the appellant was, however, pressed by the learned counsel for the appellant. It was argued that the ire and wrath of the prosecution party must have been directed towards the driver and the *Khalasi* of the Jeep and towards the Jeep itself and that when the Jeepwalas found that their Jeep would be destroyed and that they themselves would be assaulted they took out a *bhala* from the Jeep and gave a blow with it to Lachhuman on his chest as a result of which he died. There is absolutely no evidence in support of this allegation and the suggestion appears to be highly improbable. The prosecution party knew quite well that the fault was not of the driver of the Jeep in trespassing through the filed of the deceased and thereby destroying his wheat crop. They did know that the person responsible was Gorakh himself because it was at his instance that the Jeep had gone through the field to his *Darwaza*. In the circumstances, it would not have been natural on their part to pick up a quarrel with the Jeepwalas leaving out the main person responsible for the damage. In this behalf the evidence of Chandradeep (son of the deceased) may be noticed. He has stated that while he was returning home at about sun-set time from village Jajharia after attending an *Astajam (Kirtan)*, he saw the Jeep returning from the house of Gorakh through his field and the field of Mahendra (P.W. 1) and then he first reported the matter to Mahendra whose house fell on the way to his house and then to his father (the deceased) and Halimat (P. W. 5). Thus the Jeep had already left the *Darwaza* of Gorakh before the prosecution party arrived there. It may be mentioned that Chandradeep (P. W. 2) did not accompany Mahendra, Halimat and the deceased to the house of Gorakh Raut and it appears that after having passed on the information to Mahendra and his father (the deceased) he stayed at home which is very close to Gorakh's house. Thus it is quite clear from the evidence of Chandradeep (P. W. 2) that the Jeep was not there at the *Darwaza* of Gorakh Raut at the time the incident took place. It was pointed out that P.W. 1 had stated that when he went to see the damage in the field, the Jeep was standing on the cremation ground and, that the same was the evidence of Halimat (P.W. 5). The cremation ground is west of the house of Gorakh Raut at some distance from it intervened by

some fields and it is to the west of the field in which damage had been caused In the circumstances, the fact that the Jeep, after having returned from Gorakh Raut's house was standing in the cremation ground, does not in any way indicate that the occurrence had nit taken place at the *Darwaza* of Gorakh or that the *bhala* blow had been given by the Jeepwalas. It has not been disputed that the occurrence took place adjacent to the house of Gorakh, at the place where the deadbody of Lachchuman was lying. *Bhala* is not such a weapon as may ordinarily be carried in a Jeep. I have not the least hesitation in rejecting the suggestion of the defence as improbable and absurd.

12. The contention that the prosecution case with regard to the giving of order for assault by Gorakh and the participation in the occurrence by the persons acquitted having been disbelieved, the appellant should not have been convicted on the evidence of the same two eye witnesses, is also not sound. It would appear that none of the co-accused was alleged to have caused any hurt either to the deceased or to Halimat (P.W. 5) or Mahendra (P.W. 1). It has already been pointed out that the allegation that Ambika and Bindeshwari had hurled their *lathis* but missed their marks was at best only an useless embellishment of the prosecution case and it did not in any way affect the core of the case. In the circumstances not much can be made of the fact of acquittal of Gorakh, Ambika and Bindeshwari.

13. The decision in the case of *Karunakaran* vs. *State of Tamil Nadu*(1) and those in the case of *Prem Singh* vs. *State of Punjab*(2) and *Balaka Singh and others* vs. *State of Punjab*(3) were cited in support of the contention that since the evidence of the two eye witnesses had not been accepted by the trial court in respect of three co-accused who had consequently been acquitted, their evidence should not have been accepted in so far as the appellant is concerned. It would appear that the observations made in those cases had been made in view of the peculiar facts of those cases and the Supreme Court did not lay down an inflexible rule in this behalf. In *Karunakaran's* case the testimony of the sole witness had been rejected against the co-accused and on his testimony sentence of death had

(1) (1976) S.C.C. 434.
(2) (1976) S.C.C. 805.
(3) (1975) B.B.C.J. 559.

been awarded against the appellant. In the said circumstances it had been observed that the finding that the witness was not truthful with regard to the co-accused had degraded him from the status of an absolutely reliable witness. In that case the witness had been held to be untruthful because he had been persuaded to substitute three of the prosecution witnesses of his deceased brother as chasing the assailant and, therefore, it was held that he was definitely an obliging witness and could at all be trustworthy. No such consideration can arise in this case.

14. In *Prem Singh's* case also, as in this case, there were two eye witnesses who had been disbelieved with respect to four co-accused and it had been held that the conviction of the appellant based on the evidence of the same two eye witnesses was improper. Both the witnesses had stated that spear injuries had been caused to two of the victims of the prosecution party by four other co-accused but the medical evidence revealed that there were no such injuries. It was in the said circumstances that their evidence was found by the Supreme Court to be unreliable not only in respect of the co-accused but also in respect of the appellant. Another reason for not accepting their evidence was that according to one of the prosecution witness there were two teachers present at the time of the incident who could have given evidence as independent witnesses but neither of them was examined by the prosecution. It was in those circumstances that the Supreme Court did not consider it safe to convict the appellant on the basis of the evidence of the two eye witnesses.

15. In *Balaka Singh's* case the eye witnesses were found to have given parrot-like version of the entire case regarding assault on the deceased by the various accused persons and they all, with one voice and with complete unanimity, implicated even the four accused persons acquitted by the High Court, equally with the appellants, making absolutely no distinction between one and the other. It was further found that the prosecution case against the appellant and the four acquitted accused was so inextricably mixed up that it was not possible to sever the one from the other and to separate the grain from the chaff. It was because of those circumstances that the evidence of the eye witnesses who had bitter enmity on account of their implication in a previous murder case, had been rejected by the Supreme Court.

16. It would appear that in the present case the circumstances were quite different and the trial court had not come to the conclusion that the acquitted accused were not present at the scene of the occurrence. The accusation against them was merely that they had hurled *lathis* but had failed to cause any injury to any one of the prosecution party. It has already been found that the evidence of the eye witnesses with regard to the acquitted accused did not affect in any manner the core of the prosecution case and there is nothing in this case like the weighty circumstances on the basis of which the evidence of the eye witnesses had been rejected by the Supreme Court in the above three cases. The observations of the Supreme Court or the High Court are made in the back ground of the facts and circumstances of the cases before them and the general probabilities and they are not meant to be applied blindfoldly in all situations howsoever peculiar or different they may be. The evidence of the witnesses has always to be judged in the light of the facts and circumstances of the case and the broad probabilities and with reference to their antecedents and particularly on the intrinsic worth of their evidence. Assessment of evidence of witnesses cannot be made on the basis of rigid abstractions.

17 Mr. Nageshwar Prasad also contended, though not seriously that it was at best a case in which the appellant could be said to have only exceeded the right of private defence inasmuch as the prosecution party had gone to Gorakh's *Darwaza* and kicked up a row which must have greatly annoyed Gorakh and the appellant and that the said act of their's amounted to criminal trespass giving rise to a right of private defence. This argument is not acceptable. The crop of the deceased and Mahendra had been damaged by the Jeep in its passage to and from the *Darwaza* of Gorakh as such the deceased, Mahendra (P.W. 1) and Halimat (P W. 5) were justified in going to his *Darwaza* and lodging a legitimate protest. It was certainly not their intention to commit any offence by going to his *Darwaza* or to intimidate insult or to cause annoyance to Gorakh or the appellant or any of the other members of his family. In the circumstances they cannot be said to have committed criminal trespass. Moreover the right of private defence is available to a person under the provisions of section 97 of the Indian Penal Code. That section provides that every person has a right subject to the restrictions contained in section 99 to defend—

> First—His own body, and the body of any other person, against any offence affecting the human body;

Secondly—The property, whether movable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

It is quite manifest from the said provisions that the right is available to a person for *defending* his own body, the body of any other person against any offence affecting the human body and also for *defending* the property of himself or any other person against any of the acts mentioned above. In this case there was no question of any exercise of the right of private defence of body. The prosecution party did not carry any weapon and there is no evidence to show that any assault was made or attempted by the deceased or by any of the others of his party. Similarly, there was no question of any invasion by the prosecution party on any property moveable or immoveable belonging to or in possession of Gorakh or the appellant or of any of the other co-accused. In the circumstances the contention raised by the learned counsel must be rejected.

18. Lastly, it had been argued by the learned counsel that the case was covered by the Fourth exception to section 300 of the Indian Penal Code. It is not in dispute that the deceased died as a result of the *bhala* blow giving on his chest. The Medical Officer who had held the autopsy had found a punctured wound 2" × ½" × chest cavity deep in the front of the chest lying transversely in the left sternal line cutting through the sternum. On dissection, he noticed that the tissues had been infiltrated with blood and blood clots were also present. The punctured wound was placed transversely in the anterior paricardium corresponding to the external wound. The cavity of the pericardium was full of blood and blood clots. The right ventricle of the heart had been pierced through the whole of its thickness. The Medical Officer was of the view that death had been caused as a result of the above injury which appeared to have been caused by a sharp piercing instrument like a *bhala*. In his opinion, the injury was sufficient to cause death in the ordinary course of nature. No other inference is possible. There is no evdience to show that the appellant wanted to strike on some other part of the body of the deceased and that the *bhala* fell accidentally on the chest. In the circumstances, it would be reasonable to infer that he had caused that injury intentionally which had been found objectively by the

Medical Officer to be sufficient to cause death in the ordinary course of nature. As such even it be assumed that he did not intend to cause death by giving the blow on the chest since he did intend to cause the injury in question and no other injury and the injury had been to be found sufficient to cause death in the ordinary course of nature, the act clearly fell under clause Thirdly of section 300 of the Indian Penal Code unless it could be shown that the act was covered by the Fourth exception to that section.

19. The Fourth exception provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of passion upon sudden quarrel and without the offender's having taken undue advantage in a cruel or unusual manner. There is an Explanation appended to that exception which provides that it is immaterial in such cases which party offers provocation or commits the first assault.

20. It has already been pointed out that there is nothing to show that the deceased or any of his companions carried any weapon. The quarrel was no doubt sudden but there was no fight and it cannot be said that the appellant did not take undue advantage and that he did not act with cruelty in delivering so severe blow with a *bhala* on an unarmed person on a vital part of his body. In the circumstances, I am unable to agree to the contention of the learned counsel that the appellant was protected by the Fourt exception. The offence committed was clearly one of murder and the appellant had been rightly convicted of that offence. Accordingly, the appeal is dismissed.

MUNESHWARI SAHAY, J. —I agree.

R. D. *Appeal dismissed.*

CIVIL WRIT JURISDICTION

Before Hari Lal Agrawal and P. S. Sahay, JJ.

BOKARO ISPAT KAMGAR UNION.*

v.

THE STATE OF BIHAR & ORS.

1976

December, 20.

Industrial Disputes (Central) Rules, 1957, *rules* 22 *and* 24 *and Industrial Disputes Act* (*Act XIV of* 1947), *section* 11(3), *scope and applicability of—dispute referred to the Labour Court*—ex parte *award—management filing an application for setting aside* ex parte *award—Labour Court, whether has jurisdiction to set aside* ex parte *award—Code of Civil Procedure*, 1908, (*Act V of* 1908), *Order IX rules* 8, 9 *and* 13.

Held, that on a consideration of the provisions of the Industrial Disputes (Central) Rules, 1957 and its ambit and application, the Labour Court was competent to entertain the application of the Management for setting aside the *ex parte* award and to pass an appropriate order.

In view of the authoritative decision of this court that the provisions of order IX of the Code of Civil Procedure can be applied to a proceeding before the Tribunal in the case of *Tata Iron and Steel Company Ltd.* v. *Central Government Industrial Tribunal, Dhanbad, & Ors.*(1), there is no reason why the provision contained in rule 9 of Order IX could not be applied to an appropriate case pending before the Labour Court when the provision of rule 8 of Order IX could be applied. If this view is taken, then it cannot be held that the Labour Court had no power to make an *ex parte* award when the Management was in default. For the same reason the provision contained in rule 13 of Order IX must be applied.

*Civil Writ Jurisdiction Case no. 706 of 1975. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1966) 1 Labour Law Journal 759.

Sarbjit Singh & Anr. v. *Nankana Sahib Transport Company (P) Ltd. & Ors,* (1), *The Workmen of Bangagora Tea Estate* v. *The Management of Bangagora and Anr.* (2), referred to

Gungaram Tea Company Ltd. v. *Second Labour Court & Anr.* (3), *Sarojini* v. *Lakshmana Rao & Anr,* (4), not followed.

Application by the Workmen Union.

The facts of the case material to this report are set out in the judgment of Hari Lal Agrawal, J.,

Mr. Aftab Alam, for the petitioner.

Mr. Prabhu Dayal Agarwala, for the respondent no. 3

HARI LAL AGRAWAL, J.—The petitioner, the Union of Bokaro Steel Workmen, has filed this writ application for quashing the order, dated the 2nd January, 1975 (Annexure 1) in Reference Case no. 1 of 1975 passed by the Presiding Officer, Labour Court, Bokaro Steel City (Respondent no. 2) allowing the application of the management, namely, Messrs Modern India Construction Company, Bokaro Steel City (Respondent no. 3) for setting aside an *ex parte* award and restoring the reference to its original file for hearing, on the ground that respondent no. 2 was not vested with such a power.

2. The Government of Bihar by its notification, dated the 28th November, 1973, made a reference before the respondent no 2 for his adjudication on an industrial dispute between the Management of respondent no. 3 and their workmen represented by the petitioner Union The Management had appeared in the proceeding before the Labour Court. The Labour Court was formerly created only up to 28th February, 1974. The *ex parte* award, however, was pronounced on 3rd October, 1974. On 28th October, 1974, the Management filed an application for setting aside the *ex parte* award on the ground that they had not been informed of the date on which the reference case was fixed for *ex parte* hearing. Their further case was that they did not receive any information as to the extension of the period of the Labour Court when its term expired on 28th February, 1974

(1) (1972) 2 Labour Law Journal. 341.
(2) (1971) 4 Lab. I.C. cases 518.
(3) (1967) 2 Labour Law Journal. 825.
(4) (1969) 1 Labour Law Journal 9.

and, accordingly, they had no knowledge of the further dates fixed in the reference proceeding until they received the notice, dated 3rd October, 1974, of the pronouncement of the *ex parte* award. A question was raised as to whether the Labour Court had jurisdiction to set aside the *ex parte* award, and by the impugned order, it has held that it had the necessary jurisdiction and, accordingly, set aside the *ex parte* award on the ground that there was sufficient case for the absence of the Management on the relevant date. The petitioner has, accordingly, challenged the said order.

3. From the facts stated in the impugned order of the Labour Court, it appears that the Labour Court was formerly created only up to 28th February, 1974, and that the notification regarding extension of the period of the Court was received by it in April 1974. The Management, accordingly, remained absent after 28th February 1974. After the notification regarding extension of the period of the Court, no notice was admittedly sent to the Management. The Labour Court has referred to the order sheet of some other reference cases, namely, Exts. M-1 to M-3 to show that in similar circumstances notice had been issued to the absenting party after the term of the Court was subsequently extended by another notification. On a consideration of these facts and circumstances, the Labour Court came to the conclusion, and, in my opinion, rightly that there was good and sufficient cause for the non-appearance of the Management when the case was taken up for *ex parte* hearing.

4. The question that arises for consideration, and which was also pressed before the Labour Court, is as to whether in spite of the above finding, it had the jurisdiction to set aside the *ex parte* award, or the award could be set aside only if it could be found to be wrong in law in proceeding *ex parte*. Reference in this connection may be made to the provisions contained in section 11 of the Industrial Disputes Act, which falls under Chapter IV, laying down the procedure and powers of conciliation officers, Boards, Courts and Tribunals. Sub-section (1) empowers them to follow such procedure as they may think fit. Sub-section (3) confers some of the powers of the Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in the matter of—

(*a*) enfourcing the attendance of any person and examining him on oath;

(*b*) compelling the production of documents, etc.;

(*c*) issuing commissions for the examination of witnesses;

(*d*) in respect of such other matters as may be prescribed.

The question is not *res integra* and has fallen for consideration before different High Courts in India, in some form or the other. The Act does not lay down detained rules or procedure to be followed by the Presiding Officer of a Labour Court. In the Industrial Disputes (Central) Rules, 1957, there are certain provisions regulating the procedure to be followed by the Labour Court in all proceedings under the Act. I would quote the relevant rules. Rule 22 says :—

> "If without sufficient cause being shown any party to proceedings before a board, court, labour court, tribunal, national tribunal or arbitrator fails to attend or to be represented, the board, court, labour court, tribunal, national tribunal, or arbitrator may proceed as if the party had duly attended or had been represented."

This rule confers discretion on the Labour Court to proceed with the enquiry if a party is absent on a particular date without sufficient cause. Rule 24 says :—

> "In addition to the powers conferred by the Act, boards, courts, labour courts, tribunals and national tribunals shall have the same powers as are vested in Civil Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely :—
>
> (*a*) discovery and inspection;
>
> (*b*) granting adjournment;
>
> (*c*) reception of evidence taken on affidavit;
>
> and the board, court, labour court, tribunal, or national tribunal may summon and examine any person whose evidence appears to it to be material and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898."

This rule thus confers on the Labour Court the power of a Civil Court under the Code of Civil Procedure in respect of granting adjournment.

6. In the case of Tata Iron and Steel Company Ltd. *vs.* Central Government Industrial Tribunal, Dhanbad, and others [1966(1) Labour Law Journal, 759], a question arose before a Bench of this Court as to whether the non-appearance of a party on the date of hearing, the Tribunal had power to dismiss the application for non-prosecution. What had happened in that case was that on an adjourned date of hearing, i.e., July 1, 1962, adjournment was prayed

for on behalf of the Management. The prayer was refused and the matter was fixed up at 3.30 P.M. on that very day. The agent of the Management declined to go on with the case as he had not brought any persons. The Tribunal then dismissed the application for default. Narasimham, C.J. delivering the judgment with reference to rules 22 and 24 of the Central Rules quoted above held :—

> "....., though Order IX may not by its own force apply to proceedings before the tribunal, nevertheless, by virtue of Order XVII, rule 2, of the Code of Civil Procedure, read with rule 24 of the Industrial Disputes (Central) Rules, 1957, the provisions of Order IX may also reasonably be construed to apply to proceedings before the tribunal as far as applicable....."

And as rule 8 of Order IX enables the Court to dismiss an application for default due to the absence of the petitioner, it was held that there was no lack of jurisdiction on the part of the Tribunal in dismissing the application of the petitioner for non-prosecution. In view of the authoritative decision of this Court that the provisions of Order IX can be applied to a proceeding before the Tribunal, I do not see any possible reason why the provision contained in rule 9 of Order IX could not be applied to an appropriate case pending before the Labour Court when the provision of rule 8 of Order IX could be applied. If this view is taken, then it cannot be held that the Labour Court had no power to make an *ex parte* award when the Management was in default. For the same reason the provision contained in rule 13 of Order IX must be applied.

6. Reference in this connection may be made also to a decision of the Punjab and Haryana High Court in the case of *Sarbjit Singh and another* vs. *Nankana Sahib Transport Company (P) Ltd. and others*(1), where exactly the same question arose. In that case, inspite of the fact that notice had been served on the Management, nobody appeared on their behalf and the Tribunal took *ex parte* proceedings against the management and after recording evidence made an award on 16th November, 1970. The management made an application to the Tribunal on January 4, 1971, praying for the setting aside of the *ex parte* award on the ground of illness of their Manager. The *ex parte* award was set aside, but that order was challenged by a writ application. With reference to a large number of cases of the various High Courts, it was held that the Tribunal could not be

(1) (1972) 2 L.L.J. 341.

regarded as a Civil Court although it had been entrusted with a number of functions which are analogous to those performed by a Judicial Officer and is expected to observe the elementary and fundamental principles of a judicial enquiry to comply with the rudimentary constitutional rights of the citizen, and notwithstanding the fact that no specific powers in this respect are given to the Court, the inherent powers of the Court under the Act to promote justice cannot be said to have been taken away.

7. Before the Labour Court, besides the Patna case, three other cases were also cited on behalf of the management, namely, *The Workmen of Bangagore Tea Estate* vs. *The Management of Bangagora and another*(1), a case of the Assam & Nagaland High Court. In this case on the date fixed for hearing, the workmen represented by the union were not found present, and then the Labour Court proceeded to examine the management's solitary witness and reserved its award. Later, on the same day, the Union arrived and made a prayer for being heard. A question arose as to whether the Labour Court, after having reserved the order, could give an opportunity to the workmen to take part in the proceedings, and the Labour Court held that no such opportunity could be given. When the matter came to the High Court, on reference to rule 24 of the Central Rules, referred to earlier, it was held that the said rule itself gave jurisdiction to the Labour Court to consider whether a party has been prevented by sufficient reason for not attending the Court and the Tribunal was, therefore, within its jurisdiction in allowing the prayer.

8. The Calcutta and Andhra Pradesh High Courts, however, have taken a different view in this regard, in *Gungaram Tea Company, Ltd.* vs. *Second Labour Court and another*(2) and *Sarojini* vs. *Lakshmana Rao and another*(3) respectively, which were strongly relied upon by the learned counsel appearing for the petitioner. There it was held that in the absence of any rule empowering the Tribunal to set aside the *ex parte* order or awards, a party who was absent even for sufficient cause on the date fixed for hearing of the reference, has usually no opportunity to show to the Tribunal that the absence was for sufficient reason, and that from the rule enabling the Tribunal to proceed *ex parte*, it cannot be inferred that the power to restore an *ex parte* order under Order IX of the Code of Civil Procedure is vested in the Tribunal. In such a case, the award can only be

(1) (1971) 4 Lab. I.C. 518.
(2) (1967) 2 L.L.J. 825.
(3) (1969) 1 L.L.J. 9.

set aside where it is found to be wrong in law in proceeding *ex parte*. On the authority of these decisions, learned counsel for the petitioner strongly contended that the power to set aside the *ex parte* not having been conferred upon the Labour Court, it could not have set aside the award, dated 3rd October, 1974, and, therefore, the impugned order was wholly without jurisdiction and must be quashed and set aside.

9. It is difficult to accept the contention advanced on behalf of the petitioner as the observations made in the aforesaid two authorities relied on his behalf are in direct conflict with the observations of Narsimham, C.J. in the case of *Tata Iron and Steel Company Ltd.* (supra), a decision of our own High Court which will have a binding force, and I do not find any justifiable reason to differ from the reasonings given by the learned Chief Junstice.

10. Before the Labour Court, another decision in the case of *Martin Burn Ltd.* vs. *R. N. Banerjee*(1) was also cited on behalf of the Management. In that case the question involved was with regard to the powers of the Appellate Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950, and their Lordships were considering whether while hearing an appeal, it had got the power to apply the provisions of Order 41, rule 21 of the Code of Civil Procedure. The question was answered with reference to the provisions contained in a different Act and, therefore, this case is not of much assistance to us.

11. One consideration of the provisions of the Central Rules, referred to above, and its ambit and application, I feel inclined to take the view that the Labour Court was competent to entertain the application of the Management for setting aside the *ex parte* award and to pass an appropriate order.

12. No other question has been raised in this application and the only question raised having been answered against the petitioner, this application must fail and it is, accordingly, dismissed. In the circumstances of the present case, I shall make no order as to costs.

P. S SAHAY, J.—I agree.

S.P.J. *Application dismissed.*

(1) (1958) A.I.R. (S.C.) 79.

CRIMINAL WRIT JURISDICTION

Before Hari Lal Agrawal and Chaudhary Sia Saran Sinha, JJ.

CHANDESHWAR MAHTO & ORS.*

v.

STATE OF BIHAR & ORS.

1977

January, 10.

Essential Commodities Act, 1955 (*Act X of* 1955), *sections* 6A *and* 6B—*scope and applicability of—order of confiscation—essential preliminary steps to be taken by Collector—confiscation—meaning of—deprivation of property right of a person—regular machinery provided for—notice to owner under section* 6*B, whether obligatory—section* 6B—*provisions of, when to be deemed to be fully complied with person from whom essential commodity seized pleading no concern and disclosing real owner—notice to alleged owner, whether essential—person getting knowledge or information aliunde of confiscation proceeding—authority whether absolved from following statutory provision—principles of natural justice, whether to be followed.*

In order to authorise the Collector to make an order of confiscation, he has to take some essential preliminary steps which are in the nature of condition precedent and have been very clearly indicated in separate clause, namely, clauses (*a*), (*b*) and (*c*) of section 6*B* of the Essential Commodities Act, 1955, that is, he has to give a notice in writing to the owner of the essential commodity in question or the persons from whom it is seized. Then he has to give an opportunity of making a representation in writing and a further reasonable opportunity of being heard in the matter. After completing these formalities and hearing the offender, if the Collector comes to a conclusion that there has been a contravention of any order under section 3 of the Act in relation thereto, then alone he may order confiscation of the essential commodity so seized.

*Criminal Writ Jurisdiction Case no. 32 of 1976. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Confiscation is deprivation of the property rights of a person, had in order to deprive him of such rights, the Parliament in its wisdom has provided a regular machinery for adjudicating the same, keeping in view the principles of natural justice by affording sufficient opportunity to the person concerned of representing his case and of being heard and also if aggrieved by the order, to appeal against that before the prescribed authority.

It is obligatory upon the authority concerned to issue notice on the owner of the essential commodity as a matter of course. The provisions of section 6*B* may be deemed to be fully complied with if the notice is issued to the person from whom the essential commodity is seized. The intention of providing the issuance of any show cause notice under section 6*B* is with a definite purpose; the purpose being to enable the authority to see as to whether there has been a contravention of any order made under section 3 of the Act or not, and with that end in view, a regular representation and hearing has been provided for. Therefore, where a person from whose possession such a property has been seized, has in essence no cause to show on merits where it was simply stated by him that he had no concern with the property and the persons concerned were different and informed the authority concerned as to who are the alleged owners of the commodity, then, in that situation, that is, where a person from whom any essential commodity is seized, pleads no concern with the commodity, asserts to be simply a custodian and the real owners are disclosed to the authority who is to hold the enquiry, then, in that situation, it is desirable to issue show cause notice to such persons, namely, the alleged owners of the essential commodity, before any actual order of confiscation is made. Taking any other view would be doing simply an empty formality in the matter and the scheme of these provisions substituted by the amendment would be rendered meaningless. The learned Collector in the instant case has reconciled himself in passing the impugned order on the mere observation that inasmuch as the opposite party nos. 3 and 4 did not lay any claim before him to the seized commodity, he was not expected to go any further in the matter and that was sufficient for him to pass the order of confiscation.

Held, that the order of confiscation passed in these terms does not satisfy the conditions imposed by section 6A of the Act. It was open to the Collector to reject the plea of the persons from whose possession the essential commodity was seized, to the effect that it

were not they, but the petitioners who were concerned with and were owners of the commodity in question and then to record a finding that they dealt in the essential commodity for which a licence was required. But having recorded no finding in this regard, even by implication, but stopping short by mere observation that as they did not lay any claim, his function was over and the condition for passing the order of confiscation was satisfied, he has committed an apparent error and therefore, his order must be quashed on this ground alone.

Held, further that, section 6B of the Act enjoins a duty upon the authority to issue a show cause notice before passing the order of confiscation. Simply because a person has got any knowledge or information aliunde of any confiscation proceeding already initiated by any Collector or authority, that would not absolve the said authority from following the statutory procedure prescribed under section 6*B* of the Act. In view of the mandatory requirement of the issue of show cause notice, the person might be very well waiting that he would receive the show cause notice from the Collector and, therefore, simply because he himself did not choose to intervene in the proceeding, he is not stopped from challenging the correctness or legality of the order on the ground of infraction of the provision contained in section 6*B* of the Act. It is well settled that any order which visits a person with any civil or evil consequence, must be based on following the basic principles of natural justice.

T.R. Ramaiah & Ors. v. *Dy. Commissioner, Chitradurga District & Anr.*(1), and *Siemens Engineering and Manufacturing Co. of India Ltd.* v. *The union of India & Anr.* (2), relied on.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set in the judgment of the Court.

Mr. G. C. Bharuka, for the petitioners.

Mr. Kamendra Kumar, for the State.

HARI LAL AGRAWAL AND CHAUDHARY SIA SARAN SINHA, JJ.— This writ application has been filed by four persons challenging the

(1) (1975) A.I.R. (Karnataka) 77.
(2) (1976) A.I.R. (S.C.) 1785.

order, dated 24th February, 1976 passed by the District Magistrate of Nalanda at Biharsharif (respondent no. 2) confiscating 36 bags of coarse rice weighing 69 maunds, in purported exercise of the powers conferred upon him under section 6A of the Essential Commodities Act (briefly the 'Act'). A copy of the relevant order is Annexure 4 to the writ application.

2. The facts and circumstances leading to the passing of the impugned order are these: On 18th September, 1975, the Assistant Superintendent of Commercial Taxes, Biharsharif, in course of his inspection at Madhopur Bazar, under Chandi Police-Station, is said to have found Raghunath Sah (respondent no. 4) carrying on business in the house of Ram Pravesh Pandit (respondent no. 3) without any licence. He checked the shop in presence of the Circle Officer, Chandi, and the Assistant Sub-Inspector of Chandi Police Station, besides some local people, and found 36 bags of rice weighing 69 maunds, for which respondent no. 4 did not produce any licence or permit for its storage or business. The said Assistant Superintendent, thinking that there had been a contravention of the provisions of section 7 of the Act, submitted a written report to the Officer-in-charge of Chandi Police Station on the same day. On the said report, the Chandi Police registered a case under section 7 of the Act and took up investigation. The rice bags in question were seized in presence of the witnesses.

3. The petitioners filed an application before the Subdivisional Judicial Magistrate, Hilsa at Biharsharif for release of the said food-grains in their favour on the ground that Raghunath Sah (respondent no. 4) had nothing to do with the same and that the same belonged to them and they had kept the same in the house of Ram Pravesh Pandit (respondent no. 3), the owner of the premises in question. As stated in the writ application, their further case is that they are agriculturists and reside at a short distance from Madhopur Bazar, which is the nearest market place for them for the sale of their agricultural produce. They claimed that on 17th September, 1975, they had gone to Madhopur Bazar for sale of their rice, being agricultural produce of their own lands. In paragraph 2 of the writ application, they have given out the quantity and number of rice bags which belonged to each of them. According to that statement, the first two petitioners had brought 10 bags of rice each and the remaining two eight bags each. The rice, however, could not be sold on that day and, therefore, they kept the same in one of the rooms

of the house belonging to respondent no. 3, with whom they had old acquaintance, and went away. In the meantime the rice bags were seized, as already indicated earlier. The petitioners have further stated that respondent no. 3 informed them on 19th September, 1975 about the seizure of the rice bags in question and, accordingly, they are said to have made an application for the release of the rice bags in the Court of the Subdivisional Judicial Magistrate, Hilsa at Biharsharif, as already said earlier. The matter was postponed for some time as the Court wanted some information from the Assistant Public Prosecutor in the matter. On 8th October 1975 the Assistant Public Prosecutor filed the report of the District Supply Officer, Nalanda, informing the Court that a confiscation proceeding under section 6A of the Act had already been started in the matter by the District Magistrate and as such, in view of the provisions contained in section 6A of the Act, no order for the release of the seized rice bags could be passed on the petition of the petitioners.

4. It appears that the District Magistrate had started a confiscation proceeding which was registered as Case no. 39 of 1975 against Raghunath Sah and one Devendar Pandit of Chandi. On issuance of of show cause notice, the said Raghunath Sah and Devendar Pandit in their show cause made a complete disclaimer to the seized rice bags in question and asserted that they belonged to the petitioners and gave particulars of all the petitioners. On this attitude being taken by the persons against whom he confiscation proceeding was started, the respondent District Magistrate passed the impugned order on 24th February, 1976. I would do better to extract the relevant portion of the impugned order :

> ".....The O.P. did not lay any claim to the foodgrains in question. It has, however, been alleged on their behalf that the foodgrains belonged to Chandeshwar Mahto, Sidheshwar Mahto, Bishun Dayal Singh and Ramjee Singh (petitioners). These persons have not appeared before me. This court is concerned merely with confiscation of the seized articles and because the O.P. do not lay claim before me. I am not expected to go any further in the matter. The above foodgrains are confiscated to the State Government....."

After passing the said order, he directed that the price should be deposited in the Revenue Deposit. It is this order that is being assailed before us.

5 The petitioners challenge the impugned order on the ground of violation of the principles of natural justice as no notice was issued to them by respondent no. 2 who was in clear terms informed that it were the petitioners who were the owners of the rice in question and the person from whose possession the commodity was seized had put no claim of ownership to the same and had specifically stated in the show cause that it were the petitioners who were the real owners of the rice in question. The second contention raised on behalf of the petitioners is that the impugned order does not record any finding as to whether there has been any contravention of any Order made under section 3 of the Act, which is a jurisdictional fact, and, therefore, the impugned order cannot be upheld.

6. A counter-affidavit has been filed on behalf of respondents nos. 1 and 2, namely, the State of Bihar and the District Magistrate of Nalanda, which has been affirmed by the Supply Inspector. It has been stated in this counter-affidavit that the real owners of the foodgrain seized were respondents nos. 3 and 4 who deal in the said commodity, without having any valid licence in an unauthorised manner; the petitioners having been set up by them simply to escape the liability for the offence committed by them. It has further been stated that the petitioners having full knowledge of the confiscation proceeding, no question of issuing any notice to them arose and, therefore, there has been no infraction of the principles of natural justice.

7. In order to decide the controversy raised for our consideration, we would refer to the relevant provisions of the Act. The scheme for confiscation of foodgrains, edible oilseeds and edible oils was introduced in the Essential Commodities Act by Act 25 of 1966 and a few sections were inserted as sections 6A to 6D. Section 6A empowers the Collector to confiscate the essential commodity which may have been seized in pursuance of an Order made under section 3 in relation thereto, if he is satisfied that there has been a contravention of the said Order. This power is without any prejudice to any action which may be taken under any other provision of the Act.

Then there is section 6B which prescribes a machinery for holding an inquiry in the matter by the Collector before he passes a final order of confiscation under section 6A of the Act. It says

that "No order confiscating any essential commodity shall be made under section 6*A* unless the owner of such essential commodity or the person from whom it is seized—

(*a*) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the essential commodity;

(*b*) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(*c*) is given a reasonable opportunity of being heard in the matter."

Section 6*C* provides a right of appeal to "any person aggrieved by an order of confiscation under section 6*A*....." within one month from the date of the communication of such order.

8. Coming to the point in issue and the relevant provisions namely, sections 6*A* and 6*B*, which we have extracted earlier, it is apparent that in order to authorise the Collector to make an order of confiscation, he has to take some essential preliminary steps which are in the nature of condition precedent and have been very clearly indicated in separate clauses, namely, clauses (*a*), (*b*) and (c) of section 6*B*, that is, he has to give a notice in writing to the owner of the essential commodity in question or the person from whom it is seized. Then he has to give an opportunity of making a representation in writing and a further reasonable opportunity of being heard in the matter. After completing these formalities and hearing the offender, if the Collector comes to a conclusion that there has been a contravention of any Order made under section 3 of the Act in relation thereto, then alone he may order confiscation of the essential commodity so seized.

9 Confiscation is deprivation of the property rights of a person, and in order to deprive him of such rights, the Parliament in its

wisdom has provided a regular machinery for adjudicating the same, keeping in view the principles of natural justice by affording sufficient opportunity to the person concerned of representing his case and of being heard, and also if aggrieved by the order, to appeal against that before the prescribed authority.

10. We would take up the second ground for consideration first as we feel that the impugned order should be set aside on this second ground alone as contended by Mr. Bharuka, learned counsel appearing for the petitioners, namely, that the impugned order does not record the satisfaction of the respondent Collector that there has been a contravention of any Order made under section 3 of the Act. We have extracted earlier the order passed by him, which clearly shows that no finding to this effect has been recorded. The learned Collector has reconciled himself in passing the impugned order on the mere observation that inasmuch as the opposite party nos. 3 and 4 did not lay any claim before him to the seized commodity, he was not expected to go any further in the matter, and that was sufficient for him to pass the order of confiscation. We are afraid, the order of confiscation passed in these terms does not satisfy the conditions imposed by section 6A of the Act. It was open to respondent no. 2 to reject the plea of opposite party nos. 3 and 4 before him to the effect that it were not they, but the petitioners who were concerned with and were owners of the commodity in question and then to record a finding that they dealt in the essential commodity for which a licence was required. But having recorded no finding in this regard, even by implication, but stopping short by mere observation that as they did not lay any claim, his function was over and the condition for passing the order of confiscation was satisfied, he has, in our opinion, committed an apparent error. This order, therefore, must be quashed on this ground alone.

11. Now we propose to take up the second question, namely, the necessity of giving a notice to the owner. We have already indicated that section 6*B* enjoins upon the Collector to give a notice in writing before an order confiscating any essential commodity is made. Sub-section (1) clearly lays down that the notice has to be issued to the owner of such essential commodity or to the person from whom it is seized. In the disjunctive manner in which the two expressions "owner" and "the person from whom it is seized" have been used, we are not inclined to take the view that it is obligatory upon the authority concerned to issue notice on the owner of

the essential commodity as a matter of course. The provisions of section 6*B* may be deemed to be fully complied with if the notice is issued to the person from whom the essential commodity is seized. The facts and circumstances of the case before us, however, are slightly different. The intention of providing the issuance of any show cause notice under section 6*B* is with a definite purpose: the purpose being to enable the authority to see as to whether there has been a contravention of any Order made under section 3 of the Act or not, and with that end in view, a regular representation and hearing has been provided for. Therefore, where a person from whose possession such a property has been seized, has in essence no cause to show on the merits, as in the present case, where it was simply stated by him that he had no concern with the property and the persons concerned were different and he informed the authority concerned as to who are the alleged owners of the commodity, then in that situation, that is, where a person from whom any essential commodity is seized, pleads no concern with the commodity, asserts to be simply a custodian and the real owners are disclosed to the authority, who is to hold the inquiry, then in that situation, in our opinion, it is desirable to issue show cause notice to such persons, namely, the alleged owners of the essential commodity, before any actual order of confiscation is made. Taking any other view would be doing simply an empty formality in the matter and the scheme of these provisions substituted by the amendment would be rendered meaningless. We find support for our view from a Bench decision of the Karnataka High Court in the case of *T. R. Ramaiah and others* vs. *Deputy Commissioner, Chitradurga District and another*(1). There from a rice mill, 2,307 bags of paddy were seized which belonged to the second respondent of that case. Notice was, however, issued to the second respondent, i.e., the mill owner, as in the case before us. In response to the notice, the mill owner stated that the paddy bags in question belonged to different persons, namely, the appellants before the High Court, in whom the ownership of the stock vested. According to the definite case of the second respondent, namely, the mill-owner, the paddy in question was delivered by the appellants for the purpose of hulling. The Deputy Commissioner of Chitradurga district, the authority empowered to adjudicate confiscation, however, did not issue any notice to the appellants and passed the order of confiscation. The order was challenged under the writ jurisdiction of the High Court and the High Court set aside the

(1) (1975) A.I.R. (Karnataka) 77.

order and held that when the proprietor of the mill disclaimed all ownership to the paddy seized and put forward a definite case that it belonged to the appellants and the fact that the appellants had already claimed to be the owners of the paddy in question no order of confiscation could have been made in such a situation without affording an opportunity to the appellants to show cause as to why the paddy should not be confiscated. The facts of that case are very much similar to the facts and circumstances of the case before us. We would like to make it clear that we do not propose to lay down that in every case where the person from whose possession any essential commodity is seized, disowns ownership of the same, it would be obligatory on the authority to find out the real owners of the said property by holding any inquiry or otherwise before he could pass any final order in the matter.

12. Learned State counsel, however, contended that inasmuch as the petitioners did not appear of their own before respondent no. 2, there was no necessity of issuing any show cause notice to them and therefore there has been no infraction of the principles of natural justice. He next contended that the petitioners were merely creatures of the real owners who were already noticed by respondent no. 2 and, therefore, this Court should not interfere in exercise of the writ jurisdiction. The second ground must be rejected on the face of it as no such finding has been recorded by respondent no. 2 before passing the final order. Section 6*B* of the Act enjoins a duty upon the authority to issue a show cause notice before passing the order of confiscation. Simply because a person has got any knowledge or information aliunde of any confiscation proceeding already initiated by any Collector or authority, in our decision that would not absolve the said authority from following the statutory procedure prescribed under section 6*B* of the Act. In view of the mandatory requirement of the issue of show cause notice, the petitioners might be very well waiting that they would receive the show cause

notice from the Collector and, therefore, simply because they themselves did not choose to intervene in the proceeding, they are not stopped from challenging the correctness or legality of the order on the ground of infraction of the provision contained in section 6*B* of the Act. It is well settled that any order which visits a person with any civil or evil consequence, must be based on following the basic principles of natural justice. Recently, the Supreme Court has reiterated this view in the case of *The Siemens Engineering and Manufacturing Co. of India Ltd* vs. *The Union of India and another* (1) by observing that it is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order and after following the principles of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.

13. The facts of the present case that we have stated earlier leaves no room for any doubt that the order of the learned Collector dated 24th February, 1976 (Annexure 4) is vitiated on both the grounds, namely, that it does not record the fact of contravention of any Order nor it is a speaking order recording any reasons for passing the same as well as it has failed to follow the basic principle of natural justice. Therefore, the impugned order cannot be sustained.

14. Accordingly, we, in exercise of the powers conferred upon this Court under Articles 226 and 227 of the Constitution of India, quash the order, dated 24th February, 1976 passed by respondent no. 2 and direct him to pass a fresh order after following the procedure as laid down under section 6B of the Act in the light of the observations made above by us. Let an appropriate writ issuse accordingly.

M. K. C. *Order Quashed.*

(1) (1976) A.I.R. (S.C.) 1785.

CIVIL WRIT JURISDICTION

Before Nagendra Prasad Singh and *B. S. Sinha, JJ.*,

CHANDRASEKHAR PRASAD CHOUDHARY.*

v.

THE STATE OF BIHAR & ORS.

1977

January, 29.

Land Acquisition Act, 1894 (*Act I of* 1894), *sections* 4 *and* 5A—*notification under section* 4 *without mentioning any public purpose but to serve the interest of an individual—whether sanctioned by the provisions of the Act—acquisition for public purpose, whether depends on the question as to how many persons are to be benefited —acquisition of land for providing house to a citizen having no home, wether a public purpose—court, whether and when can examine the question as to whether the purpose for acquisition has any public purpose or not.*

It is well settled that the land of a citizen can be acquired under the provisions of the Act for any public purpose and to that extent the right of an individual to hold the property has to give way in the interest of the community at large. But in case the question as to whether the acquisition is for the public or not cannot be answered immediately. Whether the acquisition is for public purpose or not, does not depend on the question as to how many persons are ultimately to be benefited by the said acquisition. It will always vary from facts of each case. If the acquisition of the land is made keeping in view only the interest of an individual, the object of acquisition cannot be for public purpose. Generally, the courts are very reluctant n examining the question as to whether the purpose for which the acquisition has been made or going to be made, has any public purpose behind it or not. But in the cases like the present one it is permissible for this court to examine this matter.

Merely non-mention of the public purpose in the notification under section 4 of the Act is not fatal to the validity of the proceeding; later it can be shown that there was a public purpose behind

*Civil Writ Jurisdiction Case no. 1185 of 1972. In the matter of an application under Articles 226 and 227 of the Constitution of India.

the proposed acquisition. Acquiring land for providing houses to citizens having no home is a public purpose. But that principle cannot be applied to a case where the acquisition is being made, keeping in view one individual who has failed to prove his claim to the land in different courts and before different authorities.

Held therefore, that on the facts and in the circumstances of the present case the notification under section 4 and the order rejecting the objection under section 5*A* of the Act must be quashed on the ground that they have been issued and passed in colourable exercise of the power.

Smt. Somawanti & Ors. v. *The State of Punjab & Ors.* (1), *R. L. Arora* v. *The State of Uttar Pradesh & Ors.* (2), *Prem Nath & Ors.* v. *State of Jammu and Kashmir,* (3) and *Babu Barkya Thakur* v. *State of Bombay (now Maharashtra) & Ors.* (4), referred to

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of Nagendra Prasad Singh, J.,

Mr. A. N. Chatterjee, for the petitioner.

Messrs. Tarakant Jha, A.G. & B. K. Singh, J. C. to G.P II, for the respondents.

NAGENDRA PRASAD SINGH, J.—This writ application under Articles 226 and 227 of the Constitution of India has been filed on behalf of the petitioner for quashing a notification, dated 2nd July, 1971 issued in purported exercise of the power under section 4 of the Land Acquisition Act, 1894, (hereinafter referred to as 'the Act'), conferred on the respondent-Additional Collector, Darbhanga, a copy whereof is Annexure 1 to the writ application By that notification the respondent, Additional Collector, has stated that it appeared to him that it was desirable that 0.17 acres of land within Dalsingsarai notified area should be acquired for construction of the house of Shri Balo Das and Rohit Paswan, who were Harijans. Details of the lands

(1) (1963) A.I.R. (S.C.) 151.
(2) (1962) A.I.R. (S.C.) 764.
(3) (1960) A.I.R. (J. & K.) 78.
(4) (1960) A.I.R. (S.C.) 1203.

in question have been mentioned in the said (notification. In that very notification, it was further stated that any person affected by the said acquisition was at liberty to file an objection in accordance with section 5A of the Act.

2. It is the case of the petitioner that pursuant to the said notification, an objection under section 5A of the Act was filed on his behalf. A copy of the said objection is Annexure '2' to the writ application. The respondent, Additional Collector, however, after hearing the petitioner, rejected the said objection by his order, dated 14th August, 1972. A copy whereof has been annexed and marked as Annexure '4'.

3. According to the petitioner, the notification aforesaid is not sanctioned by the provisions of the Act inasmuch as it has been issued to serve the interest of an individual and without there being any public purpose for the same. Aforesaid Balo Das, respondent no. 4 (since deceased), was the father of Rohit Paswan, respondent no. 5. According to petitioner he had several litigations in respect of the land, in question, with the aforesaid respondents. They having failed in those litigations have later managed to get the land, in quesion, acquired through the government machinery. Learned counsel appearing for the petitioner in support of his contention has drawn our attention to a copy of the aforesaid notification, dated 2nd July, 1971 and the objection filed on behalf of the petitioner before the Additional Collector and has urged that on the facts and in the circumstances of the present case, the proposed acquisition cannot be held to be for any public purpose. At the outset I must say that the notification, in question, on face of it, does not confirm to the requirement of section 4 of the Act. At no place in the said notification, it has been stated that the land, in question, is being acquired for any public purpose. I have already pointed out that the notification stated that, for consruction of the house of Balo Das, the land, in question, was required. The actual words used are as follows :

"चूंकि अपर समाहर्त्ता, दरभंगा को यह प्रतीत होता है कि ग्राम लोकनाथपुर नं० ७२ थाना दलसिंहसराय परगना सरैसा जिला दरभंगा में, दलसिंहसराय नोटिफाएड एरीया कमिटी के अन्दर सर्वश्री बालो दास एवं सोहित पासवानहरिजन के पुनर्वास एवं गृह-निर्माण हेतु सरकारी खर्च पर सरकार द्वारा जमीन ली जानी अपेक्षित है। इसलिए इसके द्वारा अधिसूचित किया जाता है कि उपरोक्त गांव लोकनाथपुर के भीतर भूमि का एक टुकड़ा अपेक्षित है जो मानक माप से कम बेश ०.१७ एकड़ होता है और जिसकी चौहद्दी निम्न प्रकार है :—"

Thereafter the details of the land, in question, has been given. In view of the aforesaid statement made in the notification itself, it has to be held that the land in question is sought to be acquired for an individual, i.e., Balo Das. Now two questions arise. Firstly whether an acquisition under the provisions of the Act can be made for an individual and still it can be held to be for a public purpose? Secondly as to whether in the facts and circumstances of the present case it can be held that the power vested in the Collector under the Act had been utilised in a *bona fide* manner?

4. Learned counsel appearing for the petitioner laid great emphasis on the first point that the power of acquisition vested in the Collector under the provisions of the Act cannot be exercised for an individual. It is well settled that the land of a citizen can be acquired under the provisions of the Act for any public purpose and to that extent the right of an individual to hold the property has to give way in the interest of the community at large and on that very principle the validity of the Act has been upheld on several occasions by this Court as well as the Suupreme Court. But in every case the question as to whether the acquisition is for the public purpose or not cannot be answered immediately. Whether the acquisition is for public purpose or not, does not depend on the question as to how many persons are ultimately to be benefited by the said acquisition. It will always vary from facts of each case. But once it is shown that the object of the acquisition is some way connected with some public purpose, then Court have always rejected any such argument raised on behalf of the persons whose rights have been affected by acquisition.

5. The question as to whether an acquisition of land to serve the interest of an individual, in special circumstances of the case, can be held to be for a public purpose, has been considered on different occasions. In this connection reference can be made to the case of *Smt. Somawanti and others* v. *The State of Punjab and others*(1) where it was observed at 164:

> "The power committed to the Government by the Act is a limited power in the sense that it can be exercised only where there is a public purpose, leaving aside for a moment the purpose of acompany. If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all the action of the Government would be colourable as not

(1) (1963) A.I.R. (S.C.) 151.

being relatable to the power conferred upon it by the Act and its declaration will be a nullity."

In that very case it was further observed:

"Though we are of the opinion that the courts are not entitled to go behind the declaration of the Government to the effect that a particular purpose for which the land is being acquired is a public purpose we must emphasise that the declaration of the Government must be relatable to a public purpose as distinct from a purely private purpose. If the purpose for which the acquisition is being made is not relatable to public purpose then a question may well arise whether in making the declaration there has been, on the part of the Government a fraud on the power conferred upon it by the Act In other words the question would then arise whether that declaration was merely a colourable exercise of the power conferred by the Act, and, therefore, the declaration is open to challenge at the instance of the party aggrieved. To such a declaration the protection of S. 6(3) will not extend. For, the question whether a particular action was the result of a fraud or not is always justiciable provisions such as S. 6(3) notwithstanding."

In the case of *R. L. Arora* v. *The State of Uttar Pradesh and others*(1), again a question arose as to whether the purpose of acquisition in that case had any nexus with the public purpose to be achieved and it was observed as follows:

"In the present case all that the Government was satisfied about, appears to be that the product of the company will be useful to the public and the provision in the agreement is merely that the public shall be able to go upon the works for purpose of business. This in our opinion is not the meaning of the relevant words under Ss. 40 and 41 and therefore the Government's satisfaction in that behalf is not enough to entitle it to use the machinery of the Act for the purpose of acquisition in this case."

In the case of *Prem Nath and others* vs. *State of Jammu and Kashmir and others*(2) a Bench of that Court held that giving over of one person's land to another person for his private enjoyment and

(1) (1962) A.I.R. (S.C.) 764.
(2) (1960) A.I.R. (J. & K.) 78.

personal gain cannot be designated as a public purpose and it was further held that if there was no public purpose the notification under section 4 or under section 6 cannot be upheld. In the aforecaid case one Qadir Suthu was in unauthorised possession of a land belonging to the petitioner of that case. Later a notification under section 4 of the Land Acquisition Act was issued for acquisition of that peace of land. The acquisition was for the purpose of giving the land, in question, to the aforesaid Qadir Suthu. In that connection, while quashing the notification it was observed :

> "It is equally clear that the giving over of the petitioner's land to Qadir Suthu for his private enjoyment and personal gain cannot by any stretch of language be designated a public purpose. When the notification under Ss. 4 and 6 of the Land Acquisition Act were issued, Qadir Suthu and respondents 3 to 8 appear to have been in actual possession and enjoyment of the land. They were never dispossessed from the land even for a moment as a result of the land acquisition proceedings
>
> Nor was the land under their occupation sought to be made use of for any public purpose. It appears to us clear beyond doubt that the land in possession of Qadir Suthu which really belonged to the petitioners was made the subject of the land acquisition proceedings only with a view to regularising and giving a legal cloak to an otherwise unauthorized and illegal possession by a private individual, namely, Qadir Suthu."

6. From the statement made in the writ application and the statement made in the objection filed on behalf of the petitioner under section 5A of the Act before the Additional Collector, Darbhanga, it appears that some family members of the petitioner at an earlier stage had constructed a *Tatti* shade over a portion of Survey Plot no. 517 and the same was let out to the aforesaid Balo Das for keeping *Tandom* and horse. In this connection a *Kerayanama had* also been executed by him as a monthly tenant. That *Tatti* shade stood over an area of 5 dhurs only. After the vesting of the estate under the provisions of the Bihar Land Reforms Act, Balo Das and his son aforesaid Rohit Paswan began to lay claim over 4 kathas 10 dhurs of aforesaid plot no. 517. This led to a series of litigation. The wife of Balo Das lodged a criminal case under section 395 of the Indian Penal Code against the brother of the petitioner and others. The accused of that case were acquitted by the Sessions Judge,

Darbhanga, in the year 1958. Later a proceeding under section 144 of the Code of Criminal Procedure was initiated in respect of that very 4 katha 10 dhurs of survey plot no. 517, which was converted into a proceeding under section 145 of the Code. The dispute afterwards was referred to the Munsif, Samastipur, under section 146 of the Code. On 23rd June, 1962. the learned Munsif recorded a finding that Balo Das was a monthly tenant of the *Tatti* shed aforesaid, which stood over 5 dhurs for which he had executed a *Kerayanama*. It was further held that Balo Das was not in possession of any other portion of the plot. He also recorded a finding that the father of the petitioner and his brothers were in possession of the aforesaid 4 kathas 5 dhurs of the land. Later in the year 1963, Balo Das and his son, Rohit Paswan, forcibly dispossessed the father of the petitioner and thereafter a Title Suit no. 138 of 1964 was filed, which was pending disposal in the court of the Munsif, 1st Court, Samastipur. It was further stated that Balo Das had also filed a petition under the provisions of the Bihar Privileged Persons Homestead Tenancy Act, claiming to be a privileged tenant entitled to remain in possession of the land, in question, which was rejected by the authorities concerned. In this connection our attention was drawn to the observation of the Additional Collector himself in the order, dated 14th August, 1972, by which he has rejected the objection filed under section 5A of the Act by the petitioner, which is as follows :

> "From the facts and circumstances of the argument and the history of litigation between the aforesaid two persons and the objector has disclosed to me during the course of argument by the learned lawyer for the objector, I am also inclined to feel that the entire litigation between the two parties in the past has been going on because the aforesaid two persons have been struggling for having homes for themselves. Since these two Harijans live within the Notified Area Committee, they cannot be provided with homes by the Government within the provisions of the Bihar Privileged Persons Homestead Tenancy Act. There is apparently, therefore, no alternative before the Government then to acquire the land to ensure their rehabilitation."

According to the petitioner, having failed at different forums and courts, ultimately some of the political helpers of said Balo Das got the notification under section 4 of the Act issued for acquisition of the land, in question. Further, according to the petitioner, the

aforesaid facts elequently prove that the acquisition is not for any public purpose but only for the purpose of one individual, i.e., Balo Das.

7. No doubt, there is force in the contention of the learned counsel even on the first point that an acquisition under the provisions of the Act cannot be made for an individual because it cannot be considered to be a public purpose. But I do not intend to decide this question finally, in view of the fact that the application of the petitioner has to succeed on the second point. For the purpose of this case, even if it is assumed that in certain circumstances acquisition made for an individual can have nexus with a public purpose, in my opinion, in the instant case it cannot be held that it had any such public purpose.

8. No counter-affidavit has been filed on behalf of Balo Das or his son Rohit Paswan, who were impleaded as respondent to this application. A counter-affidavit, however, had been filed on behalf of the State, but due to non-compliance of a peremptory order passed by this Court, that counter-affidavit has been directed to be ignored. The net result is that the statements made on behalf of the petitioner in the writ application and in his objection filed under section 5*A* of the Act have to be accepted on their face value. If the statements regarding the past litigation made on behalf of the petitioner are to be accepted, which are also supported by the observation of the Additional Collector in his impugned order, than it has to be held that the acquisition of the land, in question, is going to be made, keeping in view only the interest of Balo Das and his son Rohit Paswan. In my opinion, in the facts and the circumstances of the present case, the object of acquisition cannot be held to be for a public purpose. Generally, the Courts are very reluctant in examining this question as to whether the purpose for which the acquisition has been made or is going to be made, has any public purpose behind it or not. But in the instant case I am of the view that it is one of those cases where it is permissible for this Court to examine this matter. In the case of *Smt. Somawanti and others* v. *The State of Punjab and others*(1) referred to above, while pointing out the limitation of this Court in examining any such issue it was held that if this Court is satisfied that the acquisition has no public purpose behind it or no purpose at all and was only just colourable exercise of the power, not relatable to the purpose for which power is conferred under the Act, then such declaration has to be held to be a nullity.

(1) (1963) A.I.R. (S.C.) 151.

9. The learned counsel also pointed out that in the notification under section 4 of the Act there is no mention that the acquisition is being made for any public purpose. This is, however, is not of much importance. In the case of *Babu Barkya Thakur* v. *State of Bombay (now Maharashtra) and others* (1) it was held that merely non-mention of the public purpose in the notification under section 4 of the Act as not fatal to the validity of the proceeding; later it can be shown that there was a public purpose behind the proposed acquisition. But the difficulty in the instant case is that not only it is not mentioned in the notification under section 4 of the Act that the acquisition is going to be made for any public purpose, no such public purpose, has been pointed out on behalf of the respondents. The Additional Collector in his order rejecting the objection under section 5A of the Act has referred to a decision of the Supreme Court in the case of *State of Bombay* v. *Bhanji Munji and another* (A.I.R. 1955 S.C. 41) in support of his view that the acquisition for the purpose of providing houses to homeless persons will be deemed to be an acquisition for public purpose. In my opinion, there cannot be two views on this score that acquiring land for providing houses to citizens having no home is a public purpose. But that principle cannot be applied to a case where the acquisition is being made, keeping in view one individual who has failed to prove his claim to the land, in question, in different courts and before different authorities. Even the learned Advocate-General appearing for the State who vehemently contended that the acquisition for an individual in special circumstances of a case can be held to be for a public purpose, had to concede that on the facts and in the circumstances of the present case it cannot be said that proposed acquisition has nexus with any public purpose.

10. In the result, the application is allowed, the notification (Annexure '1') under section 4 of the Act and the order passed by the Additional Collector rejecting the objection under section 5A of the Act (Annexure '4') are quashed, holding that they have been issued and passed in colourable exercise of the power. In the circumstances of the case, however, there will be no order as to costs.

B. S. Sinha, J.—I agree.

M. K. C. *Application allowed.*

(1) (1960) A.I.R. (S.C.) 1203.

CIVIL WRIT JURISDICTION

Before Nagendra Prasad Singh and B. S. Sinha, JJ.

SRI HARINATH PRASAD.*

v.

THE STATE OF BIHAR & ORS.

1977

February, 10.

Constitution—Articles 14 *and* 16*—enforcement of right under, during the continuance of Presidential Proclamation—Constitution (as ammended by forty second amendment)—Article* 226(1)(a) *and* (b)*—applicability of—enforcement of right under Article* 16*—maintainability of—Article* 12*—District Board whether deemed to be "State" against which a citizen can enforce a right under Article* 16 *of the Constitution.*

A writ can be issued even to any person or authority, but for the purpose of enforcing a right under Articles 14 and 16 of the Constitution the authority must be deemed to be a "State" within the meaning of Article 12 of the Constitution. District Board is a Local Government Body and as such it will be deemed to be a "state" against which a citizen can enforce a right under Article 16 of the Constitution.

The writ-petitioner may not found his application during the continuance of the Presidential Proclamation on the ground that he has been discriminated, but certainly he can persue his remedy before the High Court for enforcement of his right under Article 16 of the Constitution. In that event, the case will be covered by clause (*a*) of new Article 226(1) because it will amount to an application for enforcement of any of the right conferred by the provisions of Part III of the Constitution.

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*Civil Writ Jurisdiction Case no. 1423 of 1972. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, that the instant case will not only be covered by clause(a) cut it will also be governed by clause (b) of new Articles 226(1) of the Constitution;

Application under Articles 226 and 227 of the Constitution.

The facts of the material to this report are set out in the judgment of Nagendra Prasad Singh, J.

Messrs. Basudeva Prasad, Narendra Prasad and *Ajay Kumar*, for the petitioner.

Messrs. B. C. Ghose, Mahendra Prasad Sinha, Sidheshwar Prasad Singh, Ramesh Prasad Singh and *Susheel Chandra Singh* Respondents. *Messrs. S. B. N. Singh (G. P. II)* and *Prabhu Nath Roy (J. C. to G. P. II)* for the State.

NAGENDRA PRASAD SINGH, J.—The petitioner in this writ application has made a prayer for quashing an Order, dated 3rd December 1968 passed by the Administrator of the District Board, Patna appointing respondent no. 3 on the post of the Head Clerk-*cum*-Accountant of the office of the District Engineer of the said Board. A copy of the said order is Annexure 10 to the writ application According to the petitioner, the said appointment has been made superseding the claim of the petitioner to be appointed to the said post..

2. According to the petitioner, he was appointed as a clerk against a substantive vacancy by the then Chairman of the respondent-District Board, Patna (hereinafter to be referred to as the Board) on 1st February, 1946. Later the petitioner was confirmed on the aforesaid post with effect from 1st February, 1946, the day of his initial appointment. On 20th July, 1946, the petitioner was placed in the scale of pay of Rs. 30-5-70. Subsequently, the pay scale of the petitioner was raised to Rs. 50—2—70—EB—2—90 with effect from 1st November, 1954. Again, there was a revision in the pay scale of the petitioner with effect from 1st January, 1957 and he was

put in the scale of Rs. 70—4—90—EB—5—120. It is further the case of the petitioner that respondent no. 3 was appointed in temporary vacancy in the chain of one Shri Sheonandan Prasad Singh on 16th March, 1954 with effect from 10th March, 1954. On 2nd June, 1954, the then Chairman of the Board, according to the petitioner, illegally and arbitrarily allowed respondent no. 3 to continue on the post of the clerk and allowed him to draw Rs. 50 with effect from 10th March, 1954. On a prayer being made by respondent no. 3, on 11th April, 1955, the Chairman passed an order that respondent no. 3 would draw higher pay scale of Rs. 80—4—120 with effect from 1st November, 1954, the day the new scale came into force. Respondent no. 3 was, however, deputed to Kosi Project on that very scale of pay, on an offer being made by him. In September, 1958, Bihar District Board and Local Boards (Control and Management) Ordinance, 1958 (Bihar Ordinance VI of 1958) came into force. This was later replaced by the Bihar District Board and Local Boards (Control and Management) Act, 1958 (hereinafter to be referred to as the Control and Management Act). The Ordinance vested power in the State Government to issue notification in respect of different District and Local Boards. After issuance thereof the Chairman and Vice-Chairman, etc. had to vacate their respective offices and, thereafter, the powers of such Chairman and Vice-Chairman and members were to be exercised by such person or persons as the State Government might appoint. The respondent-Administrator has been appointed in exercise of the powers conferred under section 2(2) of the said Ordinance and since September, 1958 all powers of the Chairman, Vice-Chairman and other members of the Board vested in him. It is further the case of the petitioner that on 1st November, 1968 a vacancy of Head Clerk-*cum*-Accountant in the office of the District Engineer of the Board occurred due to the retirement of the incumbent. The petitioner having possessed the requisite qualifications was entitled to be promoted to the said post. But the Administrator appointed respondent no. 3 to the said post on 3rd December, 1968 in contravention of the provisions of the "Rules for examination qualifying for appointment to the post of District Engineer's Accountant". This Rule was framed in the year 1930 under the Bihar and Orissa Local-Self Government Act, 1885 (hereinafter to be referred to as the Local Self Government Act), which prescribed that no person will be eligible as a candidate for the post of District Engineer's Accountant unless he has passed one of the examinations prescribed in Part I, II or III of the Appendix to the said Rules. According to the petitioner, respondent no. 3 was

not only junior to him in service, but he had also not passed the aforesaid examination, and in spite of that, he was appointed on the post referred to above superseding the just claim and right of the petitioner.

3. On 4th December, 1968, the petitioner filed a representation to the District Magistrate, Patna, a copy whereof is Annexed as Annexure-II. On 26th January, 1969, the petitioner also filed a representation to the Administrator concerned, a copy whereof is annexed as Annexure-13. On 18th April, 1969, the petitioner filed a representation to the Minister Incharge Local Self Government. On the representation filed by the petitioner, certain queries were made by the concerned Department of the State Government, and ultimately on 4th November, 1972, the representation of the petitioner was rejected. The petitioner, left with no option, filed the present writ application before this Court on 23rd November, 1972. According to the petitioner, the aforesaid order, dated 11th April, 1955 passed by the Chairman of the Board appointing respondent no. 3 on the post of upper division clerk with effect from 1st November, 1954 and the order, dated 3rd December, 1968 passed by the Administrator appointing him as the Head Clerk-*cum*-Accountant amounts to an arbitrary invasion over the right of the petitioner to be appointed to that post. Accordingly, the petitioner has made a prayer for quashing those orders including the order, dated 4th November, 1972 passed by the State Government rejecting his representation.

4. Counter-affidavits have been filed on behalf of the Administrator of the Board as well as on behalf of respondent no. 3 challenging the assertions made on behalf of the petitioner.

5. Mr. B. C. Ghose, learned counsel appearing for the Board raised a preliminary objection that even if the allegations made on behalf of the petitioner are accepted on their face value, he is not entitled to any relief in view of the new Article 226 of the Constitution, according to which the present case has to be disposed of, and in that connection learned counsel placed the provisions of the newly amended Article 226 of the Constitution. Section 58 of the Constitution (Forty-second Amendment) Act, 1976 provides that every petition made under Article 226 of the Constitution which was pending

before any High Court immediately before the appointment day, i.e., 1st February, 1977, is to be dealt with in accordance with the new Article 226 as substituted by section 38 of that Act. In view of the aforesaid section 58, there cannot be any dispute that this writ application has to be considered in the light of the provisions of the new Article 226. Under the new Article 226(1) every High Court has power to issue writs in appropriate cases to any person or authority, including on any Government in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari* for the purposes mentioned in clauses (*a*), (*b*) and (*c*) of Article 226(1), which are as follows:—

> "(*a*) for the enforcement of any of the rights conferred by the provisions of Part III, or
>
> (*b*) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or
>
> (*c*) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (*b*) where such illegality has resulted in substantial failure of justice"

According to Mr. Ghose, even if it is assumed that the petitioner had a right to be considered for the appointment to the said post and he has not been appointed, then it will only attract Article 14 of the Constitution which is under suspension due to the Presidential Proclamation, as such, there is no question of applicability of clause (*a*) of the said Article 226(1). It has been further contended that in fact and circumstances of the present case, there has been no violation of any provision of the Constitution or of any enactment or Ordinance or any order, rule, regulation, bye-law framed thereunder to attract the provision of clause (*b*). Similarly, on the allegations made on behalf of the petitioner no illegality has been alleged on the part of any authority constituted under the Constitution or any enactment or Ordinance, who is said to have committed any illegality resulting in substantial failure of justice, According to him, the

Administrator had to make selection amongst the different employees of the Board and he appointed respondent no. 3 in exercise of his administrative power and there cannot be any question of exercise of any statutory power causing any substantial injury to the petitioner.

6. For the purpose of answering the question as to whether the writ application is maintainable the allegations made on behalf of the petitioner are to be accepted on their face value. A writ can be issued even to any person or authority; but for purpose of enforcing a right under Articles 14 and 16 of the Constitution the authority must be deemed to be a State within the meaning of Article 12 of the Constitution. Petitioner can make grievance of infringement of his right under Articles 14 or 16 only if District Board is held to be a "State" within the meaning of Article 12 of the Constitution. In the case of *Sirsi Municipality* v. *C. K. F. Tellis*(1), at paragraph 43 it was held that local Government bodies fall within the definition of "State" given in Article 12 of the Constitution. District Board is a Local Government Body and as such it wil be deemed to be a "State" against which a citizen can enforce a right under Article 16 of the Constitution. In the instant case, if the assertion of the petitioner is found to be correct that his right of equality of apointment on the post in question has been infringed, then not only Article 14 will be attracted, but Article 16 also comes to his rescue which guarantees equal opportunities to all citizens in the matter relating to appointment or employment to any office under a State. He may not found his application during the continuance of the Presidential Proclamation on the ground that he has been discriminated, but certainly he can pursue his remedy before this Court for enforcement of his right under Article 16 of the Constitution. In that event, the case will be covered by clause (*a*) of the new Article 226(1) because it will amount to an application for enforcement or any of the rights conferred by the provisions of Part III of the Constitution. In my opinion, the present case will not only be covered by clause (*a*) but it will also be governed by clause (*b*) of new Article 226(1). Clause (*b*) speaks about redress of any injury of a substantial nature by reasons of contravention of any provisions of the Constitution or any enactment or Ordinance or any order, rule, regulation or bye-law made thereunder. According to the petitioner, respondent no. 3 was apponted in contravention of the aforesaid statutory rule framed under the Local Self Government Act. If the appointment

(1) (1978) A.I.R. (S.C.) 855.

is in contravention or the provisions of a statutory rule, and if by that contravention the claim of the petitioner has been superseded, then it will be deemed to be an injury of substantial nature to the petitioner, attracting the provisions of clause (*b*) of Article 226(1). In that view of the matter, I am of the opinion that there is no substance in preliminary objection raised on behalf of the Board and this case has to be examined on merit as to whether on the allegations made on behalf of the petitioner he is entitled to any relief from this Court.

7 As I have already pointed out above, the grievance of the petitioner in substance is that he was appointed in February, 1946 whereas respondent no. 3 was appointed in March, 1954. According to him, he was confirmed whereas respondent no. 3 had been appointed on an ad-hoc basis. On 3rd December, 1968, when respondent no. 3 was being appointed as Head Clerk-*cum*-Accountant of the office of the District Engineer, he had not passed the examination referred to above, whereas the petitioner had already passed the said examination as early as on 12th July, 1962, and, as such, amongst the two, the petitioner was the only candidate who was qualified to be appointed to the said post. If it is held that respondent no. 3 could not have been appointed, there being a statutory bar, then there is substance in the contention raised on behalf of the petitioner. But, I shall immediately show that the rule which prescribed a bar on the appointment to that post without passing the examination referred to in the said rule, was later amended in the year 1944. By amendment, it prescribed that a person who has passed B. Com. examination of any Indian University was eligible for appointment as an Accountant of the District Engineer's office. It also provided by amendment that notwithstanding anything contained in rule 1, a candidate may be appointed on probation for a period of two years and he shall be eligible for confirmation only if during the period of probation he passed the examination referred to therein. In view of this amendment, the absolute bar which had been prescribed initially was relaxed. It is an admitted case that respondent no. 3 was a B. Com. when he was appointed by the Board in the year 1954 and he passed the examination, referred to above, in May, 1969, i.e., within two years from 3rd December, 1968 when he was appointed on probation by the impugned Annexure 10. In this view of the matter, it cannot be held that respondent no. 3 did not hold the requisite qualification for being appointed to that post.

8. Now the question which remains to be answered is as to whether while making such appointment the claim of the petitioner has been superseded causing him a substantial injury. On this aspect also the petitioner has a lot of difficulties. No doubt, the petitioner was appointed much earlier than respondent no. 3, but it has been admitted by the petitioner that in the year 1968 he was a lower division assistant and was drawing the pay in the scale of Rs. 70—4—90—EB—5—120, which was meant for Lower Division Assistants whereas respondent no. 3 was appointed on 11th April, 1955 with effect from 1st November, 1954 in the pay scale of Rs. 80—4—120, which was the scale then meant for Upper Division Assistant. This was later revised to Rs. 100—5—150—EB—10—200. In November-December, 1968 respondent no. 3 was drawing pay in this scale, i.e., the scale of pay meant for Upper Division Assistant. During the course of argument, there was some confusion as to whether respondent no. 3 had been appointed initially as an Upper Division Assistant, but when it was pointed out to the counsel appearing for the petitioner that the petitioner in prayer portion of the writ application itself has admitted that on 11th April, 1955 the Chairman appointed respondent no. 3 on the post of Upper Division with effect from 1st November, 1954, the learned counsel conceded. In view of the circumstances set forth above it has to be held that the petitioner was appointed as a Lower Division Assistant whereas respondent no. 3 was appointed as an Upper Division Assistant and on the day when respondent no. 3 was appointed as Head Clerk-*cum*-Accountant, he was in a higher grade. If this fact is admitted, I am unable to appreciate as to how the petitioner can make grievance regarding supersession of his claim to appointment to the post of the Accountant.

9. It was then submitted that the petitioner was challenging the earlier order, dated 11th April, 1955 itself by which the then Chairman illegally appointed respondent no. 3 as an Upper Division Assistant. To entertain any such plea now will amount to entering into an enquiry about the legality of an appointment which has taken place more than 20 years ago. It is well settled by several decisions of the Supreme Court as well as of this Court that belated claim should not be allowed to be agitated before this Court while invoking its writ jurisdiction. This rule is all the more applicable in cases of promotions and appointments, because by lapse of time many of the incumbents, acquire certain rights and on the basis

thereof are promoted to next higher grades. Reference in this connection can be made to the cases of *Trilokchand Motichand and others* v. *H. B. Munshi*(1), *P. S. Sadasivaswamy* v. *State of Tamil Nadu*(2) and *Jagdish Narain Maltiar* v. *State of Bihar and others*(3). On behalf of the petitioner, however, reference was made to the case of *Ramchandra Shankar Deodhar and others* v. *The State of Maharashtra and other*(4) in support of the contention that delay in invoking the writ jurisdiction of this Court will not be always fatal to the writ application and in appropriate cases injustice will not be allowed to be perpetrated. In that case it has been specially pointed out that although there was delay of 10 to 12 years in filing the petition since the accrual of the cause of complaint, but that was not sufficient to disentitle the petitioner to get any relief, in view of the fact that no prejudice was likely to be caused to the respondents of that case. Several circumstances have been mentioned in that judgment on the basis of which a finding was recorded that neither there was any laches on the part of the petitioners nor they had slept over their rights. It was also pointed out that on the day in question the petitioners as well as the respondents were in the same grade In that connection, it was observed as follow :

> "It may also be noted that the principle on which the Court proceeds in refusing relief to the petitioner on ground of laches or delay is that the rights which have accrued to other by reason of the delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for the delay."

In the istant case, I shall immediately show that during the pendency of the writ application, on 1st June, 1975 respondent no. 3 has been appointed as the Accountant of the Board itself, which is the next higher grade. An affidavit to that effect has been filed which is not being challenged on behalf of the petitioner. This is a higher post, the scale of pay whereof is Rs. 220—390.

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(1) (1970) A.I.R. (S.C.) 898.
(2) (1974) A.I.R. (S.C.) 2271.
(3) (1973) A.I.R. (S.C.) 1348.
(4) (1974) A.I.R. (S.C.) 259.

10. The respondents have also pointed out in this connection that this writ application is not only belated so far as the grievance of the petitioner regarding the appointment of respondent no. 3 in the year 1954 is concerned, it is also belated so far as the order, dated 3rd December, 1968 (Annexure 10) is concerned. It appears that the representation which had been filed on behalf of the petitioner in April, 1969 was rejected by the State Government on 11th November, 1970, a copy of the said order is Annexure F to the counter-affidavit filed on behalf of the respondent-Board. That order of rejection was communicated to the petitioner on 23rd November, 1970. This writ application was filed about two years thereafter. On behalf of the petitioner and explanation has been given that after the first rejection, the second representation of the petitioner was under consideration and even comments were also asked for from the Administrator, but it was ultimately rejected on 4th November, 1972 for the second time. This aspect of the matter is also well settled by the Supreme Court. Merely because a second representation has been entertained by the authorities concerned, it cannot be taken to be as the ground for condoning the delay in approaching this Court for redress of grievance, if any.

11. Learned counsel appearing for the petitioner also submitted that the Administrator before making the appointment of respondent no. 3 on 3rd December, 1968, has purported to consider the relative merit of the petitioner *vis-a-vis* respondent no. 3. A copy of the said order is Annexure E to the counter-affidavit of respondent no. 2. According to the learned counsel, from the order itself it will appear that the consideration per se is arbitrary as he has taken into consideration matters which are irrelevant and not borne out by the records. In that connection learned counsel by referring to different documents has purported to show that some of the reasons given for rejecting the claim of the petitioner are baseless. Even if it is assumed that there is substance in the contention of the learned counsel appearing for the petitioner, in my opinion, this Court will not be justified in recording a finding on that issue as a court of Appeal. A person has a right to be considered for the purpose of promotion. If while considering the case of promotion some relevent and some irrelevant reasons have been mentioned generally this Court will not interfere with the same and record its own findings on the relative merits of the candidates, unless on reading of the whole order it appears that it amounts to a colourable exercise

of power. In my view, there is no substance in this contention as well.

12. There is yet another reason because of which the relief claimed on behalf of the petitioner has become academic. An affidavit has been filed on behalf of the petitioner himself that on 5th December, 1972 a notification was issued bifurcating the district of Patna into different districts and a new district, namely, Nalanda has been established. On 8th January, 1973, the petitioner being asked opted for being appointed as Head Clerk-*cum*-Accountant of the office of the District Engineer of Nalanda District Board. He has joined the said post on 31st January, 1973 subject to the result of this writ application. In view of the aforesaid appointment, now the petitioner has become an employee of different District Board and he has ceased to have any connection with the Board in question. Now even if the allegations made on behalf of the petitioner were correct, although on merit they have not been accepted, any writ in his favour will amount to disturbing respondent no. 3 who has been appointed on a still higher grade as well as disturbing one Raj Kumar Thakur, who has been appointed as Head Clerk-*cum*-Accountant in the office of the District Engineer of the Board in question where respondent no. 3 had been appointed by the impugned order. That Raj Kumar Thakur is not a party to this writ application. In view of the aforesaid circumstances also the petitioner is not entitled to any relief.

13. In the result, the application fails and it is dismissed. In the circumstances of the case, however, there will be no order as to costs.

B. S. SINHA, J.,—I agree.

R. D. *Application dismissed.*

CIVIL WRIT JURISDICTION

1977

March, 15.

Before Nagendra Prasad Singh and B. S. Sinha, JJ.

LOKNATH GOENKA.*

v.

MUNICIPAL COMMISSIONERS OF THE SAMASTIPUR MUNICIPALITY & ORS.

Bihar and Orissa Municipal Act, 1922 (*Act VII of* 1922), *sections* 179, 180, 191 *and* 198—*scope and applicability of—unauthorised construction on one's own private land and the constructions made on the land of the Municipality—distinction between—making erection of platform over public road and drain—written permission as contemplated by section* 179 *and a licence under section* 180 *whether necessary—failure to obtain written permission or licence—effect of—construction according to sanctioned plan—whether can be demolished even without affording opportunity to show cause—breach of the procedure—clauses* (b) *and* (c) *of Article* 226(1) *of the Constitution, whether and when attracted—Constitution of India Article* 226(1) *clauses* (b) *and* (c).

Under the different sections of the Bihar and Orissa Municipal Act a distinction has been drawn between unauthorised construction on one's own private land and the constructions made on the land of the Municipality and it has a rational basis. So far as the construction on one's own private land is concerned, the Municipality is stopped from taking any action on rule of estoppel having sanctioned the plan, but so far as the construction over the road or public drain and lands of the Municipality is concerned, section 191 of the Municipal Act is neither applicable nor it gives any protection. Any person making such constructions has to obtain a written permission as contemplated by section 179 in respect of projection on

*Civil Writ Jurisdiction Case no. 1565 of 1976. In the matter of an application under Article 226 of the Constitution of India.

the road and a licence under section 180 for making erection of platform over public road and drain, in absence whereof actions under sections 196 to 198 of the Municipal Act can be taken.

It is difficult to conceive that a construction according to the sanctioned plan can be demolished even without affording any opportunity to the person concerned to show cause that the construction is not in contravention of any of the provisions of the Municipal Act or the rules and bye-laws framed thereunder. Under section 198 of the Act, before the Magistrate concerned orders demolition of the constructions, he has to give an opportunity to show cause to the person concerned then any breach of this procedure will amount to breach of the provision of section 198 itself so as to attract clause (*b*) as well as clause (*c*) of Article 226(1), if the inquiry caused by such contravention or breach is of substantial nature or has resulted in failure of justice;

Held, therefore, that in the instant case it cannot be urged that if a statutory authority constituted under the Act passes an order in contravention of section 198 of the Municipal Act ordering demolition of the house or constructions of a citizen, it will not amount to an injury of substantial nature or will not result in substantial failure of justice.

Kashi Prasad Kataruka v. *Bibi Allay Fatma & Ors*,(1) and *Bishwanath Prasad* v. *The Municipal Board, Chapra through the Special Officer, Chapra*(2). referred to.

Application under Article 226 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of Nagendra Prasad Singh, J.,

Messrs. Basudeva Prasad, Radha Mohan Prasad and *Mrs. Renuka Sharma*, for the petitioner.

Messrs. B. C. Ghose, S. K. Ghose and *Abhijit Sinha* and *Messrs R. B. Mahto (G. P. IV)* and *Harendra Prasad, J. C. to G. P. IV*, for the State.

(1) (1957) A.I.R. (Pat.) 303.
(2) (1976) B.B.C.J. 204.

NAGENDRA PRASAD SINGH, J.,—This writ application has been filed on behalf of the petitioner for quashing a notice, dated 28th November, 1973 issued by the Executive Officer, Samastipur Municipality saying that the petitioner has constructed a platform over the drain and a portion of road belonging to the Municipality, which has caused inconvenience. By that very notice the petitioner was asked to dismantle the same within three days of the receipt of the notice failing which the Municipality would get it dismantled and removed and the costs therefor would be realised from the petitioner. A copy of the said notice is Annexure 1 to the writ application.

2. In the writ application it has been stated that the petitioner filed for sanction, a plan of his house and shop to the respondent-Municipality. In that plan the platform and the projections over the road were shown. In due course this plan was sanctioned. No objection was taken at any stage during the constructions of the platform and projections in question and after a lapse of several years now the aforesaid notice has been issued, which is in contravention of the provisions of the Bihar and Orissa Municipal Act, 1922 (hereinafter to be referred to as the Municipal Act). This writ application was filed in this Court on 6th December, 1973 and was admitted on 10th December, 1973. At the time of admission, the operation of the notice (Annexure 1) was stayed during the pendency of the writ application. The respondents were also restrained from demolishing the platform and the projections of the petitioner during this period.

3. A counter-affidavit has been filed on behalf of the respondents-Municipality (respondent nos. 1 and 2) saying that the Municipal Board of the Municipality in question received public complaint regarding the obstructions on public road and then it was unanimously resolved that platforms constructed over roads and drains which were causing inconvenience to public should be removed forthwith, and in pursuance of that resolution notices were issued to different persons including the petitioner. It has been further stated that after the issue of the notice, the petitioner himself removed the platform before 4th December, 1973, i.e., before filing of the writ application in this Court. It has been asserted that it was well within the authority of the Municipality to issue the notice in question to the petitioner.

4. At the time of hearing, an objection regarding the maintainability of this application was also taken in view of the new Article 226. as has been substituted by the Constitution (Forty-second Amendment) Act, 1976 (hereinafter to be referred to as the Constitution Act). Mr. B. C. Ghose appearing for the respondent-Municipality has urged that it should be held that this application has abated in view of sub-section (2) of section 58 of the Constitution Act.

5. Sub-section (2) of section 58 of the Constitution Act provides that a writ application which was pending on the appointed date, i.e., on 1st February, 1977, is to be heard and disposed of in accordance with new Article 226 as substituted by the aforesaid Constitution Act. It also provides that any application which would not have been admitted if on the date it was admitted this new Article would have been in force, then such application shall abate. According to the respondents, even if the grievances made on behalf of the petitioner are taken on their face value, they are not covered by any of the three clauses of Article 226(1) inasmuch as there is no question of enforcement of any right conferred by provision of Part III of the Constitution nor there is any question of contravention of any other provision of the Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder so as to attract clause (*b*) of Article 226(1). The petitioner, according to the respondents, can also not invoke the jurisdiction of this Court under Article 226(1)(*c*) as no illegality in any proceeding before any authority constituted under any of the provisions referred to in sub-clause (*b*) has been pointed out. It has been further submitted that utmost that can be argued on behalf of the petitioner is that the plan showing the platform and projections having been sanctioned by the Municipality, it could not have been demolished without giving an opportunity to show cause to the petitioner, but that will neither amount to a contravention of any statutory provisions as mentioned in clause (*b*) of Article 226(1) nor an illegality being committed by any of the authorities constituted under any of those provisions, in any proceeding pending before him.

6. Under Chapter V of the Municipal Act, different provisions have been made regarding laying of the roads, projections over roads, drains, erection of platform, erection of building after sanction of the plan, removal of unauthorised constructions over private and public

land and penalties for such contravention. Different sections of that Chapter have been put under three sub-heads; Sections 164 to 185 under sub-head 'Roads', sections 186 to 195 under sub-head 'Buildings' and sections 196 to 203 under sub-head 'Removal of Encroachments on roads, house-gullies and property of the Commissioners'. According to the petitioner, a plan was filed in accordance with sections 186 and 187 of the Municipal Act on his behalf showing these platforms and projections along with the main building, for sanctioned before the municipality and they were duly sanctioned in accordance with section 188. The fact that in the plan the platform as well as projections were shown over the drain and road does not appear to be in dispute. The petitioner asserts that once any such sanction is given under section 188, no further action can be taken in respect of constructions which are covered by the sanctioned plan even if they may be in contravention of the provisions of the Municipal Act or the rules or bye-laws framed thereunder. Reliance in this connection was placed on section 191 of the Municipal Act which is as follows:

> "A sanction given or deemed to have been given under section 188 shall exempt the person to whom the sanction is given or deemed to have been given from any penalty or consequence to which he would otherwise be liable under sections 174, 192 or 193, but shall not operate to relieve any person from the obligation imposed by section 179 to obtain separate sanction for any structure referred to therein."

What is the effect of section 191 and to what extent it protest the right of a citizen who has constructed any building although in accordance with the plan sanctioned by the Municipality, but in contravention of certain bye-laws or rules of the Municipality, was examined in the case of *Kashi Prasad Kataruka* v. *Bibi Allay Fatma and others*(1) and in that connection it was observed as follows:—

> "It is manifest that the word 'sanction' in section 191 must be construed as a *de facto* sanction and not necessarily a lawful sanction in the context of the language of that section. The effect of section 191 is that the Municipality has no power to prosecute the owner of the building illegally erected or to demolish such a building or

(1) (1957) A.I.R. (Pat.) 303.

to stop the erection of such a building once the construction of the building has commenced. It is, therefore, manifest that the illegality of the sanction does not make it void or nullity; such a sanction is revocable by the Municipality before the owner starts construction of the house on the basis of the illegal sanction. But once the owner acts upon the plan and starts construction the sanction becomes irrevocable, the stage for a revocation is gone and a ban is imposed upon the Municipality from taking recourse to any remedies provided under section 192 or 193."

7. In my opinion, the aforesaid judgment of this Court is not of much help to the petitioner inasmuch as in the aforesaid judgment a question had arisen about taking action under the provisions of the Municipal Act in respect of a building which had been constructed on the basis of a sanctioned plan, but in violation of bye-laws of the Municipality concerned, on a private land, not on a land belonging to the Municipality. I have already pointed out that sections 186 to 196 deal with sanction, construction and demolition of building erected on private land. Section 193 says in clear and unequivocal terms that if any illegal erection or construction of a building is discovered, an action has to be taken under that section within 15 days from the date on which information is received and after 15 days of such contravention, in view of the proviso, no action can be taken under that section. Apart from that, section 191, as referred to above, itself exempts such person from all the consequences to which he may be otherwise liable if he has got the plan sanctioned although that may be in contravention of some bye-law or rule of the Municipality. So far as encroachments, constructions on road or properties belonging to the Municipality are concerned, law on that point stands on a different footing. Those cases are governed by sections 179 and 180. Section 179 prescribes that projections over road or drain can be made only after the Commissioners have given written permission to the owners or occupiers of the building. In view of section 180, no platform is to be erected or extended over any public road or drain without the previous sanction of the Commissioners. Under sub-section (2) of section 180, a licence has to be taken by the owner of every platform constructed on any such public road or drain, which is to be renewed every year. Section 196 vests power in the Commissioners to issue notice requiring any person to remove any building or any other obstructions or encroachment which he may have erected on any public drain, house-gullies,

or property of the Municipality. Under section 197, the Commissioners may issue notice requiring the owner or occupier of any house to remove "any projection, obstruction or encroachment erected or placed against or in front of such house, if the same overhang the road or just into or in any way projects or encroaching upon or is an obstruction to the safe and convenient passage along, any house-gully, or obstructs or projects, or encroaches into or upon any public drain, acqueduct in any road". Under section 198, a Magistrate, on an application of the Commissioners, may order any such obstruction, encroachment or projection to be removed, if the person on whom notice has been issued fails to comply within eight days of the receipt of the same. A relevant fact to notice is that in none of these sections any limitation has been prescribed after which no such action can be taken. Section 191 which, according to the petitioner, gives immunity after the plan is sanctioned itself exempts the cases covered by section 179. In my opinion, under the different sections a distinction has been drawn between unauthorised constructions on one's own private land and the constructions made on the land of the Municipality and it has a rational basis. So far as the construction on one's own private land is concerned, the Municipality is stopped from taking any action on rule of estoppel having sanctioned the plan, but so far as the construction over the road or public drain and lands of the Municipality is concerned, section 191 of the Municipal Act is neither applicable nor it gives any protection to them. Any person making such constructions has to obtain a written permission as contemplated by section 179 in respect of projection on the road and a licence under section 180 for making erection of platform over public road and drain, in absence whereof actions under sections 196 to 198 of the Municipal Act can be taken. In my opinion, the principles laid down in the aforesaid judgment of this Court in A.I.R. 1957 Patna 303 is not applicable in cases of constructions or projections made over public drain, public road or lands belonging to the Municipality.

8. It was then submitted on behalf of the petitioner that even if it is held that it is open to the Municipality to take actions under sections 196 and 197 of the Municipal Act for removal of such encroachments, they can do it only after observing the rule of principle of natural justice, i.e., only after giving an opportunity to the petitioner to show that the constructions in question are not unauthorised or in contravention of section 179 or section 180 of the Municipal

Act and in that connection it was also pointed out that if any such opportunity would have been given, then the petitioner could have shown that he had obtained permission from the Municipality and he was also paying fee for the platform in question. In support of the contention reliance was placed on a Bench decision of this Court in *Bishwanath Prasad* v. *The Municipal Board, Chapra through the Special Officer, Chapra*(1) where a question had arisen for consideration as to whether before an unauthorised construction is demolished under section 198 of the Municipal Act, the person concerned is entitled to be heard or not. In that connection different sections were examined and it was pointed out that although none of the sections specifically mentions that before the constructions are demolished or removed the person concerned is to be heard, but such requirement was implicit in those sections. While repelling the argument made on behalf of the Municipality that section 198 does not contemplate any such notice, it was observed as follows :—

> "If the said contention is accepted, it has to be held that at no stage the person who is disputing the correctness of the assertion made on behalf of the Commissioners is to get an opportunity to show that he has not made any encroachment on any part of the Municipal land. Although the sections in question do not say in so many words, yet in my opinion, the requirement to show cause is implicit in those sections specially under section 198. The Magistrate has to issue notice to the person against whom he proposes to pass an order under that section and in case any show cause is filed in pursuance of the said notice, it is incumbent on the Magistrate concerned to hear the parties in question, to record a finding on the issue. This requirement has to be fulfilled, otherwise a person aggrieved can legitimately urge that such orders are illegal having been passed in breach of the principles of natural justice."

In my view, this contention made on behalf of the petitioner is well founded. It is difficult to conceive that a construction according to

(1) (1976) B.B.C.J. 204.

the sanctioned plan can be demolished even without affording any opportunity to the person concerned to show cause that the construction is not in contravention of any of the provisions of the Municipal Act or the rules and bye-laws framed thereunder.

9. The next question which arises for consideration is as to whether under the new Article 226 a person can make a grievance about the breach of principles of natural justice which is not a statutory law in the literal sense. According to the counsel appearing for the respondents, even if the petitioner was entitled to be heard, there being no specific provision to that effect in the Act, the petitioner is not entitled to relief under clause (*b*) or clause (*c*) of Article 226(1) of the Constitution. Clause (*b*) of Article 226(1) reads as follows :—

> "for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder."

In this clause (*b*) the words 'order, rule' will include only statutory orders and rules or will include even administrative orders issued in exercise of the executive powers of the State under Article 162 of the Constitution or rules which are not statutory but have acquired the force of law, is not free from doubt. But, in the facts and circumstances of the present case, in my opinion, this point need not be decided. In the present case this opportunity to show cause is not solely based on principles of natural justice, but in view of the aforesaid Bench decision of this Court it has to be read by necessary implication in section 198 of the Municipal Act. If it is accepted that under section 198, before the Magistrate concerned orders demolition of the constructions in question, he has to give an opportunity to show cause to the person concerned, then any breach of this procedure will amount to breach of the provision of section 198 itself so as to attract clause (*b*) as well as clause (*c*) of Article 226(1), if the injury caused by such contravention or breach is of substantial nature or has resulted in failure of justice. In my opinion, it cannot be urged that if a statutory authority constituted under the Act

passes an order in contravention of section 198 of the Municipal Act, ordering demolition of the house or constructions of a citizen, it will not amount to an injury of substantial nature or will not result in substantial failure of justice.

10. Now the question is that in the facts and circumstances of the present case, to what relief the petitioner is entitled. So far as the platform which was constructed on behalf of the petitioner is concerned, it has been asserted on behalf of the respondents that it has already been demolished. There is no specific denial. I am inclined to accept that the platform has already been demolished by the petitioner himself in view of aforesaid notice (Annexure 1). This may be under some threat, but if the petitioner himself has demolished, he is not entitled to any relief before this Court. Apart from that, from the receipts produced by the petitioner himself it appears that he was paying fees for occupation of the platform and there was a clear stipulation that it could be removed any time. Of course, the petitioner is entitled to have some sort of platform which may be used for access to his house in question, if it is otherwise not possible to approach. So far as the question of demolition of the projections made on road by the petitioner, on the basis of the sanctioned plan is concerned, it is only imperative on the part of the authorities concerned to proceed in accordance with the provisions of sections 196, 197 and 198 of the Municipal Act. If they want to demolish the same, then a notice should be given to the petitioner to show cause, in absence whereof it will amount to contravening the provision of section 198 of the Municipal Act itself.

11. In the result, the application is allowed in part to the extent indicated above. In the circumstances of the case, there will be no order as to costs.

B. S. SINHA, J.,—I agree.

Application allowed.

M. K. C.

CIVIL WRIT JURISDICTION

Before S. Sarwar Ali and Gobind Mohan Misra, JJ.

GANESH PRASAD SINGH & ORS.*

v.

THE STATE OF BIHAR & ORS.

1977

March, 24.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Act 12 of 1962) as amended by Act 22 of 1976—sections 4(a) and (b) and 5(3)(ii)—scope and applicability of—Ceiling area—classification of lands—whether to be done on the appointed day—future improvement in the land, whether to be taken into account—language of the legislation—interpretation of—considerations of harshness, reasonableness, justice and the like, whether to be taken.

After the amendment brought about by Act 22 of 1976, it is now clear, in view of the amendment of section 4 of Act 12 of 1962. that the ceiling area has to be determined with reference to the appointed day, the actual words used in the section being "on the appointed day the following should be ceiling area for one family unit for the purpose of this Act". Clause (*a*) of section 4 of the Act fixes the area as 15 acres so far as land irrigated or capable of being irrigated by State tube-wells, etc. are concerned. It is thus obvious that classification of lands has to be done on the appointed day. If irrigation facilities were not availlable on that day through such tube-wells, the lands in question cannot be classified as class I lands. In this connection, it will be pertinent to refer to section 5(3)(*ii*), which states that any future improvement will not be taken into account.

Held therefore, that in the instant case the authorities erred in law in holding that 8.17 acres of land was class I land on the ground that it was irrigated or capable of irrigation by the tubewell which was constructed in the year 1972.

*Civil Writ Jurisdiction Case no. 2620 of 1976. In the matter of an application under Articles 226 and 227 of the Constitution of India.

When the language of the legislation has only one meaning, considerations of harshness, injustice or convenience will not induce the court to change the meaning by interpretation. But where words are capable of more than one meaning or where there is a choice between wide and expansive meaning being ascribed to the words as compared to narrow and restrictive meaning, considerations of harshness, reasonableness, justice and the like have a definite role to play.

Held further, that it is only when a land-holder has assured source of irrigation, that the provision can be said to apply; where to irrigate or not to irrigate depends on his volition, and not on the sweet will of another. The assured irrigation may either be because the land-holder himself owns the tubewell or it may be because of certain contractual agreement between the land-holder and third persons, or any such circumstanee as can assure irrigation of the lands in question. If wider interpretation is given to the language of section 4(*b*) of the Act as suggested by the State, it would mean that although the land of land-holder has never been irrigated by an adjoining tubewell, yet the same will have to be classified as class II land, merely on account of existence of an adjoining tubewell belonging to another land-holder, for then the land can he said to be capable of irrigation. Such irrational and unfair result was not intended by the Legislature. Expression irrigation or capable of providing water has, therefore, not been used by Legislature in the wide sense. A restrictive meaning must be given to the words in section 4(*b*) which accords with justice and reasons and avoids irrational and unfair consequenees.

Case laws discussed.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of the Court.

M/s. Balbhadra Prasad Singh and *Janardan Pd. Singh*, for the petitioners.

M/s. Md. Khaleel (*G. P. III*) and *Iqbal Ahmad*, (*J.C. to G. P. III*), for the respondents.

SARWAR ALI AND GOBIND MOHAN MISRA, JJ.—"It is a canon of statutory interpretation, founded on happy experience, that Parliament is presumed to intend justice and to avoid injustice."

So said Lord Simon in *Rugby Joint Water Board* v. *Foottit*(1) reiterating a rule which has been fully recognised, and appropriately applied, in interpreting provisions of Statute. The instant case is also one of those cases where in order to get at the legislative intent this rule of interpretation has to be invoked. But first the facts

2. A proceeding under the provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act was started against Brajdeo Narain Singh (who died during the pendency of the revision application before the Board and was substituted by his heirs). An objection was filed to the draft statement which was served on the said Brajdeo Narain Singh. The objection was heard and disposed of under Annexure 3. An appeal was filed which has been disposed of under Annexure 2. Thereafter a revision filed before the Board of Revenue, has been disposed of under Annexure 1 by the Additional Member Board of Revenue. The petitioners challenge all these Annexures and pray that they be quashed.

3. The objections with which we are concerned in this case relates to classification of the lands, exclusion of the property gifted by the aforesaid Brajdeo Narain Singh to his daughter by a registered deed of gift, dated 7th March 1963, and that the petitioners were entitled to additional land permitted to be held under section 5(3)(*i*) of the Act. We shall deal with each of these objections separately.

4. The question whether the lands gifted to petitioner no. 4 should or should not have been excluded from consideration depends on whether she was major on the appointed day. The learned counsel for the petitioners contended that the finding in relation thereto is vitiated. Since, however, we are remanding the case we do not propose to express any opinion on this question, which may be raised before the authorities when the question of classification and additional land permitted to be held is being considered.

5. According to the draft statement 8.17 acres were class I and 20.94 acres of lands were class II lands. This has been accepted by

(1) (1972) 1 All ...ng. Rep. 1057, 1060.

the authorities and the objection of the land-holder to the contrary has been rejected. In holding that the lands as class I and class II lands, the authorities came to the following conclusions :—

(*a*) That a portion of land was irrigated by State tubewell which was constructed in the year 1972.

(*b*) 20.91 acres classified as class II land was being irrigated from private tubewells belonging to different persons and not the land-holder, who had only one tubewell. In other words, although, the land-holder had only one tubewell so far as his lands were concerned they were, in fact, irrigated by tubewells which belong to the other raiyats.

6 The first contention that has been raised in this connection is that the appointed day is 9th of September 1970. The ceiling area has to be determined as on the appointed day. Consequently, it has to be seen whether the irrigational facilities were available on that day. The fact that the State tubewell was constructed about two years after the appointed day would not be relevant for the purpose of classification of the lands in question and would not make the lands class I land. The view taken by the authorities is that the fact that the tubewell was constructed in the year 1972 is not of importance and it does not make any difference, since 9th September 1970 is not relevant for the purpose of classification of the land. The contention of the petitioner appears to be correct. After the amendment brought about by Act 22 of 1976, it is now clear, in view of the amendment of section 4 of Act 12 of 1962, that the ceiling area has to be determined with reference to the appointed day, the actual words used in the section being "on the appointed day the following should be ceiling area for one family unit for the purpose of this Act."/Clause (*a*) of section 4 of the Act fixes the area as 15 acres so far as lands irrigated or capable of being irrigated by State tubewells, etc., are concerned. It is thus obvious that classification of lands has to be done on the appointed day. If irrigation facilities were not available on that day through such tubewell, the lands in question cannot be classified as class I lands. In this connection, it will be pertinent to refer to section 5(3)(*ii*), which states that any future improvement will not be taken into account. The authorities thus erred in law in holding that 8.17 acres of land was class I land, on the ground that it was irrigated or capable of irrigation by the tubewell which was constructed in the year 1972.

7. We next take up the contention in relation to classification of lands as class II lands. The relevant provision is as follows :

> "4(b) eighteen acres, equivalent to 7,2846 hectares of land irrigated by such private lift-irrigation or private tubewells as are operated by electric or diesel power, and provide or are capable of providing water for more than one season (hereinafter referred to as class II land) :
>
> Explanation : Private lift irrigation or private tubewells mean those which are not constructed, maintained, improved or controlled by the Central or the State Government or by a body corporate constituted under any law, or"

In the instant case the petitioner owns only one tubewell. There is no finding as to how much land of the land-holder is irrigated or capable of being irrigated from the tubewell which belongs to him. The basis of coming to the conclusion regarding classification is that there are tubewells of other persons in the vicinity of the lands of the petitioners and the lands are, in fact, irrigated from such tubewells. It is, therefore, the fact of irrigation from tubewell of others which has been taken to be the determinative factor. The contention of the petitioners is that it is only where the lands are irrigated or capable of irrigation by assured source of irrigation mentioned in section 4(*b*) that the provisions would be applicable. Where irrigation is *dependent* on the volition of others the sub-clause aforesaid is inapplicable. The petitioners, the learned counsel, says, must have a right to irrigate the lands by tubewell before the authorities can bring the land so irrigated or capable of irrigation within the clause. The contention of the State on the other hand is that the words used in the section are very wide. There are no qualifying words to the expression irrigated or capable of providing water. Consequently, if there is factual irrigation of the lands by tubewell, etc., the lands would be class II lands Thus the State canvasses a wider interpretation. It says to interpret the words in their widest amplitude. The petitioners on the other hand invite this Court to give a restrictive interpretation. And so the problem now as ever, in similar circumstances, is to fathom the legislative intent.

8. When we speak of legislative intent we mean the intention as discernable from the words used. When the language the legislation has only one meaning, considerations of harshness, injustice or convenience will not induce the Court to change the meaning by interpretation. But where words are capable of more than one meaning or

where there is a choice between wide and expensive meaning being ascribed to the words as compared to narrow and restrictive meaning, considerations of harshness, reasonableness, justice and the like have a definite role to play.

9 In 1970 S. C. 1880 at 1883 at (*Budhan Singh and another* v. *Babi Bux and another*) Hedge, J said :

> ".....It is necessary to mention that it is proper to assume that the law-makers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words, as observed by Crawford in his book on Statutory Constructions that the entire legislative process is influenced by consideration of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently, where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, there is little reason to believe that it represents the legislative."

We shall now only mention a few decisions of the Indian, English and American Courts, where the emphasis has been on the result or consequence of the competing interpretations, pointing out the occasions when concept of justice has a definite role to play.

10. In *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and others* v. *Union of India*(1), Shah, J. observed :

> "Above all, the Court will avoid repugnancy with accepted norms of justice and reason."

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(1) (1971) A.I.R. (S.C.) 530.

Some twentyfour years earlier Chief Justice Beaumont observed in *Emperor* v. *Somabhai Govindbhai*(1) :

> "A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair, he is entitled, and indeed bound, to assume that the Legislature did not intend such a construction to be adopted, and to try to find some more rational meaning to which the words are sensible."

11. We may now refer to some of the English decisions. Bret, L.J. observed in *Ex parte Correct in re Shand*(2) :

> ".....there is a general rule of construction of statutes which is applicable to this matter, namely, that, unless you are obliged to do so, you must not suppose that the Legislature intended to do palpable injustice....."

Coming to recent times in Holmes v. Branofiled Rural District *Council* (3) Finnemore, J said :

> ".....if there are two different interpretations of the words in an Act the court will adopt that which is just, reasonable and sensible rather than that which is none of those things."

In *Inland Revenue Commissioners* v. *Hinchy*(4) *Lord Reid* observed :

> "One is entitled and, indeed, bound to assume that Parliament intends to act reasonably and, therefore, to prefer reasonable interpretation of a statutory provision if there is any choice."

The same law was put thus by Lord Reid in *Gramas Properties Ltd.* v. *Connaught Fur Trimmimings, Ltd.*(5).

> ".....one must always remember that the object in construing any statutory provision is to discover the intention of Parliament and that there is an even stronger presumption that Parliament does not intend an unreasonable or irrational result."

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(1) (1938) A.I.R. (Bom.) 484, 488.
(2) (1880) 16 CA. D. 120, 129.
(3) (1949) 1 All. Eng. Rep. 381, 381.
(4) (1960) All. Eng. Rep. 505, 512.
(5) (1965) 2 All. Eng. Rep. 382, 385.

Lastly, we may refer to a decision of the U. S. Supreme Court in the *Lessee of Henry Brewer, v. Jacob Bloucher and Daniel Blougher*(1) where Chief Justice Taney said:

> "It is undoubtedly the duty of the Court to ascertain the meaning of the Legislature, from the words used in the statute, and the subject-matter to which it relates: and *to restrain its operation within narrower limits than its words import*, if the court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it."

12. We may mention here that *Budhan Singh's case Madhav Rao Scindia's* case and *Ex Parte Walton in re Levy*(2) are amongst cases where a restrictive meaning has been given to the word used by the legislature.

13. Now we must look to the result or consequence of the two interpretations. The interpretation put forth by the State would mean that even if there has been a casual or accidental irrigation of the land on the appointed day by one of the sources of irrigation mentioned in section 4(*b*), the land would have to be classified as class II land. Even in cases where availability of irrigational facility is available on the sweet will of a third person similar would be the result. The land-holder may have no right to irrigate the land, yet the mere fact of irrigation on a particular date would lead to the land being classified as class II land, although the land-holder may not be in a position to irrigate the land thereafter or may not have irrigated it earlier as well. Such the situation, in our view, could not have been contemplated by a legislature for that would clearly lead to injustice and hardship The narrower meaning that is put forth on behalf of the petitioner is much more in consonance with justice and common sense. It is only where a land-holder has assured source of irrigation, that the provision can be said to apply; where to irrigate or not to irrigate depends on his volition, and not on the sweet will of another. The assured irrigation may either be because the land-holder himself owns the tubewell or it may be because of certain contractual agreement between the land-holder and third persons, or any such circumstance as can assure irrigation of the lands in question. We may state that if we accept the wider interpretation suggested by the State it would even mean that although the land of land-holder has never been irrigated by an adjoining tubewell, yet the same will have to be classified as class II land, merely on account of existence of an adjoining

(1) 10 Law Edition 408, 418.
(2) 17 Ch. D. 182.

tubewell belonging to another land-holders, for then the land can be said to be capable of irrigation. We are not persuaded to accept that such irrational and unfair result was intended by the legislature. Expression irrigation or capable of providing water has, therefore, not been used by legislature in the wide sense which is being canvassed in this case on behalf of the State. We, therefore, accept the contention of the petitioner that a restrictive meaning must be given to the words in section 4(*b*), which accords with justice and reasons and avoids irrational and unfair consequences.

14. It is clear that in the instant case there has not been any examination of the question from the point of view whether the irrigational facilities available for 20.94 acres of land are assured irrigational facilities. The matter has, therefore, to be re-examined in the light of the law as explained.

15. Learned counsel for the petitioners pointed out that the Additional Member, Board of Revenue has accepted that one of the petitioners, Ganesh Pd. Singh is major but has not taken into consideration the fact that he has got a wife and four children. In view of the number of members in his family he is entitled to hold extra land as sanctioned in section 5(3)(*ii*) of the Act. This aspect also needs re-examination.

16. In the result, we allow this writ application, quash Annexures 1, 2 and 3 and direct the disposal of the objections under section 10(3) of the Act in accordance with law and in the light of the law as explained in this judgment. It appears that even on the petitioners' case 5.62 acres will be in excess of ceiling area and we, therefore, direct the petitioners to indicate to the authorities 5.62 acres of land which may be treated as surplus and be immediately dealt with in accordance with law. In case the authorities find that some further area has to be declared as surplus suitable steps will also be taken later in that regard in accordance with law. We fix 15th April, 1977 as the date on which the petitioners must appear before the Subdivisional Officer and give details of 5.62 acres of land as directed above. On that date another date should be fixed for hearing of objection and disposal thereof according to the law. The parties including the State, may then adduce such evidence as they may be advised in support of their respective cases. There will be no order as to costs.

M. K. C. *Application allowed.*

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Secretary to Government.

BSP (I. L. R.) 5—Lino—600—9-5-1978——G.B.M. & others

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CIVIL WRIT JURISDICTION

1976

July, 27.

Before B. D. Singh and Muneshwari Sahay, JJ.

DR. PHANI BHUSHAN PRASAD.*

v.

THE STATE OF BIHAR & ORS.

Constitution—Article 226—application under—Sergeant Major Rules, 1944—applicability of—principle of seniority-cum-merit, whether would apply in case of appointment and promotion in Medical Colleges—writ-petitioner, whether entitled to be considered for promotion as professor in Surgery by State Government.

Where it was stated by the State that there was no statutory rules regarding appointment and promotion in Medical Colleges and that Sergeant Major Rules of 1944, which have statutory force of law under Article 309 of the Constitution, were not applicable in their case;

Held, that, it would be difficult to limit the scope of the Sergeant Major Rules, which has been conceded that it has statutory force in view of notification, dated 15th April, 1950. The said rule indicates that only length of teaching experience cannot be considered as a criteria for appointment and promotion. In other words merit should also be taken into account;

Held, further, that the principle of seniority-*cum*-merit would apply in the instant case. In case of promotion of doctors their academic attainments and the intellectual ability, etc. have to be considered in order to promote the public welfare;

Held, also, that the writ-petitioner has made out a case that he was entitled to be considered by the State Government for promotion

*Civil Writ Jurisdiction Case no. 706 of 1976. In the matter of an application under Article 226 of the Constitution of India.

as a Professor in Surgery. *Prima facie* it seems that the writ-petitioner is quite meritorious than respondent no. 2, the former possessing the requisite length of teaching experience as well as being senior to respondent no. 2 in the speciality and in the combined cadre. However, it is for the State Government to investigate and be satisfied about the writ-petitioner's real qualification *vis-a-vis* respondent nos. 2 and 3. For affording a fresh opportunity, so that the writ-petitioner may also be considered, the appointment of respondent no. 2 is quashed.

Case law discussed.

Application under Article 226 of Constitution.

The facts of the case material to this report are set out in the judgment of B. D. Singh, J.

Messrs. Basudeo Prasad and *Nagendra Kumar Roy*, for the petitioner.

Messrs. Balbhadra Prasad Singh, (*Advocate-General*), *Shreenath Singh*, *Shivanand Prasad Sinha*, *K. N. Keshava*, *C. K. P. Bhagat* and *Biresh Chakravarty*, for the opposite party.

B. D. Singh, J.—This application by Dr. Phani Bhushan Prasad, under Article 226 of the Constitution of India, is directed against the proposal contained in the memorandum submitted to the Government, dated 27th December 1975 (Annexure 4) for appointment of Dr. H.N. Verma, respondent no. 2 as a Professor in the Department of Surgery, Rajendra Medical College, Ranchi, on the basis of combined gradation list showing him as seniormost lecturer in surgery, as also against the promotion of respondent no. 2 as Professor of Surgery in the P. W. Medical College, Patna (hereinafter referred to as 'the Patna Medical College'), as per order, dated 22nd March 1976 (Annexure 5 to the supplementary affidavit, dated 29th March 1976) in the vacancy caused by the retirement of Dr R. V. P. Sinha and also against the promotion of Dr. S. K. Sarkar (respondent no. 3) as Professor of Surgery in the Rajendra Medical College, Ranchi (hereinafter referred to as 'the Ranchi Medical College') as per order, dated 22nd March 1976 (Annexure '6' to the petition for amendment filed on behalf of the petitioner on 15th April 1976). Prayer has further been made for

quashing the gradation list of lecturers in surgery employed in the medical colleges of the State of Bihar, as contained in Annexure '4', and for determination of the seniority of the petitioner *vis-a-vis* respondents 2 to 5 for the purpose of appointment to the post of Professor in Surgery in the Patna Medical College, since, according to the petitioner, he ought to have been considered for such promotion instead of respondent nos. 2 and 3.

2. In order to appreciate the points involved in this petition, it will be necessary to state briefly the facts, as stated in the main application, supplementary affidavits and the counter-affidavits filed on behalf of the respondents

3. The petitioner passed matriculation examination in first division in 1943, and I.Sc. examination in first division in 1945 from Patna University. In 1950 he passed M.B., B.S. examination securing three Gold Medals. He had to his credit five honours merit scholar from 1st to 5th year of the M.B., B.S. He also obtained Sifton Gold Medal for securing highest marks in medicine, besides P.C. Talent's prize medal for highest mark in aggregate at final M.B., B.S. (Parts I and II) Examination and Wheeler Gold Medal for securing highest marks in aggregate at the M.B.,B.S. final Examination. Thereafter the petitioner was recruited to the Bihar State Medical Service on 3rd July 1951 and he joined as Civil Assistant Surgeon. He was Casualty Registrar from 6th November 1952 to 17th August 1953 and Surgical Registrar from 18th August 1953 to 27th September 1955, in Patna Medical College (vide Annexure 1/1). In the meantime the petitioner passed Primary F.R.C.S. (London) from Colombo in 1952, only six months after finishing his housemanship. He passed Master of Surgery in 1954 from Patna University and final F.R.C.S. (London) in 1956 only in about six months after reaching London, after having gone on Ex-India study leave from 28th September 1955 and remained abroad up to 9th August 1958. He has to his credit several scientific papers published in Scientific Journals and he presented many papers in National and International Surgical Conferences. The petitioner remained on supernumerary duty (in short 'supy. duty') from 10th June 1958 to 2nd September 1958, thereafter as junior surgeon from 3rd September 1958 to 9th November 1962; tutor from 10th November 1962 to 13th September 1968 and lecturer in surgery from 14th September 1968 on which post he is still continuing.

4. That when the petitioner joined as Civil Assistant Surgeon on 3rd July 1951, Dr. H. N. Verma (respondent no. 2) was then not even qualified for the post, since he was simple graduate in medicine, and was never selected by the Bihar Public Service Commission for the post of Civil Assistant Surgeon as a direct recruit. In 1954 respondent no. 2 became a Malaria Officer. In 1959 respondent no. 2 passed F.R.C.S. from Edinburgh and on return to India, he was posted in Surgical Department of the Patna Medical College on supy. duty from December 1959 to August 1965 and while so posted, he tried to compete for every regular post like Resident Surgical Officer, Registrar, Tutor but due to his poor academic record could not succeed. In 1965 respondent no. 2 was somehow designated as Junior Surgeon retrospectively from 1959 to 1964, to enable him to gain teaching experience for the period while he was on supy. duty. Thereafter for certain period from 1964 to August, 1965, he worked as Surgical Register when he was posted in Ranchi Medical College as a lecturer but the concurrence of the Bihar State Public Service Commission (hereinafter referred to as 'the Commission') had never been obtained in his case. It may be stated here that in 1962 respondent no. 2 obtained Master of Surgery degree from the Bihar University. Except the thesis for his M.S. Examination he has no scientific work or paper to his credit and his professional records as a clinician and teacher are very much inferior to those of the petitioner. Over and above, the State Government never gave him the status of a senior surgeon.

5. The petitioner further states that the State Government in the year 1962 included the name of the petitioner in the panel for appointment of lecturers in the medical colleges, requiring three years of teaching experience and the Patna University too, which recognised the teaching experience only on regular post, that is, Tutor, Registrar, Junior Surgeon, etc. for appointment as lecturers, did the same thing in 1963. At that time Dr. H. N. Verma, respondent no. 2, was nowhere as a teacher, what to speak of being considered for appointment as a senior teacher, like lecturer. It was only on the basis of posting of respondent no. 2 as a lecturer in Ranchi Medical College on 20th August 1965, by which he was designated as a Junior Surgeon on supy duty and certain other posts in the officiating capacity on supy. duty as Registrar, that he was so posted for performance of such duty only on the basis of such designated teaching experience. The process of filling up of posts in the Patna Medical College, while under the Patna University and the State Government, had been by appointment on fixed criteria, either made or confirmed by the Commission, for which

respondent no. 2 was unable to compete due to his ordinary merit. Many persons like respondent no. 2 could not compete for any regular post like tutor in the Patna Medical College but shortly afterwards they were given higher posts of lecturer in Ranchi and Darbhanga Medical Colleges, by respondent no. 1. On 9th November 1968 respondent no. 1 by letter no. 6472(2), addressed to the Patna University, sent a panel of names for the appointment of lecturers of surgery in Patna Medical College, which included the name of the petitioner at serial no. 7, that of respondent no. 2 at serial no. 9 and those of respondent nos. 3, 4 and 5 at serial nos. 16, 18 and 27, respectively, as would be apparent from Annexures 1 and 1/1. Patna University referred the names of the petitioner, respondent no. 2 and others, to the Commission for recommendation for appointment as lecturer in surgery at Patna Medical College and the Commission, after interview, selected and recommended the petitioner as the first nominee for the post of lecturer in surgery, in preference to respondent no. 2. None of the respondents was found suitable for the said post of lecturer in surgery at Patna Medical College, as would be apparent from the letter dated 25th September 1969—Annexure '2'. Respondent no. 2, having not been recommended by the Commission for being appointed as a lecturer in surgery at Patna Medical College, managed to continue as a lecturer in Ranchi Medical College, even beyond six months, without the concurrence of the Commission, on an illegal order of the Government.

6. The petitioner further submitted in paragraph 15 of the main application that although there are two separate cadres of teachers for Patna Medical College and Ranchi Medical College, the State Government by Order, dated 15th December 1972 (Annexure 3) transferred respondent no. 2 as lecturer from Ranchi Medical College to Patna Medical College in its Surgery Department, where the petitioner had been working on a permanent basis as a lecturer from before. The said transfer order (Annexure 3) has been challenged in C.W.J.C. 150 of 1973 by Dr. K. K. Sinha, which is pending consideration, on the ground that the transfer of respondent no. 2 was *mala fide* and in circumvention of law relating to appointment of lecturers in Patna Medical College. During the pendency of that writ petition (C.W.J.C 150/73) respondent no. 1 initiated an illegal proposal for appointment of respondent no. 2 as professor of surgery in Ranchi Medical College on 27th December 1975 on the basis of an illegal combined gradation list showing him as seniormost lecturer in surgery—vide Annexure '4'.

Before, however, the said proposal was finally disposed of, a vacancy in the post of professor of surgery occurred in Patna Medical College consequent upon the retirement of Dr. R. V. P. Sinha. Before the petitioner had filed the present writ application, the proposal as contained in Annexure '4' for appointment to the post of professor of surgery in Ranchi Medical College was placed before the Cabinet in its meeting, dated 17th February 1976 to take its decision but no decision, was, however, taken on that date. According to the petitioner, respondent no. 2 was trying to get himself appointed in Patna Medical College in place of Dr. R. V. P. Sinha. After the petitioner had filed the present writ petition on 5th March 1976, respondent no. 1 on 22nd March 1976 appointed respondent no. 2 in the vacancy caused by the retirement of Dr. R. V. P. Sinha. Therefore, the petitioner filed a supplementary affidavit on 29th March 1976 wherein a copy of the said order of appointment of respondent no. 2 has been made as Annexure '5', and he has also challenged that order. The petitioner has also filed a petition on 15th April 1976, enclosing therewith a copy of the order of appointment of respondent no. 3 as professor of surgery in Ranchi Medical College (Annexure 6) with a prayer to amend the main petition. In that application the petitioner has reiterated that he had prayed for quashing of Annexure '4' and for determination of the seniority of the petitioner *vis-a-vis* respondents 2 to 5 for the purpose of appointment to the post of professor in surgery in the Patna Medical College and to rectify the said gradation list by declaring the petitioner senior as a lecturer of surgery to respondent nos. 2 to 5. As stated earlier, the petitioner has also challenged the two orders of appointment, one relating to respondent no. 2 as professor in surgery in place of Dr. R. V. P. Sinha (Annexure 5) and the other relating to respondent no. 3, as professor in surgery in Ranchi Medical College (Annexure 6) as having been passed arbitrarily and illegally, ignoring the claim of the petitioner and without giving any consideration to his case. The amendment prayed for was allowed by this Court by order, dated 16th April 1976.

7. A counter affidavit was filed on behalf of respondent no. 1 on 4th May 1976, *inter alia*, justifying the appointment of respondent nos. 2 and 3. It was further denied that the said appointment was made arbitrarily and without any principle. It also stated that the name of respondent no. 2 was published as indicated in the cadre of State Health Service at serial no. 315 (permanent) vide notification dated 17th February 1968 and the same was never objected by the petitioner.

It was further stated that the appointment to the posts of lecturers and professors are guided by the recommendations of the Medical Council of India according to which 5 years of minimum teaching experience as lecturer in surgery is taken into account for the post of professor in surgery, and that only the length of teaching experience as a lecturer is the main point of consideration for the appointment to the post of professor. In paragraph 18 thereof it was stated that respondent no. 2 was continuing to hold the post of lecturer (surgery) with effect from 20th August, 1965, whereas the petitioner was appointed as lecturer (surgery) with effect from 14th September, 1968 and that also temporarily in anticipation of the concurrence of the Commission, which has now been received and the proposal to regularise his aforesaid appointment is under consideration of the Government. Therefore, it is asserted that the contention of the petitioner that he had long teaching experience as a lecturer than respondent no. 2 was not correct and so there was no question of the petitioner being threatened with illegal supersession by respondent no. 2 having been appointed as a professor in surgery in the vacancy caused by the retirement of Dr. R. V. P. Sinha By reference to Annexure 4 it is also to be found that respondent no. 5 was also appointed lecturer from the same date (20th August, 1965). In paragraph 13 of the counter affidavit of the State it was stated that the contentions of the petitioner in paragraph 15 of his application were not tenable in law. There was nothing like separate cadre of teachers posted in the State Medical Colleges. According to respondent no. 1, there is only one cadre, that is, the Bihar State Health Service, which includes the aforesaid teachers. They are treated on deputation to the teaching side while posted as such.

8. Another counter affidavit has been filed on 21st April, 1976 on behalf of respondent no. 2, among others, justifying his appointment and the order passed by the State Government and also his transfer from Ranchi Medical College to Patna Medical College. In his counter affidavit he has annexed various papers supporting his contentions, which shall be referred as and when required. In paragraph 3 of the counter affidavit, *inter alia*, he stated that the memorandum contained in Annexure '4' included only seniormost lecturers eligible for promotion to the post of professor in surgery in the Medical Colleges under the State Government. It is clearly indicated in that memorandum that for appointment to the post of professor only such lecturers are considered who possess certain minimum academic qualification and who hold minimum five years' teaching experience as a lecturer. It

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was submitted by respondent no. 2 that the length of teaching experience as a lecturer had always been most important determining criteria for selection for the post of professor, therefore, in accordance with the guidelines prescribed by the Indian Medical Council, as explained in Annexure '4' names of five seniormost lecturers, including respondent no. 2, were placed before the Cabinet for selection for the post of professor. In view of his academic qualifications, longest tenure of experience as a lecturer and his satisfactory record of service he (respondent no. 2) was selected for the post of professor.

9. A separate counter affidavit has been filed by respondent no. 3 on 26th April, 1976. He has also, *inter alia*, justified his appointment as a professor under Annexure 6. In paragraph 4 of the counter affidavit, he has stated that he became tutor in surgery on 29th July, 1957 and remained as such till 20th August, 1965 and, therefore, from 21st August, 1965 he became a lecturer in surgery and is continuing as such till the date of filing of the counter affidavit. In paragraph 5 thereof he has stated that the petitioner became tutor from 10th November, 1962 and remained as such till 13th September, 1968 and only thereafter he became a lecturer in surgery and hence in no case the petitioner can claim seniority over respondent no. 3. In paragraph 6 he stated that he (respondent no. 3) had also a better academic career. As a matter of fact, he got innumerable medals and prizes during the course of his scholastic period at Darbhanga Medical College and he secured F. R. C. S. Degree in 1955 in a record time and passed both Parts I and II in first attempt, as a result of which he was appointed directly in teaching cadre from 1956 and onwards. In paragraph 8 respondent no. 3 submitted that in 1962 he being fully qualified and experienced his name was included by the State Government in the panel of names for appointment as a lecturer and he appeared before the Commission. He fulfilled all the criteria for the post of lecturer in surgery (tutor in surgery) and as such he was given option on the basis of his merit, whereas the petitioner had irregular teaching assignment by his being a casualty officer in the year 1952-53, which was never a teaching post.

10. Annexure 4, memorandum containing proposal for the appointment which the petitioner has prayed for quashing, also included the names of Dr. H. N. Thakur (respondent no. 4) and Dr. Mahendra Pratap Sinha (respondent no. 5). Therefore, counter affidavits have also been filed by them. Respondent no. 4 filed his counter affidavit on 19th April, 1976 and respondent no. 5 filed his counter affidavit on

24th April, 1976. I will refer those affidavits if and when required. Thereafter, the petitioner has filed replies to the counter affidavits of the respondents on various dates.

11. Mr. Basudev Prasad, learned counsel appearing on behalf of the petitioner has raised the following points for consideration by us :—

(i) impunged order contained in Annexure '5' under which respondent no. 2 has been promoted as professor in surgery in the vacancy caused on the retirement of Dr. R. V. P. Sinha and also the order under Annexure '6' whereby respondent no. 3 has been promoted as professor of surgery in Ranchi Medical College on the proposed contained in the memo. under Annexure '4' are *ultra vires* of Article 16(1) of the Constitution of India, being in violation of law as it was arbitrary exercise of power and also it was a *mala fide* act of respondent no. 1.

(*ii*) The order of transfer of respondent no. 2 dated 15th December, 1972, as contained in Annexure '3', is *ultra vires* rule 56 of the Bihar Service Code and *mala fide*, as the Patna Medical College teachers formed a separate cadre within the meaning of rule 12 of the said Code.

(*iii*) The petitioner has been wrongly shown as junior to respondents 2 to 5 on the basis of length of teaching experience alone, which is contrary to the decision of the State Government, as also 1944 Sergeant Major Rules, which got statutory force on 15th April, 1950, by notification no. 3555-3L-27/50A.

12. It will be convenient to deal with the submission of learned counsel of the petitioner under point no. (*ii*) first. According to him, there are two separate cadres of teachers in the Patna Medical College and Ranchi Medical College. In order to appreciate his submission learned counsel referred to the past history as to how the Patna Medical College came into existence. In this connection he referred to the affidavit in reply filed by the petitioner on 11th May, 1976 to the counter affidavit filed on behalf of respondents 1 and 2, In paragraph 3 thereof it was stated that the Government of Bihar and Orissa in their letter dated 25th February, 1918 sanctioned the provincialization of the Bankipur General Hospital with effect from 1st April, 1918 under the

nomenclature of Patna General Hospital. The Civil Surgeon of Patna took entire charge of the Hospital as the Superintendent from the Committee of Management. The Prince of Wales Medical College, Patna, has evolved out of the old Temple Medical School established in 1874 and named after Sir Richard Temple who formerly opened the same. For over 30 years that institution continued in a dormant condition when Sir Andrew Fraser, the Lt. Governor of Bengal, recognised its claim and made liberal grants for its improvement. The Prince of Wales Medical College, Patna, was created as the first Medical College in Bihar, by the British Government of India by converting and upgrading the Temple Medical School on 25th February, 1925. On the basis of the statement made by the petitioner in paragraph 18 of the reply filed by him on 27th April, 1976 to the counter affidavit of respondent no. 2, it was urged that the Government had sanctioned the Prince of Wales Medical College, Patna, as a Unit of the then Medical Service with a separate hierarchy of teaching posts. Subsequently, other medical colleges were created by the State Government after Independence. The Patna Medical College was transferred to Patna University. According to the petitioner, Patna Medical College in the Patna University continued to be a separate cadre and appointment to that cadre was made in accordance with the relevant provisions of the Patna University Act and the Statute of the Patna University. When different medical colleges were created by the State Government, each was sanctioned as a separate part of the Medical Service or the State Health Service as a separate Unit. Each college had a separate Cadre within the meaning of that expression under the Bihar Service Code. The Governor's Ordinance dated 29th May, 1971, which returned the ownership and management of the Patna Medical College to the Government also in terms maintained it as a separate part of Service by continuing and protecting all the rights of the existing teachers of the college. He emphasised that its existence as a separate unit was never obliterated He contended that there was no Government decision merging it either with the Government Health Service or with any other part of the Service existing as a separate Unit. In that view of the matter he contended that the State Government had illegally and arbitrarily transferred respondent no. 2 as lecturer from the Ranchi Medical College to Patna Medical College in its surgery department under Annexure 3. The petitioner had been working on a permanent post of lecturer in that Department from before. The said transfer adversely affected the prospect of promotion of more suitable tutors of the Medical College. According to him, it was done *mala fide*.

13. On the other hand, the Advocate-General appearing for respondent no. 1 submitted that there is nothing like separate cadre of teachers posted in the State medical colleges. There is only one cadre, that is, the State Health, Service, which includes teachers of various colleges. For example, teachers of Ranchi and Darbhanga Medical Colleges are all treated as on deputation to the teaching side while posted as such, he referred to *Dr. Umakant Saran* v. *State of Bihar*(1). In paragraph 6 of the judgment their Lordships observed that "there had been a reorganisation of the Medical Health Services. The State Government had two separate cadres known as the Medical cadre and the Public Health cadre in Bihar. Both these cadres were merged into one cadre known as the Health Service by Government Resolution dated July 17, 1965 published in the *Bihar Gazette* Extraordinary on July 22, 1965. This amalgamated cadre consisted of (*i*) duty posts on the Administrative side and (*ii*) teaching posts. All posts in the new health service were borne on the administrative side and the teaching posts were filled on an officiating basis from amongs those who were borne on the administrative side after having due regard to their teaching experience..... As the teachers are always regarded as on deputation, they could be withdrawn to the administrative side....." He pointed out that the Medical Colleges at Darbhanga, Ranchi and Bhagalpur, which were established subsequently, were maintained and run by the Government under its direct supervision. The Patna Medical College, which was originally maintained and run by the Government under direct supervision, was transferred to the control of the Patna University; but later the State Government resumed control under Ordinance no. 62/71. On the basis of the above observations he emphasised that all the teachers were treated as on deputation. There was, therefore, no bar for a lecturer working in Ranchi Medical College to be transferred to the Patna Medical College having the same qualification. In other words, they were interchangable. Learned counsel for the other respondents have adopted the arguments advanced by learned Advocate-General and in this connection they have drawn our attention to the statements made in the various counter affidavits.

14. In my opinion, on the materials on the record it will be difficult to accept the contention of learned counsel for the petitioner that the Patna Medical College has its separate existence and has

(1) (1973) A. I. R. (S. C.) 964.

a separate cadre and, therefore, respondent no. 2 could not have been transferred from Ranchi to Patna Medical College. Rule 12 of the Bihar Service Code defines 'cadre', means "the strength of the service or a post of a Service sanctioned as a separate unit". In the counter affidavit, which respondent no. 2 has filed, he has enclosed a copy of the gazette notification dated 6th March, 1968 containing Government resolution dated 17th February, 1968 (Annexure 'I' therto), the relevant portion of which reads thus :

> "the State Medical and the State Public Health Cadres are hereby combined into a single cadres known as 'State Health Service' with effect from the 1st April 1964 as in the statement appended hereto."

Paragraph 8 of the Finance Department resolution dated 17th July, 1965 (Annexure 'J' thereto) also goes to show that the teachers of the medical colleges are officers of the Bihar Medical Service Cadre and they are deputed to the medical colleges on teaching assignment, the relevant portion of which reads thus :

> "The Medical and Public Health Cadre will be combined and will be called the 'Health Service'. The cadre will consist of duty posts on the administrative side and teaching posts calculated on the basis of the actual requirements of deputation on the teaching side. The holders of teaching posts will be treated to be on deputation to the teaching branch for the time during which they are employed as teachers and will be in the teaching posts on officiating basis."

If we accept the contention of learned counsel for the petitioner that the Patna Medical College should be treated as a separate Unit having separate cadre and other medical colleges should be considered as having separate cadre for the purpose of appointment, transfer and promotion, it would not also serve public interest. Reference may be made to the *State of Bihar* v. *Asis Kumar Mukherjee*(1) where Krishna Iyer, J. in paragraph 26 has observed "Government's sole concern, we feel confident, will be to get the most capable, in the public interest....." If in the public interest it is necessary that a doctor should be transferred from Ranchi to Patna or from Patna to Ranchi

(1) (1975) A. I. R. (S. C.) 192.

and for the sake of administrative contingency also in my view, the Government should have a free hand, and it should not be easily interfered with. In the *State of Jammu & Kashmir* v. *Triloki Nath Khosa*(1) at page 13 in paragraph 42 Chandradchud. J. observed :

"This.....It is often impossible or at any rate inexpedient to reach and remedy all forms of evil, wherever present. Reform must begin somewhere if it has to begin at all and therefore, the administrator who has nice and complex problems to solve must be allowed the freedom to proceed tentatively, step by step. Justice Holmes gave in a similar context a significant warning that : 'We must remember that the machinery of Government would not work if it were not allowed a little play in its joints.' Bain Peanut Co. *v.* Pinson (1930) 75 Law Ed. 482, 489."

In the instant case, therefore, I do not find any material to hold that the transfer of respondent no. 2 from Ranchi Medical College to Patna Medical College was in any way motivated, and, according to me, it was not a *mala fide* action of respondent no. 1. After careful consideration, therefore, I hold that there is no merit in the contention of learned counsel for the petitioner under point no. (*ii*).

15. Now, I proceed to consider the controversial point nos. (*i*) and (*iii*) together as they are allied. Mr. Basudev Prasad submitted that although the petitioner had requisite minimum qualification, he was not considered at all while making the order of promotion of respondents 2 and 3. In paragraph 5 of the counter affidavit, filed on behalf of respondent no. 1, the minimum qualification is given the relevant portion of which is mentioned below :—

> "Appointments to post of Lecturer and Professors are guided by the recommendations of the Medical Council of India (noted below) according to which 5 years of minimum teaching experience as Lecturer in Surgery is taken into account for the post of Professors in Surgery.

(1) (1974) A. I. R. (S. C.) 1.

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Post.	Academic Qualification.	Teaching/Research Experience.
Professor	M.S., F.R.C.S., Speciality Board of Surgery (U.S.A.) or an equivalent qualification in the subject.	As Reader/Assistant Professor in Surgery for 5 years in a Medical College after requisite post Graduate Qualification."

Learned counsel for the petitioner referred to paragraph 18 of that counter affidavit in which it has been stated that the petitioner was appointed as lecturer (surgery) with effect from 14th September, 1968 temporarily in anticipation of the concurrence of the Commission, whereas respondent no. 2 was holding the post of lecturer (surgery) from 20th August, 1965. So was the case of respondent no. 3, that is, he was also holding the post of lecturer (surgery) from 20th August, 1965. Therefore, it was submitted by the learned counsel that it is admitted by the respondent that the petitioner had minimum requisite length of teaching experience. In the concluding portion of paragraph 18 of the said counter affidavit it is stated "that the aforesaid proposal to appoint respondent no. 2 as Professor of Surgery is in accordance with law since he possessed more teaching experience as lecturer whereas the petitioner was not even considered because his teaching experience as Lecturer being less than others." The bone of contention is as to whether only length of teaching experience should be taken into account while making promotion. According to the case of respondent nos. 1 to 5, only length of teaching experience is the main point for consideration in such cases. According to counsel for the respondents that has always been the basis in the past and the same has been held in various cases decided by this Court.

16. On the other hand, Mr. Basudev Prasad contended that according to Sergeants Major's Rules and the latest decision of the Supreme Court merit has also to be taken into account and not only length of teaching experience. In order to find support to his contention he relied on The State of Bihar *v.* Asis Kumar Mukherjee (A.I.R. 1975 Supreme Court 192). That case arose out of the judgment of this Court of which I was one of the members. The main issue, as

framed by Krishna Iyer, J., who delivered judgment for the Court, is to be found in paragraphs 3 and 4 of the judgment which read thus :—

"3. The main issue that arises and was argued before us by the State's counsel, supported by Shri Garg for the other candidates, is that the High Court, which allowed the writ petition, grievously erred in probing improperly into the concerned cabinet papers and upsetting Government's orders of appointment, upholding the petitioner's eligibility and directing a reconsideration of the claims of all the contenders on certain untenable finding of fact and indefensible interpretation of law. Did the petitioner possess the prescribed qualifications for the post ? If he did, the High Court was right in directing the appointing authority to consider his claims; and if did not Government rightly ignored his credentials for the post as an unqualified hand, despite his impressive British testimonials and good showing otherwise. Such is the compass of the dispute which is basically a technical question but, under our system, has to be decided by courts unaided by expert advice.

4. The case has taken three days of argument based on three heavy volumes of appeal records mercifully less than the eight days of hearing in the High Court. The colossal consumption of forensic time, investment of considerable litigation expense and the diversion of useful medical energy of three young specialists for three years in two rounds of writ contests are the heavy social price paid by the community for discovering through court—trained in law and not in medicine, and called upon to adventure into the nature of actual *teaching experience* and names of approved *teaching institutions* beyond Indian frontiers. The question involved is as to whether the writ petitioner, a doctor who worked in hospitals in Britain under orthopaedic professors supposedly of great repute, had *teaching experience* ('in a *teaching institution* good enough under the Indian statute and for the Patna College. From Olympic team selection to orthopaedic expertise the judicial robes are invited to exercise umpire's jurisdiction under our system. Even were Judges angels, should they not fear to tread where perhaps others may rush in ?"

Mr. Prasad drew our attention to paragraph 23 of the judgment in which it has been observed that while officious interference with every wrong Government order was not right, the first respondent of that case had complained of violation of the regulations which bound State

and citizen alike. Although the State need not always make a reasoned order of appointment, reasons relevant to the rules must animate the order. Moreover, an obligation to consider every qualified candidate is implicit in the 'equal opportunity' right enshrined in Articles 14 and 16 of the Constitution. Screening a candidate out of consideration altogether is illegal if the applicant has eligibility under the regulations and for such a drastic step as refusal to evaluate comparatively, i.e., exclusion from the ring of a competator manifest grounds must appear on the record. Such being the legal perspective, their Lordships tested the order of the Government by those canons. Mr. Prasad laid emphasis on the observation made in paragraph 26 of the judgment at page 198 of the Report. It will be relevant to extract the said paragraph in extenso :—

"We have already observed that at the first flush the 1st respondent looks like eligible and highly qualified but there may be more than meets the eye. Government may investigate and be satisfied about the real qualifications. In the interests of justice and in view of the ambiguous thinking on this question at administrative levels we regard it as necessary to give the candidates time till the end of January, 1975 to produce evidence of the 1st respondent's teaching experience in teaching institutions as interpreted by us. Government will give a fair consideration to the qualifications and relative worth of all the candidates. Length of teaching experience will certainly be a relevant not necessarily dominant—factor. The quality of their experience, their academic attainments and the intellectual ability to stimulate students in the speciality and the investigative curiosity likely to be imparted to the alumni—these weighty considerations will promote public weal in a country hungering for talented doctors. Government's sole concern, we feel confident, will be to get the most capable, in the public interest and in the hope that this happy wish will not fail we proceed to issue the substantive declaration and directions."

On the basis of the above observations Mr. Prasad submitted that their Lordships have clearly held that the length of teaching experience will certainly be a relevant—not necessarily dominant—factor. Therefore, the quality of experience, academic attainments and intellectual ability have also to be taken into account and their Lordships have held that those were weighty considerations which.

17. Mr. Prasad also drew our attention to an unreported judgment of this Courtt dated 31st January 1976 in C. W. J. C. no. 1820 of 1974 (*Dr. Sharda Sahay* v *State of Bihar and others*) wherein it was observed

that generally for promotion seniority-*cum*-merit is taken into consideration but it does not mean that the length of teaching experience should not be considered at all.

He also submitted, by reference to Sergeants Major's Rules of 1944, which is to be found in notification no. 2765/A dated 15th July, 1944, that for promotion merit is to be treated as a weighty consideration and the quality of experience, academic attainments, etc. have to be taken into account. He also submitted that the said Rules have statutory force of law under Article 309 of the Constitution. Relevant portion of the said Rules reads thus:

> "A definite decision regarding the fitness of officers for promotion to the higher service should be taken not when officers are promoted to officiating vacancies but when substantive vacancies occur. In making this decision the policy should be to reject rigorously all those who are unfit for promotion, i.e., all those who are not definitely fit for the higher posts and subject to the conditions, to promote by seniority. Thus, if more than one officer has to be promoted to the post of Deputy Superintendent of Police on the same day, their seniority *inter se* should depend on their seniority as Inspectors or Sergeants-Major, provided all of them satisfy the criterion of fitness....."

Learned counsel also referred to an extract of Government orders communicated to the Darbhanga Medical College under Health Department's letter no. IIP 4-2-1-55—12319/H, dated 2nd May, 1955, which is as follows:—

> "That the Government has been pleased to decide that when two officers are more or less on equal merit then the length of experience as specialist should be the deciding factor in determining the seniority between one another to hold a specialist post, when, however, they are of equal merit and have also equal length of service as specialist then seniority in the cadre should be deciding factor."

The submission of Mr. Prasad was that the above Government decision is also supplemental to the Sergeants Major's Rules and points to the same direction that merit should not be ignored while passing an order for promotion. He contended that length of teaching experience as

specialist should be the deciding factor in determining seniority between one and another, to hold a specialist post. It is only when 2 or more persons of equal merit with equal length of service as specialist that seniority in the cadre should be the deciding factor. This decision of the Government, learned counsel submitted, fully supports the case of the petitioner.

18. How merit has to be judged, learned counsel submitted, guideline has been provided by the Supreme Court in *Gurnam Singh* v. *State of Rajasthan* (Supreme Court Service Laws Judgments—1935—1973 at page 571, Vol. 3). In that case also their Lordships dealt with the case of promotion. It was observed therein that no doubt the term 'merit' was not capable of any easy definition, but it could be safely said that merit was sum total of various qualities and attributes of an employee such as his academic qualifications, his distinction in the University, his character, integrity, devotion to duty and the manner in which he discharges his official duties. Allied to that might be various other matters or factors such as his punctuality in work, the quality and out-turn of work done by him and the manner of his dealings with superior and subordinate officers and the general public and his rank in the service. Besides, various particulars in the annual confidential reports of an officer, if carefully and properly noted, would also give a very broad and general indication regarding the merit of an officer.

19. Mr. Prasad urged that in the instant case in the counter affidavit of respondent no. 1, as already stated earlier, it is clearly admitted that the petitioner was not even considered. Learned counsel argued, keeping in view merit of the petitioner as well as his length of service as specialist and his seniority in the State Health Service, the petitioner was entitled to due consideration of his case, which was denied to him. In order to find support to his submission he referred to *Dr. Asis Mukherjee* v. *State of Bihar*(1) and drew our attention to the observation made in paragraph 20 at page 203 wherein a passage has been extracted from the case of *S. G. Jaisinghani* v. *Union of India*(2), the relevant portion of which is quoted below :—

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our

(1) (1973) B. L. J. R. 187.
(2) (1967) A. I. R. (S. C.) 1427.

whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.....'

In the said paragraph 20 their Lordships also quoted with approval a passage from the Full Bench decision in the case of *Dr. C. M. Srivastava* v. *The State of Bihar*(1) as follows :—

"It is true that the petitioner could not ask for condonation of the deficiency of his teaching experience as of right and that he did not have a legal right to be appointed as a Lecturer. But it was admittedly a question of promotion and the petitioner can urge that he was entitled to a due consideration of his case, which was denied to him. He can show to the Court that his case did not receive consideration or honest consideration of the appointing authority and so this was really a case of non-consideration of the relevant factors in dealing with the question of promotion."

20. Mr. Prasad, on the basis of the above observations contended that in the instant case the petitioner was entitled to due consideration of his case, which was admittedly denied to him.

21. Learned Advocate-General, on the other hand, contended that the length of teaching experience should be a deciding factor for the appointment of professor. He referred to the recommendation of the Mukhopadhyaya Committee dated 8th September, 1973, a copy of which has been marked as Annexure '9' to the reply filed by the petitioner on 27th April, 1976 to the counter affidavit of respondent no. 2. He pointed that in paragraph 5 it is mentioned that for appointment to the post of professors length of teaching experience as a lecturer in the subject shall be the deciding factor. It is only when the teaching experience as a lecturer of two or more officers are of equal duration, their seniority in Health Service Cadre shall determine

(1) (1972) P. L. J. R. 182.

inter se position. The said report of the Mukhopadhyaya Committee was adopted by the Government under resolution dated 13th August, 1974. The Mukhopadhyaya Committee's report has been fully considered in *Dr. Chhedi Chowdhary* v. *State of Bihar*(1). In paragraph 22 of the judgment their Lordships have held that the Council of Ministers had accepted the Mukhopadhyaya Committee report. Learned Advocate-General also submitted that there is no statutory rules making selection for the appointment of professors and, therefore, the State Government has acted in the best of its judgment for making selection, as he has submitted that the Sergeant Major's Rule is not applicable in the instant case, as in none of the judgments Sergeant Major's Rule has even been referred. He drew our attention to Dr. Umakant Saran *v.* State of Bihar (A.I.R. 1973 S.C. 964), which went to the Supreme Court from this Court. The appellant was Dr. Uma Kant Saran, whereas Dr. Hari Narain Verma and Dr. Mahendra Pratap Sinha, who were impleaded as respondents 6 and 5 in that case, are respondents 2 and 5 in the instant case. In paragraph 7 of that judgment it is stated that the State Government relied upon the counter-affidavits filed on behalf of respondents 5 and 6 so far as the factual statements were concerned and averred as follows in para 6 :—

> "The charges of arbitrariness and *mala fide* made in the writ applications are arroneous and unjustified. There being no statutory rules directly governing the matters under considerations, the State Government acted in the best of its judgment in selecting for appointment the persons most suited to the job by reason of their capability and experience."

He also referred to paragraph 14 thereof where it was held that even so Dr. Saran complained that he was senior to respondents 5 and 6 and since they were all in the same class of teachers, his seniority could not be ignored. There could be no doubt that he was senior to respondent no. 5 but the same could not be said with regard to respondent no. 6. It was true that respondent no. 6 was absorved in the Medical Service for the first time in 1957 and in that sense he was junior to Dr. Saran who joined in 1954. But as already pointed out, respondent no. 6 had been working as Assistant Malaria Officer from 1953 in a grade equivalent to that of Civil Assistant Surgeon and that on his absorption in 1957 as a Civil Assistant Surgeon, his seniority

(1) (1975) C. W. J. C. no. 1341 of 1974 decided on 9th May 1975.

was counted in the cadre as from the date he was appointed as the Malaria Officer, i.e., 1953. He could not, therefore, be regarded as junior to Dr. Saran. Therefore, the latter could not question the appointment of respondent no. 6 either on the ground that he was junior to him or on the ground that respondent no. 6 did not have teaching experience for 3 years. Learned Advocate-General submitted that in the instant case there is no question of violating Article 16 of the Constitution. It was incumbent upon the petitioner to disclose not only the rule said to have been infringed, but also how that opportunity was unjustifiably denied on each particular occasion. In order to find support to his submission learned Advocate-General relied on *Amrit Lal Berry* v. *Collector of Central Excise Central Revenue*(1) where it was observed in paragraph 12 at page 545 that fundamental rights alleged to be violated could only be the general ones embraced by Article 16 which reads: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." When a petitioner alleged that he had been denied equality of opportunity for service, during the course of his employment as a Government servant, it was incumbent upon him to disclose not only the rule said to be infringed but also how this opportunity was unjustifiably denied on each particular occasion. The equality of opportunity in a matter relating to employment implied equal treatment to persons similarly situated or in the same category as the petitioner. It postulated equality of conditions under which a number of persons belonging to the same category competed for the same opportunities and a just and impartial application of uniform and legally valid standards in deciding upon competing claims. It did not exclude justifiable discrimination. In paragraph 15 also it was held that it was for the petitioner to satisfy the Court that he was not given the senior grade although he satisfied all the required conditions of it and that others, who were promoted into it, were given unjustifiable preference over him. Learned Advocate-General submittted that similar view was taken in *Joginder Nath* v. *Union of India*(2) wherein it was observed in paragraph 15 "did it put unequals with equals and violated Article 14 of the Constitution?" In that very paragraph it was observed: "It was not possible or practical to measure their respective merits for the purpose of seniority with mathematical precision by a barometer Some formula doing largest good to the largest number had to be evolved....."

(1) (1975) A. I. R. (S. C.) 538.
(2) (1975) A. I. R. (S. C.) 511

22. Mr. Karuna Nidhan Keshav appearing on behalf of the respondent no. 2 has adopted the arguments advanced by the learned Advocate-General and referred to the case of *Dr. Asis Mukherjee* (supra), wherein this Court had directed the consideration of the case of the petitioner only because of the teaching experience, which the petitioner had acquired in foreign country, were not taken into consideration, and if those could have been taken into account, he had the length of teaching experience equal to that of respondent nos. 5 and 6. Learned counsel referred to paragraph 9 of the judgment where it was observed that it was admitted by the petitioner as well as respondents that respondent no. 1 had adopted the recommendations of the Medical Council of India with regard to academic qualification and teaching/research experience for appointment to the post of Professor/Associate Professor and Reader/Assistant Professor for the subject Orthopaedics. It was further held in that very paragraph that the recommendation of the Medical Council of India had also been approved by the Government of India as required under the Indian Medical Council Act, 1956. Reference was also made to an unreported judgment in the case of *Dr. Asis Mukherjee* v. *The State of Bihar and others* (C.W.J.C. no. 430/73) decided on 22nd November, 1973. In paragraph 11 of the said judgment Dr. Mukherjee, the petitioner had contained that after the order passed by this Court in C.W.J.C. no. 754 of 1972 (1973 B.L.J.R. 167) the State had merely put up a show of examining the certificates filed by him in support of his claim of teaching experience in United Kingdom. According to learned counsel, there had been no honest consideration of his claim by the State and, therefore, its order appointing Dr. Ram and Dr. Jamuar in preference to Dr. Mukherjee was liable to be set aside. It was further contended that again the grounds taken by the State for rejecting the teaching experience in the United Kingdom of Dr. Mukherjee were irrelevant and extraneous. He had relied on an observation in the case of *Dr. C. M. Srivastava* v. *The State of Bihar*(1) that the petitioner could show to the Court that his case did not receive consideration or an honest consideration of the appointing authority and so that was really a case of non-consideration of the relevant factors in dealing with the question of promotion. On the other hand, learned counsel for the respondents of that case had vehemently urged that there had been an honest consideration by the State of the claim of Dr. Mukherjee regarding his teaching experience in the United Kingdom and the decision of the State on that question taken after due consideration of all the papers filed by Dr. Mukherjee

(1) (1972) P. L. J. R. 182 (S. B.).

could not be set aside by this Court in exercise of writ jurisdiction. In that case the petitioner had referred to various certificates from Dr. Robert Roa and Dr. Geoffery Orborue, which he had from the United Kingdom while he was working as Registrar in three hospitals and consultant in two hospital boards and in that capacity he had obtained teaching experience. In paragraph 26 Shambhu Prasad Singh, J., who delivered the judgment, observed that Dr. Mukherjee did possess requisite teaching experience and the State had refused to recognise it on irrelevant and extraneous considerations. Accordingly, in paragraph 29 of the judgment he held :—

".....let a writ issue quashing the order of the State dated 14th of March, 1973 as contained in Annexure 14, appointing Dr. Ram and Dr. Jamuar to the two posts of lecturers in orthopaedics and directing it not to keep Dr. Mukherjee, who admittedly possesses the requisite academic qualification and as found in Civil Writ Jurisdiction Case no. 754 of 1972, is senior to Dr. Ram and Dr. Jamuar, out of consideration for appointment to the post of lecturer in orthopaedics on the ground that he does not possess requisite teaching experience....."

Accordingly the writ petition filed by Dr. Asis Mukherjee, (C.W.J.C. no. 430 of 1973) was allowed while that of Dr. Surendra Dutta Misra (C.W.J.C. no. 429 of 1973) was dismissed on the ground that he did not possess requisite teaching experience of three years on any date in the year 1971 or even on the 18th of May, 1972.

23. On the basis of the above observation it was contended on behalf of the respondents that it was apparent that this Court has taken into account only the length of teaching experience. It was submitted on behalf of the respondents that aggrieved by the order of this Court in C.W.J.C. no. 430 of 1973. whereby the application of Dr. Asis Mukherjee was allowed, the State of Bihar and other respondents, namely, Dr. Ram and Dr. Jamuar, had preferred an appeal to the Supreme Court, which was dismissed and the judgment of this Court was affirmed, as reported in A.I.R. 1975 S.C. 192 (supra).

24. Learned Advocate-General, in reply to the contention of learned counsel for the petitioner referred to the observation of Krishna Iyer, J. in paragraph 26 at page 198 and pointed out that his Lordship has merely expressed his desire that the quality of their experience, their academic attainments and the intellectual ability to stimulate students in the speciality and the investigative curiosity likely to be

imparted to the alumni were weighty considerations. Obviously, it was his desire, he submitted, because he has used the expression "in the hope that this happy wish will not fail....." The learned Advocate-General referred to paragraph 27 of the judgment wherein it was directed that the first respondent's eligibility on the basis of the relevant regulation would be examined afresh. Therefore, he urged that his Lordship has made it clear that the eligibility of the first respondent would be considered only on the basis of the relevant regulation and the relevant regulation is based on the Indian Medical Council Act and the Mukhopadhyaya Committee report, which was adopted by the State Government, referred to above.

25. In my opinion, the submission of the Advocate-General regarding the observation made by Krishna Iyer, J. in paragraph 26 is not acceptable. Simply because his Lordship used the expression "happy wish" it cannot be assumed that his Lordship meant only to express his desire and not to be followed. Reference may be made to the earlier portion of paragraph 27 where his Lordship has clearly mentioned "in so ding the State will act in conformity with the findings and observations made above". Therefore, in my opinion, his Lordship has laid down that while making appointments not only length of teaching experience but also merit should be taken into consideration; for example, academic attainments, intellectual ability in the speciality, etc. This view is also supported from the further observation made by his Lordship in paragraph 27 where it was directed that the parties, particularly the 1st respondent, would have the "liberty to adduce materials to satisfy the State Government on his qualifications (or otherwise) on or before the last day of January, 1975....."

26. However, learned counsel for the respondents submitted, as mentioned earlier, that this Court in various cases had considered the length of teaching experience as the only criteria for promotion. Reference was made to an unreported decision in the case of *Dr. Onkar Nath Jayaswal* v. *The State of Bihar and others*(1), wherein Shambhu Prasad Singh, J., who delivered the judgment for the Court, observed in paragraph 13 as follows :—

"I now take up for consideration the main question arising for decision in the case, namely, whether on the materials placed before the Court, keeping out of consideration annexures 6 and 6-1, the

(1) (1972) C.W.J.C. no. 409 of 1972 decided on 6th October 1972.

petitioner is entitled to a writ quashing that part of annexure 8 by which respondent no. 3 has been promoted to the pay scale of a professor. In view of the fact that respondent no. 3 is much senior to the petitioner in the cadre of Health Service of the State and holds degree of M.R.C.P. in Paediatrics from Edinburgh and Diploma in Child Health from London, which the petitioner does not hold, strong reliance was placed by learned counsel for the petitioner on certain passages in a recent Full Bench decision of this Court in the case of *Dr. C. M. Srivastava* v. *State of Bihar and others* (1972 P.L.J.R. 182) showing as to what was the case of State of Bihar, respondent no. 1 (respondent no. 1 in that case as well) as to principles followed in the matter of promotion to a teaching post. It was the case of respondent no. 1, as it appears from the judgment of the said case, that Fellowship of Dental Surgery of the Royal College of Surgeons (which is equivalent to the degree of M.R.C.P. of respondent no. 3) was to be treated on the same level as the M.D.S. degree in Dentistry (equivalent to the M. D. degree of the petitioner) for the purposes of promotion to the post of lecturer and that cadre seniority in the Health Service was not taken as the basis for appointment to a teaching post; what was relevant was the seniority determined on the basis of length of recognised teaching experience and cadre seniority would prevail only as between officers having equal teaching experience. It further appears from that judgment that according to respondent no. 1, decision to act on the lines as stated in the preceding sentence was taken as far back as in 1954. A portion of the counter-affidavit filed in that case by respondent no. I has also been made annexure 9 to the petition. The decision in the aforesaid Full Bench case was also given on that basis. Strictly speaking, much reliance cannot be placed on what was the counter-affidavit of respondent no. 1 in another writ case. Writ cases are decided on affidavits of the parties. Unless the two cases are between the same parties, one of the parties to the former case cannot be pinned down for the purposes of a subsequent case to its affidavit in the former. It may be that affidavit in the former case was not factually correct and it is always open in such a case to that party to say that and explain the matter in a subsequent case. But, neither respondent no. 1, nor other respondents, were able to convince us that what was stated in the counter-affidavit of respondent no. 1 in the aforesaid case was not factually correct. I would, therefore, proceed on the assumption that since 1954 respondent no. 1 have been adopting the aforesaid principles in the matter of promotion of the members of the State Health Service to teaching posts in Medical Colleges of the State. In the circumstances, respondent no. 3 can

derive an advantage of his seniority in the cadre of the State Health Service and his better professional qualifications only if it is found that both he and the petitioner had equal teaching experience."

27. Reliance was also placed on *Dr. C. M. Srivastava* v. *The State of Bihar*(1) where in paragraph 49 at page 205 it was observed that in dealing with a case of promotion, an appointing authority would not be justified in preferring a junior officer even though he might possess higher academic qualifications than officers who were senior to him, for the simple reason that a senior officer could not be passed over in the matter of promotion simply because there were officers with better qualifications junior to him. It was only where the superior post was a selection post that the principle of merit-*cum*-seniority might legitimately be followed. But in ordinary cases of promotion, it was usual to follow the principle of seniority-*cum*-merit, meaning thereby that a senior officer would be selected for promotion unless his merits or his service records did not show his fitness for the higher post. It followed, therefore, that the petitioner could not have been preferred for appointment as a Lecturer simply because he claimed to possess a higher post-graduate qualification.

28. It was submitted on behalf of respondent no. 2 of the present case that no material has been placed to show that the service record of respondent no. 2 did not show his fitness for the higher post to which he has been promoted. Reference was also made to *Dr. Chhedi Chowdhary's* case (C.W.J.C. no. 1341 of 1974) the relevant portion of paragraph 18 whereof has already been mentioned. In paragraph 18 it was observed that there was a dispute between two parties with regard to the claim on seniority. Upon the determination of the question of seniority depended the right of the parties to be promoted to the post of professor. In that case it was admitted on all hands that the deciding factor for the purpose of appointment to the post of professor was the length of teaching experience as a lecturer. In that view of the matter, in my opinion, the above observation made in that case would not be of much avail. In the present case, it may be noticed that there is acute controversy between the parties as to whether only length of teaching experience would be the determining factor, which was not in that case. On the contrary, it was admitted

(1) (1972) P. L. J. R. 182.

there on all hands that the deciding factory for the purpose of appointment to the post of professor was the length of teaching experience as a lecturer.

29. Learned counsel for the respondents have also drawn our attention to the observation made in an unreported judgment in *Sharda Sahay's* case (C.W.J.C. 1820/74), particularly to paragraphs 5, 21 and 22 thereof in order to show that there also the length of teaching experience was treated as the basis for the decision of a case between two rival claimants.

30. In my opinion, in none of these cases specific point was raised, as in the present case, as to whether only length of teaching experience should be taken into account and merit should not be taken into account while considering the case of promotion.

31. It appears that the State Government also in the past had been taking into consideration, while making such appointments. Reference may be made to the case of *Dr. Uma Kant Saran*(1) where in paragraph 8 paragraph 5 of the counter affidavit filed on behalf of the State of Bihar on 29th September, 1966 had been quoted. It will be pertinent to extract the relevant portion therefrom :—

"In the matter of appointment to superior teaching post, although there are no statutory rules in taking its decision, the State Government has undoubtedly always kept in mind the appropriate factors namely merit and experience. As evidence of merit, the State Government has always kept in mind the academic qualifications of a candidate under consideration in accordance with the recommendation of the Indian Medical Council, namely, whether the candidate possessed a post-graduate degree of M.S., whether he possessed F.R.C.S. or equivalent qualification in Surgery....."

The Government order, referred to above, which was communicated to the Principal, Darbhanga Medical College, by Dr. B. B. Mukherji, Deputy Director of Health Services (M) Bihar, in his letter no. IIP-4-2-1-55—12319/H, dated 2nd May, 1955, also, in my opinion, goes to show that merit has to be taken into account. The learned Advocate-General and other counsel for the respondent, however, contended that the said order cannot be treated as a statutory

(1) (1973) A. I. R. (S. C.) 964.

rule, but it is simply an administrative order. That, however, in my opinion, does not mean that the said order would not be followed. Reference may be made to *Union of India* v. *K. P. Joseph*(1) where it was observed that "to say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away rights that Courts have imported the principle of natural justice....." Reference may also be made to *Tara Singh* v. *State of Rajasthan*(2) in which A.I.R. 1973 S.C. 303 was relied. It was observed that although the Government could not supersede statutory rules by administrative instructions yet if the rules framed under Article 309 of the Constitution were silent on any particular point, the Government could fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions would govern the condition of service. The Advocate-General, then, submitted that the said direction has been superseded by the Mukhopadhyaya Committee's report, which was adopted by the State Government.

32. In my view, the direction contained under letter dated the 2nd May, 1955 was not superseded by the Mukhopadhyaya Committee's report which was set up to make recommendation for the appointment as Lecturer and Professors. It mentions that before examining cases of individual candidates or preparing panel of names for the posts of Professors and Lecturers in different subjects, the Committee examined the under mentioned papers in the context of the decision taken by the Committee at its meeting held on the 27th August, 1973. Among other papers in item no. 1 is noted "Health Department's letter no. II-P462-1-55—12319/H, dated the 2nd of May, 1955". The Committee after referring to those papers mentioned that on a perusal of papers available to the Committee, the Committee came to the conclusion that Government instructions, decisions, conversion and orders, issued from time to time, with regard to the appointment to posts of Lecturers and Professors might briefly be stated as follows :—Among others, under item no. 5 the Committee noted for appointment to the post of Professors, length of teaching experience as a Lecturer in the subject shall be the deciding factor. When teaching experience as a lecturer of two or more officers are of equal duration, their seniority in Health Services Cadre shall determine their interse position.

(1) (1973) A. I. R. (S. C.) 303.
(2) (1975) A. I. R. (S. C.) 1487.

Therefore, in my opinion, the above recital was merely summarisation and it was not recommendation of the Committee; nor it can be said that the Committee had superseded the previous Government order contained under letter dated the 2nd May, 1955. It may be mentioned here that by reference to the original file it appears that the said Committee wa set up to fill up the posts of Professors and Lecturers which had fallen vacant in the State Medical College. The relevant portion of the said original file reads thus :

संलग्न संचिका का पताका एल० देखा जाय जिनके अनुसार राजकीय चिकित्सा महाविद्यालयों में प्राध्यापकों एवं व्याख्याताओं के रिक्त पदों पर न्यूनतम अवधि में नियुक्ति करने के उद्देश्य से राज्य सरकार ने एक चयन समिति का गठन किया था।

English version of this portion runs thus:—

"Flag L of the link file may be perused, according to which the State Government had formed a Selection Committee for the purposes of appointing Professors and Lecturers to vacant post in Government medical colleges within the shortest period."

Therefore, it is apparent that the said Committee was not set up in order to suggest any rule or to lay down any principle for the appointment and promotion to the medical officers. It may be recalled that the learned Advocate-General had contended that there is no statutory rule regarding the appointment and promotion in the Medical Colleges. He had urged that the Sergeants Major Rule was not applicable in their case, as there are special provision regarding the appointment and promotion in Medical Colleges on the basis of length of teaching experience, based upon the Mukhopadhyaya Committee's report, which was accepted by the State Government. According to the learned Advocate-General, it (the Sergeants Major Rule) applied only in case of appointment in any cadre of Government service. In my judgment it would be difficult to limit the scope of the Sergeants Major Rule which has been conceded that it has statutory force in view of the notification dated the 15th April, 1950 published in Part II of the *Bihar Gazette*, dated the 26th April, 1950 which reads thus :—

"No. 3555-3L—27/50A.—In exercise of the powers conferred by the proviso to Article 309 of the Constitution of

India, the Governor of Bihar is pleased to make the following rule, namely;—

'All enactments, rules and orders, whether made under any enactment or otherwise, which regulated the recruitment and condition of service of persons appointed to public services and posts in connection with the affairs which are now the affairs of the State of Bihar and which were in force immediately before the 26th January, 1950, shall, until provision is made by or under an Act of the State Legislature to regulate such recruitment and conditions of services be inforce as if they had been made by virtue of the powers under the said proviso.'

By order of the Governor of Bihar,
(Sd.) L. P. SINGH,
Chief Secretary, Bihar."

Under memo. no. 2763-A, dated the 15th July, 1944, the Chief Secretary to the Government of Bihar had written to the other Departments of Government as follows :—

Government have recently had under consideration the question whether the seniority of an Inspector or Sergeant-Major on substantive promotion to the rank of the Deputy Superintendent of Police should depend upon his length of officiating service as Deputy Superintendent of Police or on his seniority in the gradation list of Inspectors or Sergeants Major. It has been decided that length of officiating service should not be the criterion of deciding seniority on substantive promotion to the higher service but that the following procedure should be followed uniformly in making promotions to higher services and in determining the seniority of officers on promotion.

2. A definite decision regarding the fitness of officers for promotion to the higher service should be taken not when officers are promoted to officiating vacancies but when substantive vacancies occur. In making this decision the policy should be to reject rigorously all those who are unfit for promotion, i.e., all those who are not definitely fit for

the higher posts tnd subject to the condition, to promote by seniority. Thus if more than one officer has to be promoted to the post of Deputy Superintendents of Police on the same day, their seniority *inter se* should depend on their seniority as Inspectors or Sergeants Major, provided all of them satisfy the criterion of fitness. His Excellency has decided that the above principles should also be followed by other departments of Government while making promotions to the services under their administrative control."

It may be noticed that the Sergeants Major Rule never came for consideration in any of the cases referred to above, which related to the Medical Officers; nor there was any specific occasion to consider the said rule, not it seems that the said rule was ever placed before the Court for consideration. The said rule also indicates that only length of teaching experience cannot be considered as a criteria for appointment and promotion. In other words, merit should also be taken into account. Even if I ignore the above statutory rule, I find that there are indications that in case of appointment or promotion of doctors or Medical Officers, the principle of seniority-*cum*-merit should be followed. Even in Mukhpadhyaya Committee report (Annexure 9) I find that while recommending for two posts of professors in medicine it was mentioned that eight persons (names given therein) were eligible for appointment and their names were arranged in order of merit. Among them two persons, mentioned at the top. according to merit, were no. 1, Dr. Swami Nandan Prasad and no. 2, Dr. Brahmanand Sinha. Similarly, while recommending for one post of Director-Professor in Surgery the Committee mentioned in its report that only two professors of surgery were eligible for that post. The names, placed in order of merit, were of (1) Dr. R. V. P. Sinha and (2) Dr. U. N. Sahi. A reference may be made to the observation of G. N. Prasad, J. in paragraph 49 of the judgment in *Dr. Srivastava's* case (supra) at page 205. The relevant portion of his observation reads thus :—

".....It is only where the superior post is a selection post that the principle of merit-*cum*-seniority may legitimately be followed. But in ordinary case of promotion, it is usual to follow the principle of seniority-*cum*-merit....."

33. On behalf of the petitioner reliance was placed in the case of *Dr. Hari Prasad* v. *The State of Bihar and others*(1) where it was observed in paragraph 8 that "it is beyond any debate that merit counts foremost in the matter of promotion to the selection grade posts". But in my view the said case related to the selection grade post. In the instant case we are not concerned with the promotion to the selection grade post. Therefore, the principle of seniority-*cum*-merit would apply in the present case. In view of the observation of Krishna Iyer, J. in paragraph 26 of the judgment (A.I.R. 1975 Supreme Court 192) supra. I have no hesitation in holding that in case of promotion of doctors their academic attainments and the intellectual ability, etc., has to be considered in order to promote the public welfare.

34. Learned Advocate-General then submitted alternatively that even if when the length of teaching experience is taken into account for the sake of appointment and promotion in case of doctors, impliedly the merit also comes in. He referred to Annexure '4' to the writ application to show that in the present case while preparing the memorandum, consideration was also made of the merit. It may be recalled that under Annexure '4' only the names of respondent nos. 2 to 5 were mentioned as they were appointed as teachers on the 20th of August, 1965 and their length of teaching experience was considered from that date. Learned Advocate-General has drawn our attention to paragraph 4 of Annexure '4' which reads thus :—

१। डा० हरि नारायण वर्मा ।

२। डा० एस० के० सरकार ।

३। डा० आर० एन० ठाकुर ।

४। डा० महेन्द्र प्रताप सिन्हा ।

उपर्युक्त प्रथम चार चिकित्सकों को व्याख्याता के पद पर शैक्षणिक अनुभव बराबर है। शिक्षकों की नियुक्ति में पूर्व परिपाटी के अनुसार संवर्गीय वरीयता ही व्याख्याता के पद इनकी पारस्परिक वरीयता का निर्णायक होगा। तदनुसार डा० हरि नारायण वर्मा संवर्ग में वरीय होने के कारण प्राध्यापक के पद नियुक्ति के लिए प्रथम वरीयतम एवं योग्य चिकित्सक हैं।

Paragraph 4 means that all the four doctors referred to above had equal teaching experience. Since Hari Narain Verma (respondent no. 2) is senior to the other three in cadre, he should be considered fit for the appointment of Professor and he is meritorious also. In my view

(1) (1972) A. I. R. (Pat.) 4.

since Annexure '4' does not mention the name of the petitioner, it is obvious that he was not considered. Therefore, neither about his length of teaching experience nor about his merit there is any mention in Annexure '4'. Paragraph 18 of the counter affidavit filed on behalf of the State of Bihar (respondent no. 1) referred to above, clearly indicates that the petitioner was not even considered, because his teaching experience as Lecturer was less than the others.

35. In the instant case an application was filed by the petitioner under section 151, order 11, rule 14 of the Civil Procedure Code praying to direct respondent no. 1 to produce the documents mentioned below :—

(*i*) The entire files concerning the appointment of respondent no. 2 as Professor of Surgery of P. W. Medical College, Patna; and

(*ii*) The Memorandum and decision of the Bihar Government in regard to the appointment of respondent no. 2 as Professor of Surgery in P. W. Medical College, Patna.

On the 12th April, 1976 it was ordered that the learned Government Advocate should keep those documents ready for produced of the Court. The learned Advocate-General in all fairness has brought himself the relevant file. He also perused the Government file regarding the proposal for appointment of Professor of Surgery in the post which had originally fallen vacant in Rajendra Medical College, Ranchi due to vacancy caused by the retirement of Sri P. N. Jaiswal, Professor of Surgery which contains how the file had moved and ultimately the appointment of respondent nos. 2 and 3 were made by the Chief Minister. A reference to the said file also does not show that the petitioner was considered, as according to the respondents, the main criteria was the length of teaching experience and since the length of teaching experience of the petitioner was less than other four doctors, referred to above, he was not considered. The petitioner has brought on record the materials to show that he possessed merits and also requisite length of teaching experience. Although his length of teaching experience as the Lecturer was less than the other four, but in the combined gradation list which was published in the extra-ordinary Gazette, dated the 6th March, 1968, the petitioner's name finds place at serial 176 and respondent no. 2 at serial 315, respondent no. 3 at serial 374, respondent no. 4 at serial 386 and respondent no. 5 at serial 533.

36. In paragraph 13 to the reply made by the petitioner to the counter affidavit of respondent no. 2, he stated that his experience as specialist was longer than that of the respondents. He further stated therein that it was consistently held by the Government that a teacher getting a Civil Surgeon's scale of pay was considered as specialist which the petitioner was getting since April, 1962 much before it became available to respondent no. 2 in the year 1971. In order to find support to his statement, he has annexed copy of Government orders under Annexure '8' series.

37. It was contended on behalf of the counsel for the respondent no. 2 that the appointment of the petitioner as Lecturer of Surgery was with effect from the 14th September, 1968 and that too was on ad-hoc basis. Similarly, in paragraph 18 of the counter affidavit of respondent no. 1 it was stated that respondent no. 2 was continuing to hold the post of Lecturer (Surgery) with effect from the 20th August, 1965 whereas the petitioner has been appointed as Lecturer (Surgery) with effect from the 14th September, 1968 temporarily in anticipation of concurrence which has since been received and the proposal to regularise the aforesaid appointment is under consideration of the Government. In reply to the counter affidavit in paragraph 11(*d*) the petitioner has stated that finally the State Government by notification no. 4441(2), dated the 17th August, 1974, confirmed and regularised the appointment of the petitioner as permanent Lecturer of Surgery in the Patna Medical College, Patna. True copies of the relevant letters he has marked as Annexure '7' series to the reply to the counter affidavit filed by the respondent no. 2.

38. The petitioner's chief grievance, as it appears from his application as well as the various affidavits filed in reply to the counter affidavit of the respondents, is that only respondent nos. 2 to 5 were considered for promotion as Professor of Surgery and in fact respondent no. 2 was appointed as Professor of Surgery in Patna Medical College, Patna, whereas respondent no. 3 was appointed Professor of Surgery in the Rajendra Medical College, Ranchi and the petitioner who was more meritorious than those respondents, was not considered at all. In one of the replies to the counter affidavits filed on behalf of the respondents, the petitioner has annexed the true copies of the various testimonials and correspondences marked as Annexure '10' series, which indicate that he had good academic career and he appears to be meritorious. If I am permitted to borrow the words used by Krishna Iyer, J. in A.I.R. 1975 Supreme Court 192 at page 198, the

petitioner at the first flush looks like eligible and highly qualified but there may be more than meets the eye. Therefore, according to me, the petitioner has made out a case that he was entitled to be considered by the State Government for promotion as a Professor in Surgery. *Prima facie* it seems that the petitioner is quite meritorious than respondent no. 2, the former, possessing the requisite length of teaching experience as well as being senior to respondent no. 2 in the speciality and in the combined cadre. However, it is for the State Government to investigate and be satisfied about the petitioner's real qualification *vis-a-vis* respondent nos. 2 and 3 for affording a fresh opportunity so that the petitioner may also be considered, I quash the appointment of respondent no. 2 made under Annexure '5' to the writ petition and that of respondent no. 3 made under Annexure '6' and direct the State Government to consider also the case of the petitioner for promotion as Professor in Surgery.

39. In the view that I have taken, it was not very necessary to deal with the other submission of learned counsel for the petitioners, whereby he has challenged the appointment of respondent nos. 2 and 3, also on the ground that the procedures under rules 8, 12, 13, 15, 17 and 18 of the Rule of Executive Business were not followed. Since it has been argued at great length by the counsel for the parties. I proposed to decide this matter also. Mr. Prasad referred to the statement of the petitioner in his application and the replies filed by him to the various counter affidavits filed by the respondents that the Chief Minister was not authorised by the Council of Ministers to take decision in the matter appointment to the post of Professor of Surgery in the Patna Medical College. The Council of Minister never authorised the Chief Minister to divert the question of appointment to the post of Professor of Surgery in the Rajendra Medical College, Ranchi. Rule 8 provides, *inter alia*, that subject to the orders of the Chief Minister under rule 12, all cases referred to in the Third Schedule to these rules shall be brought before the Council in accordance with the provisions of the rules contained in Part II. Rule 12 provides :

> "All cases referred to in the Third Schedule shall be submitted to the Chief Minister through the Secretary to the Council after consideration by the Minister-in-charge with a view to obtaining his orders for circulation of the case under rule 13 or for bringing it up for consideration at a meeting of the Council."

Rule 13 provides :

> "(1) The Chief Minister may direct that any case referred to in the Third Schedule may instead of being brought up for discussion at a meeting of the Council be circulated to the Ministers for opinion, and if the Ministers are unanimous and the Chief Minister thinks that a discussion at a meeting of the Council is unnecessary, the case shall be decided without such discussion. If the Ministers are not unanimous or if the Chief Minister thinks that a discussion at a meeting is necessary, the case shall be discussed at a meeting of the Council.
>
> (2) If it is decided to circulate any case to the Ministers, copies of all papers relating to such case which are circulated among the Ministers shall simultaneously be sent to the Governor."

Rule 15 deals with the preparation of the memorandum of decision. It also provides what a memorandum should contain. Rule 17 provides, *inter alia*, where Council shall meet and at such place and time as the Chief Minister may direct. It also provides circulation of copies of memoranda. Rule 18 provides :

> "Except as otherwise provided by any other rule, cases shall ordinarily be disposed of by or under the authority of the Minister-in-Charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the department. Copies of such standing orders shall be sent to the Governor and the Chief Minister."

Third Schedule of the Rules gives list of cases which shall be brought before the Council of Ministers. Item no. 9 of that Schedule refers to the appointment. There is no dispute that the appointment of respondents 2 and 3 came within the ambit of one of such cases, which were to be brought before the Council of Ministers under the Rule of Executive Business.

40. By reference tot the original file it appears that the memorandum was prepared (a copy of which is marked as Annexure '4' to the application) as per note, dated 11th December, 1975. It was placed

before the Council of Ministers on 17th December, 1975. On that date it was postponed to be placed in the next meeting. Shri Karam Chand Bhagat, Minister of Community Development, Housing and Public Health Engineering Departments, called the file for perusal which was sent to him on 6th January, 1976. On 31st January, 1976 he proposed to the Health Minister that according to the qualification and seniority it would be better that respondent no. 2 be appointed as professor in surgery in the Patna Medical College in the vacancy, which was likely to occur shortly, and the persons junior to him be promoted as professor in surgery and posted at Ranchi Medical College. At page 12 of the file it is stated that the said proposal should be included in the agenda of the next meeting. On 17th February, 1976 the matter was placed before the Council of Ministers, which directed that the file might be placed before the Chief Minister, who was authorised to take final decision in the matter. On 25th February, 1976 the file was endorsed to the Secretary to the Chief Minister, for obtaining the order of the Chief Minister. The Secretary of the Chief Minister prepared a note on 1st March, 1976 and when it was placed before the Chief Minister on 12th March, 1976, he passed final order for appointment of respondent no. 2.

41. Mr. Basudeo Prasad, therefore, submitted that in the particular case the above rules of Executive Business had not been complied with and according to him those provisions are mandatory. In my opinion, the submission of learned counsel is not correct. Article 154 of the Constitution provides *inter alia* that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the provisions made in the Constitution. Article 163(1) of the Constitution *inter alia* lays down that there shall a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in exercise of his function and clause (3) thereof reads thus:

> "The question whether any, and if so what, advice was tendered by Ministers to the Governor, shall not be inquired into in any court."

Article 164(1) provides that the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor

on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the Governor. Clause (2) thereof lays down that "the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State". Article 166 provides as to how the business of the Government should be conducted and clause (3) thereof lays down that "the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion". From the above provisions of the Articles it is clear that the Chief Minister plays very important role and he is vested with wide power under the Constitution.

42. Reference may be made to *Bachhittar Singh* v. *State of Punjab*(1). In that case the provisions contained under Article 166(3) of the Constitution and rules 28(1) and 4 of the Punjab Rules of Business came up for consideration. In paragraph 13 at page 399 their Lordships observed that the order passed by the Chief Minister, even though it was on a matter pertaining to the portfolio of the Revenue Minister, would be deemed to be an order of the Council of Ministers. So deemed its contents would be the Chief Minister's advice to the Governor, for which the Council of Ministers would be collectively responsible. It will also be relevant to refer to *Haridwar Singh* v. *Begun Sumbrui*(2) where Article 166(3) of the Constitution *vis-a-vis* rule 10 of the Bihar Rules of Executive Business came up for consideration. It was observed therein that no universal rule could be laid down for determining whether a provision in a rule was mandatory or directory. In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. Prohibitive or negative words could rarely be directory and were indicative of the intent that the provision was to be mandatory. It will further be useful to refer to *N. P. Mathur* v. *State of Bihar*(3). In that case,

(1) (1963) A. I. R. (S. C.) 395.

(2) (1972) A. I. R. (S. C.) 1242.

(3) (1972) A. I. R. (Pat.) 93 (F. B.).

inter alia, Articles, 154, 163, 164, 166 *vis-a-vis* various rules of the Bihar Executive Business, including rule 8, came up for consideration. It was observed therein that the ultimate step taken in the matter by the Chief Minister must be held to be the result of decision of Council of Ministers. It could not be said that the Council of Ministers had illegally delegated their function of dealing with question of appointment of the Chief Secretary to the Chief Minister. Sinha, C. J. in paragraph 21 at page 105 observed thus :

".....Moreover, I do not think that the Court will be justified in inquiring into the matter mentioned in paragraph 17 of the writ application, where it was stated that the Council of Ministers decided at a meeting held on 17th June, 1970 that the Chief Minister be authorised to take a decision regarding the appointment of the Chief Secretary and grievance made in paragraph 36 to the effect that the Council of Ministers cannot delegate its power to another authority."

43. Besides, in the present case the notice, which were prepared by the Secretary to the Chief Minister, give full details and also mentions that apart from the Minister for Community Development, Housing and Public Health Engineering, several other Ministers have opined that some delay does occur in postings. As one more post has subsequently fallen vacant, the seniormost lecturer Dr. Verma, may, in accordance with the principle decided, be posted as professor in the Patna Medical College Hospital and other officer having requisite qualifications be posted at Ranchi in order of preference. Therefore, it is apparent that not only the Chief Minister was authorised by other Ministers to pass final order but also it was the desire of other Ministers that Dr. Verma be so appointed. Therefore, there is no merit in the submission of learned counsel for the petitioner.

44. The petitioner has also prayed for determination of his seniority *vis-a-vis* respondent nos. 3 to 5 for the purpose of appointment to the post of Professor in Surgery in the Patna Medical College and to rectify the gradation list by declaring the petitioner senior as lecturer in surgery to respoudents 2 to 5. It was urged that the memorandum (Annexure 4) was prepared on the basis of the said seniority, and, as such, it was had and should be quashed. The petitioner has not, however, placed sufficient materials before us to rectify the

gradation list nor necessary parties are on the record to enable us to interfere with the gradation list. Respondent no. 5 in paragraph 8 of the counter affidavit has stated that the petitioner was also superseded by Dr. Rambali Singh, who was appointed lecturer in the year 1966. Dr. Rambali Singh happened to be junior to respondent nos. 2 to 5 but was senior to the petitioner. That shows that the petitioner cannot get such a declaration in absence of Dr. Rambali Singh. In that view of the matter Mr. Basudev Prasad, learned counsel for the petitioner, has not raised specific point for rectifying the gradation list and declaring the petitioner as senior to respondents 3 to 5. Therefore, Annexure '4' cannot be assailed on the ground that it was based on incorrect gradation list.

15. In conclusion however, for reasons indicated earlier, I allow the writ application of the petitioner in part, and quash the appointments of respondent no. 2 (Dr. H. N. Verma) and respondent no. 3 (Dr. S. K. Sarkar) made under Annexures '5' and '6' respectively and direct the State Government to consider also the case of petitioner for promotion as Professor in Surgery *vis-a-vis* respondent nos. 2 and 3 or the basis of their respective merits in the light of the observations made in this judgment. While I have indicated the broad approach, it is within the power and responsibility of the Government to take all relevant considerations in making the final choice. It is also open to the Government to consider other eligible doctors on their merit and teaching experience. In the circumstances, I shall make no order as to costs.

MUNESHWARI SAHAY, J.—I agree.

Application allowed.

R. D.

CIVIL WRIT JURISDICTION

Before Shambhu Prasad Singh and S. K. Jha, JJ.

1976

November, 15.

NALINI RANJAN SINGH & ORS.*

v.

THE STATE OF BIHAR & ORS.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, (*Bihar Act XII of* 1962) *as amended by Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act*, 1972 (*Bihar Act I of* 1973),—*provisions of—whether unconstitutional—whether violative of Article* 15 *of the constitution—relevant date for determining the majority of a person—proceeding initiated under the parent Act continued after the commencement of the amending Act—order finally passed in favour of the landholder—initiation of fresh proceeding under the provisions of amending Act, whether barred by principle of* res judicata—*Code of Civil Procedure*, 1908 (*Act V of* 1908) *section* 11—*Constitution, Article* 15—*Hindu Succession Act*, 1956 (*Act XXX of* 1956) *section* 6—*Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act*, 1972 (*Bihar Act I of* 1973) *sections* 1(2) *and* 13(3).

It cannot be said that it was not within the legislative competence of the legislature to have enacted both the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 and the amending Bihar Act I of 1973 and the mere fact that in some respects the statutory provisions may override the provisions of the general or customary Hindu Law will not make them suffer from any constitutional inhibitions regarding the equality and property clauses in Part III of the Constitution. The parent Act as amended does conform to the directive principles of State policy only more so as they have been admittedly included in the 9th Schedule of the Constitution.

*Civil Writ Jurisdiction case nos. 1040 of 1974 and 1564 of 1975. In the matter of application under Articles 226 and 227 of the constitution of India.

Harinandan Yadav & Ors.—Petitioners in C.W.J.C. 1564/75.

The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 and the amending Bihar Act I of 1973 is not violative of Article 15 of the Constitution. It cannot be held that after the commencement of the Constitution, under the Mitakshra School of Hindu Law, a daughter becomes a coparcener along with a son and that she has any interest in the coparcenery property by birth nor for that matter, it is such a situation which brings that part of the customary law within the field forbidden by Article 15(1).

The date with reference to which a person can be said to be either a minor or a major is the date on which the notice under section 6 of the parent Act as amended by the Bihar Act I of 1973 is published and no other date.

The proviso to section 19(3) of the amending Bihar Act I of 1973 as also the provisions of section 6(1) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, as amended is clearly a pointer to the intent of the legislature. If the proceeding had been started under the parent Act and concluded before the commencement of the amending Act, the matter could be re-opened. Under the provisions of the Act as amended, if, however, it was not concluded before the 9th of September 1970 when the amending Act came into force but was continued thereafter and decided on merits in favour of the landholder holding that he did not hold any land in excess of the Ceiling Area then it must also be deemed that the decision of the competent authority on merits was under the Act as amended. In that view of the matter, the principles of *res judicata* will certainly bar the initiation of any fresh proceeding.

Applications by the petitioners.

The facts of the cases material to this report are set out in the judgment of S. K. Jha, J.

Messrs Kailash Roy, B. K. Roy, Dinesh Ch. Sinha, Chandrashekhar and *Janardan Singh*, for the petitioners in C. W. J. C. 1040 of 1974.

Messrs. S. N. Jha and *B. P. Pandey*, for the respondents in C. W. J. C, 1040 of 1974.

Messrs Kailash Roy, B. K. Roy, Brahmanand Singh and *S. B. Pathak*, for the petitioners in C. W. J. C. 1564 of 1975.

Messrs T. K. Jha and *P. N. Jha*, for the respondents in C. W. J. C. 1564 of 1975.

S. K. JHA, J.—In these two applications under Articles 226 and 227 of the Constitution of India are involved some common questions arising out of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act 12 of 1962), hereinafter referred to as the parent Act, and the amendments made therein by virtue of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972 (Bihar Act I of 1973) hereinafter referred to as the amending Act. Hence, this common judgment. Before setting out the points raised at the Bar and the questions involved, it is worthwhile to state the facts relating to each of the two applications separately.

C. W. J. C. 1040/74.

2. Petitioner no. 1, Nalini Ranjan Singh, is the husband of petitioner no. 2, Shrimati Usharani Singh, and the father of petitioner no. 3, Padmanabh *alias* Chetan, a minor. Petitioner no. 1 had a number of co-sharers all descending from his father Rukmini Raman Singh. In 1956 petitioner no. 1 instituted title suit no. 45 of 1956 in the court of 1st Munsif, Sitamarhi, for declaration of title and recovery of possession with mesne profits in respect of some lands allotted to him as a result of partition in the joint family against his father Rukmini Raman Singh. On the 28th of June, 1956 a compromise decree was passed by which a previous partition amongst the co-sharers and petitioner no. 1 as also his father Rukmini Raman Singh was recognised and affirmed. On the 6th of September, 1962 petitioner no. 1 made a gift of 42.67½ acres of land to his wife, petitioner no. 2, by a registered deed and her name was duly mutated in the revenue records of the State. She has been paying rent to the State as also agricultural income-tax assessed from time to time. On the 31st of March, 1966 petitioner no. 1 transferred 57.39½ acres of land to petitioner no. 3 by a private partition in the family of the petitioners. Petitioner no. 3 was thereafter duly mutated and rent is being paid on his behalf to the revenue authorities of the State. Up to the 22nd of June, 1966 by some registered sale deeds petitioner no. 1 sold 9.35 acres of land to different persons and 1.03 acre of land was acquired by the State Government for seed multiplication. After the exclusion of the aforesaid lands, petitioner no. 1 was left with 52.93½ acres including culturable land and orchards. On the 3rd of October, 1970 the Deputy

Collector, Sitamarhi, respondent no. 3, issued a notice (annexure 1) to petitioner no. 1, which was received by him on the 17th of October, 1970, requiring him to submit a return by the 27th of October, 1970 with regard to the lands held by him. Petitioner no. 1 prayed for extension of time which was granted and within the time extended he duly submitted a return in ceiling case 7 of 1970-71. After due enquiries and on a consideration of all the facts and circumstances including the affidavits filed on behalf of petitioner no. 1, final order in the case was passed on the 29th of April, 1971, a copy whereof has been marked annexure 2. That order is a rather long one and the operative portion there runs thus:

> "On examination of the whole case I find that this landholder holds only 52.93½ acres in his own possession as separate landholders. The break up is also within the permissible limit under the existing provisions of the Act. I don't find cogent reasons to disbelieve the affidavits sworn and the contents therein. The proceeding is, therefore, dropped. Write to the Sub-Registrar, Sitamarhi, to delete his name from the list of landholders holding excess land. Let separate records be started in the name of Shrimati Usha Rani Singh and Chetan as said earlier and inform the Sub-Registrar."

After this order was passed, petitioner no. 1 sold some lands with the permission of the Consolidation Officer since consolidation proceedings were going on. Then came the amending Act the land-marks of which I shall advert to later at a more appropriate place. Suffice it to say here by the amending Act the definition of 'landholder' in section 2(*g*) of the parent Act was changed and definitions of 'family' and 'minor child' were inserted by sections 2(*ee*) and 2(*eee*) respectively. The permissible ceiling area prescribed under the parent Act was reduced by the amending Act by amendment of sections 4 and 5. It is also worthwhile to mention here that, although the amending Act was brought on the Statute Book much later, it was laid down in section 1(2) thereof that it shall be deemed to have come into force with effect from the 9th of September, 1970. It may also be mentioned in the passing that the ceiling area was further reduced by Bihar Act IX of 1973 the provision of which, however, are not relevant for the purpose of deciding these cases. After the passing of the amending Act, a notice dated 22nd July 1973 was issued by the Collector, Sitamarhi, respondent no. 2, under section 8(1) of the parent Act as amended by

the amending Act, in ceiling case 7 of 1973-74, to submit a return in Form LC 2 within 30 days of the receipt of the notice, failing which the provisions of section 8(2) were to be invoked. A copy of that notice has been marked annexure 3. On the 19th of October, 1973 petitioner no. 1 submitted a return (annexure 5) along with a petition (annexure 1) stating therein that the matter had already been decided in earlier ceiling case 7 of 1970-71 which has become final by the order, dated the 29th of April, 1971 aforementioned and also that with the permission of the Consolidation Officer certain lands have been disposed of by petitioner no. 1. Respondent no. 2, however, rejected all the submissions of petitioner no. 1 as also the correctness of the return by two orders, dated the 30th of October, 1973 and the 9th of April, 1974 which are incorporated in his ordersheet marked annexure 6. On the 7th of May, 1974 petitioner no. 1 filed a petition before respondent no. 2 praying to stay further proceeding in ceiling case 7 of 1973-74 so as to enable him to agitate the matter higher up against the impugned orders (annexure 6) and stay was granted till the 17th of May, 1974. Certain certified copies of the orders were not available to petitioner no. 1 and he applied for extention of time. On the 17th of May, 1974 the prayer was rejected (vide annexure 8) and respondent 2 directed the draft of notification to be published in consequence whereof draft publication was made on 23rd May 1974 (annexure 9) and a copy of the same was served on petitioner no. 1 on 27th May 1974. On the 26th of June, 1974 petitioner no. 1 submitted an objection petition against the draft publication which was heard by respondent no. 2 on the 3rd of July, 1974 on which date the objections were rejected and final order was passed by respondent no. 2 directing final publication (annexure 11). On these facts the petitioners challenged the legality and validity of the orders as incorporated in annexures 6, 8 and 11 aforementioned and the draft publication as contained in annexure 9 and for issuance of an appropriate writ quashing the aforesaid orders and the draft publication.

C.W. J. C. 1564/75.

3. There are seven petitioners in this case. Petitioner no. 7 Harinandan Yadav is the husband of petitioner no. 7 Shrimati Sharda Devi. Their son Santu Kumar *alias* Vijoy Kumar Yadav is petitioner no. 2 and petitioners 3 to 5 Shrimati Shyam Kumari, Shrimati Krishna Kumari and Shrimati Ratan Kumari are the married daughters of petitioner no. 1. Petitioner no. 6 Roshan Kumari is the daughter of petitioner no. 4, i.e., the daughter's daughter of petitioner no. 1. In 1961 petitioner no. 1 filed partition suit 29 of 1961 in the court of the

Subordinate Judge, Madhipura, against his co-sharers. On 9th July 1973 a compromise decree was passed. Out of the share allotted to petitioner no. 1, he made a gift of a portion to petitioner no. 6 by registered deed. He also gifted 10 acres of land to a High School at Hardi. About 8 acres of land were further gifted by petitioner no. 1 to his two daughters by registered deeds. These transfers, it is alleged, were made in consonance with the provisions of section 5 of the parent Act. It is further alleged that petitioner no. 7 got 29 acres of land as stridhan from her father-in-law. It was looked after by, and was under the management of, petitioner no. 1 but petitioner no. 7 is said to have always enjoyed the usufructs thereof. All the co-sharer recognised her stridhan proper by specifically mentioning it in schedule 3 of the compromise decree of the partition suit aforementioned. A notice under section 8 of the parent Act was issued to petitioner no. 1 to submit a return by the Deputy Collector Incharge Land Reforms, Supaul, respondent no. 3. A return was duly submitted by petitioner no. 1 claiming that he held no land in excess of the ceiling area. Respondent no. 3 continued the proceeding in ceiling case 679 of 1973-74 and on the report of the Anchal Adhikari, Tribeniganj, respondent no. 4, he, by his order, dated the 14th May 1975 (annexure 1), held that petitioner no. 1 held land to the extent of 26.25 acres belonging to classes II, III and IV. It was further held that petitioner no. 1 was entitled only one unit. By conversion of the different classes of lands in accordance with the provisions of section 4 of the parent Act as amended by the amending Act, petitioner no. 1 was held entitled to 19.27 acres only and he was further held as having been in possession of 106.78 acres in excess of the ceiling area. Petitioner no. 1 was directed to surrender the excess land. The aforesaid order has been marked annexure 1 as stated above. On 16th June 1975 order of final publication under section 11 of the parent Act, which had undergone no change despite the amending Act, was passed a copy whereof has been marked annexure 2. The grievance of the petitioners is that petitioners 2 to 5 are entitled to hold different units of ceiling areas separately on his or her own right and, therefore, allotment of only one unit was bad and that the classification of land made in annexure 1 was arbitrary. It has further been alleged that petitioners 3 to 7 were not served with any notice at any stage although separate jamabandis were running in the names of petitioners 3, 5, 6 and 7. A prayer has accordingly been made for issuance of an appropriate writ quashing annexures 1 and 2 aforesaid and directing the respondents to forbear from enforcing the provisions of the amending Act as also Bihar Act IX of 1973.

4. On these facts the following points were raised by the learned Counsel for the petitioners of the two cases:

1. Both the parent Act and the amending Act are *ultra vires* as they contain provisions which are in contravention of the fundamental provisions of the general or customary Hindu Law particularly relating to stridhan and maintenance and the minor sons' right of unobstructed heritage on the basis of sapindaship or offering oblations.

2. The concept of family as known to the Mitakshara School of Hindu Law has been destroyed by the artificial definition introduced by the amending Act resulting in discrimination. The provisions of the parent Act as amended by the amending Act must, therefore, be so construed as to harmonise the artificial definition of 'family' in section 2(*ee*) with the well-settled notions of joint family in the Mitakshara School of Hindu Law, otherwise the Act will be rendered unconstitutional being discriminating in nature.

3. (*a*) Whatever may have been the position with regard to the rights and privileges of a daughter under the general Hindu Law earlier, after the coming into force of the Constitution of India even under the general Hindu Law a daughter is as much a member of the joint Hindu family as a son entitled to the same rights and privileges in the joint family property. For, if that be not so then it will be contrary to the provisions of Article 15 of the constitution. Therefore, the definition of family in section 2(*ee*) must be so construed as to embrace of major daughter who ought to be held entitled to claim a separate unit for herself like any major son.

(*b*) In any event, if the provisions of the parent Act as amended by the amending Act be held to exclude the major daughter as claiming a separate unit for herself then the Act itself will be in contravention of Article 15 of the Constitution liable to be struck down.

Apart from the aforesaid points common to both the writ applications, three points have been further raised in relation to C. W. J. C. 1040/74, namely,

4. The relevant date on which a person has to be found a minor or a major for the purposes of the parent Act as amended is the date of the determination of the question with reference to the probable date of the notification under section 15(1) of the parent Act and not the 9th of September, 1970 when the amending Act came into force.

5. Section 13 of the amending Act precludes the reopening of a case initiated under the parent Act and concluded under the provisions thereof.

6. In any event, on the facts and in the circumstances as mentioned above initiation of any fresh proceeding was barred by the principles of *res judicata*.

5. I first propose to deal with points 1 to 3 which are common to both the cases before directing my attention to the last three points in relation to C. W. J. C. 1040/74.

6, To appreciate the contentions raised by Mr. Kailash Roy, learned Counsel for the petitioners, with regard to the first three points, some features of the parent Act as also the amending Act have to be noticed. Before the amending Act was brought in, section 5(1)(i) read as follows :—

"It shall not be lawful for any person to hold, except as otherwise provided under this Act, "land in excess of the ceiling area.",

section 5(3)(i) laid down—

"Where the number of persons, not being landholders, entitled under their personal law to be maintained by land-holder and dependent upon him, exceeds four, such landholder may hold, in addition to the area specified in sub-sections (1) and (2), land not exceeding one-fifth of the ceiling area for every such number exceeding four :

Provided that in no case shall the aggregate of the land held by him exceed two times the ceiling area."

and section 2(*g*) defined 'landholder' thus :

" 'landholder' means a person who holds land as a raiyat or as under-raiyat and includes a mortgagee of land with possession;"

Explanation.—(*i*) A member of an undivided Hindu family having or being entitled to a share in land shall be deemed to be a land-holder for the purposes of this Act as if there had been partition in the family immediately before the commencement of this Act.

(*ii*) In this clause, the word 'person' includes any company, institution, trust, association or body of individuals whether incorporated or not."

After the amending Act was brought on the Statute Book, the following relevant amendments were made. Section 5(1)(*i*) reads as follows :—

'It shall not be lawful for any family to hold, except as otherwise provided under this Act, land in excess of the ceiling area.

Explanation.—All lands owned or held individually by the members of a family or jointly by some or all of the members of such family shall be deemed to be owned or held by the family."

and section 5(3)(*i*) now reads as follows :—

"Where the number of members in a family exceeds five, the family may hold in addition to the area specified in sub sections (1) and (2) land not exceeding one-tenth of the ceiling area for that class of land for every such additional member :

Provided that in no case shall the aggregate of the land held by the family exceed one and a half times the ceiling area."

As a necessary corollary to the change brought about in sub-section (1)(*i*) of section 5 'family' had to be defined and it was accordingly so done by inserting in the parent Act section 2(*ee*) which reads as follows :—

" 'family' means and includes a person, his or her spouse and minor children.

Explanation.—In this clause the word 'person' includes any company, institution, trust, association, or body of individuals whether incorporated or not."

Clause (*eee*) was further inserted in section 2 which defines 'minor child' in these terms—

"'minor child' means a person (male or female) who has not completed eighteen years of age."

The definition of 'landholder' in section 2(*g*) also underwent a change. Section 2(*g*) of the parent Act has been substituted in these terms of the amending Act—

"'landholder' means a family, as defined, in clause (*ee*) holding land as raiyat or as under-raiyat and includes a mortgagee of land in possession."

7. It will be seen from the aforesaid provisions that before the amending Act a landholder was any person holding land as a raiyat or as an under-raiyat including a mortgagee of land with possession and every member of an undivided Hindu family entitled to a share in land was deemed to be a landholder on a fictional partition in such family immediately before the commencement of the parent Act and the unit for purposes of ceiling was any person falling within the definition of landholder in section 2(*g*). The effect of the amending Act is that the unit for the purpose of ceiling has to be determined with reference to a family as defined in section 2(*ee*) read with section 2(*eee*) which was holding land as raiyat or under-raiyat including a mortgagee in possession. Explanation (*i*) to section 2(*g*) in the parent Act, which brought in a fictional partition amongst the members of an undivided Hindu family was deleted and an explanation to sub-section (1)(*i*) of section 5 was added, the effect of which is that all lands, which are owned or held individually or jointly by the members of a family as defined, are to be deemed to be owned or held by the family itself. Consequentially, it follows that before the amendment each member of the joint Hindu family entitled to a share in land on partition was treated as a unit for the purpose of fixation of the ceiling area; a minor child in the joint Hindu family entitled to a share on partition, albeit fictional, was, therefore, also treated as a separate unit. With regard to persons who were not entitled to a share on partition in the undivided Hindu family but were entitled to be maintained by, and were

dependent upon, any person so entitled to hold, provisions had been made in section 5(3)(i) to the effect that where such persons entitled to be maintained by, and dependent upon, a landholder exceeded four, for every member exceeding four a landholder would hold in addition to the ceiling area land not exceeding one-fifth of the ceiling area subject to a maximum of two times the ceiling area. After the amendment, no minor child in a joint Hindu family, any of whose parent was alive, was entitled to be treated as a unit for the purpose of fixation of the ceiling area, even though it would have been entitled to a share in the joint family property on a partition. And, the family is merely permitted, in case the number of members thereof exceeds five, to hold additional one-tenth of the ceiling area for every such additional member subject to a maximum of one and a half times the ceiling area irrespective of the number of such additional members. These are the basic features upon which submissions were made with regard to points 1 to 3.

8. From the foregoing analysis of the relevant statutory provisions, it is quite clear that the Act as amended has laid down an artificial definition of 'family'. There can also be no doubt with regard to the well settled principle that if the various statutory provisions are capable of more than one interpretations: one leading to an absurdity or unconstitutionality of an Act and the other capable of harmonious construction in a manner consistent with the general, customary or personal law, which does not attract any contravention of any constitutional provision then the harmonious rule of construction is to be followed. It is equally well settled that where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences for in that case the words of the Statute speak the intention of the Legislature. What the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable or necessary implication. The language of the Acts of Legislature—more especially modern Acts—must neither be extended beyond its natural and proper limits in order to supply omissions or defects nor strained to meet the justice of an individual case (c.f. Craies on Statute Law, 5th Edition, page 68). In the instant cases, the statutory provisions aforementioned are capable of no ambiguity, and section 3 of the parent Act clearly lays down that—

> "The provisions of this Act shall have the effect, notwithstanding anything contrary contained in any other law, custom, usage or agreement, for the time being in force or in any decree or order of any court:

"Provided that nothing contained in this Act shall be deemed to have any effect on the provisions of the Bihar Bhoodan Yagna Act, 1954 (Bihar Act XXII of 1954)."

As a matter of fact, the points with regard to the parent Act being unconstitutional on the very grounds as traversed in these cases at the Bar were raised in the case of *Mahabir Prasad* v. *The State of Bihar*(1) and a Bench of this Court expressly overruled these objections. In that case, it was expressly held that the parent Act was consistent with the directive principles of State policy and even the amending Act was not inconsistent with that part of the Constitution. The provisions of the amending Act must be considered along with the parent Act and cannot be treated in isolation. It was further held that neither the parent Act nor the amending Act was *ultra vires*. As a matter of fact, learned Counsel for the petitioners with all his ingenuity wanted us to refer these cases to a larger Bench for a reconsideration of the Bench decision in *Mahabir Prasad's* case. I, however, do not feel persuaded to take a view different from the one taken in that case. There can be no doubt that the Acts in question are directed towards a policy of the State with a view to securing the ownership and control of the material resources of the community for the purpose of their distribution to best subserve the common good and to ensure that the operation of economic system does not result in concentration of wealth and means of production to the common detriment, as envisaged by clauses (*b*) and (*c*) of Article 39 of the Constitution. The Acts are legislative measures towards agrarian reform. As a matter of fact, the Supreme Court in the case of *Inder Singh* v. *State of Punjab*(2), while dealing with section 32-KK as inserted by Punjab Act XVI of 1962 in the Pepsu Tenancy and Agricultural Lands Act, 1955, which are in *pari materia* with the present parent Act, held that the fixing of ceiling on lands and provisions relating to it would form part of and constitute agrarian reform and, therefore, such provisions would have the protection of Article 31-A. In this connection I am tempted to borrow the language of Mahajan, J., (as he then was), dealing with the Bihar Land Reforms Act (Act 30 of 1950) and other State Acts in the case of *The State of Bihar* v. *Sir Kameshwar Singh*(3) at the page 274—

"Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the

(1) (1975) B.B.C.J. 701.
(2) (1967) A.I.A. (S.C.) 1776.
(3) (1952) A.I.R. (S.C.) 252.

constitution of India is based. The purpose of the acquisition contemplated by the impugned Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible. In other words, shortly put, the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised. The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence and it is not possible for this Court to say that there was no public purpose behind the acquisition contemplated by the impugned statute. The purpose of the statute certainly is in accordance with the letter and spirit of the Constitution of India."

That being so, it cannot be said that it was not within the legislative competence of the legislature to have enacted both the parent and the amending Acts, and the mere fact that in some respects the statutory provisions may override the provisions of the general or customary Hindu Law will not make them suffer from any constitutional inhibitions regarding the equality and property clauses in part III of the Constitution. I fully agree with the view expressed in *Mahabir Prasad's* case that the parent Act as amended does conform to the directive principles of State policy only more so as they have been admittedly included in the 9th schedule of the Constitution. I must, therefore, overrule the contentions raised with regard to the first two points.

9. That then brings us to the third point argued by Mr. Kailash Roy with some amount of vehemence. Learned Counsel contended in the first place that after the commencement of the Constitution the general or customary Hindu Law must be deemed to have equated the rights of a son and a daughter in a Hindu undivided family so as to avoid the infraction of Article 15 of the Constitution. Learned Counsel for the petitioners invited our attention to paragraph 259 at page 318 of Mayne on Hindu Law and Usage, 11th Edition. I do not find anything in that paragraph which can, in any way, be said to support the contention of the learned Counsel. While it is true that under the Mitakshara School of Hindu Law every coparcener has an interest in the coparcenery property from birth or even since when he has been begotten, it is not correct to say that a daughter is a member of the coparcenery having any right in praesenti even in respect of her father's self-acquired property. Even after coming into force of the Hindu

Succession Act, 1956 the daughter is merely entitled to a share in her parent's property on partition on his or her death. The essence of a coparcenery under the Mitakshara Law is unity of ownership. The ownership of the coparcenery property is in the whole body of coparceners. A coparcener's interest is a fluctuating one capable of being enlarged by deaths and liable to be diminished by births of coparceners in the family. It is only on partition that a coparcener becomes entitled to a definite share. No female can be coparcener under a Mitakshara Law. A coparcener's acquisition of right by birth and devolution by survivorship in the coparcenery property are the invariable concommitants of a Mitakshara coparcenery. Even section 6 of the Hindu Succession Act, 1956 recognises this with an exception in the shape of proviso thereto read with the explanation. The section reads thus—

> "When a male Hindu dies after the commencement of this Act having at the time of his death an interest in a Mitakshara coparcenery property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenery and not in accordance with this Act:
>
> Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such a female relative, the interest of the deceased in the Mitakshara coparcenery property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> *Explanation* 1.—For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> *Explanation* 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenery before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

This section makes it clear that this Act does not interfere with the special rights of those who are members of a Mitakshara coparcenary except to the extent that it ensures the female heirs and the daughter's son specified in Class I of the Schedule a share in the interest of a coparcenary in the event of his death by introducing the concept of a fictional partition immediately before his death and the carving out of his aliquot share in the coparcenary property as on that date. It cannot, however, be said that a female heir or a male claiming through her specified in Class I of the Schedule has any acquisition of right in the coparcenary by birth. She has no right in praesenti and by virtue of the proviso to section 6 aforesaid she can claim only on the death of the coparcener whose heir she claims to be. Although a daughter can be a member of a joint or Hindu undivided family, she cannot be given a status of a coparcener in a coparcenary even after the commencement of the Constitution of India, and that by itself cannot be said to attract the constitutional inhibitions contended in Article 15. Article 15(1) reads as follows :—

> "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

Clause (1) of this Article can apply only where the discrimination against a citizen is solely based on the ground of sex, religion, race, etc. If there can be found any rationale behind any general or customary law making such a discrimination between a male and a female in favour of the male based not solely on the ground of sex, then such a law cannot come within the sweep of Article 15. There are various factors which sanction that, while a son may be a member of a coparcenary, a daughter may not. Some of such factors are the offering of oblations after the death of the father, the pious obligation attaching to a son to discharge his father's debts, the changing of gotra of a daughter when she is married from one of her father to that of her husband and well-night severing in many vital respects her connections with the father's family and joining that of her husband so that a daughter on marriage ceases to be a member of her father's family and becomes a member of her husband's family : these, *inter alia*, do afford sufficient rationale to sanction the discrimination between a son and daughter. It cannot, therefore be said that with the enforcement of the Constitution the daughters acquired the status of a coparcener in a coparcenary ipso jure.

Learned Counsel relied upon two decisions of the Supreme Court in this regard, namely, the case of *Inder Singh* (supra) and *Surjit Lal Chhabda* v. *The Commissioner of Income-tax*(1). In the case of *Surjit Lal Chhabda* (supra) which was one under the Income-tax Act it was held that a single male, his wife and unmarried daughter constituted a Hindu undivided family. In the case of *Inder Singh* (supra) in paragraph 8 at page 1779 it was observed as follows :—

"The section (section 32-KK) does not effect any change in the rights of the descendants as members of a Hindu undivided family or the relationship of the family *inter se* except to the extent of depriving the descendants of their right to claim the ceiling area for each of them. The contention as to the validity of section 32-KK, therefore, must fail."

Relying upon the aforesaid observation, learned Counsel argued that a daughter being a member of a Hindu undivided family, her interest in the joint family property should be held to be the same as that of a son. In the case of Surjit Lal Chhabda the Supreme Court was not dealing with a coparcenary but merely a joint or Hindu undivided family within the meaning of the Income-tax Act, and in the case of Inder Singh the observations extracted above must be read in the context of the argument which had been advanced in that case. It was contended in that case that under Hindu Law every coparcener in a Hindu undivided family acquires right in the property of such coparcenary on birth and is entitled to a right of joint possession and enjoyment of its entire property and that section 32-KK of the Punjab Act deprived such a coparcener of his rights of property in that it takes away rights of the descendants of the land owner to claim for themselves the permissible area. It is clear that the term 'Hindu undivided family' as used by the Supreme Court is in the sense of coparcenary. I must, therefore, overrule the contention of learned Counsel for the petitioners that after the commencement of the Constitution, under the Mitakshara School of Hindu Law a daughter becomes a coparcener along with a son and that she has any interest in the coparcenary property by birth nor, for that matter, it is such a situation which brings that part of the customary law within the field forbidden by Article 15(1).

10. As a necessary corollary, therefore, it follows that the very same reasons which, I have held, justify the discrimination between a son and a daughter in a coparcenary apply with equal force to any

(1) (1976) 3 S.C.C. 142.

attack on the validity of the impugned Acts as being violative of Article 15(1). Without detaining myself any further on this part of the case, I may merely state that I fully agree with the view of a Full Bench of the Punjab and Haryana High Court in the case of *Sucha Singh Bajwa* v. *The State of Punjab*(1), where the Punjab Land Reforms Act (10 of 1973), an Act in *pari materia* with our Acts, was being considered and was held not to be violative of Article 15 of the Constitution. There is thus no merit in the third point also.

11. That then leads us to the next question as to what would be the relevant date for the purpose of determining the minority or majority of a child. Section 2(*eee*), as already quoted above, defines 'minor child as a male or female who has not completed the age of 18 years. It was contended by learned Counsel for the petitioners that this completion of 18 years of age should be determined with reference to the probable date of the notification under section 15(1) of the parent Act. On the contrary, it was contended by learned Counsel for the respondents that the date of such majority should be held to be the 9th of September, 1970 when the amending Act came into force. As a matter of fact, this very Bench in the case of *Ganga Das* v. *The State of Bihar*(2) had held that at any rate the relevant date for determining the minority or majority cannot be earlier than the date on which the notice under section 6(3) of the Act as amended is published. It has been rightly argued in these cases by the learned Counsel for the petitioners that in the above mentioned decision the question as to whether a person can be said to have attained majority under the amended Act at any stage later than the publication of the notice under section 6(3) was not gone into. Nonetheless after giving the matter my anxious consideration and for the reasons to be given hereinafter, I am of the view that the date with reference to which a person can be said to be either a minor or a major must be the date on which the notice under section 6(3) of the amending Act is published. Section 6 after amendment reads as follows:—

> "(1) As soon as may be after the commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972, the State Government shall cause to be published a notice in the matter laid down in sub-section (3) calling upon all the landholders of the State who hold land in excess of the

(1) (1974) A. I. R. (Punj. and Haryana) 162.
(2) (1976) B.B.C.J. 409.

ceiling area, anywhere in State to submit to the Collector of the district where they ordinarily reside, within thirty days of the date specified in the notice, a return containing the following particulars, namely :—

(*i*) the total area and description of land held by the landholder anywhere in the State;

(*ii*) if the landholder is a raiyat, the names and description of his under-raiyats and the description of land held by them under him anywhere in the State;

(*iii*) the particulars of legal proceedings, if any, in respect of the land held by the landholder pending on the date of submission of the return;

(*iv*) encumbrances on the land, if any, with their full particulars; and

(*v*) any other particulars that may be prescribed.

Provided that the Collector may, on an application made by the landholder extend the period specified in such notice for submission of the return by a period not exceeding thirty days.

(2) If the landholder is a minor or a person of unsound mind the return required under sub-section (1) shall be submitted by his guardian.

(3) The substance of the notice shall be published in the official gazette in not less than three issues of at least two newspapers having circulation in the State of Bihar.

(4) Where the landholder or the guardian mentioned in sub-section (2) as the case may be fails to submit the return required under sub-section (1) without sufficient cause, the Collector may, after giving him a reasonable opportunity of being heard and adducing evidence, impose a fine which may extend to five hundred rupees."

It will be seen from the provisions quoted above that it is mandatory to issue a notice in the manner laid down in sub-section (3) to all

the land-holders of the State holding land in excess of the ceiling area to submit a return containing the particulars mentioned in section 6(1). So long as a notice is not issued and published in accordance with the provisions of section 6, it is not necessary for any land-holder even if he holds land in excess of the ceiling area, to submit a return. Therefore, by no stretch of imagination, it can be said that irrespective of the issuance and publication of notice under section 6 the date relevant for the purposes of determining the majority would be the date of the commencement of the amending Act, namely, 9th September 1970. If a land-holder has to submit any return after the issuance and publication of notice under section 6 then, to say the least, he is not expected to submit the return with reference to the state of things that existed on a date prior to the publication of such notice. Section 6 speaks of a fact whereas the commencement of the amending Act is a fiction. There is nothing in the Act to bring within its sweep persons who were minor before the publication of notice under section 6. It, however, remains to be seen as to whether there is any substance in the contention of the Learned Counsel for the petitioners that such date should be the probable date of notification under section 15(1). Learned Counsel for the petitioners invited our attention to sub-sections (1), (2) and (3) of section 15 of the parent Act as it stood before the amending Act came into force. It reads thus—

> "(1) Subject to the provisions of sub-section (5) the State Government shall, after the final publication of the statement under sub-section (1) of section 11, acquire the surplus land by publishing in the Official Gazette a notification to the effect that such land is required for a public purpose and such publication shall be conclusive evidence of the notice of the acquisition to the person or persons concerned.
>
> (2) On publication of the notification under sub-section (1), the land specified in the notification shall, subject to the provisions of this Act, be deemed to have been acquired for the purposes of this Act and vested in the State free from all encumbrances with effect from the date of commencement of this Act and all right, title and interest of all persons claiming interest therein shall, with effect from that date be deemed to have been extinguished.

(3) On the publication of the notification under sub-section (1) any person claiming interest in the land specified in the notification, may within sixty days of such publication, file a claim before the Collector."

After the amendment sub-section (1) remained as it was in the parent Act whereas sub-sections (2) and (3) were substituted by the following :—

"(2) On the publication of the notification under sub-section (1) , the land specified in the notification shall, subject, to the provisions of this Act, be deemed to have been acquired for the purposes of this Act and vested in the State free from all encumbrances with effect from the date of the notification and all right, title and interest of all persons claiming interest therein shall, with effect from that date, be deemed to have been extinguished.

(3) On the publication of the notification under sub-section (1) any person claiming interest in the land specified in the notification may, within thirty days of such publication file a claim before the Collector."

It was argued, therefore, that whereas under the parent Act on the publication of notification under sub-section (1) the surplus land vested in the State free from all encumbrances with effect from the date of the commencement of the parent Act, under the amending Act the vesting takes place with effect from the date of the notification and not with reference to the date of commencement of the amending Act. It was, accordingly, urged that so long as the vesting of the surplus land in the State does not take place, the interest of a land-holder is not wiped out. As a necessary corollary, if a minor has attained majority by the date of publication of the notification under section 15(1), he can still lay a claim for a separate unit for himself. This argument is fallacious. The relevant date must be the date on which a notice is published in the Gazette under section 6, on the publication of which he is to file a return containing the necessary particulars. If such a return is filed, it must contain the name and age of different members constituting a family as also of such person who, though not included in the term 'family', is entitled by virtue of his own right to be treated as a separate unit and thereby become a family by himself. Once a return is submitted consequent upon the publication of notice

under section 6 and a person is shown as a minor being included in the term 'family' as defined then it will be absurd to suggest that at any subsequent stage the very same person on attaining majority may be permitted to claim a unit for himself. If the argument of learned Counsel for the petitioners be accepted, a return will have to be filed in pursuance of section 6 notice in a particular manner showing a person as a minor and yet it will be open to claim a unit for that minor in a return to be submitted in pursuance of a notice under section 8(1) as amended which makes it incumbent for a land-holder holding land in excess of the ceiling area, who has not submitted a return within the period specified or extended under section 6, to submit a return within the 30 days of the service on the notice under section 8(1). It is not expected that a person, if called upon to furnish a return by virtue of the public notice under section 6, will furnish a return which would not tally with the return to be filed in pursuance of a notice under section 8(1). The only reasonable approach to the question at hand is the earliest point of time at which a land-holder is called upon to submit a return in which he has to specify the number of members in the family as defined. Once a person has been shown as a minor in such a return as is bound to be done, it will not be open to the very same person, while the proceedings under the parent Act as amended are going on, to claim a unit for himself on the ground that he has attained majority since the date of filing the return in pursuance of the notice under section 6. Any other view will be inconsistent with the well-settled principle of harmonious construction of different statutory provisions. The age for the purpose of determining minority or majority cannot in one case be with reference to publication of the notice under section 6, yet another in the case of a return to be filed under section 8, yet a third one when the proceeding has come to a point of time for exercise of option to select land under section 9 and yet another at the stage of filing of objection about draft statement under section 10(3) of the Act and so on till the date of publication of the notice under section 15(1). Such a construction will lead to absurdity. I, therefore, hold that the date on which a person is to be treated as a major or a minor is the date of publication of notice under section 6 of the parent Act as amended and no other date. It may be true that the surplus land vests in the State on and from the date of publication of notice under section 15(1), but that does not mean that the units to be held by persons belonging to a family will fluctuate at every stage from the date of publication of notice under section 6 up to the date of publication of notice under section 15. There is thus no manner of doubt that the date on which

notice under section 6 is published is the crucial date for determining whether a person is a minor or a major; the subsequent attainment of majority by any person will not entitle him to claim a separate unit for himself subsequently.

12. It was next contended that in view of section 13(3) of the amending Act once a proceeding had been initiated and either dropped or otherwise finally decided under the parent Act before the commencement of the amending Act, the matter could not be reopened after the commencement of the amendig Act. Section 13(3) of the amending Act reads thus :—

> "Nothing in this Act or the amendments effected thereby shall affect or be deemed to affect anything done or any action taken under the provisions of the said Act :
>
> Provided that in case where the land-holder has already submitted a return in accordance with the notice issued under section 6 or section 8 of the said Act and has exercised the option under section of the said Act, he shall be given an opportunity to further exercise the option under the said section in view of the provisions of this Act within 15 days from the date of service of notice issued by the Collector for this purpose or within such extended period as may be allowed by the Collector."

It is not possible to uphold the validity of this contention. From a perusal of the relevant statutory provisions, it appears that the Legislature contemplated two classes of cases. One was where a proceeding had been started and concluded under the parent Act and before the commencement of the amending Act. In such a case section 6(1) of the parent Act as amended, which has already been quoted above, prescribes that as soon as may be after the commencement of the amending Act a notice has to be published in the manner laid down in sub-section (3) of section 6 calling upon all the land-holders of the State who hold land in exercise of the ceiling area to submit return. That in its turn, clearly implies that even if a land-holder had already been held to be within the limits of the ceiling area as fixed by the amending Act before the commencement of the amending Act then on the publication of a notice under section 6 as amended, if a land-holder holds lands in excess of the ceiling area as fixed by the amending Act, he has still to file a return. This class of

cases cannot be held to be protected by sub-section (3) of section 13 of the amending Act. The other class of cases contemplated by the Legislature is that where the proceeding initiated under the parent Act before the amending Act is continued even after the commencement of the amending Act. In such cases the proviso to section 13(3) has been made applicable in so far as if a land-holder under the parent Act has exercised option under section 9 thereof then he shall be given a further opportunity to exercise the option in view the provisions of the amending Act. In support of his contention, learned Counsel for the petitioners placed reliance on the decisions of the Supreme Court in the case of *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subhash Chandra Yograj Sinha*(1), *Ram Prasad* v. *State of Punjab*(2), and *Gurdit Singh* v. *State of Punjab*(3). But the decisions in those cases, in my view, are of no avail to the petitioners in view of the express statutory provisions in the amending Act as pointed out above. There was no provision in the statutes which were being considered in the three cases relied upon by the learned Counsel for the petitioners akin to section 6(1) of the Act as amended which could be invoked in those cases. This point was also raised before a Bench of this Court in the case of *Mussomat Radha Devi* v. *The State of Bihar*(4) and I am reinforced in my conclusion by that decision wherein it has been held after noticing the provisions of section 13(3) of the amending Act:

"In our opinion, it is not possible to accept the contention that on account of a decision under the Act before the present amendment, a fresh proceeding cannot be started under the provisions of the present law. The effect of the provisions relied upon by the learned Counsel is not to take away the jurisdiction of the authorities to start a proceeding in accordance with the amended provision of law."

13. The only other point that remains to be seen is whether there is any force in the contention of Mr. Roy that if a proceeding was initiated under the parent Act and continued after the commencement of the amending Act and an order finally passed in favour of the land-holder then the initiation of a fresh proceeding under the provisions of the Act as amended would be barred by the principles of *res judicata*.

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(1) (1961) A. I. R. (S. C.) 1596.
(2) (1966) A. I. R. (S. C.) 1607.
(3) (1974) A. I. R. (S. C.) 1791.
(4) (1976) C.W.J.C. no. 11 of 1975 decided on 4th August, 1976.

I think there is sufficient force in this contnention. As I have pointed out earlier, it cannot be said that the Legislature, while passing the amending Act, was not aware of a contingency wherein although a proceeding had been started under the parent Act, it was still being continued after the commencement of the amending Act. The proviso to section 13(3) of the amending Act extracted above as also the provisions of section 6(1) of the Act as amended is clearly a pointer to the intent of the Legislature. If the proceeding had been started under the parent Act and concluded before the commencement of the amending Act, the matter could be reopened. Under the provisions of the Act as amended if, however, it was not concluded before the 9th of September, 1970 when the amending Act came into force but was continued thereafter and decided on merits in favour of the land-holder holding that he did not hold any land in excess of the ceiling area then it must also be deemed that the decision of the competent authority on merits was under the Act as amended. Section 1(2) of the amending Act says that—

> "It shall be deemed to have come into force with effect from the 9th September, 1970."

It introduces a clear provision with regard to the date from which the amending Act would be operative. And, as was observed by Lord Asquith in the case of *East End Dwellings Co., Ltd.*, v. *Finsbury Borough Council*(1) at page 599—

> "If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's inmagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This observation has been referred with approval in quite a number of cases by the Supreme Court, to wit. *The State of Bombay* v. *Pandurang Vinayak*(2), *Commissioner of Income-tax* v. *Teja Singh*(3) and *Additional Income-tax Officer* v. *E. Alfred*(4). I have already

(1) (1951) 2 All. Eng. L. R. 587 (N.L.) = (1952) A. C. 109.
(2) (1953) S. C. R. 773.
(3) (1959) A. I. R. (S. C.) 352.
(4) (1962) A. I. R. (S. C.) 663.

stated at the outset while stating the facts of C.W.J.C. 1040 of 1974, Annexure 2 thereto contains the final order passed by the Collector on the 29th of April, 1971 on merits holding that the land-holder held land within the permissible limit under the existing provisions of the parent Act. Since the amending Act will be deemed to be in force on that date, the decision also must be deemed to be under the provisions of that Act. In that view of the matter, the principles of *res judicata* will certainly bar the initiation of any fresh proceeding. C.W.J.C. 1040 of 1974 has, therefore, to be allowed on this ground alone.

14. In so far as C.W.J.C. 1561 of 1975 is concerned, a point has been taken in the petition as was also canvassed at the Bar that petitioner no. 2 of that case being a major, he was entitled to hold a separate unit of his own in his own right. No materials, however, are forthcoming nor was anything pointed out to us in course of the hearing to show as to on what particular date petitioner no. 2 attained majority or even as to whether he had attained majority on the date when general notice under section 6 of the Act as amended was published. it is not possible, therefore, to grant any relief to the petitioners of that case on this score.

15. In view of what has been held above, C.W.J.C. 1040 of 1974 is allowed and the orders as incorporated in annexures 6, 8 and 11 and the draft publication as contained in annexure 9 of that petition are hereby quashed. There is no merit in C.W.J.C. 1564 of 1975 and accordingly it is dismissed. In the circumstances of the cases, however, there shall be no order as to costs.

SHAMBHU PRASAD SINGH, J.—I agree that C.W.J.C. no. 1040 of 1974 be allowed and C.W.J.C. no. 1561 of 1975 be dismissed both without costs. I would like to make certain observations of my own on some questions raised in this case. On other matters, I am entirely in agreement with the reasonings of my learned brother S. K. Jha, J.

2. It is true that the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act as originally enacted or

as it stands now after various amendments taken as a whole is consistent with the directive principles of State policy as held by a Bench of this Court in the case of *Mahabir Prasad* v. *The State of Bihar*(1) inasmuch as the purpose behind it was to take away lands from affluent persons for distributing them amongst the poorer sections of the society who were either landless or possessed of little land. However, the artificial definition of the 'family' as introduced by the amending Act, that is, the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972, according to me, to some extent helps those who can be said to be better placed and affect adversely those who are weaker than the former. There can be no doubt that while a major brother, according to the said definition, becomes entitled to be treated as a separate unit, the minor brother is not allowed to be so treated. As between a major and a minor obviously the major one is better placed and the minor is weaker than the former. Further in view of the artificial definition of the 'family', even minors, who are similarly placed in certain cases may have to be treated differently; for illustration, if there were two brothers, 'A' and 'B', each having three minor sons and one of them, say 'A' as well as his wife are dead while the three minor sons of his will be treated as a separate unit under the Act for the purpose of determining surplus land, the three minor sons of 'B' will not be so treated and they shall have to remain content with their share in one unit of land which is left for their father and them together. Perhaps, the framers of the Act were not conscious at the time of introducing the amendment that the artificial definition of 'family' will lead to such unreasonable and inequitable consequences. For these reasons, if the amending Act would not have been included in the 9th Schedule of the Constitution and on that ground declared protected under Article 31B of the Constitution, I might have considered seriously the argument of Shri Kailash Roy that the aforesaid decision in Mahabir Prasad's case requires reconsideration and the matter should be referred to a larger Bench. However, as the amending Act also is included in the 9th Schedule of the Constitution, it is not possible for this Court to go into the question of vires thereof on the ground of infringement of some of the fundamental rights specially during the period of emergency and the Bench decision in Mahabir Prasad's case appears to have been correctly decided that the

(1) (1975) B.B.C.J. 701.

vires of the amending Act cannot be challenged as it is included in the 9th Schedule of the Constitution.

3. Coming now to the argument of Sri Kailash Roy that in view of section 13(3) of the Amending Act once a proceeding had been initiated and either dropped or otherwise finally decided under the parent Act before the commencement of the amending Act, the matter could not be reopened after the commencement of the amending Act. In my opinion, the words "anything done or any action taken under the provisions of the said Act" ("said Act" means the original Act) do not cover an order passed under the parent Act on the question whether a land-holder possesses surplus land or not; the aforesaid words being some such acts of the authorities as issuing a notice or a notification, etc. While dealing with that argument, my learned brother S. K. Jha, J. has also referred to the provision of section 6(1) of the parent Act as it stands after amendment prescribing that as soon as may be after the commencement of the amending Act a notice has to be published in the manner laid down in sub-section (3) of that section calling upon all the land-holders of the State who hold land in excess of the ceiling area to submit return. If the argument advanced by Sri Roy has to be accepted then section 6 as stands after amendment will almost stands nugatory. A limited meaning, therefore, shall have to be given to section 13(3) of the Amending Act so that the amendment introduced in section 6(1) by that Act is not rendered useless. Therefore, section 13(3) of the Amending Act cannot be given a meaning that once a proceeding had been initiated and either dropped or otherwise finally decided under the parent Act before the commencement of the Amending Act, the matter could not be reopened after the commencement of the Amending Act.

S. P. J.-

C. W. J. C. no. 1040 *of* 1974 *allowed.*

C. W. J. C. no. 1564 *of* 1975 *dismissed.*

CIVIL WRIT JURISDICTION

1977.

March, 11.

*Before B. D. Singh and Birendra Prasad Sinha, JJ.**

SHRI CHANDRA MAULI SINGH & ANR.**

v.

THE UNION OF INDIA AS OWNER OF THE EASTERN RAILWAY THROUGH THE GENERAL MANAGER & ORS.

Railway Servants (Discipline and Appeal) Rules, 1968, rule 14 clause (ii), scope and applicability of—railway employees removed from their services—no opportunity of being heard given to them—order of removal, whether liable to be quashed—the word 'consider' in Rule 14, whether applies to cases of both criminal and civil nature.

The words 'the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit' occurring in rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, govern all the clauses (*i*) to (*iii*) of rule 14 of the Rules, and, therefore, the word 'consider' which their Lordships of the Supreme Court were considering in *Divisional Personnel Officer* v. *T. R. Challapan*(1) in a criminal matter with regard to clause (1) of rule 14, would equally apply in the instant case relating to a civil dispute

Held, therefore, that in the instant case since no opportunity of being heard was given to the petitioners before the highest punishment of removal was awarded to them in exercise of powers vested in the authority under rule 14, clause (*ii*) of the Rules, the orders of their removal from their services contained under Annexures 1 and 2 passed

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*Sitting at Ranchi.

**Civil Writ Jurisdiction Case no. 325 of 1976(R). In the matter of an application under Article 226 of the Constitution of India.

(1) (1975) A. I. R. (S. C.) 2216.

by the Divisional Superintendent, Eastern Railway, Dhanbad, and the appellate orders contained under Annexures 5 and 6 passed by the General Mananger, Eastern Railway, are liable to be quashed.

Divisional Personnel Officer v. *T. R. Challapan*(1), followed *D. N. Singh & Anr.* v. *Divisional Superintendent, Dhanbad Division, Eastern Railway and Anr.*(2), held, no longer a good law in view of Supreme Court decision.

Ramchartra Sharma & Ors. v. *The Union of India & Ors.* (3) referred to.

Application by the railway employees who were removed from their services.

The facts of the case material to this report are set out in the judgment of the court.

Messrs Tarkeshwar Dayal, Arun Bihari Mathur and *Mrs. Priti Sinha* for the petitioner.

Mr. D. K. Sarkar for the respondents.

B. D. SINGH & B. P. SINHA, JJ.—This application by Chandra Mauli Singh and Nikhil Chandra Mazumdar has been filed under Article 226 of the Constitution of India, against two separate orders of the same date, namely, 13th of May, 1974 (Annexures 1 and 2) passed by the Divisional Superintendent, Eastern Railway, Dhanbad (respondent no. 3). Annexure 1 relates to petitioner no. 1 whereas Annexure 2 relates to petitioner no. 2. In the said two orders, respondent no. 3 had ordered removal of petitioner nos. 1 and 2 from their services under the Eastern Railway. In the application they also prayed for quashing the two orders dated the 31st of July 1974, passed by the General Manager, Eastern Railway (respondent no. 2) on appeal preferred by the petitioners against the orders contained under Annexures 1 and 2. Therefore, the two appellate orders sought to be quashed are Annexures 5 and 6 to the application. By the said appellate orders, respondent no. 2 has affirmed the orders contained under Annexures 1 and 2.

2. In order to appreciate the points involved in this application, it will be necessary to state some material fact as stated by the petitioners in their application. Petitioner no. 1 was appointed on the

(1) (1975) A. I. R. (S. C.) 2216.
(2) I. L. R. LIV Pat. 623.
(3) C.W.J.C. no. 1735 of 1975 with C.W.J.C. nos. 43, 44 and 45 of 1975 decided on 15th April 1976.

6th of May, 1965, as an office clerk in the time scale pay of Rs. 110—180 as it then was at Dhanbad and contained as such till the order of removal whereas petitioner no. 2 also was a ministerial staff under respondent no. 3 at Chaupan in the time scale pay of Rs. 130—300 having earned promotion and he continued as such till he was removed under order contained in Annexure 2. Both the petitioners, against the orders contained under Annexures 1 and 2, preferred an appeal before respondent no. 2 on the 24th of June, 1974. Respondent no. 2 however, dismissed their appeal and affirmed the orders contained under Annexures 1 and 2. Against the appellate orders, the petitioners filed two separate writ application before the Hon'ble High Court at Calcutta, being Civil Rule no. 6061 W of 1974 and Civil Rule no. 6062 W of 1974. The rule was issued by the High Court at Calcutta against the respondents and an interlocutory order was also passed protecting the continuance of the petitioners in the railway quarters and preserving status quo as on the date of the filing of the writ applications before the said High Court. The respondents in those two cases before the Calcutta High Court filed petition *inter alia* supporting the impugned orders, but those cases could not be disposed of as those applications were withdrawn by the petitioners on the 24th of November 1976, because they expected that in view of the declaration made by the Hon'ble Railway Minister in the Rajya Sabha on 11th of November, 1976, it was no more necessary for them to continue the litigation, since the persons who had participated in the strike would be reinstated. True copies of the orders of the High Court of Calcutta in those cases have been filed by the petitioners and they have been marked as Annexures 8 and 9. On the 25th of November, 1976, after the petitioners have withdrawn their applications which were pending before the High Court of Calcutta, they filed representations before respondent no. 2 for reinstating them. True copies of these two representations filed separately by the petitioners, are marked as Annexures 10 and 11. Annexure 10 relates to petitioners no. 1, whereas Annexure 11 relates to petitioner no. 2. Thereafter the two petitioners filed the present writ application before this Court on 16th of December, 1976. In this application the petitioners have stated that the impugned orders contained under Annexures 1 and 2 were passed by respondent no. 3 in purported exercise of powers vested in him under rule 14 clause (*ii*) of the Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to as 'the Rules). They have further stated that no notice or opportunity was ever offorded to the petitioners of being heard prior to the passing and publication of the aforesaid orders of removal from their services.

3. A counter-affidavit has been filed on behalf of the respondent today, a copy of which has already been given to the counsel of the petitioners yesterday. In the counter-affidavit the respondents had *inter alia* supported the impugned orders.

4. Learned Counsel for the petitioners has assailed the impugned orders and has raised the following point of law for consideration by this Court. He submitted that the petitioners ought to have been heard before the highest punishment of removal was awarded to them by respondent no. 3 by the impugned orders, which were affirmed by the appellate authority (respondent no. 2). Learned Counsel urged that in the instant case since no opportunity was given to the petitioners, it was in violation of the provisions contained under rule 14 clause (*ii*) of the Rules. He drew our attention to the provisions contained under the said rules, the relevant provisions of which are thus :—

14. Special procedure in certain cases :—

Notwithstading anything contained in Rules 9 to 13—

(*i*) where any penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge; or

(*ii*) where the disciplinary authority is satisfied for raesons to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(*iii*) where the President is satisfied that in the interest of the security of the state, it is not expedient to hold an inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit :"

In order to find support to his contention he has relied on the case the *Divisional Personnel Officer* vs. *T. R. Challapan*(1). In that case their Lordships were considering clause (*i*) of rule 14 and the word 'consider' occurring under rule 14 of the Rules. Our attention was specifically drawn to paragraph no. 21 at page 2224. the relevant portion of which reads thus :

"The word 'consider' has been used in contradiction to the word 'determine'. The rule—making authority deliberately used the word

(1) (1975) A. I. R. (S. C.) 2216.

'consider' and not 'determine' because the word 'determine' has a much wider scope. The word 'consider' merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term 'consder' postulates consideration of all the aspects, the pros and cons of the matter after hearing the aggrieved person. Such an inquiry would be a summary inquiry to be held by the disciplinary authority after hearing the delinquent employee. It is not at all necessary for the disciplinary authority to order a fresh departmental inquiry which is dispensed with under Rule 14 of the Rules of 1968 which incorporates the principle contained in Act 311(2) proviso(*a*)."

5. In our opinion the submission of the Learned Counsel for the petitioners is well founded. In the counter-affidavit it has not been stated that any such opportunity was given to the petitioners. Learned Counsel for the respondents, however, contended that in the Supreme Court case, referred to above, their Lordships were considering a criminal matter and were considering only the provisions contained under clause (*i*) and not clause (*ii*) of rule 14 of the Rules. He further submitted that the words 'the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit' are applicable only to clause (*i*) of rule 14 of the Rules. In our opinion this interpretation given by the Learned Counsel for the respondents is not tenable. Those words govern all the clauses (*i*) to (*iii*) of rule 14 of the Rules, and, therefore, the word 'consider' which their Lordships of the Supreme Court although were considering in that case in a criminal matter with regard to clause (*i*) of rule 14, would equally apply in the instant case relating to a civil dispute. He also submitted that this Court in an earlier case in a Division Bench in *D. N. Singh*, vs. *Divisional Superintendent Eastern Railway and others*(1) held that no opportunity was required to be given while passing an order of punishment. In our view the observations made in the judgment are now no more good law and binding on us in view of the judgment of

(1) I. L. R. (Pat.) 623.

the Supreme Court referred to above. It may be mentioned that the case reported in I.L.R. 54 Patna 623 (supra) was already considered in an unreported judgment dated the 15th of April 1976 in the case of *Ramcharitra Sharma and others* versus *The Union of India and others* (C.W.J.C. no. 1735 of 1975 with C.W.J.C. nos. 43, 44 and 45 of 1975) and those cases were of civil nature, even then their Lordships, H. L. Agrawal and S. K. Choudhuri JJ. observed that while awarding sentence, opportunity had to be given to the deliquent officer under rule 14 clause (*ii*) of the Rules and their Lordships did not follow the observation made in *D. N. Singh's* case. As against their Lordships' judgment dated the 15th of April, 1976 the respondents filed an application for certificate to leave to appeal to Supreme Court, which was registered as S.C.A. 139 of 1976 and their prayer for the certificate was rejected by the Hon'ble Chief Justice and S. Ali Ahmed, J. by order dated the 9th of February 1977. It may be mentioned that the Hon'ble Chief Justice was also one of the members in the D. N. Singh's case and their Lordships, therefore clearly mentioned in their order dated the 9th of February 1977 that after the decision of the Supreme Court the law on the question will be that which has been laid down by the Supreme Court and, therefore, their Lordships dismissed their application for the certificate to leave to appeal to Supreme Court by said order. Learned Counsel for the respondents had also submitted that in the instant case since the representations contained under Annexures 10 and 11 are still pending before the respondents, the writ application of the petitioners should not be entertained. In our opinion there is no merit in this submission either it may be mentioned that the Learned Counsel for the respondents has not been able to show us any of the provisions for making such reprentation under the Rules. The petitioners have already exhausted their remedy on appeal and only after having exhausted the remedy they had filed this writ application.

6. In the result, therefore, the application of the petitioners is allowed and the impugned orders contained under Annexures 1 and 2 and the appellate orders contained under Annexures 5 and 6 are quashed. In the circumstances, however, there will be no order as to costs.

S.P.J.

Application allowed.

REVISIONAL CRIMINAL

Before R. P. Sinha and P. S. Sahay, JJ.

BAMSHANKAR ROY.*

v.

GUNESHWAR ROY & ORS.

1977

April, 13.

Code of Criminal Procedure, 1973, (*Act II of* 1974), *Chapter* XXX *sections* 203, 397, 398 *and* 399, *scope and applicability of—complaint dismissed under section* 203*—application made to the Sessions Judge under section* 397(1) *dismissed—present application filed in High Court under section* 398 *for further enquiry—maintainability of—second revision, whether barred.*

In Chapter XXX of the Code of Criminal Procedure, 1973, there has been provision for only one application in revision to be entertained by the Sessions Judge or by the High Court and with that end in view, the provisions were suitably amended barring second revision before High Court if there has already been revision before the Sessions Judge;

Held, that an order passed by the Sessions Judge or by the High Court under section 398 of the Code or Criminal Procedure, 1973, must be regarded as an order passed in revision and, although there is no express provision in section 398 like sub-section (3) of sections 397 and 399 of the Code, a second revision before the High Court after an order passed by the Sessions Judge in revision is not contemplated under the provisions of sections 397 and 399 of the Code and as such the present application before the High Court was not maintainable.

*Criminal Revision no. 372 of 1975. From an order passed by Shri Bipin Bihari Verma, 2nd Additional Sessions Judge, Saharsa, dated the 10th January, 1975.

Application by the person, whose, complaint was dismissed.

The facts of the case material to this report are set out in the judgment of R. P. Sinha, J.

Messrs. Basudeva Prasad, Radha Mohan Prasad, Shashi Anugrah Narain and *Mrs. Renuka Sharma*, for the petitioner.

Messrs. B. K. Banerji, Shashi Bhushan Prasad Sinha and *S. N. Choudhary*, for the opposite party.

R. P. SINHA, J.—This is an application under section 398 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) by the petitioner against the order passed by the Second Additional Sessions Judge, Saharsa, on the 10th January, 1975.

2. The circumstances leading to the filing of this revision application here, in brief, are as follows:

The petitioner had filed a petition of complaint against one Brahmadeo Roy and 11 others before the Chief Judicial Magistrate, Saharsa, on the 1st May, 1974 on the allegation that Nirmala Devi was his legally married wife and they had lived as husband and wife for about 1½ years. Dhananjai Roy, one of the members of the opposite party, came to the house of the petitioner on the 14th April, 1974 and took away the wife of the petitioner Nirmala Devi who was his niece on the pretext of the illness of her mother. When the petitioner went to the house of Dhananjai Roy aforesaid on the 25th April, 1974 to bring back his wife, Dhananjai Roy postponed her *Roksadi* to the 29th April, 1974. Again on the 29th April, 1974 when the petitioner went to him he did not find his wife there and on enquiry, he learnt that his wife had been sent to the house of Brahmadeo Roy who had kept her for committing illicit intercourse. The petitioner filed a petition of complaint and was examined on solemn affirmation by the Chief Judicial Magistrate who, acting under section 202 of the Code, sent the petition of complaint for enquiry to the Block Development Officer, Kahra. While the enquiry was pending, the petitioner filed a few petitions on different dates before the Chief Judicial Magistrate for recalling the enquiry from the Block Development Officer aforesaid. The learned Magistrate, however, on the 19th July, 1974, dismissed the complaint under

section 203 of the Code after considering the enquiry report received from the enquiring officer and giving reasons for having done so.

3. The petitioner thereupon filed an application under section 397(1) of the Code in the court of session against the aforesaid order of the learned Magistrate. That application was heard by the learned Second Additional Sessions Judge, Saharsa who, after throughly considering the petition of complaint, the enquiry report and the aforesaid order of the learned Magistrate, came to the conclusion that there was no sufficient ground for proceeding in the matter and the complaint was held to have been rightly dismissed with the result that the revision application of the petitioner under section 397(1) was dismissed on the 10th January, 1975.

4. Being aggrieved by the order of the learned Additional Sessions Judge, the petitioner filed the present application in this Court originally under sections 397 and 401 of the Code but the same was subsequently amended and it was labelled as an application purporting to be one under section 398 of the Code.

5. Mr. B. K. Bannerji, learned counsel appearing on behalf of the opposite party raised a preliminary objection regarding maintainability of the present application in this Court. According to him, under the provisions of the new Code which has come into force from 1st of April, 1974 a second revision is barred under section 399(3) of the Code. Mr. Basudeva Prasad, learned counsel for the petitioner has, on the other hand, very vehemently contended that an application for further enquiry under section 398 of the Code can be made in this Court even though an application under the provisions of section 398 had been made unsuccessfully before the court of session. Learned counsel for the parties made their submissions both on the question of maintainability as well as on merits of the application.

6. First we have to decide whether this application is maintainable. If so, then we have to see whether the impugned order of the learned Additional Sessions Judge is fit to be interfered with on merits.

7. Mr. Bannerji, on the question of maintainability, has submitted that the petitioner had filed an application under section 397(1) of the Code before the Sessions Judge against the order of the

learned Magistrate dismissing the complaint. The very first paragraph of the order of the learned Additional Sessions Judge reads thus :—

> "This is a petition in revision under section 397(1) Cr. P. C. now which has been filed against an order dated 19th July 1974 passed by the Chief Judicial Magistrate, Saharsa, in Complaint case no. 185/74 dismissing the complaint under section 203 Cr. P. C."

According to learned counsel, under section 397(3) of the Code the petitioner could not move this Court again after having already moved the Sessions Judge. Section 397(3) reads as follows :—

> "If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by other of them."

Further he has submitted that even for passing an order under the provisions of section 398 of the Code the High Court or the Sessions Judge has to examine the record under section 397. The relevant portion of section 398 reads as follows :—

> "On examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make ..... further enquiry into any complaint which has been dismissed under section 203 ..... ".

According to Mr. Banerji, the Additional Sessions Judge in this particular case entertained the application of the petitioner under section 397 of the Code and on being satisfied that the complaint was rightly dismissed, passed an order refusing to direct further enquiry and dismissed the application of the petitioner. The question is whether the petitioner could again file an application purporting to be one under sections 397 and 401 as it was originally labelled, or under section 398 as has been done after amending the same. Mr. Bannesji has rightly submitted that the High Court and the Sessions Judge no doubt exercise concurrent powers for directing further enquiry into any complaint which has been dismissed under section 203 of the Code in

view of the provisions of section 398. This power can be exercised by the High Court or the Sessions Judge on the application of the person aggrieved or otherwise. In the instant case, the learned Additional Sessions Judge had passed the impugned order against the petitioner on his application under section 397(1), so according to Mr. Banerji, under section 397(3) no further application by him shall be entertainable by this Court.

8. Mr. Basudeva Prasad has very strongly contended that if an application in revision is made by a person under section 397(1) of the Code then certainly under the provisions of sub-section (3) of section 397 no further application by the same person can be entertained but, according to him, if an application is made by a person to the Sessions Judge for exercising his powers under section 398 then there is nothing in the section from which it can be concluded that no further application before this Court can be made by the person who has already made an application before the Sessions Judge. Mr. Prasad has tried to draw a line of distinction between the revisional powers of the Sessions Judge and the High Court and their powers for ordering further enquiry under section 398 of the Code. According to him, an application in revision is not the same thing as an application for ordering further enquiry. He has urged that so far as sections 397 and 399 of the Code are concerned, undoubtedly, under sub-section (3) of the aforesaid sections, another application and another revision are barred. As already stated earlier, under section 397 (3) no further application by the same person and under section 399(3) no further proceeding by way of revision shall be entertained. According to Mr. Prasad, no such restriction has been imposed under section 398 of the Code.

9. Under Chapter XXX of the Code under the heading 'Reference and Revision' there are as many as 11 sections. Section 395 provides for making a reference to the High Court; section 396 deals with disposal of cases after decision of the High Court on reference; section 397 deals with the powers of the High Court and the Sessions Judge to call for records to exercise powers of revision; section 398 empowers the High Court and the Sessions Judge to direct further enquiry into a complaint which is dismissed under section 203 of sub-section (4) of

section 204 or in the case of any person accused of an offence who has been discharged. Under section 399 the Sessions Judge has been empowered to exercise powers of revision which the High Court under section 401 can exercise. Section 400 empowers an Additional Sessions Judge with all powers of the Sessions Judge under this Chapter. Section 401 deals with the powers of the High Court in exercise of its revisional jurisdiction. Section 402 deals with the power of the High Court to withdraw and transfer revision cases and section 403 gives the power to the court exercising revisional powers to hear the parties. Under section 404 a Metropolitan Magistrate may submit the grounds of his decision for consideration of the High Court or the Court of Session and section 405 requires the High Court or the Sessions Judge to certify that decision or order to the Court whose order is revised.

10. Mr. Prasad's contention has been that the order to be passed under section 398 of the Code cannot be treated as an order passed under section 397 or section 399 of the Code as, according to him, they deal with matters in which the Sessions Judge or the High Court, in exercise of their revisional powers, can pass any order except an order of the nature which can be passed under section 398 of the Code So, according to him, although an order passed by the Sessions Judge in revision under the provisions of sect on 397 or section 399 is not again revisable by the High Court but an order by the Sessions Judge under section 398 of the Code can be examined by the High Court as there is nothing in section 398 to indicate that after an order has been passed by the Sessions Jusge, this Court is precluded from exercising its power under section 398, since there is no bar provided in that section as has been so done in sub-section (3) of both sections 397 and 399 of the Code. In my opinion, although there is no such express provision in section 398 like sub-section (3) of sections 397 and 399 but from the scheme of Chapter XXX it appears that it deals with cases of reference and revision. This is clear from section 405 also the relevant portion of which reads as follows :—

> "When a case is revised under this Chapter by the High Court, or a Sessions Judge, it or he shall, in the manner provided by section 398, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed."

From the above it can be safely concluded that even an order passed by the Sessions Judge or by the High Court under section 398

must be regarded as an order passed in revision. Besides that, an aggrieved party has, broadly speaking, a right to go in appeal against a judgment or order where appeal is specifically provided or to prefer an application in revision. There is no other provision under which the order of a subordinate court can be interfered with by the High Court or Court of Session at the instance of the party aggrieved except by way of appeal or revision. Undoubtedly the order passed by the High Court or by the Sessions Judge against an order of a Magistrate dismissing a complaint is an order passed not in appeal but in revision under Chapter XXX of the Code and in that view of the matter, a second revision before the High Court after an order passed by the Sessions Judge in revision is not contemplated under the provisions of sections 397 and 399 of the Code.

11. There is yet another aspect of the matter also from which it appears that the petitioner was not entitled to make an application to this Court under section 397 read with section 401 or section 398 of the Code. Section 398 clearly provides that on examining any record under section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate to make further enquiry. In this case the petitioner has undoubtedly filed an application under section 397(1) of the Code before the Court of Session for invoking the powers under section 398 and the learned Additional Sessions Judge, on examining the record under section 397 passed the impugned order. As already quoted above, under sub-section (3) of section 399 where an application in revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge becomes final and no further proceeding by way of revision can be entertained by the High Court or any other Court. Mr. Prasad has referred to the decision in the case of the *Commissioner of Income-tax, Patiala* v. *M/s. Shahzada Nand and Sons and others*(1), with particular reference to the following except from paragraph 8 of the said decision :

When the words of a section are clear, but its scope is sought to be curtailed by construction, the approach suggested by Lord Coke in In re : *Heydon's* case (1584) 3 Ci. Rep. 7a yields better results :

"To arrive at the real meaning, it is always necessary to get an exact conception of the aim scope and object of the whole Act: to consider according to Lord Coke :

(1) (1966) A. I. R. (S. C.) 1342.

1. What was the Law before the Act was passed; 2. What was the mischief or defect for which the law had not provided: 3. What remedy Parliament has appointed; and 4. The reason of the remedy." "

In my opinion, in Chapter XXX of the new Code, there has been provision, as already discussed above, for only one application in revision to be entertained by the Sessions Judge or by the High Court and with that end in view, the provisions were suitably amended barring second revision before High Court if there has already been a revision before the Sessions Judge.

12. A situation similar to one in the present case had arisen before the Bombay High Court in the case of *Babu Balgonda Patil and others* v. *Dhanyakumar Balasaheb Patil and others*(1). In that case the short question of law was whether the revision petitions filed by the petitioners — complainants in the High Court were maintainable in view of the provisions of section 397(3) of the new Code. There it was held that sub-section (3) of section 397 of the new Code bars a second revision application to the High Court by the same party when the party had made a revision application to the Sessions court. In view of the admitted position in that case that petitions by the complainant were against the orders passed by the Sessions Judge dismissing the revision petitions the bar enacted by the said provision was held to apply and hence, the revision petitions were held to be not maintainable and the High Court could not entertain them.

13. For the reasons stated above, my concluded opinion is that the present application by the petitioner before this Court against the order of the Additional Sessions Judge passed in revision on 10th January, 1975 is not maintainable and cannot be entertained. In this view of the matter, I need not go into the merits of this application when the same is not entertainable by this Court. The application is, accordingly, dismissed.

P. S. SAHAY, J.—I agree.

S. P. J.

Application dismissed.

(1) (1976) Cr. L. J. 1872.

CRIMINAL WRIT JURISDICTION

Before Madan Mohan Prasad and M. P. Singh, JJ.

RAMDEO MAHTO *ALIAS* SUKHDEO MAHTO *

v.

THE STATE OF BIHAR

1977

April, 18.

Criminal trial—no provision in the Code of Criminal Procedure, 1973, enabling Magistrate to pass order of remand of an accused to custody after submission of final form and before taking of cognizance—effect of—Code of Criminal Procedure, 1973 (Central Act 11 of 1974), sections 167(2), 173(2) and 209—provisions of.

An examination of the provisions of Chapter XII of the Code of Criminal Procedure, 1973 would show that there is no indication given by the legislature even in an implied manner to suggest that after the completion of investigation and the submission of the report under section 173 (2), the Magistrate has a right to pass an order of remand under section 167 (2). There is thus, no escape from the conclusion that there is an obvious lacuna in the Code which, perhaps, is the result of it having escaped the notice of the legislature that there would be some sort of a period of interregnum in between the period after the close of investigation and the taking of cognizance by the Magistrate of the offence, or the point of time when section 209 of the Code is attracted;

Held, that, it is obvious that in the absence of any provision in the code enabling the Magistrate to pass an order of remand of an accused to custody after the submission of the final form and before

*Criminal Miscellaneous no. 4867 of 1976 converted as Criminal Writ Jurisdiction case no. 20 of 1977. In the matter of an application under sections 439 and 440 of the Code of Criminal Procedure subsequently converted into an application under Article 226 of the Constitution of India.

taking cognizance thereof, the order of remand under which the Writ petitioner is said to have been kept in custody must be held to be unwarranted by law;

Held, further, that the writ petitioner is entitled to a writ directing his immediate release.

Lakshmi Brahman & Anr. v. *State*(1), *Natabar Parida & Ors.* v. *State of Orissa*(2), relied on.

State v. *Jairam & Anr.*(3), distinguished.

Application under Article 226 of the Constitution.

The facts of the case material to this report are set out in the judgment of Madan Mohan Prasad, J.

M/s. Thakur Prasad and *Chandramouli Kumar Prasad* and *Mrs. Manjula Singh*, for the petitioner.

Mr. Ramnandan Prasad Singh, G. P., for the State.

MADAN MOHAN PRASAD, J.—An application under sections 439 and 440 of the Code of Criminal Procedure (hereinafter called 'the Code') was filed by the petitioner which, with the permission of this Court has now been converted into an application under article 226 of the Constitution of India with a prayer for issuance of a writ for the release of the petitioner from illegal detention.

2. It is stated that an occurrence resulting in the death of one person took place on the 23rd of April, 1976 in respect of which a first information report was lodged. After investigation the police submitted final form on the 28th of June, 1976 as against this petitioner, which was received by the Magistrate on the 30th of June, 1976. Meanwhile, however, this petitioner had surrendered before the Magistrate on the 7th of May, 1976. Unsuccessfully though, he made several attempts to get an order of release on bail at all levels

(1) (1976) Cr. L. J. 118.
(2) (1975) A. I. R. (S. C.) 1465.
(3) (1976) Cr. L. J. 42.

including this Court, his bail application to this Court having been rejected on merits on the 14th of September, 1976. An application thus, based on different grounds, for an order for bail was filed in this Court on the 25th of November, 1976. The day next it was admitted by a learned single Judge of this Court who, in view of the importance of the argument pressed in support of the application, directed it to be heard by a Division Bench. It appears that it was placed before one such Bench but could not be disposed of and ultimately it has come to us for decision.

3. It has been alleged that it would appear from the order sheet of different dates that the petitioner was not produced, even though he had surrendered, and was kept in custody on many dates on which orders of remand were passed in his absence and only on the production of the custody warrant. This state of affairs continued until the 30th October, 1976. When the application was placed before us, we directed copies of the further orders passed thereon to be sent to us in order to have materials on which to decide as to whether on the date of hearing of this application the order of remand was legal and proper. It appears from the subsequent orders passed that the petitioner was not produced from custody even on the subsequent dates fixed and in his absence, orders of remand to custody were passed. Meanwhile, it may be mentioned, on the 6th of December, 1976 when this application was placed before us for hearing, and finding that the matter would be protracted, we considered it in the interest of justice to pass an *ad interim* order of release of the petitioner on his furnishing bail of Rs. 5,000 with two sureties of the like amount. As a result thereof the petitioner was enlarged on bail, though temporarily. Thus it was only on the 13th of December, 1976 that the petitioner appeared before the Magistrate. The Magistrate, however, did not pass any order on that date except that, in the absence of the records of this case, he directed the case to be placed before him on the 7th of January and 25th of January, 1977. The orders passed subsequently are, therefore, irrelevant to the question as to whether the petitioner was remanded to custody by any proper and legal order.

4. The fact that the petitioner has been granted *ad interim* bail does not, however, relieve us from deciding the question as to whether his detention, if he had not been granted bail by this Court, was valid. The interim order of bail could not, therefore, be treated as one which would affect the merits of the case.

5. Learned counsel for the petitioner has urged only one point in support of his argument that the petitioner's detention is invalid and that is, that there is no provision of law in the Code, which enables a Magistrate to pass an order of remand after submission of final form under section 173 (2) of the Code and before taking of cognizance of the offence disclosed by the aforesaid report under section 190 of the Code.

6. Admittedly, in the present case final form has been submitted. Admittedly, again, cognizance of the offence has not been taken. The question, therefore, pertinently arises. In this connection, briefly stated, the argument is that there are only three provisions under the Code relating to orders of remand. The first one is to be found in section 167(2) of the Code which, it is said, relates only to the period during which investigation is going on. Then comes section 209 which provides for a case where the accused appears or is brought before the Magistrate and it appears to him that the offence is triable exclusively by the court of sessions, in which case he has to commit the accused to the court of sessions. The third provision is to be found in section 309 which relates to inquiry or trials. It is urged, therefore, that when the investigation is over, section 167 ceases to be applicable to the case and until the accused appears and is committed to the court of session, section 209 is not attracted nor is section 309 attracted until the court has taken cognizance of the offence and the trial has commenced. Thus, it is urged, it follows that there is a lacuna in the Code inasmuch as it does not provide for the stage in between the submission of the final form and the stage of section 209 or 309, as the case may be.

7. In support of this contention learned counsel has placed reliance on decisions of the Allahabad and Delhi High Courts. The first case is in the case of *Lakshmi Brahman and another* v. *State*(1) and the second in the case of *State* v. *Jai Ram and another*(2). In the first case decided by the Allahabad High Court, it was an application for bail which was being considered. In that case, the police had not submitted charge-sheet initially when the application was filed before that Court. Subsequently, however, the charge-sheet was

(1) (1976) Cr. L. J. 118.
(2) (1976) Cr. L. J. 42.

submitted and the Magistrate had already taken cognizance of the offence. That was a case under section 302 of the Indian Penal Code and yet the Magistrate had not committed the accused to the court of session. The contention made before the Court was that once the police had failed to submit charge-sheet within a period of 60 days of the arrest, the detention of the accused became illegal and they were entitled to be released in view of section 167(2) of the Code. On the other hand, it was urged that since the charge-sheet had been submitted and cognizance had been taken subsequently, section 167 of the Code ceased to apply and the accused could not claim the benefit of that section. The learned Judges considered the scope of section 167(2) of the Code as also of sections 209 and 309 thereof, and held that the provision of section 167(2)(*a*) means "that a Magistrate cannot during investigation, remand an accused to custody beyond a period of 60 days, if the accused is prepared to and does furnish bail. This necessarily implies that even after expiry of 60 days if the accused does not offer and furnish bail, the Magistrate will have to make the order remanding him to custody. Accordingly, it cannot be said that under section 167(2) of the Code, the Magistrate can, in no case, authorise the detention of an accused person beyond a period of 60 days."

Turning to the argument that section 167 ceased to apply after the submission of the final form the learned Judges held: "As explained above, once the police has submitted the charge-sheet and investigation of the case is over, the Magistrate cannot authorise the detention of an accused under section 167 of the Code". Next their Lordships discussed section 209 and held that the power to remand the accused to custody under this section should be exercised only by making an order committing the accused to the court of session. Coming next to section 309 of the Code, it was held that "the power to remand the accused under section 309(2) can be exercised only when a court after taking cognizance of an offence or commencement of trial finds it necessary or advisable to postpone the commencement of or adjourn any inquiry or trial". Ultimately, therefore, their Lordships held that the order of remand passed in that case was illegal not being supported by any of the provisions mentioned above.

8. The other case on which reliance has been placed is a decision of a learned single Judge of the Delhi High Court. There a reference had been made by a Magistrate, the point of law referred being "whether in a challan submitted under section 307/34, Indian Penal Code a

Magistrate under section 209 of the Code, in deciding whether the offence alleged is exclusively triable by a court of session is bound to hear the accused". With a view to answer this question the learned Judge discussed the provision of section 209 of the Code and was of the view that once the Magistrate reached the conclusion that the case was triable exclusively by a court of session he had to do nothing more than to commit the accused to the court of sessions and thus he was not required to hear the accused. It is obvious from the facts of the case that the question decided there was different and is not an apposite decision in the circumstances of the present case. It has, however, been cited before us, perhaps, only with a view to show that once the accused is produced or appears, the Magistrate has merely to determine whether it appears to him that the case is triable exclusively by the court of sessions and if he finds so he has only to commit the accused and while so committing he may pass an order of remand.

9. The question before us thus remains whether there is any provision in the Code which would directly apply to a case where investigation is over and final form has been submitted but neither the cognizance of the offence has been taken nor has the accused appeared or has been produced so as to enable the court to commit him to the court of session. Counsel for the petitioner has contended that with the submission of the final form investigation is completed and thus the power given by section 167(2) ceases to have any application to the case thereafter. On the other hand, it has been contended by the counsel for the State that the stage of investigation must be deemed to continue even after the submission of the final form until the Magistrate decides upon that basis as to whether to take cognizance of the offence or discharge the accused.

10. It will first be relevant to mention that 'investigation' itself means and for that one has to go to the definition in section 2 and clause (*h*) thereof, which is as follows :—

> " 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

It is obvious—and there are decisions in support of that proposition, that substantially 'investigation' means collection of evidence.

11. It will next be relevant to examine the provisions of Chapter XII of the Code in order to find out whether there is any provision thereunder which has the effect of dealing with any situation arising after the investigation has been completed and the report under section 173(2) submitted. It is not necessary to refer to each section of that Chapter. Firstly it would be noticed that the Chapter itself is devoted to "information to the police and their powers to investigate". The provisions in substance relate to information given to the police, their right to investigate, examination of witnesses, making searches, submitting reports, forwarding the accused to the Magistrate after the completion of the investigation, etc. The one important provision which deserves notice is section 167. This section provides the procedure to be adopted where the investigation cannot be completed within 24 hours as fixed by section 57 of the Code. It relates to forwarding of the accused to the Magistrate, an order of remand to be passed by him, bail to be granted after the period of 60 days, the stopping of investigation in a summons case if not concluded within six months etc. It will thus appear that there is nothing in section 167 which suggests that any of its provisions is to ensure beyond the period of investigation.

Turning next to the other important section 173, it appears that this section provides for investigation to be completed without delay, for submission of the report and other related matters. It also provides for further investigation and further report after the submission of the report under section 173(2). I do not find anything either in section 173 of the Code, except the provision of sub-section (8), to suggest that there is any provision therein which relates to a period after submission of the final form. An examination of the provisions of the Chapter aforesaid would thus show that there is no indication given by the Legislature even in an implied manner to suggest that after the completion of investigation and the submission of the report under section 173(2), the Magistrate has a right to pass an order of remand under section 167(2). There is thus no escape from the conclusion that there is an obvious lacuna in the Code which, perhaps, is the result of it having escaped the notice of the Legislature that there would be some sort of a period of interregnum in between the period after the close of investigation and the taking of cognizance by the Magistrate of the offence, or the point of time when section 209 of the Code is attracted, in other words, when the accused appears and it

appears to the Magistrate that this offence is triable exclusively by the court of session and he commits the accused to the court of session, when he can pass an order of remand.

12. I will now turn to the provision of section 209 of the Code to examine whether in the circumstances like the present one such an order of remand could be passed. The point need not detain me for long, for, it is so apparent that section 209 of the Code comes into play only when "the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the court of session". Clause (*b*) of this section, in such a situation, enables the Magistrate to remand the accused to custody during and until the conclusion of the trial. It is obvious, even though the Legislature has not said in so many words, that section 209 is attracted only after the Magistrate has taken cognizance of the offence True, it is not said that he is to do so after he has taken cognizance, but it is obvious that the Magistrate is asked to apply his mind to the facts before him with a view to take action, namely, if it is a case triable by court of session, he has to commit the accused and if it is not so he has to try the accused. The very fact that the Magistrate has to determine this after the application of his mind, makes it obvious that he has to take cognizance of the offence. It is well known that the Magistrate takes cognizance of an offence when he applies his mind with a view to proceed under the provisions of Chapters XV and XVI of the Code. Obviously, therefore, the right to remand an accused to custody under clause (*b*) cannot be exercised unless the Magistrate commits the accused to the court of session. This provision is thus of no avail in a situation which has arisen or which may arise in cases like the present one.

13. Turning now to section 309 of the Code again, there can hardly be any doubt in view of sub-section (2) of the section itself, that there can be no remand until after taking of cognizance or commencement of trial. This section also thus is not attracted to a period prior thereto.

14. The view which I have taken in respect of section 167 of the Code gets support from a decision of the Supreme Court in the case of

Nalabar Parida and others v. *State of Orissa*(1). Untwalia, J. speaking for the Court says as follows :—

"The law as engrafted in proviso (*a*) to section 167(2) and section 309 of the New Code confers the powers of remand to jail custody during the pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded."

I would like to emphasise the word "only" which comes after the word "investigation". Obviously what the learned Judge means to say is that it is only during the period of investigation that the right to remand under section 167(2) of the Code is to be exercised. It has also been clearly laid down, and in view of the statut it is hardly necessary to seek an authority on the point that section 309 has no application until cognizance has been taken or trial commenced. With regard to section 209, I have already referred to the decision of the Allahabad High Court upon which reliance has been placed by the petitioner and again I say so with great respect, that in view of the clear and unambiguous language of the legislature it is not necessary to cite an authority in support of the view. The learned Judges held that the power to remand under that section can be exercised only after making an order committing the accused to the court of sessions. I respectfully agree in this view.

14(*a*). The question then arises whether in the absence of any specific provision in the Code, the power of remand in a situation unprovided for can be said to be inherent in the court which is in seisin of the case. Exactly it is this very argument which has been urged on behalf of the State, that apart from any provisions in the Code since the accused had been arrested and is being proceeded against for having committed an offence, the Magistrate must be deemed to have an inherent power to remand him to custody unless he considered it proper to release him on bail. I am afraid, I am unable to accept this contention. The reason is obvious. Right to liberty of

(1) (1975) A. I. R. (S. C.) 1465.

person is a fundamental human right. It is not granted by any particular statute. It cannot be said that society or State grants a man a right to live. If he has the right to liberty his liberty can be curtailed only by law in interest of society. Thus, the curtailment of this human right is to be provided for by law. If a person has been illegally arrested and detained, in the absence of any law providing therefor, he has got to be released. The converse is not true that he has to be kept under detention unless there is a law providing for his release. That would be putting the cart before the horse to use a hackneyed expression. A court of justice has to decide at that point of time whether or not he has been legally arrested or is being legally detained. That is the fundamental concept underlying the law relating to habeas corpus. The argument thus that a court must be deemed to have an inherent right to keep a man under detention in the absence of any law providing for that, is too big a pill to swallow. Apart from this academic approach, I am fortified in my view by a decision of the Supreme Court which clearly repeals the argument. Referring to the very same case of *Natabar Parida* (supra) it would appear that their Lordships said as follows:—

"It may be emphasised here that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law."

That being the law laid down by the Supreme Court the argument of learned counsel for the State must be rejected.

15. It is thus obvious that in the absence of any provision in the Code enabling the Magistrate to pass an order of remand of an accused to custody after the submission of the final form and before taking cognizance thereof, the order of remand under which the petitioner is said to have been kept in custody must be held to be unwarranted by law. As stated earlier, the charge sheet against the petitioner was submitted and received in court on the 30th of June, 1976. Thereafter the Magistrate has not taken cognizance of the offence so long, nor was the accused produced before him from custody on any date subsequent thereto until he appeared after he was released in pursuance of the order of this Court as a temporary

measure. The Magistrate thus had no jurisdiction to pass the order of remand after the 30th of June, 1976 until after he had taken cognizance and proceeded in accordance with law. The order of remand resulting in the detention of the petitioner must, therefore, be held to be illegal and invalid.

16. In the result, the petitioner is entitled to a writ directing his immediate release. In the circumstances of this case, however, keeping in view that the petitioner is charged with a serious offence of murder, I would make the order of release conditional by directing him to execute a bond of Rs. 5,000 with two sureties of the like amount each to the satisfaction of the Magistrate, to appear before him as and when directed. Secondly, that he will not leave the territories of the State of Bihar without prior permission of the Magistrate.

17. Before I part with this case, I would like to draw attention of the Magistracy to the point which has emerged out of this proceeding. It has come to the notice of this Court in several cases that proceedings linger in the court of the Magistrate even after the submission of the final form for one reason or the other, resulting in delay in taking of cognizance or commencement of trial. If the Magistrates, in view of the decision in this case, allow this gap, the result would be that a large number of accused persons would, as a matter of law, be entitled to release in spite of the seriousness of offences alleged to be committed by them. The Magistracy would, therefore, do well to take immediate action on submission of the police report under section 173(2) of the Code by taking cognizance of offences and proceeding in accordance with law. This is the only way, which it is necessary in the interest of administration of justice, of avoiding the serious consequences which entail as a result of the lacuna in the Code as pointed out earlier until the Legislature takes step to fill in the gap and provide by legislation therefor.

M. P. SINGH, J.—I agree.

R. D.

Application allowed.

MISCELLANEOUS CRIMINAL

Before Hari Lal Agrawal and Chaudhary Sia Saran Sinha, JJ.

BIJENDRA RAI & ORS.*

v.

MOHAN RAI & ORS.

1977

April, 29.

Code of Criminal Procedure, 1973, (*Act II of 1974*), *sections* 144 *and* 145—*Executive Magistrate not "specially empowered by the State Government" to make an order in a proceeding under section* 144 *converting the said proceeding into one under section* 145—*legality of.*

Where the Executive Magistrate, who was not an Executive Magistrate "specially empowered by the State Government" for proceeding under section 144 of the Code of Criminal Procedure, 1973, passed an order converting the proceeding under section 144 of the Code into a proceeding under section 145 of the Code;

Held, that section 145 of the Code of Criminal Procedure, 1973 "empowers an Executive Magistrate" to make an order in writing to initiate a proceeding under section 145 of the Code; without being "specially empowered by the State Government", as in the case of section 144 of the Code and as such the order of the Executive Magistrate converting the proceeding under section 144 of the Code into one under section 145 of the Code merely amounts to initiation of a proceeding under section 145 of the Code and does not amount to any order passed in a proceeding under section 144 of the Code.

Application by the 2nd party to the proceeding.

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*Criminal Miscellaneous no. 1002 of 1976. In the matter of an application under section 482 of the Code of Criminal Procedure.

The facts of the case material to this report are set out in the judgment of Hari Lal Agrawal, J.

Mr. Jagdish Pandey, for the petitioners.

Messrs. Shreedaya Narayan, Jagtanand Prasad and *Mukteshwar Singh*, for the opposite party.

HARI LAL AGRAWAL, J.—This application on behalf of the members of the 2nd party is directed against an order dated 5th of January, 1975, passed by an Executive Magistrate converting a proceeding under section 144 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') into one under section 145 of the Code.

2. The dispute between the two parties cropped up in relation to certain landed property. On a police report a proceeding under section 144 of the Code was started by the Subdivisional Officer, Danapur in the year 1975. Both the parties filed their respective show cause. Whereas the 1st party claimed joint possession and cultivation as members of a joint family with the petitioners, the 2nd party asserted that there was a disruption in the family by virtue of a partition by metes and bounds long ago and they were in exclusive possession of the lands.

3. On the 5th of January, 1976, i.e., on the date the impugned order was passed, the court of the Subdivisional Officer, Danapur, was presided over by Shri Md. Shahabuddin, an Executive Magistrate of that place. He on considering the nature of the dispute and the claims put forward by the contesting parties, came to the conclusion that the same could not be disposed of in the proceeding under section 144 of the Code and proper procedure to be adopted was to convert the proceeding under section 145 of the Code. He accordingly passed an order converting the proceeding as already said earlier. In the impugned order, he has referred to the matters and materials on the basis of which he came to the conclusion mentioned above.

4. Shri Jagdish Pandey who appeared in support of this petition, contended that Shri Md. Shahabuddin, the Executive Magistrate was not an Executive Magistrate "specially empowered

by the State Government", for proceeding under section 144 of the Code, as according to the provisions contained under section 144, the District Magistrate, the Subdivisional Magistrate and only such Executive Magistrates, who are "specially empowered by the State Government in this behalf" may make an order in a proceeding under secction 144 of the Code.

5. In my opinion, this contention is erroneous and misconceived. By the impugned order the learned Magistrate has not passed any order in the nature of any order contemplated by the scheme contained in section 144 of the Code; all that he has done is to initiate a proceeding under section 145 of the Code.

6. Section 145 of the Code "empowers an Executive Magistrate" to make an order in writing to initiate a proceeding under secton 145 of the Code; without being "specially empowered by the State Government", as in the case of secton 144 of the Code. In my opinion, the impugned order merely amounts to initiation of a proceeding under section 145 of the Code and does not amount to any order passed in a proceeding under section 144 of the Code. Shri Pandey does not dispute that as an Executive Magistrate Shri Md. Shahabuddin was competent to initiate a fresh proceeding under section 145 of the Code. It has since been settled by several authorities of this Court that the use of the expression "conversion" is merely a misnomer when a pending proceeding under section 144 of the Code is purported to be converted into a proceeding under section 145 of the Code. Actually what is done by such an order is that when a Magistrate on the materials which he examines in the proceeding under section 144 of the Code, feels satisfied "that a dispute likely to cause a breach of the peace exists concerning any land ..... within his local jurisdiction" and which authorises him to make an order in terms of section 145 of the Code, initiates a fresh proceeding under section 145 of the Code.

7. As the application must fail in the view that I have taken of the matter, it is not necessary to go into any other question such as the maintainability of the application or the like, but before parting with this case, I may refer to another matter which was raised

by Shri Pandey. With reference to a notice, a copy of which has been made Annexure '2' to the petition, he contended that the learned Executive Magistrate has proceeded to attach the properties, in question, contrary to the provisions contained in section 145 of the Code.

The present application is directed against a specific order and I would rather refrain from taking note of any subsequent or other matter beyond that which is covered by the impugned order directly. It would, however, be open to the petitioners to raise, if so advised, any other question before the Magistrate before whom the proceeding may be taken up.

S. I would accordingly dismiss this application.

CH S. S. SINHA, J.—I agree that the application be dismissed.

S. P. J.

Application dismissed.

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BSP (I. L. R.) 5—Lino—600—9-5-1978——G.B.M. & others.

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BIHAR BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT, 1947—*Concld.*

Held, further, that section 11A, if it has to be given a sensible meaning with reference to and consistent with other provisions of the Act, has to be interpreted that the tenant can be asked to deposit rent under the section only at a rate which is lawfully payable. It will be an over simplification of the matter to say that since the expression "lawfully payable" has not been used in section 11A, the tenant can be asked to deposit rent month by month for the future as well as arrears at the rate of rent last paid even if that was not lawfully payable.

N. M. Verma v. *Upendra Narain Singh*, (1977) I.L.R. 56, Pat. 452

CODE OF CIVIL PROCEDURE, 1908—*Order XXIII, Rule* 1(3) *and Bihar Buildings (Lease, Rent and Eviction) Control Act*, 1947, *section* 11—*subject matter of suit—meaning of—whether includes cause of action—bar of order XXIII, Rule* 1(3)—*when applies—section* 11 *of Bihar Act, whether clothes the landlord with any additional right—landlord—foundation of right—Act, whether provides a complete and exhaustive Code and renders the provisions of the T. P. Act inapplicable—whether a notice of termination of tenancy is essential or not—test for*—estoppel—rule of, whether based on equity and good conscience—*Transfer of Property Act*, 1882, *section* 106 *and Evidence Act*, 1872, *section* 115;

The subject matter of a suit cannot be equated with the property in respect of which the parties quarrel. It includes the cause of action also. Unless the cause of action for the two suits is the same, the bar of Order XXIII, Rule 1(3) of the Code of Civil Procedure cannot be applied.

Section 11 of the Bihar Control Act does not clothe the landlord with any additional right it merely provides with additional protection to the tenant. The foundation of the right of the landlord is the termination of the tenancy under the provisions of the T P. Act. By section 11 of the Bihar Control Act, the landlord has been placed under an additional duty of establishing one of the conditions mentioned therein before a decree for eviction could be granted in his favour. The Bihar Act does not provide a complete and exhaustive code and, thereof, does not render the provisions of the T P. Act inapplicable. The test for finding out whether a notice of termination of tenancy is essential or not is to analyse the Buildings Control Act for finding out whether it provides a complete and exhaustive code or not. On the terms of the ratio decided in *Ratan Lal* v. *Bardesh Chander*(1), it does not

(1) (1976) A.I.R. (S.C.) 588.

(1) (1964) A.I.R. (Pat.) 401 F.B.

Code of Criminal Procedure, 1973—*Contd.*

holding an inquiry at that stage is not called upon to see as to whether there appeared sufficient ground for the conviction of the accused. At this stage he has simply to form an opinion as to whether there was a *prima facie* case for proceeding in the matter. Till that stage the proceeding is not judicial. Judicial proceeding commences with the issue of processes, and the issue of processes is entirely within the discretion of the Magistrate himself, in which he has to be guided by his own independent judgment;

Held, that while issuing processes under section 204 of the Code of Criminal Procedure, 1973, a Magistrate is not required to record his reasons for doing so and the existence of the sufficiency of the grounds for proceeding in the matter is left to the subjective satisfaction of the Magistrate taking cognizance, who has to form his own independent and judicial opinion on the materials on record, and the analogy of administrative or quasi-judicial order cannot be applied;

Held, further, that the discretion exercised by the Magistrate, in the instant case, does not suffer from any infirmity and he does not appear to have passed the order issuing processes in a mechanical manner or just by way of routine.

The direction of the Magistrate for supply of Police papers, as provided under section 207 of the Code, in the instant case, seems to be a bonafide and obvious mistake. In a case instituted otherwise than on police report under section 208 of the Code, the Magistrate has to furnish to the accused the statement recorded under section 202 of the Code of the witnesses examined by the Magistrate and the documents produced before him on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under section 161 or section 104 of the Code. No prejudice has been caused to the accused on this account and this obvious mistake can be rectified;

Held, that it is not incumbent for the complainant to examine all his witnesses before a Magistrate could pass an order either under section 203 or section 204 of the Code. The procedure indicated in the proviso to sub-section (2) of section 202 of the Code in this regard appears to be only directory and not mandatory.

The expression "all" occurring in proviso to sub-section (2) of section 202 of the Code is an enabling provision leaving it to the complainant to examine the material witnesses whose evidence he thinks would be sufficient to establish a *prima facie* case and for the Magistrate to issue process. Although it is desirable that the complainant should examine all his witnesses, he is bound to examine at least all those witnesses whose examination would be necessary to the unfolding

INDUSTRIAL DISPUTES ACT, 1947—*Concld.*

Court specified by the Government of Bihar by a notification issued to that effect for computation of money value claimed by the workmen and also certain industrial disputes being raised by the workmen, the Government of Bihar referred the matter for adjudication by the Industrial Tribunal and thereafter the company objected to the jurisdiction of the Labour Court to entertain the application of the workmen under section 33-C (2) of the Act and the Labour Court decided to proceed with the hearing of the matter and the company filed the present writ application in the High Court against the order of the Labour Court;

Held, (1) that the intention of the State Government in issuing the notification was clearly under section 33-C (2) of the Industrial Disputes Act, 1947 and, therefore the Labour Court had jurisdiction to entertain the petitioners of the workmen under section 33-C (2) of the Act, (2) that a substantial question as to the status of the workmen whether they were entitled to the benefit could be decided by the Labour Court under section 33-C (2) of the Industrial Disputes Act, 1947. In other words, Labour Court under section 33-C (2) must entertain and decide as a preliminary question whether there was relationship between the employer and the employees, that is, between the petitioner and its employees, before computing their claim. Therefore, the Labour Court had ample jurisdiction to decide as to whether there was relationship of employer and employees between the petitioners and workmen as a preliminary issue before computing the claim of the workmen as provided under section 33-C (2) of the Act, (3) that section 33-C creates no bar to the reference under section 10 and *vice versa*. The provisions contained in section 33-C do not preculde or bar a reference of a dispute under section 10 of the Industrial Disputes Act before the appropriate Tribunal. The fact that a remedy exists under section 33-C (2) of the Act in a particular case cannot take away the right of the Government under section 10 of the Act if the circumstances justified to refer the matter. Conversely, alternative remedy available to an aggrieved workman to move the Government under section 10 of the Act could not take away the right of workmen to bring their claims under section 33-C (2) of the Act to the Labour Court and it will not deprive the Labour Court of its jurisdiction to deal with the point provided the question which the Labour Court has to consider is in relations to individual right of workmen, which right is sought to be enforced by them. It is within the discretion of the Labour Court to refuse to stay the hearing of the matter. In discretionary matters, if it is reasonably refused, it cannot be interfered with under Articles 226 and 227 of the Constitution. In the instant case, there is no material to support the view that the Labour Court had rejected the prayer of stay unreasonably.

M/s. Utkal Automobiles (P.) Ltd. v. Shanti Ranjan Dey & Ors., (1977) I.L.R. 56, Pat.

APPELLATE CIVIL

Before Lalit Mohan Sharma and Birendra Prasad Sinha, JJ.

1976

August, 25.

KALOOT SAO & ANR.*

v.

MOSSTT. (NAME NOT KNOWN) W/O. MUNNI SAO & ORS.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXIII*, *Rule* 1 (3) *and Bihar Buildings* (*Lease, Rent and Eviction*) *Control Act*, 1947 (*Act III of* 1947), *section* 11—*subject matter of suit—meaning of—whether includes cause of action —bar of order XXIII, Rule* 1 (3)—*when applies—section* 11 *of Bihar Act, whether clothes the landlord with any additional right—landlord—foundation of right—Act, whether provides a complete and exhaustive Code and renders the provisions of the T. P. Act inapplicable—whether a notice of termination of tenancy is essential or not—test for—estoppel—rule of, whether based on equity and good conscience—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 106 *and Evidence Act*, 1872 (*Act I of* 1872), section 115;

The subject matter of a suit cannot be equated with the property in respect of which the parties quarrel. It includes the cause of action also. Unless the cause of action for the two suits is the same, the bar of order XXIII, Rule 1(3) of the Code of Civil Procedure cannot be applied.

Section 11 of the Bihar Control Act does not clothe the landlord with any additional right, it merely provides with additional protection to the tenant. The foundation of the right of the landlord is the termination of the tenancy under the provisions of the T. P. Act. By section 11 of the Bihar Control Act, the landlord has been placed under an additional duty of establishing one of the conditions mentioned

*Appeal from Appellate Decree no. 693 of 1971. Against the judgment of Shri T. R. Bajaj, 5th Additional Subordinate Judge, Patna, dated 8th November 1971, arising out of the judgment of Shri A. N. Chaturvedi. Munsif, 1st Class, Patna, dated 23rd December 1970.

therein before a decree for eviction could be granted in his favour. The Bihar Act does not provide a complete and exhaustive code and, thereof, does not render the provisions of the T. P. Act inapplicable. The test for finding out whether a notice of termination of tenancy is essential or not is to analyse the Buildings Control Act for finding out whether it provides a complete and exhaustive code or not. On the terms of the ratio decided in *Ratan Lal* v. *Bardesh Chandar*(1), it does not supplant but supplements the Transfer of Property Act and does not eliminate the statutory requirement of the determination of tenancy, but superimposes a ban on eviction, which otherwise may be available in conformity with the T. P. Act, without fulfilment of additional grounds. The argument that the Full Bench decision of this Court in *Niranjan Pal* v. *Chaitanyalal Ghosh*(2) was wrongly decided must be rejected.

Held, therefore, that in the present suit the cause of action for the eviction of the defendant is the service of notice under section 106, Transfer of Property Act and as the notice had not been served when T. S. 87 of 1958 was filed and was withdrawn it cannot be said that the cause of action of the two suits is common and, consequently, the present suit cannot be said to be barred under order XXIII, Rule 1(3) of the Code of Civil Procedure.

The rule of estoppel is based on equity and good conscience and it would be most unequitable to a person that if another person who by a representation induced him to act as he would not have otherwise done, should be allowed to repudiate his earlier representation to the loss of the person who acted on it. The principle that a litigant should not be permitted to approbate and reprobate covers the case.

Held, further, that in the instant case the conduct of the defendants in successfully arguing in the previous second appeal that the suit was not maintainable, in absence of service of notice under section 106, T. P. Act, they should not be permitted now to urge that it was maintainable without such a notice. The plea of estoppel would operate against the defendant-respondent.

Case laws discussed.

Appeal by the defendant.

(1) (1976) A.I.R. (S.C.) 588.
(2) (1965) A.I.R. (Pat.) 401, F.B.

The facts of the case material to this report are set out in the judgment of L. M. Sharma, J.,

M/s. R. S. Chatterjee and *B. P. Samaiyar*, for the appellants.

M/s. J. C. Sinha and *Jugal Kishore Prasad*, for the respondents.

LALIT MOHAN SHARMA, J.—This second appeal by the defendants is directed against the decree of their eviction from certain premises in the town of Patna, fully described in the plaint. They are tenants under the plaintiff-respondent, who is the owner of the property. The plaintiff earlier filed T. S. 87 of 1958 for eviction of the defendants on the grounds permissible under the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter referred to as 'the Act'). A decree was passed in favour of the plaintiff by the first appellate court and the defendant filed S. A. 518 of 1960 in the High Court. No notice under section 106 of the Transfer of Property Act had been served by the plaintiff before filing the suit and a point was taken by the defendant on the basis of the Full Bench decision in Niranjan Pal *v.* Chaitanyalal Ghosh (A.I.R. 1964, Patna, 401, F. B.) that the suit was not maintainable. The second appeal was taken up for hearing on the 3rd February 1966. When the point was taken, a prayer on behalf of the plaintiff was made for permission to withdraw the suit. The defendants did not raise any objection to the prayer which was allowed and the suit was permitted to be withdrawn. The plaintiff, thereafter, served a notice under section 106 of the T. P. Act on the defendants, and after the period mentioned in the notice was over, the present suit was filed.

2. The defendants filed similar written statements raising several pleas, out of which, I may at this stage, in view of the limited argument of Mr. R. S. Chatterjee on their behalf, mention only one, namely, that the suit is not maintainable. All the issues in the suit were decided by the trial court against the defendants and in favour of the plaintiff accepting the issue of maintainability of the suit. The court held that although the suit was not barred by res judicata, but it was not maintainable in view of the provisions of Order XXIII Rule 1 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). The plaintiff, thereafter, appealed. The lower appellate court decided all the issues against the defendants including the issue of maintainability of the suit and passed a decree for their eviction.

3. Mr. R. S. Chatterjee, appearing for the appellants contended that as the earlier suit had been withdrawn without liberty to institute a fresh suit, the present suit must be held to be barred under sub-rule (3) of Order XXIII Rule 1 of the Code, which reads as follows :—

> "(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

He said that the term 'subject-matter' in Order XXIII Rule 1(3) of the Code must be interpreted to mean the disputed property or, in any event, the decree asked for in the plaint; and they in the two suits are identical. The argument is that there is no reason to interpret the term 'subject-matter' as including the cause of action for the suit. Mr. Chatterjee compared the language of Order XXIII Rule 1(3) of the Code with that of Order IX Rule 9 wherein it is stated that if a suit is dismissed under Order IX Rule 8, "the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action." As the legislature has, in its wisdom, refrained from using the words 'the same cause of action' in Order XXIII Rule 1(3) of the Code, sub-rule (3) should not be interpreted as referring to the cause of action.

4. In *Niranjan Pal* v. *Chaitanyalal Ghosh*(1), it was held that the lease must be determined by the landlord by service of notice under section 106 of the T. P. Act before he can maintain an action for the tenant's eviction under section 11 of the Act and as the plaintiff in that case had not served such a notice, the suit was premature. The full Bench decision applied squarely to the T. S. 87 of 1958 which had come to the High Court in S. A. 518 of 1960. There it had been found that the defendants were defaulters in payment of rent and a decree for eviction had been passed by the court below. The difficulty in the way of the plaintiff arose in the High Court after the Full Bench decided that a notice terminating the lease was essential and in absence thereof, no cause of action arose in favour of the plaintiff. If the term

(1) (1964) A.I.R. (Pat.) 401, F. B.

'subject-matter' in Order XXIII Rule 1(3) of the Code does not include the cause of action and refers merely to the relief in the plaint, as is submitted by Mr. Chatterjee, the present suit must be held to be not maintainable. But, on the other hand, if the 'subject-matter' is interpreted otherwise, the point taken on behalf of the appellant must fail.

5. In *Vallabh Das* v. *Madanlal*(1), the Supreme Court had to consider the meaning of the term 'same subject-matter'. Although the facts of that case are not similar, but the law declared by the Supreme Court to the following effect must be deemed to be settlor on the question :

> "In other words, 'subject-matter' means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C. J. in *Singa Reddi* v. *Subba Reddi*, I.L.R. 39 Madras 987 (F. B.) that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second on suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."

In *Pandillapalli Singha Reddi* v. *Yeddula Subba Reddi*(2), the plaintifs first brought a suit in 1911 during the life time of a female holder of the estate in question challenging certain alienations by the lady in favour of the defendant. During the pendency of the suit, the limited owner died and the interest of the plaintiffs, which was merely spes successionis became a vested right to the property. The plaintiffs withdrew that suit without permission to bring a fresh suit and subsequently filed another. A question arose as to whether the second suit was barred under Order XXIII Rule 1(3) of the Code. The opinion of the Full Bench was in the negative which opinion has been held by the Supreme Court as correct. The subject-matter of a suit cannot be

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(1) (1970) A.I.R. (S.C.) 987.
(2) I.L.R. 39 Mad. 987, F.B.=(1917) A.I.R. (Mad.) 519.

equated with the property in respect of which the parties quarrel. As pointed out by the aforementioned decision, it includes the cause of action also. It, therefore, follows that unless the cause of action for the two suits is the same, the bar of Order XXIII Rule 1(3) of the Code cannot be applied. In the present suit, the cause of action is the service of notice under section 106 of the Transfer of Property Act and as the notice had not been served before the filing of T. S. 87 of 1958, it cannot be said that the cause of action of the two suits is common. I, therefore, hold that the suit is not barred.

6. Mr. R. S. Chatterjee next contended that the Full Bench decision in *Niranjan Pal* v. *Chaitanyalal Ghosh*(1) was wrongly decided, and that the termination of tenancy by service of notice under section 106, T. P. Act, is not essential for the success of a suit for eviction governed by the Bihar Control Act. If this argument prevails, it will follow that the service of notice after the withdrawal of the earlier suit and before the filing of the present suit was an unnecessary step taken by the original sole plaintiff and the cause of action in both the suits would be the non-payment of rent by the defendants within the meaning of section 11 of the Act. In that situation, the present suit can be held to be barred by the provisions of Order XXIII Rule 1(3) of the Code. The main question, however, is whether the Full Bench decision in *Niranjan Pal* v. *Chaitanyalal Ghosh* (supra) can be said to be erroneous.

7. In reply, Mr. J. C. Sinha, appearing for the respondents contended that in view of the conduct of the defendants in successfully arguing in S. A. 518 of 1960 that T. S. 87 of 1958 was not maintainable, in absence of service of notice under section 106, T. P. Act, they should not be permitted now to urge that it was maintainable without such a notice. Mr. Sinha also argued that the case *Niranjan Pal* v. *Chaitanyalal Ghosh* (supra) was correctly decided.

8. Mr. Chatterjee said that in view of the subsequent decisions of the Supreme Court in *M/s. Raval & Co.* v. *K. G. Ramachandram*(2),

(1) (1964) A.I.R. (Pat.) 401.
(2) (1974) A.I.R. (S.C.) 818.

Isha Vahimohammad v. *Haji Gulam Mohammad and Haji Dada Trust*(1), *P. J. Gupta* v. *K. Venkatesin*(2) and *Puwada Venkateswara Rao* v. *Chidamana Venkata Ramana*(3) it must now be held that the case *Niranjan Pal* v *Chaitanyalal Ghosh* (supra) (A.I.R. 1964 Patna 401) was incorrectly decided.

9. The case of *M/s. Raval & Co.* v. *K. G. Ramachandram* (supra) was governed by Tamil Nadu Buildings (Lease and Rent) Control Act which included certain provisions for fixation of fair rent. The landlords applied for fixing fair rent and the tenants moved the Madras High Court by a writ application for restraining the landlords from proceeding with their application on the ground that the provision regarding the fixation of fair rent was for the advantage of the tenants only and the landlords could not maintain such an application. A Full Bench of the Madras High Court decided the point in favour of the landlords and the view was upheld by the Supreme Court. It was held that Tamil Nadu Buildings Control Act has a scheme of its own and it is intended to provide a complete Code in respect of both contractual tenancies as well as statutory tenancies and that the provision for fixation of fair rent would be meaningless if fixation of fair rent can only be downwards from the contract rent and contract rent could not be increased. On the question, whether the Act was a complete Code by itself or not, the appellants before the Supreme Court relied upon the decisions in *Bhaiya Punjalal Bhagwanddin* v. *Dave Bhagwat Prasad* (4) and *Manujendra* v. *Purendu Prosad*(5). In those two cases, it had been held that the relevant Control Act did not provide the landlord with additional rights and it was, therefore, not open to the landlord to take the advantage of the provisions of the Act to apply for fixation of fair rent at a figure higher than the contract rent. Mr. Chatterjee argued that the Supreme Court did not follow these two cases and relied upon *Brij Raj Krishna* v. *S. K. Show & Bros* (6) dealing with the Bihar Buildings Control Act. A portion of the judgment in *Brij Raj Krishna's* case was quoted saying that section 11 of the Bihar

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(1) (1974) A.I.R. (S.C.) 2061.
(2) (1974) A.I.R. (S.C.) 2381.
(3) (1976) A.I.R. (S.C.) 868.
(4) (1963) A.I.R. (S.C.) 120.
(5) (1967) A.I.R. (S.C.) 1419.
(6) (1951) A.I.R. (S.C.) 118

Control Act was a self contained section and it was wholly unnecessary to go outside the Act for determining as to whether the tenant was liable to be evicted or not and under what conditions he could be evicted. The judgment in *Niranjan Pal* v. *Chaitanyalal Ghosh* (supra) strongly relied upon the decision in *Bhaiya Punjalal Bhagwanddin* v. *Dave Bhagwat Prasad* (supra) and distinguished the case of *Brij Raj Kishna*. Mr. Chatterjee strenously contended that in view of the observations of the Supreme Court in *Raval & Co.* v. *K. G. Ramachandram* (supra) specially in paragraph 15 of the judgment, it should be held that the case of *Brij Raj Krishna* must be followed in preference to the case of *Bhaiya Punjalal Bhagwanddin* v. *Dave Bhagwat Prasad* (supra); and as in *Niranjan Pal* v. *Chaitanyalal Ghosh* (supra) the Full Bench preferred the judgment in *Bhaiya Punjalal Bhagwanddin's* case and refused to follow *Brij Raj Krishna's* case, the decision must be held to be erroneous. After considering the relevant decisions, I am not in a position to accept the argument. No body has ever suggested either now or before the Full Bench that *Brij Raj Krishna's* case was not correctly decided nor did the Full Bench make such a suggestion. That decision was considered by the Full Bench at a considerable length in paragraph 21 to 24 of the judgement and it was, *inter alia*, pointed out that the Bihar Control Act underwent a drastic change by an amendment in 1955. Several other important features present in the case of *Brij Raj Krishna* were also discussed by the Full Bench, which distinguished *Niranjan Pal's case*. .It cannot, therefore, be legitimately suggested that the Full Bench decision should be held to be illegal on the ground that it refused to follow the Supreme Court decision in *Brij Raj Krishna's* case. The case of *Bhaiya Punjalal Bhagwanddin* was governed by the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947 and the Supreme Court in *M/s. Raval & Co.* v. *K. G. Ramachandram* (supra) expressly stated that it was not called upon to consider whether *Bhaiya Punjalal Bhagwanddin's* case was correctly decided. It was further observed that any general observation by the Supreme Court in a decision cannot apply in interpreting the provisions of an Act unless the Supreme Court has applied its mind to and analysed the provisions of that particular Act. It is, therefore, not possible to assume that the decision in *Bhaiya Punjalal Bhagwanddin's* case has now been held by the Supreme Court to be incorrect. The Full Bench decision of the Patna High Court accordingly cannot be challanged on the ground that it was based on the over-ruled decision of the Supreme Court in *Bhaiya Punjalal Bhagwanddin's* case. The scheme of Tamil Nadu Act was analysed and it was found that the Act provided a complete Code in itself. That

is no reason for holding that the Bihar Buildings Control Act also should be interpreted as providing a complete and exhaustive Code.

10. In *Isha Valimohammad* v. *Haji Gulam Mohammad and Haji Dada Trust* (supra), it was held that there was no question of the landlord terminating the tenancy under the Transfer of Property Act on the ground that the tenant had sublet the premises and that the landlord was entitled to a decree for eviction without a notice under the Transfer of Property Act. To the area where the premises in question were situate, the Saurashtra Rent Control Act, 1951 applied. It was repealed on 31st December, 1963, and the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947 was made applicable on 1st January 1964. Section 15 of the Saurashtra Act prohibited subletting notwithstanding anything contained in any law. The section 13(1)(*e*) of the Saurashtra Act said that notwithstanding anything contained in that Act, a landlord would be entitled to recover possession of any premises, if the Court was satisfied that the tenant had, since coming into operation of the Act, sublet the premises. The tenant in the reported case had sublet the premises in question before 1st January 1964 and neither a notice terminating the tenancy was given nor the suit was filed before 1st January 1964. The notice was served on 12th February 1964, that is, after repeal of the Saurashtra Act, and the suit was filed thereafter. While dealing with the question of notice, it was held that there was no necessity of terminating the tenancy under the T. P. Act. The reason as given in paragraph 17 of the judgment was that the landlord can terminate the tenancy on the ground that the tenant had sublet the premises unless the con-tract of tenancy prohibits him from doing so. Section 13 of the Saurashtra Act was quoted and it was pointed out that the landlord was entitled to recovery of possession under the provisions of the Saurashtra Act and not under the Transfer of Property Act. This decision cannot apply to the present case, which is governed by the Bihar Control Act. Section 11 of the Bihar Control Act does not clothe the landlord with any additional right, it merely provides with additional protection to the tenant. The foundation of the right of the landlord is the termination of the tenancy under the provisions of the T. P. Act. By section 11 of the Bihar Control Act, the landlord has been placed under an additional duty of establishing one of the conditions mentioned therein before a decree for eviction could be granted in his favour. The decision in the case of Isha Valimohammad v. Haji Gulam Mohammad and Haji Dada Trust, therefore, is of no help in the present case.

11. In *P. G. Gupta* v. *K. Venkatesan* (supra) the Supreme Court following the decision in *M/s. Raval & Co.* v. *K. G. Ramachandram* (supra) held that the Act "has a scheme of its own and is intended to provide a complete Code". Proceeding further, it was said that special procedure provided by the Act displaced requirements and procedure for eviction under the T. P. Act and it was, therefore, not necessary to consider the provisions of the T. P. Act. In *Puwada Venkateswara Rao* v. *Chidamna Venkata Ramana* (Supra), the Andhra Pradesh Buildings (Lease and Eviction) Control Act was also similarly interpreted as a complete Code. These decisions were based on the interpretation of the Madras and Andhra Pradesh Acts and cannot be applied to the Bihar Act, which is quite different. It will be observed that under the Andhra Pradesh Act, the landlord's remedy for eviction was before the Controller. In paragraph 6 of the judgment, the decision in *Mangilal* v. *Sugan Chand Rathi*(1) was considered and it was pointed out that in the context of the remedy of ejectment by ordinary civil suit, the notice of termination of tenancy under the T. P. Act was necessary as a condition precedent. After 1955 amendment in the Bihar Act, the remedy of the landlord to go before the House Controller under the provisions of the Control Act does not exist and he has to file an ordinary civil suit for that purpose. Section 11 of the Central Act merely puts an impediment in the way of recovery of possession. The Bihar Act does not provide a complete and exhaustive Code and, therefore, does not rended the provisions of the T. P. Act inapplicable. It is similar to the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947, considered in *Bhaiya Punjalal Bhagwanddin* v. *Dave Bhagwat Prasad* (supra) and *Vera Abbasbhai Alimahomed* v. *Haji Gulamnabi Haji Safibhai*(2) the Madras Accommodation Control Act, 1955 considered in *Mangilal* v. *Sugan Chand Rathi* (supra) the Mysore Rent Control Act, 1961 considered in *Dattenpant Gopalvarao Devakate* v. *Vithalrao Marutirao*(3) and the Delhi Rent Control Act, 1958, considered in *Ratan Lal* v. *Bardesh Chandar*(4). In all these cases, the Supreme Court held that the termination of tenancy by service of notice under the T. P. Act was essential. In *Ratan Lal* v. *Vardesh Chandar*, however, it was held that a written notice of termination of tenancy was not essential because the T. P. Act was

(1) (1965) A.I.R. (S.C.) 101.
(2) (1964) A.I.R. (S.C.) 1341.
(3) (1975) A.I.R. (S.C.) 1111.
(4) (1976) A.I.R. (S.C.) 588.

not extended to Delhi area where the premises were situate on the relevant date. In paragraph 7 of the judgment, it was held that if a Rent Control legislation provided grounds for eviction in supresession and not in supplementation of what is contained in the T. P. Act, then not termination of tenancy by service of notice under section 106, T. P. Act, may be essential, but in the other cases, the requirement continues. If I may say so with great respect, the same principle has been enunciated in the other decision of the Supreme Court wherein it has been said that the test for finding out whether a notice of termination of tenancy is essential or not is to analyse the Buildings Control Act for finding out whether it provides a complete and exhaustive Code or not. I have gone through the entire Bihar Act and I am of the view that on the terms of the ratio decided in *Ratan Lal* v. *Vardesh Chandar* (supra), it does not supplaent but supplements the Transfer of Property Act and does not eliminate the statutory requirements of the determination of tenancy, but superimposes a ban on eviction, which otherwise may be available in conformity with the T. P. Act, without fulfilment of additional grounds. The argument of the defendants that the Full Bench decision of this Court was wrongly decided must therefore, be rejected. I, accordingly, hold that the cause of action for the eviction of the defendants did not arise when T. S. 87 of 1958 was filed and was withdrawn; and, consequently, the present suit cannot be held to be barred under Order XXIII Rule 1(3) of the Code.

12. On the question of estoppel, Mr. J. C. Sinha relying upon the decisions in *Nagubai Ammal* v. *B. Shama Rao*(1), *Amritlal N. Shah* v. *Alla Annapurnamma*(2) and *Venigella Parendhamayya* v. *Sri Somasekharaswamy Temple Kotipalli*(3) contended that in S. A. 518 of 1958, the defendants argued before the High Court that the suit was not maintainable in absence of a service of notice of termination of tenacy and, confronted with the Full Bench decision in *Niranjan Pal* v. *Chaitanyalal Ghosh* (supra), the plaintiff had no alternative but to concede that the point was correct. He accordingly withdraw the suit. The defendants, now, cannot be allowed to take an inconsistent stand.

13. Mr. Chatterjee, in reply, argued that what the defendants are now trying to do is merely to argue a pure question of law and that they cannot be estopped from so doing.

(1) (1958) A.I.R. (S.C.) 593.
(2) (1959) A.I.R. (A.P.) 9.
(3) (1970) A.I.R. (A.P.) 994.

14. As is clear from the order of the High Court permitting withdrawal of T. S. 87 of 1958 (Ext. D), the defendants took up a stand that T. S. 87 of 1958 was not maintainable, as no cause of action had arisen for the suit in absence of a notice, and because of this stand, the plaintiff had to withdraw the suit. The rule of estoppel is based on equity and good conscience and it would be most unequitable to a person that if another person who by a representation has induced him to act as he would not have otherwise done, should be allowed to repudiate his earlier representation to the loss of the person who acted on it. The principle that a litigant should not be permitted to approbate and reprobate covers the case and I hold that the plea of estoppel would operate against the defendants-respondents.

15. Lastly, it was also suggested on behalf of the appellants that the defendants are not defaulters in payment of rent within the meaning of section 11 of the Bihar Control Act. They had paid, from time to time, several items of money and had also to spend some money over restoring some of the amenities of the house cut off by the plaintiff, and further that they had made payments in M. S. 387 of 1958 filed for realisation of the arrears. The details of the accounts have been considered at considerable length by both the courts below and they have concurrently found that the defendants defaulted in payment of the rent. The finding being a finding of fact is binding on this Court and no legal ground has been shown for interfering with the same. Besides, both the courts below have also found that the condition of the building has materially deteriorated owing to the acts and omissions of the defendants. This finding indicates that apart from default in payment of rent, another condition mentioned in section 11 of the Bihar Control Act is also satisfied.

16. For the reasons stated above, I hold that there is no merit in this appeal, which is accordingly dismissed. Having regard to the fact that the appeal had to be heard for three days, in view of the arguments addressed on behalf of the appellants, and having regard to other facts and circumstances of the case, I assess the hearing fee for this Court at Rs. 200.

BIRENDRA PRASAD SINHA, J.—I agree.

Appeal Dismissed.

M. K. C

CIVIL WRIT JURISDICTION

*Before B. D. Singh and Birendra Prasad Sinha, JJ.**

1977

April, 1.

M/S. UTKAL AUTOMOBILES (P) LTD.**

v.

SHANTI RANJAN DEY & ORS.

Industrial Disputes Act, 1947 (*Act XIV of* 1947), *sections* 10 *and* 33-*C* (2), *scope and applicability of—notification, whether conferred jurisdiction on the labour Court under section* 33-*C* (2)— *intention of the State Government—Labour Court, whether can decide the existence of relationship between the employer and employees before computing the claim under section* 33-*C* (2)—*reference of the dispute to the Industrial Tribunal under section* 10—*proceeding before the Labour Court, whether should be stayed.*

Where the workmen of a company filed applications under section 33-C (2) of the Industrial Disputes Act, 1947, before the Labour Court specified by the Government of Bihar by a notification issued to that effect for computation of money value claimed by the workmen and also certain industrial disputes being raised by the workmen, the Government of Bihar referred the matter for adjudication by the Industrial Tribunal and thereafter the company objected to the jurisdiction of the Labour Court to entertain the application of the workmen under section 33-C (2) of the Act and the Labour Court decided to proceed with the hearing of the matter and the company filed the present writ application in the High Court against the order of the Labour Court;

Held, (1) that the intention of the State Government in issuing the notification was clearly under section 33-C (2) of the Industrial Disputes Act, 1947 and, therefore the Labour Court had jurisdiction

*Sitting at Ranchi.

**Civil Writ Jurisdiction Case no. 1601 of 1974.(R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

to entertain the petitions of the workmen under section 33-C (2) of the Act, (2) that a substantial question as to the status of the workmen whether they were entitled to the benefit could be decided by the Labour Court under section 33-C (2) of the Industrial Disputes Act, 1947. In other words, Labour Court under section 33-C (2) must entertain and decide as a preliminary question whether there was relationship between the employer and the employees, that is, between the petitioner and its employees, before computing their claim. Therefore, the Labour Court had ample jurisdiction to decide as to whether there was relationship of employer and employees between the petitioner and workmen as a preliminary issue before computing the claim of the workmen as provided under section 33-C (2) of the Act, (3) that section 33-C creates no bar to the reference under section 10 and vice versa. The provisions contained in section 33-C do not preclude or bar a reference of a dispute under section 10 of the Industrial Disputes Act before the appropriate Tribunal. The fact that a remedy exists under section 33-C (2) of the Act in a particular case cannot take away the right of the Government under section 10 of the Act if the circustances justified to refer the matter. Conversely, alternative remedy available to an aggrieved workman to move the Government under section 10 of the Act could not take away the right of workmen to bring their claims under section 33-C (2) of the Act to the Labour Court and it will not deprive the Labour Court of its jurisdiction to deal with the point provided the question which the Labour Court has to consider is in relation to individual right of workmen, which right is sought to be enforced by them. It is within the discretion of the Labour Court to refuse to stay the hearing of the matter. In discretionary matters, if it is reasonably refused, it cannot be interfered with under Articles 226 and 227 of the Constitution. In the instant case, there is no material to support the view that the Labour Court had rejected the prayer of stay unreasonably.

Application by the Company.

The facts of the case material to this report are set out in the judgment of B. D. Singh, J.

Messrs Ranen Roy, J. Krishnandan and *K. D. Prasad*, for the petitioner.

Mr. Tara Kumar Das, for the respondents.

B. D. SINGH, J.—This application by M/s. Utkal Automobiles (P) Ltd., through R. B. Parikh, Director, under Articles 226 and 227 of the Constitution of India is directed against the order dated 1st July 1971 (Annexure 5) passed by the Presiding Officer, Labour Court, Jamshedpur (respondent no. 2) by which he rejected the application (Annexure 3) wherein the petitioner had submitted that respondent no. 2 was not empowered under notification under section 33C (2) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') to entertain the claims of respondent no. 1 and 155 other workmen.

2. In order to appreciate the points involved in this application it will be necessary to state some brief facts as to be found in the writ application and in the counter affidavit filed on 26th July 1976 on behalf of Alfred (respondent no. 4), one of the workmen out of 156, subsequently added as a respondent to this petition. The petitioner carries on its business of body building over chassis of trucks and buses on orders received from various customers, for which purpose it has got a factory at Adityapur, where under its employment there are more or less 50 workers both of temporary and permanent nature of various categories for performing the jobs. It gives various jobs such as structure building, panelling, carpentry, blacksmithy, etc. to various contractors purely on the basis stipulated in the respective deeds of contract. The said contractors perform their jobs with the aid of their employees and in respect of those workers the petitioner has neither any knowledge nor any contact with them, such as, supervision, wages benefits discipline, etc. The body building work is not a continuous work but it depends on the volume of orders received from the customers which are not regular but intermittent. The employees of various contractors raised certain industrial disputes and the Government of Bihar by a notification bearing no. III/D1-60179/72-L. & E.—2929, dated 11th November 1972, referred the matters under reference no. 8 of 1972 for adjudication by the Industrial Tribunal, Chotanagpur Division, Ranchi, as follows :—

(1) Whether all the workmen working in the Body Building Division of Utkal Automobiles Private Limited should get bonus at the rate of 20 per cent for the years 1964-65 to 1971-72?

(2) Whether the pay scales of different workmen of Body Building Division of Utkal Automobiles Pvt. Ltd. be fixed.

(3) Whether the dismissal or termination of services of the following workmen is proper?

(This juestion refers to 21 workmen mentioned therein).

(4) Who is the employer of workmen working in Body Building Division of Utkal Automobiles Pvt. Ltd? Subsequently, the Government of Bihar made another reference no. 3 of 1974 vide notification no. III/D1-6072/73-L. & E.—3038, dated the 22nd December 1973 the following matters for adjudication to the Industrial Tribunal, Chotanagpur Division, Ranchi :—

(1) Whether the workmen shown in Schedule 'A' are the workmen of the contractors shown in the said schedule or of Utkal Automobiles (P) Ltd., Adityapur, Jamesbedpur?

(Here list of 18 contractors and 77 workmen is given).

(2) Whether or not to take back the workmen shown in Schedule 'A' after lock-out is proper and justified? If not, whether the workmen are entitled to re-instatement and/or any other relief?"

The aforesaid two references are pending adjudication before the aforesaid Tribunal.

3. The further case of the petitioner is that respondent no. 1 filed a petition on 23rd June 1972 under section 33-C (2) of the Act in the Labour Court, Ranchi. It may be mentioned here that each of 156 workmen had filed similar application before the Labour Court, Ranchi, all of which were taken together and the Labour Court proceeded to dispose them of. In the applications the workmen had prayed for computation of money value of the allegued dues in respect of overtime work and leave salary. As a sample the petitioner has annexed a copy of the petition filed by respondent no. 1 and the same is marked as Annexure '1'. By order dated 28th April 1973 the Government of Biahr transferred the proceeding arising out of the aforesaid petition before the Labour Court, Ranchi, to the Labour Court, Jamshedpur (respondent no. 2) where it was registered as M. J. 28/3 of 72/73 and the proceedings were started from 4th July 1973. The petitioner moved respondent no. 2 that respondent no. 1 was not its employee at any time and as such the petition filed by him was not maintainable, and it should be rejected. Respondent no. 2 proceeded to decide that question

as a preliminary issue and some witnesses were examined on that point. It is further stated in the writ petition that the petitioner took part in the proceeding being ignorant of the fact that Respondent no. 2 had no jurisdiction to entertain that petition, because, according to the notification dated 25th April 1973 (Annexure 2) the State Government authorised it to compute only those benefits to which the workmen were entitled to under section 33-C(1) of the Act. Subsequently, the petitioner filed a petition before Respondent no. 2 praying that it should not proceed any further as it had no jurisdiction to do so. In that petition the petitioner also submitted that when the matter in respect of existence of relationship between the employer and employees in relation to the same party was pending decision before the Industrial Tribunal, Ranchi, Respondent no. 2 should not proceed to decide the same issue itself as the matter had already been referred to the Industrial Tribunal and also because conflict of decision by two authorities of concurrent jurisdiction should be avoided. A copy of the said petition is Annexure '3'. On behalf of the workmen a rejoinder (Annexure 4) was filed before Respondent no. 2, who by its order dated 1st July 1974 (Annexure 5) rejected the petition of the petitioner and decided to proceed with the hearing of the matter.

4. As mentioned earlier, on behalf of respondent no. 4 a counter affidavit has been filed *inter alia* supporting the impugned order.

5. Learned counsel appearing on behalf of the petitioner has assailed the impugned order and has raised the following points for consideration :—

(*i*) Respondent no. 2 had no jurisdiction to entertain the application of the workmen under section 33-C(2) of the Act, as (*a*) the notification by which jurisdiction had been conferred on it confines only to case arising out of certain conditions mentioned in section 33-C(1) and, (*b*) the dispute in the instant case is a dispute of substantial nature requiring decision on the facts to be determined by taking evidence, which could be decided only under section 10 of the Act.

(*ii*) In the circumstances of the instant case Respondent no. 2 should have stayed its hand since the same question was pending adjudication before the Industrial Tribunal, Ranchi, in order to avoid conflicting decisions by the two forums on the same points.

6. It will be convenient to take up point no. (1) (*a*) first. Learned counsel referred to the provisions contained in section 33-C (1) and (2) which read thus :—

> "(1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A, the workman himself or any other person authorised by him in writing in this behalf or in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue :
>
> Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer :
>
> Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.
>
> (2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money "due or as to the amount from which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government."

He has pointed out that no doubt the notification was issued under section 33-C (2) of the Act, but the State Government under the said notification had limited the jurisdiction of respondent no. 2 for deciding the matter only to the extent as to whether the workmen were entitled to receive from the employer the benefits to which they were entitled in accordance with section 33-C(1) of the Act, namely, money due to the workmen from the employer under a settlement or award or under the provision of Chapter V-A of the Act. He urged that the State Government has power to specify the jurisdiction of a Labour Court, and he referred to various paragraphs of the decision in the *Central Bank of*

India Ltd. v. *P. S. Rajagopalan*(1), such as, paragraphs 5 to 7, 9 to 11, 15, 16 and 18. Gajendragadkar, J., who delivered the judgment for the Court, observed in paragraph 6 as follows :—

> "It is common ground that section 33-C(1) provides for a kind of execution proceedings and it contemplates that if money is due to a workman under a settlement or an award, or under the provisions of Chapter VA, the workman is not compelled to take resort to the ordinary course of execution in the Civil Court, but may adopt a summary procedure prescribed by this sub-section. This sub-section postulates that a specific amount is due to the workman and the same has not been paid to him. If the appropriate Government is satisfied that the money is so due, then it is required to issue a certificate for the said amount to the Collector and that leads to the recovery of the said amount in the same manner as an arrear of land revenue. The scope and effect of section 33-C (1) are not in dispute before us."

His Lordship, however, held in paragraph 7 thereof that there was also no dispute that the word 'benefit' used in section 33-C(2) was not confined merely to non-monetary benefit which could be converted in terms of money, but that it takes in all kinds of benefits, which might be monetary as well as non-monetary if the workman was entitled to them, and in such a case, the workman was given the remedy of moving the appropriate Labour Court with a request that the said benefits be computed or calculated in terms of money. Once such computation or calculation was made under section 33 C(2) the amount so determined had to be recovered as provided for in sub-section (1). In other words, having provided for the determination of the amount due to a workman in cases falling under sub-section (2), the legislature had clearly prescribed that for recovering the said amount, the workman had to revert to his remedy under sub-section (1). His Lordship also held in paragraph 15 that "the legislative history to which we have just referred clearly indicates that having provided broadly for the investigation and settlement of industrial disputes on the basis of collective bargaining, the legislature recognised that individual workmen should be given a speedy remedy to enforce their existing individual rights and so, inserted section 33A in the Act in 1950 and added section 33C in 1956. These two provisions illustrate the cases in which individual workmen can enforce their rights without having to take recourse to

(1) (1964) A.I.R. (S.C.) 743=(1964) 3 S.C.R. 140.

section 10(1) of the Act or without having to depend upon their Union to espouse their cause. Therefore, in construing section 33C we have to bear in mind two relevant considerations. The construction should not be so broad as to bring within the scope of section 33C cases which would fall under section 10(1). Where industrial disputes arise between employees acting collectively and their employers, they must be adjudicated upon in the manner prescribed by the Act, as for instance, by reference under section 10(1). These disputes cannot be brought within the purview of section 33C. Similarly, having regard to the fact that the policy of the Legislature in enacting section 33C is to provide a speedy remedy to the individual workmen to enforce or execute their existing rights, it would not be reasonable to exclude from the scope of this section cases of existing rights which are sought to be implemented by individual workmen. In other words, though in determining the scope of section 33C we must take care not to exclude cases which legitimately fall within its purview, we must also bear in mind that cases which fall under section 10(1) of the act for instance, cannot be brought within the scope of section 33C." About the true scope of section 33C(2)". His Lordship had dealt in paragraph 16 where it was observed "let us then revert to the words used in section 33C(2) in order to decide what would be its true scope and effect on a fair and reasonable construction. When sub-section (2) refers to any workman entitled to receive from the employer any benefit there specified does it mean that he must be a workman whose right to receive the said benefit is not disputed by the employer? According to the appellant, the scope of sub-section (2) is similar to that of sub-section (1) and it is pointed out that just as under sub-section (1) any disputed question about the workmen's right to receive the money due under an award cannot be adjudicated upon by the appropriate Government, so under sub-section (2) if a dispute is raised about the workmen's right to receive the benefit in question, that cannot be determined by the Labour Court. The only point which the Labour Court can determine is one in relation to the computation of the benefit in terms of money. We are not impressed by this argument. In our opinion, on a fair and reasonable construction of sub-section (2) it is clear that if a workman's right to receive the benefit is disputed that may have to be determined by the Labour Court. Before proceeding to compute the benefit in terms of money, the Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit. If the said right is not disputed, nothing more needs to be done and the Labour Court can proceed to compute the value of the benefit in terms of money; but if the said right is disputed, the Labour Court must deal

with that question and decide whether the workman has the right to receive the benefit as alleged by him and it is only if the labour court answers this point in favour of the workman that the next question of making the necessary computation can arise. It seems to u that the opening clause of sub-section (2) does not admit of the construction for which the appellant contends unless we add some words in that clause. The Clause 'where any workman is entitled to receive from the employer any benefit' does not mean 'where such workman is admittedly, or admitted to be, entitled to receive such benefit.' The appellant's construction would necessarily introduce the addition of the words 'admittedly, or admitted to be' in that clause, and that clearly is not permissible. Besides, it seems to us that if the appellant's construction is accepted, it would necessarily mean that it would be at the option of the employer to allow the workman to avail himself of the remedy provided by sub-section (2), because he has merely to raise an objection on the ground that the right claimed by the workman is not admitted to oust the jurisdiction of the Labour Court to entertain the workman's application. The claim under section 33C(2) clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). As Maxwell has observed 'where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution.' We must accordingly hold that section 33C(2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. Incidentally, it may be relevant to add that it would be some what odd that under sub section (3) the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-section (2). On the other hand, sub-section (3) becomes intelligible if it is held that what can be assigned to the Commissioner includes only a part of the assignment of the Labour Court under sub-section (2)."

7. In my opinion, the contention of learned counsel for the petitioner under this point that respondent no. 2 had no jurisdiction to entertain the application under section 33C(2) of the Act in view of the wordings of the latter part of the notification under Annexure 2 is

not correct and the observation made in the aforesaid decision in paragraph 16 does not lend support to his contention. The language of sub-section (2) is perfectly clear in laying down that computation in terms of money and the benefit claimed by a workman is to be made by such Labour Court "as may be specified in this behalf by the appropriate Government". In other words, this sub-section makes it clear that the appropriate Government has to specify the Labour Court, which has to discharge the function under this sub-section. The use of the expression "specified in this behalf" is significant. The words "in behalf" clearly indicate that there must be specification by the appropriate Government that a particular Labour Court has to discharge the function under this sub-section and thereupon it is that Court alone which will have jurisdiction to proceed under the provision. In other words, jurisdiction under section 33C(2) can be exercised only by those Courts which are specified in this behalf, that is, such Labour Courts, which are specifically designated by the State Government for the purpose of computing money value claimed by the workmen. It may be noticed that the earlier part of the notification (Annexure 2) clearly indicates that the notice was issued under section 33C(2) of the Act It was a general notification for all Labour Courts in the State of Bihar which would include also the Labour Court at Jamshedpur. Relevant portion of that part of the notification reads thus :—

> ".....mony or any benefit capable of being computed in terms of money which any workman is entitled to receive....."

The aforesaid words are to be found in sub-section (2) of section 33C of the Act. Therefore, the intention of the authority to issue the notification was clearly under section 33C(2) of the Act.

8. Learned counsel for the petitioner, however contended that the latter portion of the notification (Annexure 2) "any workman is entitled to receive from the employer in accordance with the provisions of sub-section (1) of section 33C of the said Act" would go to show that in the notice the power conferred upon respondent no. 2, namely, Labour Court, Jamshedpur, was for specified purpose, that is, for determination of the claim of workmen contemplated under sub-section (1) of section 33C, namely, for the claim of any money due to a workman from an employer under a settlement or an award or under the provision of Chapter VA of the Act, since, in the instant case the claim of the workmen is for over-time wage and leave salary, as mentioned earlier, learned counsel emphasised that respondent no. 2 had no jurisdiction to decide that type of the claim, which it could have

only if such popwer was clearly given to it under section 33C(2) of the Act. In my opinion, this submission of learned counsel is also not tenable, since it seems, it was by clerical mistake in the latter part of the notification that instead of sub-section (2) sub-section (1) of section 33C of the Act was mentioned. I have already indicated that the intention of the authority for issuing the said notification was under sub-section (2) of section 33C of the Act. Learned counsel for the petitioner then submitted that even that was so, the words "any workman is entitled to receive from the employer in accordance with the provisions....." were not required to be mentioned. In my opinion, that may be a mere repetition and they may be treated as redundant. It may be noticed that I have already mentioned that the use of the expression 'specified in this behalf' occurring in sub-section (2) of section 33C is significant. It cannot be inferred that 'specified in this behalf' would also mean as specified in sub-section (1) of section 33C of the Act. In that view of the matter the findings of the Labour Court in this regard are well founded.

9. Now I turn to consider the submission of learned counsel under point no. (1) (*b*) and (*ii*) together, as they are inter-related. Learned counsel for the petitioner has urged that in the instant case it was clearly stated that there was no relationship of the employer and employee between the petitioner and the workmen as it would be apparent from reference no. 3 of 1974, where one of the questions was whether the workmen shown in Schedule 'A' were workmen of the contractors shown in the said schedule or of Utkal Automobiles (P) Ltd. He submitted that that question to be decided was beyond the scope of the Labour Court even under section 33C(2) of the Act. According to him, that is beyond the scope of the said sub section. That matter, according to him, requires fuller investigation after taking evidence by the Industrial Tribunal on reference under section 10 of the Act. In order to find support to his submission he once again referred to paragraph 15 of the judgment in the Central Bank's case, which I have already quoted *in extenso*. In my opinion, the submission of learned counsel in this regard is not supported by the observation of his Lordship in paragraph 15, rather it goes against his submission, if we read paragraphs 15 and 16 together. In paragraph 15 at page 748 his Lordship observed that where industrial dispute arose between the employees acting collectively and their employers they must be adjudicated in the manner prescribed by the Act. As for instance, by reference under section 10(1) of the Act, those disputes could not be brought within the purview of section 33C. Similarly, having regard to the fact that the policy of the Legislature enacting

section 33C was to provide speedy remedy to the individual workmen to enforce or execute their existing rights it would not be reasonable to exclude from the scope of that section cases of existing rights, which were sought to be implemented by individual workmen. In other words, for determining the scope of section 33C we must take care not to exclude cases which legitimately fall within its purview. We must also bear in mind that the cases, which fell under section 10(1) of the Act for instance could not be brought within the scope of section 33C. In paragraph 16 of the Central Bank's case his Lordship further observed at page 748 that "the clause 'where any workman is entitled to receive from the employer any benefit' does not mean 'where such workman is admittedly, or admitted to be, entitled to receive such benefit'. The appellant's construction would necessarily introduce the addition of the words 'admittedly, or admitted to be' in that clause, and that clearly is not permissible." Besides, his Lordship observed that "if the appellant's construction is accepted, it would necessarily mean that it would be at the option of the employer to allow the workman to avail himself of the remedy provided by sub-section (2), because he has merely to raise an objection on the ground that the right claimed by the workman is not admitted to oust the jurisdiction of the Labour Court to entertain the workman's application "

10. Learned counsel then referred to a latter decision of the Supreme Court in *Central Inland Water Transport Corporation Ltd.* v. *The workmen*(1) and drew our attention to various paragraphs i.e., paragraps 7, 12 to 15 and, particularly to that of paragraph 14, wherein it was held that "the scope of section 33C (2) was illustrated by this court in *Central Bank of India Ltd.* v. *P S. Rajagopalan*, (supra). Under the Shastri Award Bank clerks operating the adding machine were declared to be entitled to a special allowance of Rs. 10 per month. Four clerks made a claim for computation before the Labour Court. The Bank denied the claim that the clerks came within the category referred to in the award and further contended that the Labour Court under section 33C(2) had no jurisdiction to determine whether the clerks came within that category or not. Rejecting the contention, this court held that the enquiry as to whether the 4 clerks came within that category was purely 'incidental' and necessary to enable the Labour Court to give the relief asked for and, therefore, the court had jurisdiction to enquire whether the clerks answered the description of the category mentioned in the Shastri Award, which not only declared the right but also the corresponding liability of the Employer Bank. This was purely a case of establishing the identity of the claimants as

(1) (1974) A I.R. (S.C.) 1604.

coming within a distinct category of clerks in default of which it would have been impossible to give relief to any body falling in the category. When the Award mentioned the category it, as good as, named every one who was covered by the category and hence the enquiry, which was necessary, became limited only to the clerks' identity and did not extend either to a new investigation as to their rights or the Bank's liability to them. Both the latter had been declared and provided for in the award and the Labour Court did not have to investigate the same. Essentially, therefore, the assay of the Labour Court was in the nature of a function of a court in execution proceedings and hence it was held that the Labour Court had jurisdiction to determine, by an incidental enquiry, whether the 4 clerks came in the category which was entitled to the special allowance." In my opinion, the above observations of their Lordships have not differed from the observations made in paragraphs 15 and 16 of the *Central Banks* case. Their Lordships have simply clarified that if the question arises incidentally the Labour Court could decide the matter. In the instant case, the question about relationship between the employer and the employee, according to us, arises incidentally. Reference may be made to *Chief Mining Engineer, M/s. East India Coal Co. Ltd. Bararee Colliery, Dhanbad* v. *Rameshwar*(1) which corresponds to (1968 1 LLJ page 6) where Shelat, J., delivering the judgment for the Court, observed in paragraph 5 at page 220 that it was clear that the right to the benefit which was sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer. Since the scope of sub-section (2) was wider than that of sub-section (1) and the sub-section was not confined to cases arising under an award, settlement or under the provisions of Chapter VA, there was no reason to hold that a benefit provided by a statute or a Scheme made thereunder, without there being anything contrary under such statute or section 33C(2) could not fall within sub-section (2). In my view, a substantial question as to the status of the workmen whether they were entitled to the benefit could be decided by the Labour Court under section 33C (2) of the Act. In other words, Labour Court under section 33C(2) must entertain and decide as a preliminary question whether there was relationship between the employer and the employees, that is, between the petitioner and its employees, before computing their claim. In the instant case, I have already mentioned, as the impugned order indicates that the evidence was already gone into some extent for deciding that matter and it

(1) (1968) A.I.R. (S.C.) 218

was at that stage that on behalf of the petitioner a question of jurisdiction of respondent no. 2 was raised on the grounds referred to above. Therefore, respondent no. 2 had ample jurisdiction to decide as to whether there was relationship of employer and employees between the petitioner and workman as a preliminary issue before computing the claim of the workmen as provided under section 33C(2) of the Act.

11. Now I turn to consider the submission of learned counsel for the petitioner that since the very matter about the relationship between the petitioner and the workmen was pending under reference 3 of 1974 before the Industrial Tribunal, the Labour Court ought to have stayed the proceeding before it till disposal of that question by the Industrial Tribunal, on the principles of section 10 of the Civil Procedure Code. In my view, this submission of learned counsel for the petitioner is also not acceptable. Section 33C creates no bar to the reference under section 10 and *vice versa*. The provisions contained in section 33C do not preclude or bar a reference of a dispute under section 10 of the Act before the appropriate Tribunal. The fact that a remedy exists under section 33C(2) of the Act in a particular case cannot take away the right of the Government under section 10 of the Act if the circumstances justified to refer the matter. Conversely, alternative remedy available to an aggrieved workman to move the Government under section 10 of the Act could not take away the right of workmen to bring their claims under section 33C(2) of the Act to the Labour Court and it will not deprive the Labour Court of its jurisdiction to deal with the point provided the question which the Labour Court has to consider is in relation to individual right of workmen, which right is sought to be enforced by them. Besides, in the instant case, this matter was raised as it appears from the impugned order, before the Labour Court and it, in its discretion, has rejected it. In discretionary matter if it is reasonably refused, it cannot be interfered with under Articles 226 and 227 of the Constitution. I do not find any material to support the view that the respondent no. 2 had rejected the prayer of stay unreasonably.

12. In the result, therefore, after due consideration of the application of the petitioner it is dismissed and the impugned order is affirmed. Let the file of this case be immediately sent to the Labour Court, respondent no. 2 to proceed expeditiously in the matter in the light of the observations made above. In the circumstances, however, there will be no order as to costs.

B. P. SINHA, J.—I agree.

Application dismissed.

S. P. J.

APPELLATE CRIMINAL

Hari Lal Agrawal and Choudhary Sia Saran Sinha, JJ.

1977

April, 7.

SUKHIA BELDARIN.*

v.

STATE OF BIHAR

Penal Code, 1860 (*Act XLV of* 1860), *sections* 299, 300, 302, 328 and 304A—*Appellant administering poisonous medicine in the food of her husband without any knowledge of the real content—intention or knowledge, as contemplated in section* 299 *or* 300, *whether can be imputed—commission under section* 302—*whether maintainable—for establishing a charge under section* 328—*fact to be proved by the prosecution—conviction under section* 304A, *whether to be substituted.*

The sole intention of the appellant in the present case in administering the medicine in the food, without any knowledge of the real contents thereof being to use it as a love potion to stimulate love in the deceased for her, no intention or knowledge, as contemplated in section 299 or 300 of the Penal Code can be imputed to the appellant.

Held, therefore, that in such circumstance the question of conviction of the appellant under section 302 of the Penal Code cannot arise.

In order to establish a charge under section 328 of the Penal Code, the prosecution has to prove that the substance in question administered is a poison etc., as mentioned in the section that the accused administered it to the deceased with the intent to cause hurt or knowing it to be likely that it would cause hurt or with intent to commit or to facilitate the commission of an offence.

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*Criminal Appeal no. 263 of 1972. From the judgment of Shri Gauri Kant Thakur, Additional Sessions Judge 3rd, Patna, dated the 6th June 1972.

Held, further that on the facts and in the circumstances of the present case no intention or knowledge, as referred to in section 328 can be imputed to the appellant and as such her conviction under section 328 of the Penal Code too is not warranted.

Section 304A of the Penal Code states that whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extent to two years, or with fine or with both. In the present case there being no other family members, the deceased was solely dependent on his wife in matters of his meal. According to the evidence of P. W. 1 the deceased never took food served by the wife of his brother. This must give rise to absolute faith which generally every husband has in his wife and obviously this would cast a duty on the wife to be particular in looking after his meal etc. Even if prompted by self interest to stimulate love, as a wife it was expected of the appellant to use the medicine supplied to her by her dadi only after due care and caution and after proper enquiry and not in the rash and negligent way as she did. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular which having regard to all circumstances out of which the charge has arisen, it was the imperative duty of the accused to have adopted. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.

Held, that on the facts and circumstances of the present case there can be no doubt that the action of the appellant in administering the contents of the phial, which subsequently was found to be parathion poison and which resulted in the death of the deceased, though not amounting to culpable homicide was rash and negligent within the meaning of these words as occurring in section 304A of the Penal Code and the prosecution must, therefore, be held to have proved the charge under section 304A of the Code against the appellant.

Case laws reviewed.

Appeal by the accused.

The facts of the case material to this report are set out in the judgment of Choudhary Sia Saran Sinha, J..

Mr. Hari Narain Singh, for the appellant.

Mr. Lala Kailash Behari Prasad, for the respondent.

CHOUDHARY SIA SARAN SINHA, J.—This appeal by the sole appellant Sukhia Beldarin, a young woman, is directed against her conviction under sections 302 and 328 of the Indian Penal Code, she having been sentenced to imprisonment for life under section 302 of the Indian Penal Code, there being no separate sentence under section 328 of the Indian Penal Code.

2. The facts of the case lie in a narrow compass. The occurrence is said to have taken place in the night between 29th/30th March, 1967. Only two months earlier to that the appellant was married to the deceased Narain Beldar *alias* Bandhu, the latter too also being a young man . Undisputedly, the marriage having taken place two months prior to the date of occurrence, they had no issue and they resided as husband and wife in the house of Narain, the two other brothers of Narain residing in different houses situate in the same court-yard as that of the deceased. One Ajnasia *alias* Radhia was the grandmother (*Dadi*) of the appellant and she was an old lady.

2. In order to stimulate love in Narain towards the appellant, Ajnasia thought of a device. She gave a phial, said to contain medicine, to the appellant telling her that in case she would administer that medicine in food to Narain, the latter would begin loving her. The appellant translated this advice into action and is said to have mixed the said medicine in the food which she served to Narain on the night of accurrence. The food was in the shape of *khichari* or *Dara*. This food tasted bitter (*Tita*) to Narain, when he partook a portion of it. He, therefore, left the remaining food, which was thrown on heaps of ashes lying on a rasta close to the residential house. After taking the food, Narain felt uneasy and began to tremble and his brothers including Sukho Beldar (P. W. 1), the informant of the case., were sent for. When asked, Narain in said to have told the informant and others about the food served to him by the appellant tasting bitter and his feeling uneasy. On enquiry being made, the appellant is also said to have candidly admitted to have mixed the said medicine in the food served to the deceased under the advice of Ajnasia.

3. In the said night itself, the prosecution witnesses including the informant took Narain to Dhanarua Block Hospital but no medicine being available there, they were advised to take him to the Hospital at

Masauri. As Narain had no money, he could not be taken to Masauri Hospital and he was brought back to his house, where at 4 A.M. on the same night he died.

4. The prosecution story further is that a crow at a portion of the remanent of the food thrown on the heaps of ashes, being the part of the food served by the appellant to Narain and the crow is said to have died. On being questioned, the appellant is said to have produced a phial before the informant and others stating that the medicine she had mixed in the food was kept in that very phial.

5. In the morning, the dead body of the deceased Narain along with the dead crow and the phial, referred to above, was taken to Masauri police-station, the appellant also having accompanied them and there the first information report (Ext. 2) was recorded on 30th March 1967 at 3 P.M. on the statement of the informant (P. W. 1) and the police-officer registered a case and took up investigation.

6. The inquest was held on the dead body of the deceased Narain and the inquest report is Ext. 3. An arrangement was also made for getting the phial and the dead crow examined by chemical examiner.

7. On the dead body being sent for post mortem examination the same was performed by Dr. Kamleshwar Singh (P. W. 8) on 31st March, 1967 at 2.30 P.M. Ext. 4 being the deposition of this doctor as take down in the committing court and Ext. 1, as marked in the committing court, being the post mortem report. The doctor, though he preserved the viscera, could not find any injury on the person of the deceased either external or internal and he could not determine the cause of the death.

8. Coming to the chemical examination, as would appear from the chemical examiner's report marked Ext. 1/2, nothing incriminating was recovered in the viscera of the deceased and even the extracts injected to frogs produced no effect. The chemical examiner, however, detected parathion also called folidon poison in the washings of the phial, referred to above, as also the remanent of the food, thrown on the heaps of ashes, which had been seized by the investigating officer. This very poison was also detected in the viscera of the crow. The reports of the chemical examiner are Exts. 1 and 1/1.

9. The police submitted chargesheet against the appellant as also Ajnasia. While the appellant was charged under sections 302 and 328

of the Indian Penal Code, Ajnasia was charged under section 302/109 of the Indian Penal Code. Both of them denied the charges and pleaded innocence.

10. On a finding that there was no evidence to infer even remotely that it was co-accused Ajnasia who had given poison to the appellant for administering to the deceased intending to cause his death, the learned Additional Sessions Judge acquitted Ajnasia. He, however, convicted the appellant under both the two charges with sentence as stated above and this has given rise to the present appeal.

11. Learned counsel for the appellant, inspite of the defence plea to the contrary in the trial court, did not dispute before us the administration of the contents of the phial in question by the appellant in the food served to her husband, the deceased, in the night of accurrence. He further did not seriously dispute that the Narain died as a result of administration of the contents of the said phial in the food served to him by his own wife. In a case of poisoning generally there is absence of any injury either external or internal and in the absence of detection of any poison in viscera it is also not possible for a doctor to determine the cause of death in such cases. True it is that no poison could be detected in the viscera of the deceased, but the reason thereof is not far to seek. The report of the chemical examiner (Ext. 1/2) has to be read in this connection with the evidence of Sri S. R. Hasan, Assistant Director of Foreinsic Science Laboratory (P. W. 6). This report is dated 1st July 1969 and for reasons unknown to us the viscera was sent for chemical examination after two years of the occurrence. P. W. 6 further stated that this viscera was kept in a saline liquid which was not even saturated with the result that the viscera itself was in a decomposed state. P. W. 6 further went to say that this viscera was not even properly preserved. In these circumstances the absence of detection of any poison in the viscera of the deceased as also the fact about the cause of death remaining undetermined as stated in the post mortem report cannot adversely affect the prosecution case if it stands established otherwise that the deceased died of poisoning The learned counsel for the State relied on the case of *Mahabir Manaal and others* v. *State of Bihar*(1) in support of his contention that if other evidence and circumstance are there, the absence of detection of poison in the viscera will not militate against

(1) (1972) A.I.R. (S.C.) 1331.

the conclusion that the death of the deceased was due to poison. The reason given was that there are several poisons particularly of the synthetic hypnotics and vegetable alkaloids groups, which do not leave any characteristic signs as can be noticed on post mortem examination. In the instant case the non-detection of poison in the viscera of the deceased might be on account of the same not being preserved properly as also the abnormal delay made in sending the same for examination. This is why P. W. 6 stated in his evidence that in these circumstances non-detection of poison in the viscera was natural.

12. In cases where a poison has not been detected on chemical analysis, the Judge, in deciding the charge of poisoning, should weigh in evidence the symptoms exhibited by the patients, the post mortem appearances and moral and circumstantial evidence vide Modi's Medical Jurisprudence and Toxicology XVth Edition at pages 461-462. We have the evidence of Sukho Beldar (P. W. 1), and Keshar (P. W. 2) another brother of the deceased, that the deceased had told them before his death that the food served to him tasted bitter and that on taking it he became restless. They also found Narain trembling after sometime of his taking the food. Although Nand Kumar Pandey, Assistant, Sub-Inspector of Police (P. W. 7) has not stated in his evidence, we get an idea of the post mortem appearances of the deceased from the inquest report (Ext. 3) (vide column 4 of Ext. 3).

13. In addition to these, there are other cogent facts and circumstances which also support the prosecution verison. P. W. 1 Sukho Beldar, P. W. 9 Jhagru Mistry and P. W. 5 Sukan Singh have consistently stated about the extra judicial confession made by the appellant wherein she admitted to have mixed the contents of the phial in question in the food on the same being given to her by co-accused Ajnasia as a device to stimulate the love in the deceased for the appellant. The chemical examiner detected parathion, a poison in the washings of the said phial which was produced before the prosecution witnesses by the appellant herself and was taken to the police-station at the earliest stage. The chemical examination also revealed the existence of parathion in the remanents of food seized by the police officer, the phial and the remanents of food having been sent to the chemical examiner in the year 1967 itself unlike the viscera of the deceased which was sent 2 years after. There is also satisfactory evidence to prove that the remanents of the food, left by the deceased,

was thrown on heaps of ashes and a crow which too ate it, died instantaneously. This deal crow itself was also carried to the police-station at the earliest stage and parathion was detected in the viscera of crow also. As it generally happens, the appellant has retracted the extra judicial confession but on a close scrutiny of the prosecution evidence it becomes established beyond all shadow of doubt that besides the statements made by deceased himself before he died which have been referred to above, the appellant in her turn also made the extra judicial confession before the prosecution witnesses. P. W. 1 is, no doubt, the brother of the deceased. In her examination under section 342 of the Code of Criminal Procedure, the appellant described her occupation as dependant which indicates her being not possessed of any property. The statement of P. W. 1 in para 12 is also the same effect. If Narain was not possessed of any property, the suggestion thrown to P. W. 1 that he had falsely implicated the appellant to grab the share of the deceased falls to the ground. P. W. 5 stoutly denied the suggestion that P. W. 1 was his Kamia and similar was the case with P. W. 9 who disclaimed to be a friend of the deceased. I have given my anxious consideration to the evidence of these prosecution witnesses and I see absolutely no reason to reject their evidence. The prosecution has, therefore, proved satisfactorily the story, as unfolded by the prosecution witnesses, about the appellant making the exra judicial confession, referred to above.

14. This extra judicial confession has to be taken as a whole and on doing so it would appear that the phial, which was subsequently found to contain parathion, was made over to the appellant by Ajnasia, her *Dadi* and well-wisher, with the sole intention of using it as a device to stimulate love in the deceased for the appellant. Learned counsel for the State cited the case of *Nishi Kant Jha* v. *State of Bihar*(1) in support of his contention that in appropriate case Court may discard a portion of the confession while relying upon the remaining portion. The facts of that case are different from the facts of the instant case. In that case the exculpatory portion of the confessional statement was not only inherently imprable but it stood contradicted by other evidence. This is not the case here. This extra judicial confession is the sine qua non of the prosecution case and there is no evidence to show that any part thereof stands contradicted by an-

(1) (1969) A.I.R. (S.C.) 422.

evidence adduced in this case. The result would be that the entire extra judicial confession shall be taken as a whole.

15. This would lead us to the consideration of the question if in the facts and circumstances of the case the appellant can be convicted of any of the two charges framed against her, namely, that under sections 302 and 328 of the Indian Penal Code.

16. The appellant was married with the deceased about two months prior to the occurrense. As stated by the appellant in her examination under section 342 of the Code of Criminal Procedure, they used to live as husband and wife in the house of the deceased. Undisputedly, the couple had no issue till the time of occurrence. Though young in age, the appellant was not receiving the love and affection she required and expected which, as it appears from the statement of P. W. 5, forced her to leave her *Sasurali* house, her second visit to her Sasural being on a day prior to the occurrence. The fleeing away of a newly married girl from her *sasurali* house must have been a cause of anxiety for her old *Dadi*. There is no evidence worth the name to show the existence of any enmity between the *Dadi* of the appellant and the deceased or between the appellant and her husband. The first information report is conspicuously silent about the existence of any such enmity and the word *Banao* used by P. W. 1 in his evidence, even if true, can in the facts and circumstances of this case points simply to the want of harmonious relationship expected to exist between a young couple. Thus the prosecution has utterly failed to establish the existence of any motive in the appellant to commit the murder of her husband. Having no issue and her husband being separate from his brothers and being devoid of any property, the appellant would have been left with none after doing away with the life of her husband and unless there would be some compelling motive or mens rea, of which there is no evidence, it would be impossible to believe that she would commit murder of her husband or do him any harm with any bad intention.

17. The subsequent conduct of the appellant is also worthy of consideration. We find that the appellant present in her house right from the time she mixed the medicine of the phial in the food up to the time when the deceased met his end. We also find her making a clean breast of everything she had done to the prosecution witnesses.

We also do not find her hesitating in producing the phial in question and in going to the police-station with the dead body of her husband.

18. The next question is whether the phial which was given to the appellant by her *Dadi* contained poison to the knowledge of the appellant. Here again we have to look into the extra judicial confession itself and we find P. Ws. 5 and 9 stating that according to the appellant the phial contained medicine (*Dawa*) which was also the statement in the first information report. According to P. W. 2, the phial was said to contain oil (*Tel*). In face of these, the statement of P. W. 1 in his evidence in the court about appellant stating that the phial contained poison must be rejected. There is also no proof, either direct or circumstantial to show that even the *Dadi* of the appellant knew that the phial contained any poisonous substance much less poison.

19. In the facts and circumstances of the case and the materials available on the record the irresistible conclusion is that the phial, which was subsequently found to contain parathion-poison, was made over to the appellant by her *Dadi* saying that it contained medicine to be used as a device to stimulate love in the deceased for her and the appellant, illiterate and socially backward as she was, appears to have believed the statement of her *Dadi* and she appears to have mixed the contents of the phial in the food served by her to her husband in good faith.

20. Learned counsel for the appellant cited two decisions in support of his contention that the contents of the phial having been administered by the appellant as a love potion or drug, there can be no question of her conviction on a charge under section 302 of the Indian Penal Code. The first is reported in A.I.R. 1924 Patna 635 *Phulmani Mundain and another* v. *Emperor* and the second in A.I.R. 1952 Madras 535 (*In re Vokkaligara Yengtappa*). It was held in 1924 Patna 635 that where the intention to cause death cannot be clearly fo[illegible]d without any other possible explanation of the act of the person giving poison a conviction for murder cannot stand. It was also observed that mere administering of a love potion or drug which a person thinks might be beneficial is not in itself an offence but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is her act falls within section 304A of the Indian Penal

Code. Similarly in A.I.R. 1952 Madras 535 the conviction under section 302 of the Indian Penal Code was not found sustainable where accused having no knowledge of the real contents of the bottle which in fact contained poison, used the same under the influence of others.

21. In the facts and circumstances of the case no intention or knowledge, as contemplated in section 299 or 300 of the Indial Penal Code can be imputed to the appellant, her sole intention in administering the medicine in the food, without any knowledge of the real contents thereof being to use it as a love potion to stimulate love in the deceased for her. In such circumstances the question of conviction of the appellant under section 302 of the Indian Penal Code cannot arise. Coming to section 328 of the Indian Penal Code, for establishing such a charge, the prosecution has to prove that the substance in question administered is a poison etc. as mentioned in that section that the accused administered it to the deceased with the intent to cause hurt or knowing it to be likely that it would cause hurt or with intent to commit or to facilitate the commission of an offence. In view of what has been found above no such intention or knowledge, as referred to in section 328 of the Indian Penal Code can be imputed to the appellant. The facts and circumstances of the case, as discussed above, cannot, therefore, warrant conviction of the appellant under section 328 of the Indian Penal Code as well.

22. The appellant having been charged under section 302 of the Indian Penal Code, there can be no legal difficulty in convicting her under section 304A of the Indian Penal Code if the facts and circumstances of the case so warrant. This section states that whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both. There being no other family member, the deceased was solely dependant on his wife in matters of his meal. We find from the evidence of P. W. 1 that the deceased never took food served by the wife of his brother. This must give rise to absolute faith which generally every husband has in his wife and obviously this would cast a duty on the wife to be particular in looking after his meal etc. Even if prompted by self interest to stimulate love, as a wife it was expected of the appellant to use the medicines supplied to her by her *Dadi* only after due care and caution and after proper

inquiry and not in the rash and negligent way as she did. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all circumstances out of which the charge has arisen, it was the imperative duty of the accused to have adopted. Negligence is the omission to do something which a reasonable man, guided upon those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. In the facts and circumstances of this case there can be no doubt that the action of the appellant in administering the contents of the phial, which subsequently was found to be parathion-poison and which resulted in the death of the deceased though not amounting to culpable homicide was rash and negligent within the meaning of these words as occurring in section 304A of the Indian Penal Code and the prosecution must, therefore, to be held to have proved the charge under section 304A of the Indian Penal Code against the appellant.

23. In the result, the conviction of the appellant under section 302 of the Indian Penal Code and the sentence of life imprisonment is set aside and the same is substituted by a conviction under section 304A of the Indian Penal Code for which the appellant is awarded a punishment of rigorous imprisonment for two years, the maximum sentence prescribed under section 304A of the Indian Penal Code. The conviction of the appellant under section 328 of the Indian Penal Code is also set aside.

24. With the modification, as stated, above, the appeal fails and is dismissed.

HARI LAL AGRAWAL, J.—I agree.

Appeal dismissed with modification.

M. K. C.

CIVIL WRIT JURISDICTION

*Before Nagendra Prasad Singh and Gobind Mohan Misra, JJ.**

1977

April, 21.

O. C. KOSSY AND ORS..**

v.

THE PRESIDING OFFICER, CENTRAL GOVERNMENT LABOUR COURT, NO. 2, DHANBAD AND ORS.

Industrial Disputes Act, 1947, (*Act XIV of* 1947), *section* 2 (*j*) *and* 33C (2)—*mining operations carried on by a Department of the Government of India—whether can be deemed to be industry within the meaning of section* 2(*j*)—*application under section* 33C (2), *whether maintainable.*

Where the employees are engaged in mining operations carried on by the Department of Atomic Energy of the Government of India at two sites in the district of Singhbhum;

Held, that, whatever activities are being carried on at the sites in question, it is being carried by the local Authorities under the administrative functions of the Government of India and such functions are not analogous to trade or business so as to make it an 'industry' within the meaning of section 2 (*j*) of the Industrial Disputes Act, 1947, and, therefore, the application under section 33C (2) of the Act filed on behalf of the petitioners was not maintainable.

Case laws discussed.

Application by the employees.

The facts of the case material to this report are set out in the judgment of Nagendra Prasad Singh, J.:

*Sitting at Ranchi.

**Civil Writ Jurisdiction Case no. 941 of 1973. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Messrs. Ranen Roy, J. Krishna, K. D. Prasad and *S. N. Roy*, for the petitioners.

Messrs. Ram Nandan Sahai Sinha, Government Pleader and *Lala Sachindra Kumar, J. C. to Government Pleader*, for the respondents.

NAGENDRA PRASAD SINGH, J.—This writ application has been filed for quashing an order passed by the Central Government Labour Court no. 2, Dhanbad dismissing the application filed on behalf of the petitioners under sub-section (2) of section 33C of the Industrial Disputes Act, 1947 (hereinafter to be referred to as the Act). A copy of that order is annexure-6 to the writ application.

2. It is the case of the petitioners that they are employees of Atomic Mineral Division, Department of Atomic Energy under the Government of India and they are engaged in different mining operations which are being carried on by the aforesaid Department of the Government of India at Narwapahar and Bhatin in the district of Singhbhum. In the aforesaid villages there are uranium mines which are being worked by the Director, Atomic Mineral Division and the Mining Engineer, Atomic Mineral Division (respondents 2 and 3, respectively) on behalf of the Government of India. According to the petitioners, the mining operations carried at the aforesaid two sites fall within the definition of 'Industry' as defined in section 2(*j*) of the Act and the activities will be deemed to be industrial activities. Respondent nos. 2 and 3 have got standing orders certified under the Industrial Employment (Standing Orders) Act, 1946 (hereinafter to be referred to as the Standing Orders Act), under which the conditions of service of the petitioners are regulated. An industrial dispute was raised by the Union of the Atomic Mineral Division Employees and ultimately there was a settlement in accordance with sub-section (3) of section 12 of the Act on 12th June 1972. A copy of that settlement is enclosed to the writ application and marked as annexure-1. Under that settlement the petitioners were given the benefit of the scales of pay prevailing in the mines of Uranium Corporation of India Limited at Jaduguda and dearness allowance at Central rate was also allowed with effect from 15th September 1972. In spite of the settlement, however, the petitioners were neither paid at the scale, which had been agreed upon, nor the dearness allowance at the Central rate. Ultimately, the petitioners filed an application under sub-section (2) of section 33C of the Act before the respondent Presiding Officer, Central Government Labour Court no. 2 (hereinafter to be referred to as the said Labour Court) for computation of the money benefits payable

to the petitioners on the basis of the aforesaid settlement. A copy of that application has been enclosed to the writ application and marked as annexure-2. A notice was issued to respondent nos. 2 and 3, and, in pursuance thereof, a written statement was filed on behalf of respondent nos. 2 and 3 saying that they were merely carrying on prospecting or exploratory activities in the areas referred to above with a view to find and establish if uranium-ore can be extracted in large quantity. It was further asserted that the Government of India was not carrying any trade or business or any activity on the commercial lines: as such, the operation will not be deemed to be an industry within the meaning of section 2(*j*) so as to attract the provisions of the Act. In support of the stand taken by respondents 2 and 3, one Sri R. C. Puri was examined on behalf of respondents 2 and 3. No evidence, oral or documentary, was adduced on behalf of the petitioners to challenge the said statement that the operations, which were being carried on, will not be deemed to be an industry within the meaning of the Act. The Presiding Officer of the said Labour Court, on a consideration of the materials on record, by the impugned order came to the conclusion that the two mines, where operations were being carried on, will not be deemed to be industry within the meaning of section 2(*j*) of the Act. With that finding, he was of the opinion that the application under section 33C (2) of the Act filed on behalf of the petitioners was not maintainable, and he, accordingly, dismissed the same.

3. Learned counsel appearing for the petitioners has submitted that the respondent-Presiding Officer has not appreciated the true nature of the operations which are being carried out at the mines in question and he ought to have held that it is an industry within the meaning of the Act.

4. The question whether a particular establishment where several persons are employed will be an industry or not has always been a matter of controversy which, at times, is very difficult to resolve because in many of such institutions or establishments all the ingredients, which are required for an industry, cannot be located at the first sight and Tribunals or courts concerned have to look to different materials and circumstances to ascertain whether that particular establishment will be deemed to be an industry or not. 'Industry' has been defined under section 2(*j*) of the Act as follows :—

> " 'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

If in the establishment in question there are employees under some employer and the operations therein are being carried on for profit, there may not be any difficulty to call it immediately as an industry. The problem arises where, although there is relationship of employer and employees, the activities are being carried on systematically, but it is not on profit basis. Faced with such situation, from time to time, attempt has been made on the part of the courts to exactly lay down the tests on the basis of which it can be determined as to whether a particular establishment will be deemed to be an industry or not. This aspect of the matter was examined by the Supreme Court in the cases of *Madras Gymkhana Club Employees' Union* v. *Management*(1) and *Cricket Club of India Ltd.* v. *Bombay Labour Union*(2), and it was observed that before any activity would be held to be an industry, following requirements must be established :—

"1. When the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods or material services;

2. It must bear the definits character of trade or business or manufacture or calling or must be capable of being described as an Undertaking analogous to business or trade resulting in material goods or material services;

3. The activity to be considered as an 'industry' must not be casual but must be distinctly systematic;

4. The work for which labour of workmen is required, must be productive and workmen must be following an employment calling, or industrial avocation; and

5. When private individuals are the employers, the industry is run with capital and with a view to profits. (These two circumstances may not exist when Government or local Authority enters upon business, trade, manufacture or an undertaking analogous to trade)."

Later, the matter was examined by still larger Bench in the case of *The Management of Safdar Jung Hospital, New Delhi* v. *Kuldip Singh*

(1) (1968) A.I.R. (S.C.) 554.
(2) (1969) A.I.R. (S.C.) 276.

Sethi(1). Hidayatullah, C. J.. speaking for the Court, obeserved that the definition given in the Act read as a whole denotes a collective enterprise in which employers and employees are associated. It was also held that the establishment which were carrying on activities "analogous to trade or business for the production of material goods or wealth and material services" will also be deemed to be an industry. On the question as to whether such activity should be carried only with a profit motive, it was observed :—

> "It is not necessary that there must be a profit motive but the enterprise must be analogous to trade or business in a commercial sense."

It was also pointed out that a distinction should be drawn between administrative functions of Government and local Authorities on the one hand and their functions analogous to business. Only such activities can be held to analogous to business or trade which are for production of goods or their distribution or for producing material services to the community at large or a part of it. Applying the aforesaid tests, it was held that Safdarjung Hospital which may fulfil some of the tests for industry, will not be deemed to be an 'industry' because it is not embarked on an economic activity which can be said to be analogous to trade and business. Similar was the finding in respect of other Hospitals.

5. The same question was again considered by the Supreme Court in the case of the Workmen of *Indian Standards Institution* v. *The Management of Indian Standards Institution*(2) in connection with the Indian Standards Institution, a society registered under the Societies Registration Act, 1860. In this case it was observed that in order that an activity may be regarded as an Undertaking analogous to trade or business, it must be organised or arranged in a manner in which trade or business is generally organised or arranged. Learned counsel appearing for the petitioners has submitted that the activity at the mine is organised or arranged in a manner in which trade or business is generally organised or arranged. The employment of the petitioners is not casual and the operations are being carried on, on co-operation between the authorities and those employees who

(1) (1970) A.I.R. (S.C.) 1407.
(2) (1976) A.I.R. (S.C.) 145.

associate together for the production of the uranium in question; as such it should be held that it is an industry within the meaning of the Act and the provisions of the Act are applicable.

6. Before I discuss the points raised on behalf of the petitioners, I must observe at the outset that as to whether a particular undertaking is an industry or not within the meaning of the Act is not purely a question of law. It has to be ascertained on the basis of the materials produced on behalf of the parties. It is only after facts are found that the law can be applied. As such, I propose to discuss as to what are the materials which have been brought on the records of this case on that issue.

7. From the impugned order of the said Labour Court it appears that these petitioners neither examined any witness nor produced any document to controvert the assertion made on behalf of the respondents 2 and 3. On behalf of respondents 2 and 3, as I have already mentioned above, one witness Shree R. C. Puri was examined. The relevant portion of his statement is as follows :—

> "Narwapahar and Bhatin Mines are owned by Government of India, Department of Atomic Energy. These Mines are not working on a profit business. These mines do only prospecting and exploratory work. The object of these mines is to find out whether the uranium exist under ground. As a Manager of these mines I submit my report to the Mining Engineer at Sundernagar. The Mining Engineer on his part submit a consolidated report to the Government of India. We do not sell anything which is excavated by the Mines under my charge. We do not do any trade or business."

In cross-examination, he has stated that the prospecting is being carried out since 1964 and that there was no factory attached to the two mines: whatever machines are there it is for prospecting and exploratory work only. From the statement of this witness it appears that the two mines are owned by the Government of India; only prospecting and exploratory work are being carried on with the sole object to find out

whether the uranium exists underground or not; it is not working on a profit basis; whatever is extracted is not sold. I have already pointed out that for the purpose of holding an undertaking to be an 'industry' it is not necessary that it should be run on profit basis, but the activity must be analogous to trade or business for the production of material goods or wealth and material services. In other words, as was observed by the Supreme Court in the aforesaid case of the *Management of Safdarjung Hospital, New Delhi* (*Supra*), the activities must be in a commercial sense. Learned counsel appearing for the petitioners laid much stress on the judgment of the Supreme Court in the case of the *Workmen of Indian Standards Institution* (*Supra*) and submitted that in that case it was observed that the activity may be regarded as an undertaking analogous to trade or business if it is organised or arranged in a manner in which trade or business is generally organised or arranged. In my opinion, the Supreme Court in the aforesaid case of the *Workmen of Indian Standards Institution* (*Supra*) has never held that even such undertakings where only prospecting or exploratory work is being carried on for the purpose of finding out whether uranium exists underground or not, will be deemed to be an 'industry'. The Labour Court has recorded its finding on the basis of the statement made by the witness, referred to above, that whatever is extracted for the purpose of prospecting is not sold and that no trade or business is being carried on. In my opinion, whatever activities are being carried on at the sites in question, it is being carried by the local Authorities under the administrative functions of the Government of India and on the materials on record it is difficult to hold that such functions are analogous to trade or business so as to make it an 'industry'. I have already pointed out that on this point no evidence was adduced on behalf of the petitioners before the court concerned, and in such a situation, the Tribunal had no option but to accept the statement made by aforesaid Sri R. C. Puri on behalf of respondent nos. 2 and 3. Even in cross-examination nothing has been suggested regarding any activity which could be considered to be analogous to trade or business.

8. Learned counsel appearing for the petitioners submitted that, perhaps, the petitioners were misled due to the fact that respondent nos. 2 and 3 never objected when the aforesaid settlement under section 13(3) of the Act was arrived at. It is surprising, no doubt, as to why this objection was not taken at that stage. But, once objection was taken before the Tribunal, the Tribunal was perfectly justified in deciding the question as a preliminary issue, and I find that while

doing so, it has not contravened any provision of the Act or the Rules framed thereunder so that we may grant relief to the petitioners under new Article 226 of the Constitution.

9. Learned counsel for the petitioners also pointed out that the terms and conditions of the service of the petitioners are governed by the Standing Orders certified under the Standing Orders Act. The Labour Court has also considered this aspect of the matter and has held that it will utmost lead to the position that it will be an industrial establishment within the meaning of the Standing Orders Act, but, that will not make it as an industry, 'Industrial Establishment' has been defined under section 2(*e*) *of* the Standing Orders Act and it includes several type of establishments, many of which are admittedly not industry. After some argument, learned counsel for the petitioners fairly conceded on this point that merely by that the establishment in question cannot be held to be an industry.

10. In the circumstances aforementioned, I am left with no option but to hold that the order in question does not suffer from any such informity so that this Court should exercise its power under Article 226 of the Constitution for granting the relief prayed for on behalf of the petitioners.

11. It is, however, made clear that any finding of the Labour Court, which has not been interfered with by his Court, regarding the nature of the establishment relates to the date when the application under section 33C (2) of the Act was filed before the Labour Court concerned. If in future, some trade or business or activites analogous to trade or business is carried on by that establishment, and any dispute arises between the petitioners and the authorities concerned, then that issue will be decided afresh on the materials produced on behalf of the parties.

12. This application is, accordingly, dismissed. But, in the circumstances of the case, there will be no order as to costs.

G. M. MISRA, J.—I agree.

Application dismissed.

S P. J.

MISCELLANEOUS CRIMINAL

Before Hari Lal Agrawal and Choudhary Sia Saran Sinha, JJ.

1977

May, 9.

SUMER PANERI AND ANR.*

v.

THE STATE OF BIHAR AND ANR.

Code of Criminal Procedure, 1973 (Central Act no. II of 1974) section 202—scheme of—section 202 sub-section (2) proviso—expression "all" occurring in the proviso—effect of—whether complainant to examine all his witnesses before Magistrate could pass order under section 203 or 204 of the Code—procedure indicated in proviso to sub-section (2) of section 202, whether directory—section 204—while issuing processes under section 204 of the Code, Magistrate, whether required to record reasons therefore—order of Magistrate issuing processes, propriety of—section 208—direction of Magistrate for supply of police papers to accused in a case instituted otherwise than on police report whether a bonafide mistake—no prejudice caused—mistake, whether can be rectified—section 208—statements recorded by Magistrate under section 202 of the Code of witnesses examined by the Magistrate and document produced before him to be supplied to accused.

The only purpose for holding a preliminary examination of the complainant and his witnesses under the scheme of section 202 of the Code of Criminal Procedure, 1973, is with a view to see whether there is sufficient ground to proceed in the matter. The Magistrate holding an inquiry at that stage is not called upon to see as to whether there appeared sufficient ground for the conviction of the accused. At this stage he has simply to form an opinion as to whether there was a *prima facie* case for proceeding in the matter. Till that stage the proceeding is not judicial. Judicial proceding commences with the issue of

*Criminal Miscellaneous no. 3614 of 1976. In the matter of an application under section 482 of the Code of Criminal Procedure, 1973.

processes, and the issue of processes is entirely within the discretion of the Magistrate himself, in which he has to be guided by his own independent judgment;

Held, that while issuing processes under section 204 of the Code of Criminal Procedure, 1973, a Magistrate is not required to record his reasons for doing so and the existence of the sufficiency of the grounds for proceeding in the matter is left to the subjective satisfaction of the Magistrate taking cognizance, who has to form his own independent and judicial opinion on the materials on record, and the analogy of administrative or quassi-judicial orders cannot be applied;

Held, further, that the discretion exercised by the Magistrate, in the instant case, does not suffer from any infirmity and he does not appear to have passed the order issuing processes in a mechanical manner or just by way of routine.

Chandra Deo Singh v. *Prokash Chandra Bose and Anr.*(1), relied on.

Smt. Nagawwa v. *Veeramma Shivalingappa Konjalgi and Ors.*(2), referred to.

The direction of the Magistrate for supply of Police papers, as provided under section 207 of the Code, in the instant case, seems to be a bonafide under obvious mistake. In a case instituted otherwise than on police report under section 208 of the Code, the Magistrate has to furnish to the accused the statement recorded under section 202 of the Code, of the witnesses examined by the Magistrate and the documents produced before him on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under section 161 or section 164 of the Code. No prejudice has been caused to the accused on this account and this obvious mistake can be rectified;

Held, that it is not incumbent for the complainant to examine all his witnesses before a Magistrate could pass an order either under section 203 or section 204 of the Code. The procedure indicated in the proviso to sub-section (2) of section 202 of the Code in this regard appears to be only directory and not mandatory.

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(1) (1963) A.I.R. (S.C.) 1430.
(2) (1976) A.I.R. (S.C.) 1947.

Paranjothi Udyar and Ors. v. *State* (1), distinguished.

The expression "all" occurring in proviso to sub-section (2) of section 202 of the Code is an enabling provision leaving it to the complainant to examine the material witnesses whose evidence he thinks would be sufficient to establish a *prima facie* case and for the Magistrate to issue process. Although it is desirable that the complainant should examine all his witnesses, he is bound to examine at least all those witnesses whose examination would be necessary to the unfolding of the prosecution story. The question or consequence of non-examination of any one of his witnesses and for the matter of that their credibility or evidentiary value, however, would arise later on and be a matter for consideration in the cource of the trial. But if the Magistrate, on the evidence adduced by the complainant, feels satisfied on there being a *prima facie* case, it would be quite lawful for him to issue processes against the accused.

Application by the accused.

The facts of the case material to this report are set out in the judgment of H. L. Agrawal, J.

Messrs Prabha Shankar Misra, Rajendra Prasad Singh, Ganesn Prasad Singh and *Tara Nath Jha*, for the petitioners.

Mr. Daman Kant Jha, for the State.

Mr. Ganga Prasad Roy, for opposite party no. 2.

HARI LAL AGRAWAL, J.—This is an application under section 482 of the Code of Criminal Procedure, 1973, for quashing the order dated 29th July, 1976, passed by the Chief Judicial Magistrate, Sasaram, taking cognizance of an offence under section 396 of the Indian Penal Code against the petitioners.

2. Briefly stated, the relevant fact are these: An occurrence of dacoity is said to have taken place in the house of Shyam Rai (Opposite party no. 2) at village Shahpur, in the district of Rohtas, in the night between the 21st and 22nd June, 1971. The petitioners along with his associates, numbering about 20—25, variously armed, are said to

(1) (1976) Cr. L. J. 598.

have committed the said dacoity and looted properties worth Rs. 20,000, and in course of the same, petitioner no. 1 fired with his gun at Jagdamba Rai, as a result of which he fell down and died instantaneously.

The matter was reported by opposite party no. 2 to the Sasaram Police on the 22nd June 1971, and the Police took up investigation On 6th July, 1971, the opposite party no. 2 filed a protest petition in the Court of the Subdivisional Magistrate, Sasaram, on the allegation that the police was in collusion with the accused persons and prayed that the accused persons named in the said petition be put on trial, which petition was ordered to be kept on the record. After investigation, the Police ultimately submitted a final form, and by his order dated 16th April, 1973, the learned Subdivisional Magistrate accepted the same. By the same order, however, he fixed 17th April 1973 for hearing on the protest petition and examination of opposite party no. 2 on solemn affirmation. After examining him on solemn affirmation and hearing his lawyer, he dismissed the protest petition by order dated 17th April 1973 (Annexure 3).

3. The opposite party no. 2 then filed Criminal Revision no. 32 of 1973 in the Court of the Sessions Judge, Arrah, against the said order dated 17th April 1973 passed by the Subdivisional Magistrate, Sasaram. The learned Sessions Judge by his order dated 13th February 1974 (Annexure 4) allowed the revision application and directed for further inquiry after giving an opportunity to the petitioner before him (opposite party no. 2) to examine his witnesses in support of his case.

4. On receipt of the record from the Sessions Court, the Subdivisional Magistrate took cognizance under section 396 of the Indian Penal Code against the petitioners by his order dated 12th March 1974 and sent the matter for holding an inquiry under Chapter XVIII of the old Code of Criminal Procedure to the Court of a Munsif Magistrate at Sasaram. It is said on behalf of the petitioners that the learned Subdivisional Magistrate this time did not examine any witness and cognizance was taken and commitment inquiry was ordered straightway.

5. Petitioner no. 1 then challenged the aforesaid order dated 12th March 1974 before the Court of Session in Criminal Revision no. 43 of 1974. This application was heard by the 4th Additional Sessions Judge, Arrah, who by his order dated 3rd July, 1975 (Annexure 5) set aside

the impugned order, and as the new Code of Criminal Procedure had already come into force by that time, he sent back the record to the Chief Judicial Magistrate, Sasaram, with the direction that as the procedure for commitment inquiry had since been abolished by the new Code and the offence complained of was triable exclusively by the Court of Session, it was "incumbent upon the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath before summoning the accused", which "procedure has got to be followed in the present case". In other words, he directed the Chief Judicial Magistrate to follow the procedure contained in section 202(2) of the new Code of Criminal Procedure.

6. In view of the above directions, the Chief Judicial Magistrate by his order dated 10th September 1975 called upon the complainant to produce his witnesses. The complainant examined only four witnesses on different dates, out of nine cited in the protest petition (Annexure 2). The Chief Judicial Magistrate by the impugned order (Annexure 6) took cognizance under section 396 of the Indian Penal Code against the petitioners. It is against this order that the petitioners have come to this Court.

7. Shri Prabha Shankar Misra, who appeared in support of application, challenged the impugned order on the following grounds :—

(*i*) The order being not a speaking order, was bad in law;

(*ii*) Cognizance had been taken not in the complaint case but in the police case which came to an end on submission of the final form by the police; and,

(*iii*) Cognizance had been taken against the petitioners without complying with the mandatory requirement contained in the proviso to sub-section (2) of section 202 of the new Code, that is, *all* the witnesses of the complainant were not examined.

8. I now proceed to consider the contentions one by one.

9. Under the old Code of Criminal Procedure, Chapter XVI (Chapter XV under the new Code) dealt with "Complaints to Magistrates". It consisted of only four sections, namely, sections 200 to 203. The next Chapter XVII is "Commencement of proceeding before

Magistrates", under which section 204 falls. Section 200 deals with the examination of the complainant and sections 202, 203 and 204 with the powers of the Magistrates in regard to the dismissal of complaint or issuing of processes. Under section 200 of the old Code, a Magistrate on receipt of a complaint of an offence, if he thought fit, postpone the issue of process against the accused for the purpose of "ascertaining the truth or falsehood of the complaint". This provision has undergone a change under the new Code, where the purpose for postponement now is only to see "whether or not there is sufficient ground for proceeding". It was contended by Shri Misra that after completing the procedure contemplated by section 202 of the Code, the Magistrate may either dismiss the complaint under section 203, or issue processes against the accused if his opinion "there is sufficient ground for proceeding". Shri Misra urged that the above provision makes it imperative for the Magistrate taking cognizance, while, issuing process, to indicate the reasons therefore, although briefly, so that the existence of the sufficiency of the ground could be objectively tested further contending that when even administrative or quasi-judicial orders are required to be speaking orders, the order that is passed under section 204 of the Code, which is a judicial order, and not interlocutory in nature, must be speaking order, indicating the grounds for forming an opinion regarding the sufficiency for proceeding in the matter.

I, however, do not find any substance in this contention. The only purpose for holding a preliminary examination of the compainant and his witnesses under the scheme of section 202 of the Code is with a view to see whether there is sufficient ground to proceed in the matter. The Magistrate holding an inquiry at that stage is not called upon to see as to whether there appeared sufficient ground for the conviction of the accused. At this stage he has simply to form an opinion as to whether there was a prima facie case for proceeding in the matter. Till that stage the proceeding is not judicial. Judicial proceeding commences with the issue of processes, and the issue of processes is entirely within the discretion of the Magistrate himself, in which he has to be guided by his own independent judgment. In my opinion, therefore, it is not necessary for the Magistrate to state the reasons on which his opinion regarding the existence of sufficiency of the ground for proceeding in the matter is based. The intention of the framers of the law also, to my mind, does not appears to be so. Under section 203 of the Code, it has been specifically provided that if as a "result of his inquiry or investigation (if any) under section 202, the Magistrate

is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing". The expression "the Magistrate is of opinion" or "in the opinion of a Magistrate" occurs in both the sections, namely, sections 203 and 204 of the Code. When the Parliament intended that the Magistrate should "briefly record his reasons", it specifically provided in this regard in section 203 where a complaint has to be dismissed. No such mandate has been provided in section 204. I would, therefore, hold that while issuing process under section 204 of the Code, a Magistrate is not required to record his reasons for doing so and the existence of the sufficiency of the grounds for proceeding in the matter is left to the subjective satisfaction of the Magistrate taking cognizance, who has to form his own independent and judicial opinion on the materials on record, and the analogy of administrative or quasi-judicial orders cannot be applied.

10. There is a large volume of case law on this question as to when a Magistrate taking cognizance of an offence would issue processes as well as the scope and nature of the inquiry contemplated by section 202 of the Code and the principle laid down in those cases is that the inquiry contemplated by section 202 is designed to confirm or remove the hesitation of the Magistrate in issuing processes. It need not always be exhaustive.

The expression "sufficient ground" has also been the subject matter of judicial scrutiny times without number and the meaning given to this expression under those decisions is that the said expression does not mean sufficient ground for conviction, but only such evidence as would be sufficient to put the accused on trial. A very wide discretion has been given to a Magistrate in the matter of issuing processes. Now I would refer to some of the authorities.

11. In the case of *Chandra Deo Singh* v. *Prokash Chandra Bose and another*(1), it was observed by the Supreme Court that for determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial, and not at the stage of enquiry. On reference to a large number of decisions of various High Courts, it was

(1) (1963) A.I.R. (S.C.) 1430.

observed that the object of the provisions of section 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The only thing that the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The only limitation that is imposed upon the Magistrate is that he must form his opinion by exercising an independent and judicial discretion to the facts which are brought on the record before him in support of the allegation made in the complaint, and once the Magistrate has exercised his discretion, it is not open for any superior Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. The power to interfere would be confined where the discretion exercised by the Magistrate appears to be capricious and arbitrary, having been based either on no evidence or on materials which are wholly irrelevant or inadmissible [See the case of *Smt. Nagawwa* v. *Veeranna Shivalingappa Konjalgi and other*,(1).

12. In the impugned order, the Magistrate issuing the processes has enumerated the materials on which he has based his opinion and I would do better to quote his own words:—

> "Perused the protest, complainant's statement on S. A. and the evidence examined in this case....."

The discretion exercised by the Magistrate, therefore, does not suffer from any infirmity and he does not appear to have passed the order issuing process in a mechanical manner or just by way of routine. I would, accordingly, hold that there is no warrant for the extremely wild proposition which has been canvassed before us by Mr. Mishra that the impugned order issuing processes under section 204 of the Code must be a speaking order in the sense that it must give reasons for forming the opinion by the Magistrate in exercise of his judicial discretion so that they can be objectively tested.

(1) (1976) A.I.R. (S.C.) 1947.

13. Now I pass on to the second contention. The order in question has been impugned also on the ground that it has been passed in the same police case, namely, G. R. No. 1076 of 1971, and not in the complaint case, and that the learned Magistrate has directed for supply of "Police papers as provided under section 207 Cr. P. Code. "There is nothing in the order to show that the learned Magistrate was taking cognizance in the Police case. It was rightly contended on behalf of the State that the protest petition in question, which was treated as a petition of complaint, was filed in the Police case, and no separate record was started in that regard. A protest petition, as it was, it could be properly considered and disposed of in the Police case itself.

The direction of the learned Magistrate for supply of Police papers, as provided under section 207 of the Code seems to be a bonafide and obvious mistake. In a case instituted otherwise than on a police report under section 208 of the new Code, the Magistrate has to furnish to the accused the statements recorded under section 202 of the witnesses examined by the Magistrate and the documents produced before him on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under section 161 or section 164. No prejudice has been caused to the petitioners on this account and this obvious mistake can be rectified. I would, accordingly, direct the Chief Judicial Magistrate to furnish to the petitioners all the relevant documents mentioned in section 208 of the Code.

14. Now remains for consideration the last ground which is based on the proviso to sub-section (2) of section 202 of the new Code which reads as follows :—

> "Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce *all* his witnesses and examine them on oath."

This change in the procedure was necessitated due to abolition of commitment inquiry under the new Code. In such cases where the offence complained of is triable exclusively by the Court of Session, the Magistrate is further empowered to call upon the complainant to produce all his witnesses and examine them on oath. The contention

of Shri Misra is that the proviso makes it imperative for the Magistrate to all upon the complainant to produce *all* his witnesses who must be examined by him on oath before he can pass any order either under section 203 or section 204 of the Code. In other words, his argument is that an opionion formed for issuing process in the absence of the evidence of *all* the witnesses of the complainant would be improper and not supported by "sufficient ground" for proceeding in the matter.

15. I am again unable to accept this proposition of Shri Misra in construing the extent and scope of the proviso in question. The dominant purpose of the inquiry under section 202 itself cannot be lost sight of. To ensure that no person shall be compelled to answer a criminal charge, unless the Court is satisfied that there is a prima facie case for proceeding and issuing processes against the accused persons, the dominant object of the inquiry contemplated by this section is to find out whether the complaint is devoid of any substance or a prima facie case has been made out against the accused. The purpose of abolishing the commitment proceeding was to cause expedition and avoid delay in disposal of criminal trials on account of that proceeding. Even according to the provision contained in Chapter XVIII of the old Code dealing with the procedure of commitment proceeding, it was not imperative for the complainant to examine all his witnesses and exhaust all the evidence at that stage. Section 208, which was the relevant section regarding taking of evidence, provided that when the accused appeared or was brought before the Magistrate, he would proceed to hear the complainant "and take all such evidence as may be produced in support of the prosecution". A discretion was left with the complainant to adduce only such evidence as might be thought fit and sufficient by him to furnish "sufficient grounds for committing the accused for trial and to frame a charge under the hand of the Magistrate. If the framers of the law intended to relax the procedure in order to expedite disposal of the sessions trials, to me it appears, that it would be unreasonable to construe the proviso in the manner as contended by the learned counsel. If the expressions "all" is given the meaning as suggested, then the very purpose and objective of the amendment would be defeated and redered ineffective to a large extent. For in that event, the inquiry under section 202 would be more protracted and onerous and the Magistrate would be helpless even if one witness is not examined or he evades his appearance for some reason or the other. I feel inclined to take the view that this is an enabling provision, leaving it to the complainant

to examine the material witnesses whose evidence he thinks would be sufficient to establish a prima facie case and for the Magistrate to issue process. I, however, should not be mistaken to have failed to notice the distinction between the right of the complainant to examine his witnesses under section 200 and under the proviso to sub-section (2) of section 202 of the Code. There the complainant may or may not examine any other witness but here, although it is desirable that he should examine all his witnesses, he is bound to examine at least all those witnesses whose examination would be necessary to the unfolding of the prosecution story. The question or consequence of non-examination of any one of his witness and far the matter of that their credibility or evidentiary value, however, would arise later on and be a matter for consideration in course of the trial. But if the Magistrate on the evidence adduced by the complainant feels satisfied of there being, it would be quite lawful for him to issue processes against the accused.

16. The point appears to be fres integra. Mr. Misra, however, placed reliance on a sigle Judge decision of the Madras High Court in the case of *Paranjothi Udyar others* v. *State*(1). I have examined this case. In that case a question arose as to whether committal enquiry pending at the commencement of the new code is to be continued as according to the Old Code or is wiped out and the provisions of the New Code would apply as if the enquiry started after the New Code came into force. In discussing the provisions of section 202(2) proviso, no doubt the learned Judge has observed there that "it is mendatory and compulsory on the part of the Magistrate to examine all the witnesses produced by the complainant, but the emphasis is on the duty of the Magistrate to examine all those witnesses produced by the complainant and not on the complainant being bound to produce all his witnesses for that purpose.

17. On giving my anxious consideration, I feel inclined, to take the view as indicated earlier and hold that it is not incumbent for the complainant to examine all his witnesses before a Magistrate could pass an order either under section 203 or section 204 of the Code. The procedure indicated in the proviso to sub-section (2) of section 202 in this regard thus appears to be only directory and not mandatory.

(1) (1976) Cr. L. J. 598.

18. I, therefore, do not find any merit in any of the contentions advanced on behalf of the petitioners and would, accordingly, dismiss this application.

CHOUDHARY SIA SARAN SINHA, J.—I agree that the application be dismissed

2. Coming to the first contention, referred to in the judgment of my learned brother, it would appear from the impugned order itself that the finding of the Magistrate about there being a prima facie case under section 396, I. P. C. is based on a perusal of the protest petition, the statement of the complainant on solemn affirmation and the evidence adduced on his behalf.

3. While dealing with a case under section 202 of the Criminal Procedure Code, 1898 (old Code), where the purpose of the inquiry was ascertaining the truth or falsehood of the complaint, the purpose of section 202 of the Code of Criminal Procedure, 1973 (new Code), simply being whether or not there is sufficient ground for proceeding, the Supreme Court in the case of *Smt. Nagawa* v. *Veeranna Shivalingappa Konjalgi and others* reported in A. I. R. 1976 Supreme Court 1947 held, *inter alia*, that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside :—

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are patently absured and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused:

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based

either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like. On going through the protest petition, the statement of the complainant on solemn affirmation as also the evidence of the witnesses examined on behalf of the complainant, no such infirmity or defect, as pointed out in the said judgment of the Supreme Court, can be said to exist in the instant case. While section 203 of the New Code necessitates the Magistrate to briefly record his reasons for dismissing the complaint, the provisions of section 204 of the New Code dealing with the issue of process does not require the Magistrate to give reasons for his conclusion and they leave the matter to the discretion of the Magistrate based on his subjective satisfaction, of course the discretion to be exercised judicially. Thus the impugned order cannot be said to be vitiated on account of its not being a speaking order.

4. Coming to the second contention, there is indeed a reference to 'the F.I.R. named accused persons' as also to supply of police paper, as provided under section 207 of the New Code, in the impugned order. In is, however, to be noted that the persons named in the F.I.R. as accused are only two in number and they are the two persons, who have been arrayed as accused in the protest petition. The basis in the instant case being the protest petition, the appropriate section of the New Code applicable would be section 208 and not section 207 mentioned in the impugned order. These two defects or irregularities cannot by themselves show that the Magistrate took cognizance in the police case and not on the basis of the protest petition. None of these two defects or irregularities have occasioned any prejudice to the petitioners much less they have resulted in any failure of justice. It is hoped that the Magistrate will take appropriate action under the provisions of section 208 of the New Code insted of section 207 thereof. Thus the second contention raised by the learned counsel for the petitioners too has no substance.

5. Coming to the third contention, it is true that the proviso to sub-section (2) of section 202 of the New Code provides, *inter alia*, that the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. It is also true that, while nine persons were named as witnesses in the protest petition, the complainant examined only four of them before the Magistrate on being asked by the Magistrate to produce his witnesses. The question is whether the failure of the complainant to examine all the witnesses, named in the protest petition, would vitiate the impugned order. Even sub-section (1) of section 231 of the New Code provides, in connection with the trial of a sessions case, that on the date fixed the Judge shall proceed to take all such evidence as may be produced in support of the prosecution. There are similar provisions in sub-section (3) of section 242 and sub-section (1) of section 254 of the New Code which deal with the trial of warrant and summons cases. Although in course of the trial of a case the prosecution has to examine all material witnesses essential to the unfolding of the narrative on which the prosecution is based, no general rule can be laid down to fetter the discretion of the prosecution to call witnesses irrespective of considerations of number and of reliability. If this be the position in respect of the trial of a case where the matter concerns the proof or otherwise of the prosecution case, it cannot be the intention of the proviso to sub-section (2) of section 202 of the New Code that it is incumbent on the complainant to examine all the witnesses named by him in the protest petition at a stage where the Magistrate is merely concerned with a decision whether or not there is sufficient ground for proceeding. If the complainant does not produce sufficient evidence before the Magistrate in spite of the direction given to him under the proviso aforesaid, he would stand the risk of his complaint being dismissed under section 203 of the New Code or of the Magistrate taking a decision that sufficient ground does not exist for proceeding. Thus here again it will be a matter for the subjective satisfaction of the Magistrate and if he feels satisfied on the evidence adduced that there exist sufficient ground for proceeding in spite of the complainant not examining all his witnesses it would be lawful for the Magistrate to issue process against the accused. This contention of the learned counsel for the petitioners must, therefore, also fail.

R. D.

Application dismissed.

SPECIAL BENCH

Before K. B. N. Singh, C. J., Shambhu Prasad Singh, S. Sarwar Ali, Lalit Mohan Sharma and B. S. Sinha, JJ.

1977

May, 19.

N. M. VERMA*

v.

UPENDRA NARAIN SINGH.

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (*Bihar Act no. III of* 1947), *section* 11*A—interpretation of—expression "rent at a rate at which it was last paid", meaning of—Interpretation of Statute.*

Per majority (K. B. N. Singh, C. J., L. M. Sharma and B. S. Sinha, JJ.).

The language of section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 appears to be clear and unambiguous and its natural meaning must be given. While construing a statute, the Court must endeavour to find the intention of the Legislature and if the words of the statute are unambiguous, their literal and grammatical meaning should be given effect to. The words themselves in such a case best declare the intention of the Legislature.

If in a given case, the rent has been actually paid by the tenant and received by the landlord at a particular rate, the same has to be accepted by the Court for the limited purposes of section 11A of the Act. It has to be kept in mind that such an order does not finally determine the right and liability of the parties. The equities between them have to be finally settled only by the ultimate judgment in the case. This is the reason that the landlord has not been given an unqualified right to withdraw the deposited rent during the pendency of the litigation nor can he realise the amount by execution. On an

*Civil Revision no. 376 of 1975. Against an order of Shri Aditya Narain, Munsif III, Patna, dated the 8th April 1975.

application for the purpose, the court may permit him to withdraw the amount if deposited. In the instant case, the rent was paid by the tenant at the rate of Rs. 200 per month for more than two years before the suit was filed. If he is directed to continue to do so, subject to the final settlement of his rights, it is difficult to conceive that it will lead to a situation not warranted by the Act. This interpretation does not lead to any absurdity or repugnancy or inconsistency with the other sections of the Act including section 4 of the Act. In section 11A of the Act, the Legislature decided not to use the word "rent lawfully payable", instead the rate of rent was mentioned "at which it was last paid". The difference is too eloquent to be ignored. *Mahabir Ram* v. *S. S. Prasad*(1), *Manoranjan Nath Patra* v. *pashi Prasad Sah*,(2) and *Sasdhar Das* v. *Harihar Prasad*(3) overruled. *S. M. Khalil* v. *Akhouri Sitaram*(4), approved.

Per Shambhu Prasad Singh, and S. Sarwar Ali, JJ. (contra).

The language of section 11A of the Act is not so plain and unambiguous that it admits of only one interpretation. The section can be very well interpreted to mean, rather should be interpreted to mean, that in his application for deposit of rent month by month in future as well as of the arrears the landlord can claim rent only at a rate at which it was last paid, but the court may order for deposit of rent month by month for future and arrears of rent at such rate as may be determined by it. Determination by Court need not necessarily mean that the court should take upon itself the obligation of fixing a fair rent, but where there is a dispute between the landlord and the tenant as to the rate at which rent was last paid or as to the legality of the rate of rent as claimed by the landlord though rent was last paid at such rate on the ground that fair rent for the building has been determined by the Controller or that the landlord has illegally increased the rent, the court should go into that question and determine the rate of rent at which it is to be deposited month by month in future and at which the arrears of rent are also to be calculated;

Held, that though the language of the section is ambiguous the landlord cannot claim arrears of rent at a rate higher than at which

(1) (1968) A.I.R. (Pat.) 415.
(2) (1974) B.L.J.R. 140.
(3) (1973) B.B.C.J. 401.
(4) (1958) A.I.R. (Pat.) 103.

rent was last paid and the court cannot order for deposit of arrears of rent at a rate at which it is not lawfully payable and the rate for both must be the same;

Held, further, that section 11A, if it has to be given a sensible meaning with reference to and consistent with other provisions of the Act, has to be interpreted that the tenant can be asked to deposit rent under the section only at a rate which is lawfully payable. It will be an over simplification of the matter to say that since the expression "lawfully payable" has not been used in section 11A, the tenant can be asked to deposit rent month by month for the future as well as arrears at the rate of rent last paid even if that was not lawfully payable.

Application by tenant-defendant.

The facts of the case material to this report are set out in the judgment of L. M. Sharma, J.

M/s. S. Ahmad Imam and *Harendra Prasad*, for the petitioner.

M/s. Braj Kishore Prasad no. II, Yogesh Chandra Verma and *Madan Mohan*, for the opposite party.

LALIT MOHAN SHARMA, J.—This civil revision application by the defendant in a pending suit for his eviction from a building in the town of Patna is directed against the order passed by the court below under section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter referred to as 'the Act'). The petitioner was inducted as a tenant by the plaintiff-landlord originally on a monthly rental of Rs. 160. The rent was enhanced several times and since April, 1970 it has been at the rate of Rs. 200 per month. The plaintiff applied for a direction under section 11A of the Act to the defendant to deposit month to month rent as also the arrears of rent since July, 1972. Admittedly, the rent for the period April, 1970 to June, 1972 was paid at the rate of Rs. 200 per month. The suit was filed on 2nd December 1972. In view of the Full Bench decision in *Ramnandan Sharma* v. *Maya Devi* (1974 Bihar Bar Council Journal, 818), the Court could not and did not pass any order in regard to the period prior to the institution of the suit. By the impugned order, the Court below directed the defendant to deposit the arrears of rent since the filing of the suit as also the future rent at the rate of Rs. 200 per month as the rent was admittedly last paid at that rate.

2. The petitioner contended that since the original rent was at the rate of Rs. 160 per month, the subsequent enhancements by private agreement between the parties, without recourse to the provisions of the Act, were illegal and the plaintiff was not entitled to the additional amounts over and above Rs. 160 per month realised by him. The petitioner claimed a set off on this account. He further said that the future rent also will be deposited by him at the rate of Rs. 160 per month only.

3. This case was heard by Mr. Justice H. L. Agrawal singly who was of the view that the decision of the Division Bench of this Court in *Manoranjan Nath Patra* v. *Kashi Prasad Sah*(1), relied upon by the petitioner, was not consistent with the earlier Division Bench decision in *S. M. Khalil* v. *Akhauri Sitaram*(2), and the Full Bench decision in *Mahabir Ram* v. *Shiva Shankar Prasad*(3). He suggested that the decision in *Manoranjan Nath Patra* v. *Kashi Prasad Sah* (supra) should be reconsidered by a larger Bench and directed that the case be placed before the Hon'ble Chief Justice for the purpose. In these circumstances, this civil revision application has been ordered to be heard by the Full Bench.

4. Although certain other points are also mentioned in the civil revision application, at the time of hearing, the only question which was pressed was that the Court below was not entitled to direct the petitioner to deposit the rent at the rate of Rs. 200 per month. In view of section 4 of the Act, the original rate of Rs. 160 per month continued to be the rent lawfully payable and the subsequent enhancements were illegal. The defendant was entitled to set off the additional amount paid. He would be entitled to deposit the future rent also, after accounting, at the rate of Rs. 160 per month. On behalf of the plaintiff-landlord, it has been contended that the impugned order has been correctly passed on the basis of the rate at which the rent was admittedly last paid.

5. The question is dependant on the interpretation of section 11A of the Act which is quoted below :—

> "11A. *Deposit of rent by tenants in suits for ejectment.*—If in a suit for recovery of possession of any building the tenant

(1) (1974) B.L.J.R. 140.
(2) (1958) A.I.R. (Pat.) 103
(3) (1968) A.I.R. (Pat.) 415.

contests the suit, as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any; and the Court, after giving an opportunity to the parties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any, and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defence against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the Court may permit him to do so. The Court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant."

The Rent Control Act was passed in 1947 for regulating the letting of buildings and the rent of such buildings, and to prevent unreasonable eviction of tenants. Due to scarcity of houses, people residing in rented houses were facing serious difficulty on account of the attitude of the landlords in general to evict the continuing tenants, in an attempt to realise higher rents by inducting new ones. The Act was passed mainly for affording a protection to the tenants, but, at the same time, the Legislature took into account the desirability of regular payments of rent. The unfettered right of the landlord to evict his tenant on service of a notice under section 106 of the T. P. Act was drastically cut down. But, at the same time, a speedy remedy for eviction of a tenant on certain limited grounds was provided before a special authority designated as Controller. One of the grounds on which an order of eviction could be passed was non-payment of rent. Other provisions for determination of fair rent of buildings were also included. In 1955, large number of amendments were introduced in the Act and as a result, *inter alia*, the speedy remedy available to the landlord before the Controller was taken away. The landlord was left with the general remedy of filing a suit in the Civil Court. It is well known that the disposal of a suit in a court of ordinary civil jurisdiction takes considerable time and even before 1955 the arrears of civil litigations

had mounted up and had a tendency of growing further. An unscrupulous tenant could, with impunity, continue to occupy a building without paying the rent for a considerably long time. In this background, section 11A of the Act, quoted above, was added to the Act by section 12 of Bihar Act XVI of 1955. The object of this section is clearly to protect the right of the landlord in the matter of reception of rent during the pendency of a suit for eviction.

6. The section permits the landlord to pray for an order on the tenant to deposit rent "at a rate at which it was last paid". The court, after hearing the parties, may make an appropriate order "at such rate as may be determined". The two clauses mentioned in the preceding sentence within commas are connected, and what the court has to determine is as to the rate "at which it was last paid". To suggest that the Court may arrive at any other rate would lead to several difficulties. In the first instance, it will give an unguided and uncontrolled power to the court to fix any rate of rent without recourse to any principle. Secondly, this interpretation will not be consistent with the language of the section and the form in which it has been enacted. To say that the landlord has been authorised to claim the rent at a particular rate and the court has been given a discretion to pass its orders on the basis of a different rate, would be anomalous. I am, therefore, of the view that the landlord can require deposit of rent at a rate at which it was last paid and on determination of the factual aspect, if any controversy is raised, the Court has to pass an order accordingly. The point, however, remains as to what is the meaning of the words "at a rate at which it was last paid."

7. It has been argued on behalf of the petitioner that an interpretation to the provisions of the Act beneficial to the tenant, as far as it may be possible, should be given. I do not think, this approach should be adoped while construing section 11A. This aspect, however, appears to be academic inasmuch as the language of the section appears to be clear and unambiguous and its natural meaning must be given. While construing a statute, the Court must endeavour to find the intention of the Legislature and if the words of the statute are unambiguous, their literal and grammatical meaning should be given effect to. The words themselves in such a case best declare the intention of the Legislature. The primary meaning of the words may, however, be rejected, where it will lead to some absurdity or some repugnancy or inconsistency with the other parts of the statute or it plainly defeats the object and purpose of the statute, but no such problem arises in

the present case. The principle that the words of the statute must *prima facie* be given their ordinary meaning has been characterised as the golden rule in England (*See* Maxwell on the Interpretation of the Statutes, Tenth Edition, page 7).

8. The plain grammatical meaning of the term does not admit of any serious controversy. If in a given case, the rent has been actually paid by the tenant and received by the landlord at a particular rate, the same has to be accepted by the court for the limited purposes of section 11A of the Act. It has to be kept in mind that such an order does not finally determine the right and liability of the parties. The equities between them have to be finally settled only by the ultimate judgment in the case. This is the reason that the landlord has not been given an unqualified right to withdraw the deposited rent during the pendency of the litigation nor can he realise the amount by execution. On an application for that purpose, the Court may permit him to withdraw the amount if deposited. In the present case, the rent was paid by the petitioner at the rate of Rs. 200 per month for more than two years before the suit was filed. If he is directed to continue to do so, subject to the final settlement of his rights, it is difficult to conceive that it will lead to a situation not warranted by the Act. This interpretation does not lead to any absurdity or repugnancy or inconsistency with the other sections of the Act and no reasons have been given on behalf of the petitioner to reject the straight forward and plain grammatical meaning of the words. A comparison with the language of clause (*d*) of section 11(1) of the Act can be usefully made. One of the five grounds on which a tenant can be evicted is "where the amount of two months' rent lawfully paid by the tenant and due from him is in arrears." In section 11A, which was introduced by an amendment, the Legislature decided not to use the word "rent lawfully payable"; instead the rate of rent was mentioned "at which it was last paid." The difference is too eloquent to be ignored.

9. It was contended that section 4 of the Act which is in the following terms:—

> "4. *Enhancement of rent of buildings*.—Notwithstanding anything contained in any agreement or law to the contrary, it shall not be lawful for any landlord to increase, or claim any increase in the rent which is payable for the time being, in respect of any building except in accordance with the provisions of this Act.";

does not permit the landlord to ask for, under section 11A of the Act, rent higher than at which it was originally payable. The argument is that the rent in the present case was being paid at the rate of Rs. 160 per month till March, 1970 and the agreement raising the same was unlawful. The rent could be increased only in accordance with the provisions of the Act. Section 11A must be read subject to the provisions of section 4 and the petitioner cannot therefore be asked to make the deposit at the rate of Rs. 200 per month. Mr. Braj Kishore Prasad appearing for the plaintiff-opposite party has given several reasons in support of his argument challenging the petitioner's above point. He contended that the petitioner, by actually paying the rent at the higher rate for a period of two years, must be held to have waived this objection. The plaintiff could have started a legal action for the petitioner's eviction earlier and it was the latter's conduct that persuaded the plaintiff to permit him to occupy the building. The petitioner should, therefore, be estopped from challenging the validity of the agreement. Mr. Prasad emphasised that a strict construction should be placed on a statute controlling contractual obligations. He placed reliance on certain decisions. It was also urged that the words "rent which is payable for the time being" indicated that the rate could be different from time to time. In any event, any amount voluntarily paid in the past could not attract the provisions of section 4 and no adjustment of the excess amount can be ordered. However, in view of the decision I am taking on this point, it does not appear necessary to discuss all the arguments of Mr. Prasad. It will be seen that the provisions of section 4 override any agreement or law in general to the contrary but exception has been made in favour of the provisions of the Act. The inference is that section 11A is not subject to the provisions of section 4 of the Act.

10. It was contended on behalf of the petitioner that a literal interpretation of the language of Section 11A of the Act should be rejected, as it will lead to undesirable results in two cases, namely, (*i*) where after the commencement of a tenancy, no payment of rent has ever been made and (*ii*) in a case where fair rent has been fixed under the provisions of the Act at a rate different than that at which rent had been last paid. There does appear to be a lacuna in the section inasmuch as it does not make provisions for these cases, but it must be the concern of the Legislature to make appropriate amendments and not for a court of law to discharge the legislative functions in the garb of interpreting the section. At the same time, it must also be pointed out that the consequence of the literal interpretation does not affect

any party very seriously. In a case where the tenant has never paid the rent at all, the landlord can realise the same by getting a decree in a properly constituted suit for the purpose. If the fair rent has been fixed at a lower rate than that "at which it was last paid", the only consequence of not making the deposit under section 11A of the Act will be the striking off the defence. The amount directed to be deposited under section 11A cannot be realised by execution and, therefore, there is no inherent repugnancy between the interpretation I am putting on section 11A and any other provision of the Act including section 4. What section 11A is trying to achieve is to maintain the *status quo* in regard to the rate under the pains of rejection of the written statement. No substantial rights are being dealt with. I, therefore, hold that the observation of the Full Bench in paragraph 25(*b*) of the judgment in *Mahabir Ram* v. *S. S. Prasad*(1) to the effect that the order passed under section 11A of the Act is subject to variation, so as to make it consistant with the fair rent fixed by the Controller, is not correctly made, and the decisions of this Court following the above observation including those in *Manoranjan Nath Patra* v. *Kashi Prasad Sah*(2) and *Sashdhar Das* v. *Harihar Prasad*(3) are also not correct. I agree with the view taken in *S. M. Khalil* v. *Akhauri Sitaram*(4). As a result, I find that there is no error in the impugned order directing the petition to deposit the rent at the rate of Rs. 200 per month.

11. The Civil Revision application must, therefore, be dismissed, but I would not make any order as to costs.

K. B. N. SINGH, C. J.—I agree with the view expressed by my learned brother. In the case of *Mahabir Ram* (supra), the question involved was the correctness of the decision in the case of *Chaturbhuj Mistry* v. *Jagan Ram*(5). It was held in that case that if the defence in regard to ejectment was struck out in accordance with the provisions of section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, that would also include the defendants' plea against the plaintiffs' title and asserting their own title. This decision in *Chaturbhuj Mistry's* case was overruled by the Full Bench in *Mahabir Ram's* case. The question posed before us in the present case was not a matter at issue in *Mahabir Ram's* case. Neither section 4 of the

(1) (1968) A.I.R. (Pat.) 415.
(2) (1974) B.L.O.R. 140.
(3) (1978) B B.C.J. 401.
(4) (1958) A.I.R. (Pat.) 108
(5) (1967) B.L.J.R. 44.

Act nor the decision in the case of *S. M. Khalil* v. *A. Sitaram*(1), which has been approved by my learned brother, was noticed in the case of *Mahabir Ram* (supra). It was decided in the case of *S. M. Khalil* that the only enquiry which a Court should make while disposing of an application under section 11A of the Act is as to what was the rent which was last paid by the tenant and the quantum of arrears of rent according to the rate of rent last paid by the tenant. Therefore, the principle enunciated by Tarkeshwar Nath, J., who delivered the judgment of the Full Bench in *Mahabir Ram's* case, to the effect that an order passed under section 11A of the Act, determining as to what was the rate of rent last paid and as to what amount of rent was in arrear, is subject to variation inasmuch as the House Controller may determine that the fair rent of the house is some what different, in my opinion, was not, strictly speaking, germane to the point at issue in that case.

SHAMBHU PRASAD SINGH, J.—I regret my inability to agree with my learned brother L. M. Sharma, J. that the civil revision application be dismissed, that the decisions in *Sashdhar Das* v. *Harihar Prasad and others*(2) aud in *Manoranjan Nath Patra* v. *Kashi Prasad Sah and another*(3) are not correct and that the observation in the case of *Mahabir Ram* v. *Shiva Shankar Prasad*(4) to the effect that the order passed under section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter referred to as 'the Act') is subject to variation so as to make it consistent with the fair rent fixed by the Controller was not correctly made. I may add here that the question arising for decision in this case has lost much of its importance and may be of academic value only, for the Act has ceased to be in force from 31st of March, 1976 *vide* section 1(3) unless it is re-enacted.

2. The facts of the case have been stated in the judgment of my learned brother L. M. Sharma, J. and it is not necessary to repeat them The question arising for decision in the case undoubtedly is dependent on the interpretation of section 11A of the Act, but I find it difficult to accede to the view that the expression "at such rate as may be determined" must mean determination of "rent at a rate at which it was last paid". The language of the section is not so plain and unambiguous that it admits of only one interpretation as given to it by Sharma, J. The section, according to me, can be very well

(1) (1958) A.I.R. (Pat.) 203
(2) (1973) B.B.C.J. 401
(3) (1974) B.L.J.R. 140
(4) A.I.R. (Pat.) 415, F.B.

interpreted to mean, rather should be interpreted to mean, that in his application for deposit of rent month by month in future as well as of the arrears the landlord can claim rent only at a rate at which it was last paid, but the court may order for the deposit of rent month by month for future and arrears of rent at such rate as may be determined by it. Determination by the court here need not necessarily mean that the court should take upon itself the obligation of fixing a fair rent (under the Act that can be fixed by the Controller only), but where there is a dispute between the landlord and the tenant as to the rate at which rent was last paid or as to the legality of rate of rent as claimed by the landlord though rent was last paid at such rate on the ground that fair rent for the building has been determined by the Controller or that the landlord has illegally increased the rent, the court should go into that question and determine the rate of rent at which it is to be deposited month by month in future and at which the arrears of rent are also to be calculated. It is significant to note that a literal interpretation of the section will not entitle the landlord to claim arrears of rent at a rate at which rent was last paid nor even assuming that the interpretation put by my learned brother Sharma, J. on the expression "at such rate as may be determined" that it must mean determination of rate at which rent was last paid is correct, will entitle the court to order for deposit of arrears of rent at such rate. I say so, for neither in the first part of the clause nor in the second part thereof the expression "arrears of rent" can be said to have been qualified by "rent at a rate at which it was last paid" and "at such rate as may be determined" respectively. The landlord cannot claim arrears of rent as he likes. He can claim only that much arrears of rent to which he may be legally entitled and the court can order for deposit of only such arrears of rent. However, if there is a dispute between the landlord and the tenant as to the amount of arrears of rent, that has to be determined by the court though the section on the plain reading of it does not authorise the court to do so. Now can it be said that the court can order for deposit of rent at two rates, one at which it is to be deposited month by month for future and another at which arrears of rent are to be deposited? I am of the view that though the language of the section is ambiguous the landlord cannot claim arrears of rent at a rate higher than at which rent was last paid and the court cannot order for deposit of arrears of rent at a rate at which it is not lawfullly payable and the rate for both must be the same.

3. I have examined the question in a little detail to illustrate that we are not dealing here with some provision of law which is unambiguous. It is well established that while interpreting provisions of

law which do admit of more than one meaning it is bounden duty of the court to adopt the meaning which will avoid injustice and not to adopt the meaning which will do injustice [*Hill* v. *East and West India Dock Co.* : (1884) 9 Appeal Cases 448] or, in other words, if the language is capable of more than one interpretation, one ought to discard the more natural meaning if it leads to an unreasonable result and adopt the interpretation which leads to a reasonable practical result [*Gill* v. *Donald Humber Stone and Co. Ltd.* : (1963) 1 W. L. R. 929]. It is also well established rule of interpretation that every clause of a statute should be construed with references to the context and other clauses in the Act, so as, as far as possible, to make a consistent enactment of the whole statute [*Canada Sugar Refining Co.* v. *R.* : (1898) Appeal Cases 735]. Lord Justice Denning in *Magor R. D. C.* v. *New port Corporation*(1) in his dissenting judgment has said :—

> "We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

This view of Lord Justice Denning though did not prevail in that case and was not accepted even in some later decisions of English court, the Law Commission of England in their paper on the Interpretation of Statute Law (Law Commission no. 21 of 1969 at page 32) accepted it as correct.

4. Now, let us examine the question as to what interpretation should be given to section 11A of the Act keeping in view the rules of interpretation as enunciated above and with reference to other provisions of the Act. Section 4 of the Act makes it unlawful for any landlord notwithstanding anything contained in any agreement or law to the contrary, to increase, or claim any increase in, the rent which is payable for the time being, in respect of any building except in accordance with the provisions of the Act. Emphasis was put by learned counsel appearing for the opposite party on the words "rent which is payable for the time being" and it was contended that this shows that the rent can be increased by consent of the parties, in other words, by contract. Obviously there is no substance in this contention, for the section itself expressly says that the landlord cannot increase the rent in spite of "any agreement to the contrary". The expression "rent

(1) (1950) 2 All Eng. law Rep. 1226

which is payable for the time being" therefore, only means rent as originally agreed upon between the parties or increased or decreased in accordance with the provisions of the Act. Section 5 provides for determination of fair rent by the Controller either at the instance of the landlord or the tenant in respect of a building in occupation of a tenant. Section 6 provides for determination of fair rent of the building not in occupation of tenants on the application of the landlord or a prospective tenant. Section 7 lays down that fair rent once fixed can be re determined only in certain cases as mentioned in that section. Section 8(1) enumerates matters which are to be considered in determining fair rent. According to sub-section (2) of section 8, when the fair rent of the building has been determined or re-determined, any sum in excess or short of such fair rent paid, whether before or after the date appointed by the Controller under sub-section (3), in respect of occupation for any period after such date shall, in case of excess, be refunded to the person by whom it was paid or at the option of such person be otherwise adjusted and, in case of shortage, be realised by the landlord as arrears of rent from the tenant. Sub-section (3) of section 8 lays down that in every case in which the Controller determines the fair rent of a building, he shall appoint a date with effect from which the fair rent so determined or re-determined shall take effect. Section 8A provides that in certain cases the landlord or the tenant will be entitled to claim increase or decrease in the fair rent of a building determined or re-determined. Section 11(1) povides for grounds on which a tenant may be evicted. The tenant cannot be evicted on grounds other than those mentioned in section 11(1). Clause (*d*) of section 11(1) which states one of the grounds for eviction reads as follows :—

> "Where the amount of two months' rent lawfully payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with section 13."

It is manifest that a tenant can be evicted under this clause only if he is in arrears for two months' rent lawfully payable. He cannot be evicted if he is in arrears for two months' rent at the rate of rent last paid though it is not lawfully payable at that rate. If the landlord while instituting a suit for eviction also claims arrears of rent he can claim only such arrears of rent which is lawfully payable by the tenant.

In such a suit if the landlord makes an application under section 11A of the Act a question arises—can he claim arrears of rent at the rate rent was last paid though he has claimed arrears of rent at a lower rate in the suit, for that was the rate of rent lawfully payable? The answer, in my, opinion, obviously will be in the negative. As observed earlier, the landlord also cannot get an order from the court for deposit of rent month by month in future at another rate and of arrears of rent at another rate. Section 11A, therefore, if it has to be given a sensible meaning with reference to and consistent with other provisions of the Act, has to be interpreted that the tenant can be asked to deposit rent under section 11A only at a rate which is lawfully payable. It will be an over simplification of the matter to say that since the expression "lawfully payable" has not been used in section 11A, the tenant can be asked to deposit rent month by month for the future as well as arrears at the rate of rent last paid even if that was not lawfully payable.

5. The general rule is that in discussing the meaning of provision of a statute which is unambiguous the debates which took place in the legislature should not be referred to, but in the recent past there has been a departure from the said rule. In *Beswick* v. *Beswick*(1). Lord Rid spoke in approval of the said rule, but in the very same year in *warner* v. *Metropolitan Police Commissioner*(2) the same learned Lord Justice thought that there was "room for exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or another". In *Sashdhar Das's* case, while interpreting section 11A, I quoted *in extenso* portion of debates in the Bihar Legislative Assembly when section 11A was added to the Act. The purpose behind the introduction of section 11A, as appears from the debate, was that as a suit for eviction before a civil court was likely to take time provision was made for payment by the tenant to the landlord all the arrears of rent and rent becoming due during that period. The intention never was that the tenant should be made to pay to the landlord rent at a rate which could not be lawfully claimed by the landlord. If an unscrupulous landlord by coercion or other unlawful means makes the tenant pay rent at a rate higher than what is lawfully payable and thereafter does not accept rent from him and institutes a suit under section 11A of the Act, as interpreted by my learned brother Sharma, J., he will be entitled to get deposited rent month by month for the future as well as arrears of rent at that rate. It may be useful

(1) (1968) A.C. 58.
(2) (1968) W.L.R. 1303.

to refer here to section 20(1) of the Act which lays down that if any person contravenes any of the provisions of this Act, he shall except as otherwise provided in section 14, be punishable with imprisonment for a term which may extend to two years or with fine or with both. Section 14 provides that the tenant is entitled to obtain a receipt from the landlord of the rent paid by him and in case the landlord without reasonable cause fails to deliver the tenant a receipt, he shall be liable to pay fine not exceeding double the amount of rent so paid. In cases of contravention of provisions of the Act other than section 14, the landlord becomes punishable with imprisonment and fine as provided in section 20(1). He can be so punished even for contravention of section 4 of the Act by increasing or claiming an increase in the rent which is payable for the time being. "payable for the time being" in section 4 must mean "lawfully payable" in view of the recent decision of the Supreme Court in *New Delhi Municipal Committee* v. *Kalu Ram and another*(1) which held that the expression "payable" in section 7 of the Public Premises Eviction of Unauthorised Occupants Act, 1958—a Delhi Act—must be interpreted to mean "legally recoverable" and to exclude any amount of rent barred by law of limitation (I shall refer to this decision again at a later stage). It is not necessary to give further reasons for the view taken in the proceeding sentence. In *Sashdhar Das's* case I also emphasised that while section 4 of the Act starts with "Notwithstanding anything contained in any agreement or law to the contrary" and section 11 with "Notwithstanding anything contained in any contract or law to the contrary", section 11A does not contain any such provision and, therefore, section 11A has to be read subject to sections 4 and 11 and, therefore, the expression "last paid" in section 11A should be interpreted to mean "lawfully last paid". If any other interpretation is given to the words that will create many anomalies and will lead to unreasonable results. Some of these anomalies have alreay been pointed out earlier.

6. A reference has already been made to section 20 of the Act and it has been observed in the preceding paragraph that if a landlord increases the rent or claims any increase therein he will be contravening section 4 and thus will make himself liable to be punished under section 20 of the Act. It can very well be said that in claiming, under section 11A of the Act, rent which is not lawfully payable though it is at the rate at which the rent was last paid, the landlord will be contravening section 4 and will make himself liable to be punished under section 20 and the court in allowing such a claim of the landlord

(1) (1976) A.I.R. (S.C.) 1687.

will be assisting him in committing an offence. In my opinion, such an interpretation should not be given to section 11A as to aid the landlord in committing an offence. To avoid such an anomalous position it becomes duty of the court to interpret the expression "last paid" in section 11A as "lawfully last paid". Such an interpretation also removes the anomalies pointed out in paragraph 10 of the judgment of my learned brother L. M. Sharma, J. where he has observed—"There does appear to be a lacuna in the section inasmuch as it does not make provisions for these cases, but it must be the concern of the legislature to make appropriate amendments and not for a court of law to discharge the legislative functions in the garb of interpreting the section". He has observed in that paragraph that the consequence of the literal interpretation as put by him on section 11A does not affect any party very seriously, for in a case where fair rent has been fixed at a lower rate than that at which it was last paid the only consequence of not making the deposit under section 11A of the Act will be the striking off the defence and the amount directed to be deposited under section 11A cannot be realised by execution. With greatest respect I venture to point out that he has omitted to take into account that striking off the defence of the tenant will make him liable to eviction from the house and in many cases he may not get a shelter for some time or at least may have to pay much higher rent for a new house which he may be able to find out for himself.

7. The case of *New Delhi Municipal Committee* v. *Kalu Ram and another*(1), a reference to which has already been made earlier, in my opinion, is an authority to support the view taken by me that the expression "last paid" should be construed to mean "lawfully last paid". If the word "payable" in section 7 of the Public Premises Eviction of Unauthorised Occupants Act could be interpreted by the Supreme Court to mean "legally recoverable" there can be no objection in interpreting the expression "last paid" in section 11A to mean "Lawfully last paid". The various aspects of the matter which have been considered by me in the cases of *Sashdhar Das* and *Manoranjan Nath Patra* and in the preceding paragraphs of this judgment were not raised before the Bench which heard and decided the case of *S. M. Khalil and another* v. *Akhauri Sitaram and another*(2). Had all these aspects of the matter been raised before that Bench, perhaps, the Bench may have come to the same decision to which I have come. As it appears from the judgment of that case much emphasis was laid

(1) (1976) A.I.R. (S.C.) 1637.
(2) (1958) A.I.R. (Pat.) 103.

on behalf of the tenant that determining the rate of rent under section 11A the court was empowered to make an enquiry into the question of fair rent. It was rightly held, if I say so with respect, in that case that under section 11A of the Act the court was not empowered to make an enquiry into the question of fair rent. Fair rent, according to the provisions of the Act as they stand now, can be determined or re-determined by the Controller and not by the court. But if the fair rent has been determined or re-determined the court must take that into consideration while determining the rate of rent under section 11A of the Act as held in *Mahabir Ram's* case. However, the observation "The only enquiry which the court should make is as to what was the rent which was last paid by the tenant-defendant and what was the quantum of arrears of rent according to the rate of rent which was actually paid last" in *S. M. Khalil's* case, in my opinion, was not correctly made. To that extent the case was wrongly decided.

8. For the reasons aforesaid the court below could not have directed the tenant-petitioner to deposit rent month by month in future or arrears of rent at a rate higher than Rs. 160 per month. The tenant-petitioner was also entitled to claim a set off of the excess rent paid by him. Accordingly I would allow the civil revision application with a direction to the court below to refix the amount which is to be deposited by the petitioner month by month in future and also the arrears of rent if any in the light of observations made above. It may be open to the petitioner to make submissions before the court below as to effect of the fact that the Act has ceased to be in force from 1st of April, 1976. There will be no order as to costs.

SARWAR ALI, J.—All canons of construction have one aim in view to discern the legislative intent. But to speak of the legislative intent is not quite accurate. What we do attempt to fathom is the intention as disclosed by the words used.

2. We, therefore, took the word used by the legislature—they being the medium of communication between the draftsman and the Court of construction.

3. To get at the legislative intent certain rules of interpretation has been involved. Such rules being no more than aids to construction presumptions or pointers. One law has not as yet authoritatively established any complete hierachy among the canons of interpretation.

Yet, judicial decisions establish that where the language employed is clear, unambiguous and capable of only one meaning full effect must be given to the language employed. Consideration of hardships, inconvenience, injustice and the like play no part in such a situation. But where the words are capable of more than one meaning, where it is possible to interpret them both in a wide as also a narrow sense (and in certain other situations), other rules of interpretation have a definite role to play. Then the primary or literal rule yields to other canons of interpretation. We then look to the context, to arrive at the true meaning. As Viscount Simond said :—

> "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

(*Attorney-General* v. *H. R. H. Prince Ernest Augustus of Hanover*-1957AC. 436 at 461).

4. L. M. Sharma, J. is of the view that the language of section 11A is clear and the meaning is plain. The words used are capable of one and only meaning and thus full effect must be given to the words used. This, if I may say, with respect, it is quite an understandable approach.

5. S. P. Singh, J. on the other hand is of the view that words are capable of more than one meaning. To interpret the words literally would lead to anomaly and contradiction. It is one of those cases where restricted meaning should be ascribed to the words used by the legislature. This again, if I may say so with respect, is equally understandable approach.

6. After some vaccilation, I have finally come to the view that approach approved by S. P. Singh, J. should be adopted. The route through which I have come to this conclusion, being somewhat different I must now indicate my reasons.

7. The crucial words in section 11A are "rent at a rate at which it was last paid". The expression "last paid" deals with a factual situation and is not dependent on legal liability. Even if it be said that there is no ambiguity in the expression "last paid" and the same is not capable of several meanings, dealing as it does with a state of fact, I am of the view that the word "rent" is at least capable of more than one meaning.

8. "Rent" has not been defined in the Act. Rent is, of course, capable of a wide meaning as "Rent (Redditus) is the compensation or retribution for the lands (or property) demised" (Woodfall Landlord and Tenant Vol. 1 Page 297—1968 Edition) 'Rent' has, however, been used by the legislature in a narrow sense as well. For instance in Act 8 of 1885 rent has been defined as "whatever is *lawfully payable* or deliverable in money or kind by a tenant to his landlord on account of use or occupation of land held by the tenant". It cannot be thus said that "rent" has a fixed and unchangeable meaning, or that whenever the legislature uses the word "rent" it is only in the wide concept the word is capable of.

9. If I am right in thinking that the word "rent", undefined as it is in the Act, is capable of wide as also a restricted import, it is legitimate to examine whether the legislature was using the word rent in its wide meaning or in a limited sense.

10. In my view the word "rent" has to be interpreted as legal rent or lawful rent. My reasons are these :

It is one of the well recognised rule of construction that the meaning of the words used in a statute has to be ascertained by referring of the whole Act. One section may affect the construction of another or to quote the language of Abbot C. J., in *R. V. Hall*(1) :—

> "The meaning of ordinary words used in the Acts of Parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained."

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(1) (1922) 1 B. and C. 123, 136

11. Section 4 of the Act reads—

> "Notwithstanding anything contained in any agreement or law to the contrary, it shall not be lawful for any landlord to increase, or claim any increase in, the rent which is payable for the time being, in respect of any building except in accordance with the provisions of this Act."

The legislature, therefore, does not recognise as legal and valid increase in rent during the continuance of the same tenancy. The word rent in section 11A must be interpreted in this context. "The Court", said Upjohn L J. "should be especially astute to prevent the Commission of an unlawful act" *Boulling* v. *Association of Cinematograph, Television & Allied Technicians*(1). To interpret "rent" in its widest sense would mean, in view of section 4 of the Act, recognition of an unlawful act. Not only that the Court's seal & sanction would be put on even on unlawful enhancement of rent. Looking from another angle, "a man may not take advantage of his own wrong" (per Flectcher Moulton, L.J. in *Kish* v. *Taylor*(2). To interpret the word rent from the point of view of fact-situation would, in some cases, mean allowing a landlord to take advantage of his own wrong. These reasons, in my view are sufficient to induce the court to interpret the crucial word". In Bonam Partem" in its lawful and rightful sense. I would accordingly interpret 'rent' to mean legal or lawful rent.

12. There is yet another reason leading to the same conclusion. In section 11A the word "rent" has again been used, where the Court has to find out what is the 'arrears of rent', and to direct deposit thereof. The expression "arrears of rent", in my opinion, must mean such rent as is lawfully payable. It would, in my view, be not right to hold that although the arrears were not lawfully payable the same could be directed to be deposited.

13. If the expression 'arrears of rent" means, as it does in my opinion, lawfully payable rent, the same meaning must be ascribed to the words used in earlier part of the section. The word 'rent' there means legal rent or lawful rent. In so interpreting, I hope, I have not, to borrow the language of Denning, M. R., changed the texture of which the Act is woven but have only tried to iron out the creases.

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(1) (1964) 1 W.L.R. 807,843.
(2) (1911) 1 K.B. 625, 634.

14. I must now refer again to section 4 of the Act. It prohibits enhancement of rent during the continuance of the same tenancy. But where a new contract is, with the consent of all the parties concerned, substituted for one that had already been made, the section, in my opinion, is not applicable. It is well settled that the parties to an original contract can by mutual agreement enter into a new contract in substitution of the old one See *Union of India* v. *Kishorilal Gupta & Bros.*(1). Thus where the original contract is put an end to, and a new *valid contract* is substituted for the old contract, the section has no application. Whether there is in this sense novation of a contract depends on the facts of each case.

15. In the instant case the Court below has not examined the question whether the alleged enhancement was in contravention of section 4 of the Act, or in other words whether it was during the continuance of the original tenancy that the enhancement of rent had been made, or whether there was a new contract between the parties in substitution of the old contract.

16. I would, for the reasons discussed, allow this Civil revision application and direct determination of the question whether the enhancement of rent was in contravention of section 4 of the Act. If the Court comes to the conclusion that the enhancement was in contravention of section 4 aforesaid it should pass orders as indicated by S. P Singh, J. If, however, it comes to the conclusion that there was novation of contract in the sense explained, the Court should pass suitable orders directing deposit of rent month by month as also arrears of rent in the light of its finding. On remand it would also be open to the Court to consider the effect of the position that the Act has ceased to be in force from 1st of April, 1976. I too would not make any order as to costs.

B. S. SINHA, J.—I agree with my learned brother, L. M. Sharma J.

ORDER

In consonance with the views of the majority, the Civil Revision Application is dismissed, but without costs.

R.D.

Application dismissed.

(1) (1960) 1 S.C.R. 493.

FULL BENCH.

Before K. B. N. Singh C. J., Shambhu Prasad Singh and Uday Sinha, JJ.

1977

May, 19.

PHULENA THAKUR AND ORS*

v.

DEVI THAKUR & ORS.

Code of Criminal Procedure, 1898 (*Central Act no. V of* 1898), *sections* 145 *and* 146 (1)—*scope of—reference under section* 146(1) *to Civil Court—Magistrate not drawing up statement of facts—competency of—reference, whether without jurisdiction—section* 145(1)—*proceeding initiation of, by Magistrate—section* 145(4)—*passing of final order by Magistrate—reference under section* 146(1)—*a stage between section* 145(1) *and section* 145(4)—*Magistrate, whether seized of the proceeding from the date of its initiation till its conclusion—Civil Court—jurisdiction, of—whether of advising possession—Civil Court sending back the records to the Magistrate as the reference did not conform with the requirement laid down in section* 146(1)—*on receipt of the records, Magistrate proceeding and passing the final order—legality of—parties taking chance of success, whether can be allowed to impeach the final order after the verdict went against them—final order of the Magistrate, whether without jurisdiction.*

The reference to a Civil Court by a Magistrate, under section 146 Code of Criminal Procedure, 1898, is founded on the assumption that the Magistrate is unable to decide as to which of the parties was in possession of the subject in dispute. The matter of attachment and drawing up statements of facts of the case are not obligatory or mandatory. A Magistrate is required to draw statement of the facts of the case, but that is not the foundation of the jurisdiction either of a Magistrate or of a Civil Court.

*Criminal Revision no. 918 of 1969. Against an order of Mr. S. S. Sinha, Honorary Magistrate, First Class, Motihari, dated the 3rd of February, 1969.

Held, that, it is manifest, that the reference by the Magistrate to the Civil Court in the instant case was a competent one. The reference to Civil Court may have been irregular but it was certainly not without jurisdiction.

Shreedhar Thakur & Ors. v. *Kesho Sao & Ors.*(1) approved *State of Bihar* v. *Hari Mishra & Anr.*(2); *Mithla Saran Singh & Anr.* v. *Nihora Singh & Ors.*(3); *Imrit Rai & Ors.* v. *Jayanand Prasad & Ors.*(4), held does not lay the correct law.

A proceeding under section 145 of the Code of Criminal Procedure, 1898, occurring an Chapter XII, comes into being with the initiation of a proceeding under sub-section (1) and terminates with a final order in terms of sub-section (4). The reference to the Civil Court in terms of section 146 is a stage between these two termini. A Magistrate being in control of these two points in the journey of a proceeding under section 145 of the Code must be held to be seized of the proceeding from the date it is drawn up till its conclusion.

The provision in regard to dropping of attachment contained in the proviso to section 146(1) gives a clear indication that the proceeding always remains tied to the apron strings of a Magistrate although he has forwarded the record of the proceeding to a Civil Court. The proviso to section 146(1) empowers the Magistrate who has attached the subject of dispute to withdraw the attachment on satisfaction that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute. Although the record is with the Civil Court it has no jurisdiction to withdraw the attachment. It has no jurisdiction to decide whether the apprehension of the breach of the peace persists or not The Civil Court has a limited jurisdiction of advising possession to the Magistrate, who was fountain-head of the proceeding.

Where a Magistrate referred a case to the Civil Court in terms of section 146(1) of the Code and a Civil Court disposed of the reference by returning back the records observing "this disposes of the reference for the time being" as according to him the reference did not fulfil the requirements laid down in section 146(1) of the Code.

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(1) (1962) A.I.R. (Pat.) 468.
(2) (1965) A.I.R. (Pat.) 411.
(3) (1970) A.I.R. (Pat.) 97.
(4) (1970) P.L.J.R. 698

Held, that so far as the Civil Court was concerned, the reference had been disposed of. In that view of the matter, it was open to the Magistrate either to send back the records to the Civil Court afresh after drawing up statement of the facts of the case or to decide the question of possession for himself if he considered himself able to decide that question. The fact that one Magistrate had considered himself unable to decide the question of possession could not have rendered all successive Magistrates incapable of deciding the question of possession. The inability to decide the question of possession can have reference only to a particular Magistrate and not to all Magistrates in general.

Where after the case was referred back by the Civil Court to the Magistrate for a proper reference and the Magistrate proceeded and passed the final order under section 145 of the Code;

Held, that the parties having taken the chance of success cannot be allowed to impeach the final order after the verdict has gone against the party. The order of he Civil Court referring back the case to the Magistrate and the ultimate decision of the Magistrate could at the highest be characterised as irregular, but they were certainly not without jurisdiction.

Shib Narayan Das & Ors. v. *Satyadeo Prasad & Ors.*(1); *Ramswaroop Singh & Ors.* v. *Biso Singh & Ors.*(2) and *Ramsanehi Singh* v. *Dharamraj Singh & Ors.*(3), approved.

The United Commercial Bank Ltd. v. *Their Workmen*(4); *Kiran Singh & Ors.* v. *Chaman Paswan & Ors.*(5) and *Bengal Coal Company Ltd.* v. *Chairman Central Government Industrial Tribunal & Ors.*(6), distinguished.

Application by first party to the proceeding.

The facts of the case material to this report are set out in the judgment of Uday Sinha, J.

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(1) (1963) A.I.R. (Pat.) 144.
(2) (1970) B.L.J.R. 1207.
(3) (1974) B.B.C.J. 715.
(4) (1951) A.I.R. (S.C.) 230.
(5) (1954) A.I.R. (S.C.) 340.
(6) (1962) B.L.J.R. 681.

Messrs Prabha Shankar Mishra, Rajendra Prasad Singh and *Ganesh Prasad Singh*, for the petitioners.

Messrs J. K. Prasad, B. N. Agrawal and *Rajendra Kishore Prasad*, for the opposite party.

UDAY SINHA, J.—This application in revision by the first party is directed against the final order passed in a proceeding under section 145 of the Code of Criminal Procedure 1898 (hereinafter referred to as 'the Code') in respect of lands described in the notice to the proceeding. S. A. Hussain, J. referred it to a Division Bench to be heard along with Criminal Revision no. 1811 of 1969, which had already been ordered to be placed before a Division Bench earlier. Thereafter, this application and Criminal Revision no. 1811 of 1969 were listed for hearing before a Division Bench. Anwar Ahmad and B. D. Singh, JJ. after hearing counsel for the parties, being of the view that there seemed to be a direct conflict between two Bench decisions of this Court, namely, *Shreedhar Thakur and others* v. *Kesho Sao and others*(1) and *State of Bihar* v. *Hari Mishra and another*(2), ordered that the two applications be placed before Hon'ble the Chief Justice for finally settling the law laid down in the two decisions. That is how the matter was referred by the Chief Justice to the present Full Bench. Criminal Revision no. 1811 of 1969 became incompetent, as the sole petitioner died and no one prayed to be added as petitioner in his place. It was, therefore, dismissed as incompetent by order dated 28th April 1977, passed in that case.

2. Before considering the points arising in the case, it would be useful to set out a chronology of events. On 17th November 1963 a proceeding under section 144 of the Code was drawn up between the parties. Before the proceeding under section 144 could come to a conclusion, the learned Magistrate drew up a proceeding under section 145 of the Code in respect of the same lands and the lands in dispute were attached in terms of section 145(4) of the Code. After the proceeding had been drawn up, third and fourth parties to the proceeding were also added parties to the proceeding. The learned Magistrate who was in seisin of the case finding himself unable to decide which of the parties was in possession of the subject of dispute, forwarded the record of the proceeding to a Civil Court to decide any and which of the parties was in possession of the subject of dispute on

(1) (1962) A.I.R. (Pat.) 468.
(2) (1965) A.I.R. (Pat.) 411.

the date of the order. On receipt of the record the Civil Court finding that the proceeding had not been signed by the learned Magistrate sent back the case record to the learned Magistrate for his signature. The learned Magistrate, therefore, signed the proceeding on 28th March 1966 and returned the record to the Munsif, Motihari. A separate ordersheet was started by the Munsif, the ordersheet of the Civil Court dated 11th January 1967 shows that the District Judge transferred the case to the file of First Additional Munsif for finding in regard to possession. On 7th August 1967 the learned First Additional Munsif, Motihari being of the view that the reference to Civil Court, not being in terms of the provisions of section 146(1) of the Code was incompetent, returned back the record to the Court of the Magistrate, First Class for drawing up a proper reference. The order of the learned Additional Munsif is in the following terms :—

> "2nd and 4th party files hazari. Perused the reference order dated 18th February 1965. It appears that neither the facts of the case of both the parties have been recited even briefly nor the evidence adduced by the parties including the affidavits has been considered by the learned Magistrate at all. As such the reference does not fulfil the requirements laid down in section 146(1) of the Cr. P. C. As such the reference order does not clothe the Civil Court with the jurisdiction to answer the reference. As such it is humbly recommended to the Magistrate that a proper reference be drawn up by him and then the record may be sent to me for the disposal. *This disposes of the reference for the time being.*"

The case was placed before the learned Magistrate on 25th August 1967 on which date he issued notice to the parties to appear before him on 14th September 1967. On 18th December 1967 the case was transferred to the file of Shri S. S. Sinha, Honorary Magistrate, First Class for hearing. On 7th February 1968 Mossamat Jokhani was added as 5th party to the proceeding by the learned Magistrate. While the matter was pending before the learned Honorary Magistrate, a petition was filed by third and fourth parties to the proceeding on 12th October 1968 which was to the effect that they had compromised the case and that the fourth party was in possession of the lands in dispute. The case was ordered to be put up for hearing on 12th November 1968. Parties were heard on 12th November 1968 and 21st November 1968. The first party prayed for time for making their submissions. Time

was granted only for that day. The case was to be put up on 30th November 1968. The second, fourth and fifth parties appeared and the first party (petitioners) chose to absent themselves. Final order was ultimately passed by the learned Magistrate on 3rd February 1969 by which he declared the fourth party to be in possession of the lands in dispute. Being aggrieved by the order of the learned Magistrate the petitioners (first party) moved this Court in revision for setting aside the order of the learned Magistrate.

3. The first point urged on behalf of the petitioners was that the order of the learned Magistrate dated 18th February 1965 referring the case to Civil Court was a competent and valid reference and, therefore, the Civil Court alone had the jurisdiction to decide which of the parties was in possession of the lands in dispute. By the same process of reasonings it was contended that the Civil Court having jurisdiction to decide the question of possession, the jurisdiction of the Criminal Court came to an end and the Civil Court could not be divested of the jurisdiction and obligation of finding possession over the lands in dispute.

4. Thus whether the reference by the learned Magistrate to the Civil Court was competent or not in the instant case assumes importance. This point came up for consideration in *Shreedhar Thakur* (Supra) and *State of Bihar* v. *Hari Mishra* (Supra). In *Shreedhar Thakur's* case a Division Bench of Sahai and Untwalia, JJ. was of the view that in terms of section 146(1) of the Code a Magistrate could make a reference to a Civil Court (*i*) if he was of the opinion that none of the parties was in possession of the subject of dispute on the date of the proceeding, or (*ii*) if he was unable to decide which of them was then in such possession. Their Lordships observed that the Magistrate had not made any attempt whatsoever to consider or discuss the evidence in order to find whether one or the other party was in possession or none of the parties was in possessoin. It was also observed that a Magistrate cannot take recourse to section 146(1) merely for the purpose of shifting his own responsibility and it was only when either of the contingencies mentioned in the sub-section arose that he could refer the case to the Civil Court. Their Lordship, therefore, expressed their strong disapproval of the way in which the Magistrate had referred the case under section 146 to the Civil Court. But it is noteworthy that in spite of the infirmity alluded to by Sahai, J., with whom Untwalia, J. concurred, it was held that the reference could not be held to be incompetent merely for that reason. To emphasize the verdict

of their Lordships I cannot do better than to quote what their Lordships observed which is as follows :—

> "I must therefore, express my strong disapproval of the way in which the Magistrate referred the present case under section 146 to the Civil Court; *but I am unable to hold that the reference is incompetent merely for that reason.*"

While the decision of the Bench presided over by Sahai, J. laid down that the reference could not be held to be incompetent, a subsequent Division Bench presided over by Anant Singh, J. in *State of Bihar* v. *Hari Mishra* (Supra) took the view that a reference to a Civil Court was incompetent where the learned Magistrate had not made any serious effort to find possession and where he had not drawn up statement of the facts of the case. There cannot be any doubt that there is an apparent conflict of views in the two decisions. It is noteworthy that Anant Singh, J. referred to the case of *Shreedhar Thakur* (Supra) and accepted it as laying down a correct law but held that the reference to Civil Court without drawing up statement of the facts of the case was incompetent. His Lordship Anant Singh, J. quoted the following sentences from Shreedhar Thakur's case (Supra) :—

> "A Magistrate cannot take recourse to section 146(1) merely for the purpose of shifting his own responsibility It is only when either of the two contingencies mentioned in the sub-section arises that he can refer the case to the Civil Court."

While Anant Singh, J. referred to and accepted the above dicta lost sight of the concluding sentence in the decision of *Shreedhar Thakur*, quoted earlier, where Sahai, J. explicitly refused to hold that the reference was incompetent merely because the Magistrate had not made sincere effort to find which of the parties was in possession. Probably the attention of Anant Singh, J. was not drawn to the observation of Sahai, J., quoted earlier. The obligation of the Magistrate to draw up statement of the facts of the case cannot be held to be mandatory. The reference to a Civil Court by a Magistrate, is founded on the assumption that the former is unable to decide as to which of the parties was in possession of the subject of dispute. The matter of attachment and drawing up statement of the facts of the case are not obligatory or mandatory. A Magistrate is required to draw up

statement of the facts of the case, but that is not the foundation of the jurisdiction either of a Magistrate or of a Civil Court.

5. It is true that Sahai, J. in *Shreedhar Thakur's* case (Supra) held the reference by the Magistrate to the Civil Court as incompetent and illegal. But that was on the ground that the subject of dispute was not ascertainable either from the proceeding or the finding of the Civil Court. In his view, the subject of dispute mentioned in the proceeding was altogether vague. His Lordship's conclusion that the reference was incompetent on the ground of the proceeding being vague and not being clearly ascertainable was quite different from any conclusion about the incompetency of the reference for failure to draw up statement of the facts of the case. I am in complete agreement with the view of Sahai, J., with respect, laid down in *Shreedhar Thakur's* case (Supra). I am unable to hold that failure to draw up statement of the facts of the case will render the reference incompetent. In that view of the matter, the view of Anant Singh, J., in *State of Bihar* v. *Hari Mishra* (Supra), A.I.R. 1970 Patna, 97 (*Mithila Saran Singh and another* v. *Nihora Singh and others*) and 1970 P.L.J.R. 696 (*Imrit Rai and others* v. *Jayanand Prasad and others*) did not lay down the correct law. It is manifest, therefore, that the reference by the learned Magistrate to the Civil Court in the instant case was a competent one, as contended by Mr. Prabha Shankar Mishra on behalf of the petitioners. The reference to Civil Court may have been irregular but it was certainly not without jurisdiction.

6. Having concurred in the first leg of the submission of Mr. Mishra, it is difficult to go with him any further. It was contended by him that after the reference, the Civil Court was seized of the whole matter and the Criminal Court ceased to have any jurisdiction over the proceeding and, therefore, the Civil Court could not have referred back the proceeding to the Criminal Court which in turn had no jurisdiction to dispose of the proceeding finally. According to learned counsel for the petitioners, the learned Magistrate was obliged to refer back the proceeding to Civil Court after drawing up a statement of the facts of the case. The first question in this connection which crops up is whether the Magistrate was divested of jurisdiction over the proceeding drawn up by him or not. I regret, I am unable to accede to the submission of Mr. Mishra in this behalf. In my view, the proceeding remains a criminal proceeding. The Magistrate is at all times seized of the matters and has jurisdiction over the proceedings. The judisdiction to decide which of the parties is in possession of the lands in

dispute is always with the Magistrate. The function of the Civil Court is only advisory. A Magistrate only sends the record not the case, to a Civil Court for a finding in regard to possession. The Civil Court is not clothed with the jurisdiction to pass final orders in terms of section 145 of the Code. I shall presently set out the reasons for the conclusion to which I have arrived.

7. It should be appreciated that a proceeding under section 145 of the Code occurring in Chapter XII comes into being with the initiation of a proceeding under sub-section (1) and terminates with a final order in terms of sub-section (4). The reference to the Civil Court in terms of section 146 is a stage between these two termini. A Magistrate being in control of these two points in the journey of a proceeding under section 145 of the Code must be held to be seized of the proceeding from the date it is drawn up till its conclusion. Any other interpretation would create incongruity and absurdity. If the proposition enunciated by Mr. Mishra were to be accepted as correct, it would lead to a situation where a Civil Court would be in a position to prevent a Magistrate from concluding the proceeding with utmost despatch. That in my view, was not the intention of the Parliament. Such an interpretation would be defeating the intention of the law makers, who with a view to expeditious disposal of such disputes provided for concluding an inquiry as far as may be practicable within a period of two months. For the same reason the Civil Court was injoined to send back its findings within three months. Can it be suggested by any stretch of reasoning that if the Civil Court kept on hibernating on the record for umpteen number of years, the Magistrate would have no jurisdiction to recall the reference and decide the matter in controversy himself. In my view, such a suggestion would create absurd results and defeat the central purpose of a proceeding under section 145 of the Code. Mr. Mishra for the petitioners sought to repel this view by urging that the remedy in the case of such a recalcitrant Civil Court would be only by either of the parties moving the High Court in its revisional jurisdiction under section 115 of the Code of Civil Procedure. In my view an application under section 115 of the Code of Civil Procedure would be no answer to the problem for the simple reason that the Civil Court would not have had passed any order which could be revised by a High Court. In such a situation the proceeding would remain in doldrums.

8. Further, there are various provisions in sections 145 and 146 of the Code which support the view that a Magistrate always retains

jurisdiction over the proceeding drawn up by him although it may have been referred to a Civil Court for a finding on possession. The provision in regard to dropping of attachment contained in the proviso to section 146(1) gives a clear indication that the proceeding always remains tied to the apron strings of a Magistrate although he has forwarded the record of the proceeding to a Civil Court. The proviso to section 146(1) empowers the Magistrate who has attached the subject of dispute to withdraw the attachment on satisfaction that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute. If the Magistrate had no control over the proceeding, referred to Civil Court, how on earth could he withdraw the attachment. It should be mentioned that although the record is with the Civil Court, it has no jurisdiction to withdraw the attachment. It has no jurisdiction to decide whether the apprehension of breach of the peace persists or not. The Civil Court has the limited jurisdiction of advising possession to the Magistrate, who was fountain-head of the proceeding. Further, the provisions of section 145(5) provide another indication of the conclusion that the Magistrate retains jurisdiction over the proceeding despite the reference to the Civil Court. Section 145(5) of the Code reads as follows :—

> "(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final."

There need be no doubt that section 145(5) of the Code clothes a Magistrate with jurisdiction to cancel the order drawing up the proceeding on satisfaction that no dispute which may give rise to apprehension of breach of the peace exists or existed. After reference to Civil Court if a Magistrate ceases to have any jurisdiction over the proceeding, section 145(5) would be rendered absolutely nugatory. It would not be possible for the learned Magistrate to cancel the proceeding although he was satisfied that no dispute giving rise to the apprehension of breach of the peace existed. The confusion in regard to the nature of the jurisdiction of the Civil Court stems from the failure to appreciate the true nature of a proceeding under section 145 of the Code. The

primary purpose of a proceeding under section 145 of the Code is to prevent apprehension of breach of the peace. The finding in regard to possession, although not incidental, is secondary. If a Civil Court having entered upon the reference was entitled to disregard the Criminal Court and proceed to find possession, section 145(5) might create incongruous situations. To illustrate, the enormity of the incongruity a situation may be visualised where there is an apprehension of breach of the peace between two parties on account of possession over an immoveable property. A Magistrate after drawing up a proceeding under section 145 of the Code refers the case to Civil Court, finding himself unable to find possession. While the records are before the Civil Court, the lands in dispute are acquired by the State Government and both the parties to the proceeding are deprived of possession over the disputed lands. The matter having been brought to the knowledge of the Criminal Court, the Magistrate finding that no apprehension on account of dispute over possession exists, cancells the proceeding as empowered by section 145(5) of the Code. Can it be urged by any process of reasoning that the Civil Court being independent of the Magistrate is still bound to find possession of either of the parties to the original proceeding. In my view, certainly not. If the Civil Court proceeded to find possession oblivious of the fact that the proceeding had been cancelled by the Magistrate, as would happen if the submission on behalf of the petitioners were to be taken to its logical conclusion, the result woud be that although the proceeding had been cancelled, the Magistrate would have on his hand a finding of a Civil Court holding X or Y to be in possession of the lands in dispute. In that situation, the Magistrate would be unable to act in terms of section 146(1B) which lays down that on receipt of the finding, the Magistrate shall proceed to dispose of the proceeding in conformity with the decision of the Civil Court. If he proceeded to comply with this provision the result would be that the proceeding having been cancelled, the Magistrate would thereafter be obliged to declare possession of the party found in possession by the Civil Court. In my view, it would be an absurd situation. The Code could not have visualised such absurd results from the provisions contained in sections 145 and 146 of the Code.

9. Learned counsel for the petitioners sought to counter the above view by urging that the fact that a Magistrate was empowered by the statute to withdraw the attachment in terms of section 146(1) proviso or to cancel the proceeding in terms of section 145(5) itself shows that

but for those provisions a Magistrate would not have any control over the subject matter of dispute. I regret, I am unable to accede to this submission. That would be missing *woods* for the *trees*. Those provisions give a clear inkling that a Magistrate never loses seisin of the proceeding although for a time the records may be with the Civil Court.

10. Learned counsel for the petitioners drew inspiration and placed reliance upon the observations of the Supreme Court in paragraph 5 in *Ram Chandra Aggrawal and another* v. *State of U. P. and another*(1). In my view, the Supreme Court case can be of no assistance to the petitioners. The point for consideration in that case was entirely different. The point for consideration for the Supreme Court was whether a District Judge has jurisdiction under section 24 of the Code of Civil Procedure to transfer a reference made by a Magistrate to a particular Civil Court under section 146 of the Code to another Civil Court. It must be held, as observed by the Supreme Court, that the proceeding before the Civil Court partakes the character of a civil proceeding, but that is quite different from laying down that the Magistrate having referred the case to Civil Court ceases to have any jurisdiction over the proceeding. When the matter is before a Civil Court it is certainly before a court subordinate to a District Judge and, therefore, the District Judge would have full jurisdiction to transfer the reference from one Civil Court to another. A decision on the question whether the proceeding before the Civil Court is a civil proceeding or a criminal proceeding is not conclusive of the matter. Even if the proceeding is in Civil Court, it is so only for a limited purpose for the simple reason that the Civil Court cannot pass final orders. It can only advise the Magistrate by a finding. In my view, therefore, the Supreme Court case is of no assistance to the petitioners. For the reasons stated the contention urged on behalf of the petitioners that the learned Munsif, in the instant case, was bound to decide the question of possession and that the Criminal Court ceased to have any jurisdiction over the proceeding is manifestly untenable and must be rejected.

11. According to learned counsel for the petitioners, after the Civil Court had sent back the records to the learned Magistrate, the

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(1) (1966) A.I.R. (S.C.) 1888

Magistrate should have sent back the records to the Civil Court after drawing up the statement of the facts of the case and that it was obligatory on his part to do so. According to Mr. Mishra, the Magistrate had no jurisdiction to decide the question of possession and dispose of the proceeding for himself. I regret, I find no substance in this submission. The Civil Court disposed of the reference by returning back the records as will be obvious from the order of the learned Munsif dated 7th August 1967. The concluding line of that order, quoted in paragraph 2 earlier says: "this disposes of the reference for the time being". Thus so far as the Civil Court was concerned, the reference had been disposed of. In that view of the matter, it was open to the Magistrate either to send back the records to the Civil Court afresh after drawing up statement of the facts of the case or to decide the question of possession for himself if he considered himself able to decide that question. The fact that one Magistrate had considered himself unable to decide the question of possession could not have rendered all successive Magistrates incapable of deciding the question of possession. The inability to decide the question of possession can have reference only to a particular Magistrate and not to all Magistrates in general. To use the expression of G. N. Prasad, J. in *Mithila Saran Singh and another* v. *Nihora Singh and others*(1) the reference to the Civil Court proved abortive. I am in complete agreement with the view of G. N. Prasad, J. in that decision which is to the following effect:—

> "To put it differently, the purported reference to the Civil Court made under the order of the 30th December 1963 was abortive and it wholly failed to deprive the learned Magistrate of his normal jurisdiction to decide the proceeding in accordance with section 145(4), Criminal Procedure Code and to transfer that jurisdiction to the Civil Court under section 146(1) of the Code It is also well known that the primary jurisdiction in such matters is that of the Magistrate. That is why, even after the Civil Court returns its finding to the Magistrate, it is the duty of the Magistrate to pass the final order in the proceeding in the light of the decision of the Civil Court. Therefore, since the order of the 30th December, 1963

(1) (1970) A. I. R. (Pat.) 97

could not validly confer any jurisdiction on the Civil Court to record its decision, the conclusion must inevitably be that the jurisdiction over the proceeding continued in the Magistrate as before. Therefore, after the receipt of the record from the Civil Court, it was for the Magistrate to decide as to what course he ought to adopt, whether to make a proper reference to the Civil Court under section 146(1) of the Code or to proceed under section 145(4)."

I am not prepared however to hold the decision as laying down the correct law in so far as it lays down that reference to Civil Court by a Magistrate without statement of the facts of the case is incompetent. It is not necessary to consider *Imrit Rai's* case (Supra) because it proceeded upon an assumption that a reference to the Civil Court without drawing up statement of the facts of the case was incompetent, a view which I do not consider to be correct.

12. It was then contended on behalf of the petitioners that the learned Magistrate while deciding the question of possession could not have looked into materials which had been filed before the learned Munsif on the ground that the affidavits had not been sworn before the learned Magistrate, who decided the case. It was stated that all the affidavits on behalf of the fourth party had been sworn before the Munsif to whom the records had been sent for finding possession. Reliance was placed on the case of *Chhotan Prasad Singh and others* v. *Hari Dusadh and others*(1) which approved the decision of this Court and laid down that affidavits not sworn before Magistrates who were never in seisin of the case could not be looked into in a proceeding under section 145 of the Code. In my view, the Supreme Court case does not lend any support to the case of the petitioners. Learned counsel was not right in stating that the affidavits on behalf of the fourth party had been filed before the learned Munsif. I have looked into the affidavits myself and I find that none of them were sworn or filed before the Civil Court. Rather, they were all sworn before Magistrates who were at some or the other in seisin of the case. In fact, the affidavits of Kailash Missir and Gorakh Dubey had been sworn before Shri S. S. Sinha, Magistrate himself who decided the proceeding. In that view

(1) (1977) A.I.R. (S.C.) 407.

of the matter the submission urged on behalf of the petitioners is devoid of any substance and must, therefore, be rejected.

13. Lastly, learned counsel for the petitioners contended that the learned Magistrate had failed to consider the affidavits of Binda Raut, Bhanu Kahar, Jagarnath Hazara and Janak Rai *alias* Janak Sah on behalf of the first party. The affidavit of Janak Sah could not have been of any avail to the first party for the simple reason that he has no land in village Chailaha where the lands in dispute were situated. He only negatived the contention of the second party, but did not do so in regard to the claim of the fourth party. It is true that the fourth party had been added as party to the proceeding after the affidavit of Janak Sah had been sworn, but that circumstance, however, cannot improve the position of the first party. It was incumbent upon the first party to file fresh affidavit denying the possession of the fourth party. Bhanu Mahto claimed to be a servant of the family of Nandlall Thakur. In that capacity he testified that the vendors of the first party were *Bhaginas* of Nandlall Thakur and that after the latter's death they came in possession of his entire estate. He also deposed that they sold a portion of the heritage to the members of the first party and that the vendors were still in possession of the remaining portion. It will be appreciated that he claimed himself to be a servant of Nandlall Thakur and not of Babunand, Sakal and Baijnath Singh (vendors of the first party), *Bhaginas* of Nandlall Thakur. Specially remarkable is the fact that this witness did not even state that the first party were in possession of the land in dispute. Like Janak Sah he also did not deny specifically the claim of the fourth party to be in possession of the lands in dispute. The next witness Jagarnath Hazara also did not state that the first party were in possession of the lands in dispute after their purchase. He also has not stated anything to show his competency to depose about the possession of *Bhaginas* of Nandlall Thakur. In that view of the matter, even if the affidavits of Janak Sah, Bhanu Kahar and Jagarnath Hazra had been considered, the order of the learned Magistrate could not have been any different. I have failed to find the affidavit of Binda Raut on the record. In that view of the matter, this submission as well on behalf of the first party is without any substance and must be rejected.

14. There is yet another aspect of the matter. The petitioners never objected to the case being heard by the Magistrate and took their chance of success. The case having been decided against them,

they cannot now be permitted to turn round and challenge the final order of the learned Magistrate as being without jurisdiction A similar view was taken in *Shibnarayan Das and others* v. *Satyadeo Prasad and others*(1), *Ramswaroop Singh and others* v. *Biso Singh and others*(2), and *Ram Sanehi Singh* v. *Dharamraj Singh and others*(3). In all these cases it has been held successively that the parties having taken the chance of success cannot be allowed to impeach the final order after the verdict has gone against a party. In this connection, learned counsel for the petitioners submitted that no amount of acquiescence or waiver of the parties can clothe a Court with jurisdiction if it does not possess that jurisdiction. He placed reliance upon the cases of *The United Commercial Bank Ltd.* v. *Their Workmen*(4), *Kiran Singh and others* v. *Chaman Paswan and others*(5) and *Bengal Coal Company Ltd.* v. *Chairman, Central Government Industrial Tribunal and others* (6). In my view, the law laid down by these cases have no application for the simple reason that the order of the learned Magistrate was certainly not without jurisdiction. The order of the learned Munsif referring back the case to the learned Magistrate and the ultimate decision of the learned Magistrate could at the highest be characterised as irregular, but they were certainly not without jurisdiction. In that view of the matter, I am unable to hold that the learned Magistrate had no jurisdiction to pass the final order.

15. For the reasons, stated above, I find no merit in this application which is accordingly dismissed.

K. B. N. Singh, C. J.—I agree.

Shambhu Prasad Singh, J.—I agree and would like to make a few observations of my own. The conflict between the two Bench decisions of this Court in *Shridhar Thakur's* case and *Hari Mishra's* case is on the point that whereas according to the decision in *Shridhar Thakur's*

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(1) (1943) A I.R. (Pat.) 44.
(2) (1970) B.L.J.R. 1207.
(3) (1974) B.B C.J. 715.
(4) (1951) A.I.R. (S.C.) 230.
(5) (1954) A.I.R. (S.C.) 340.
(6) (1962) B.L.J.R. 681.

case, a reference by a Magistrate to Civil Court without making any attempt to consider and discuss evidence and recording any finding that he is unable to decide as to which of the party was in possession is merely irregular and not incompetent, according to the decision in *Hari Mishra's* case, the reference is incompetent and on such a reference the Civil Court does not get jurisdiction to decide the question of possession. I am in complete agreement with the views expressed by my learned brother Uday Sinha, J. that such a reference is merely improper or irregular and not incompetent or without jurisdiction and observation to that effect in *Hari Mishra's* case is not correct. The decision, however, in *Hari Mishra's* case setting aside and quashing the reference of the Magistrate is not wrong for in exercise of revisional jurisdiction this Court could go even into the question of propriety of any order and regularity of any proceeding of an inferior court. Both these decisions appear to have been considered in *Ram Sanehi Singh* v. *Dharamraj Singh and others*(1) wherein it has been held that such a reference by a Magistrate to the Civil Court if challenged at the initial stage may be set aside but if the parties do not take exception and allow the proceeding before the Civil Court to go on unchallenged and they take a chance, they cannot be allowed to challenge the final order. According to that decision, such a reference may not be in accordance with law but not without jurisdiction. *Ram Sanehi Singh's* decision has rightly been relied on by Uday Sinha, J. in holding that the petitioner having allowed the Magistrate to deal with the proceeding and deliver the order in the case after the reference was returned to him now cannot be permitted to challenge that order.

2. In *Hari Mishra's* case it was also held that it was not open to the Civil Cort to return back the reference to the Magistrate concerned even if it was not in accordance with law; the Civil Court could only bring the matter to the notice of the High Court or to the Magistrate without returning the reference. If the reference is incompetent or without jurisdiction as held in that decision, then the Civil Court cannot have jurisdiction to retain it. It will be proper on its part to return the reference and that observation in that decision also, according to me, is not correct on the reasonings of that case. However, even if the reference is not without jurisdiction as held by us, I do not think it can be held that it will not be open to the Civil Court to return the

(1) (1974) B.B.C.J. 715.

reference for getting the mistake rectified. In that decision it was also held that if the Civil Court without returning the reference brings to the notice of the Magistrate its opinion about the incompetent nature of such reference, the Magistrate may recall such reference if he accepts the Civil Court's opinion. My learned brother Uday Sinha, J. also appears to be of the opinion that even in cases where the Civil Court does not send any such information to the Magistrate but delays the disposal of the reference, it will be within the jurisdiction of the Magistrate to recall the reference and decide the controversy for himself. As such a point does not arise for decision in the case, I do not consider it necessary to express any opinion on that question.

Application dismissed.

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CODE OF CRIMINAL PROCEDURE, 1898—*contd.*

In spite of the dismissal of the complaint a Magistrate has jurisdiction to entertain a fresh complaint on the same facts though he will exercise this jurisdiction only in exceptional circumstances. There is no distinction in principle between entertaining a fresh complaint on the same facts and an order reviving the complaint which had been dismissed earlier. In the present case in the order dated 31st July, 1974 dismissing the complaint the expression "hence the final report is accepted, the protest-*cum*-complaint is dismissed" occurs after the sentence "None responds on behalf of the complainant". In the context and because of the use of the expression "hence" it is crystal clear that the learned Magistrate dismissed the complaint because of the non-appearance of the complainant. Though the learned Magistrate has referred to the report of the inquiring officer and the opinion expressed by him, the learned Magistrate does not appear to have based his decision of dismissal of complaint on the result of the enquiry; he has based it only on the absence of the complainant;

Held, that after the complainant had been examined on solemn affirmation and the report of an inquiry order under section 202 of the Code of Criminal Procedure received the learned Magistrate may not dismiss the complaint merely on the ground of absence of the complainant. He can dismiss the complaint only if after considering the statement on oath of the complainant and the result of the inquiry under section 202, he was of the opinion that there was no sufficient ground for proceeding. The order of the learned Magistrate dismissing the complaint, therefore, is an order which was manifestly erroneous or foolish and, therefore, a fresh complaint on the same facts could be entertained or the complaint could be revived in accordance with law.

Prior to the issue of process, the person complained against has no *locus standi* in the case It is well settled that the person complained against is not entitled to take any part in the inquiry under section 202 of the Code of Criminal Procedure. In these circumsfances, there was no necessity of hearing the person complained against before recalling the order dismissing the complaint. It is significant that under section 436 of the Code which empowered the High Court or the Sessions Judge to direct further inquiry both into any complaint which had been dismissed under section 203 or sub-section (3) of section 204 and into the case of any person accused of an offence who had been discharged made it obligatory for the court directing further inquiry to give an opportunity to the person who had been discharged why such direction should not be made but if did not make it obligatory on the High Court or the Sessions Judge to give the person complained against an opportunity of showing cause why further inquiry should not be directed into a complaint which had been dismissed under section 203. If, as is clear from the provisions of section 436 of the

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REVISIONAL CRIMINAL

Before Madan Mohan Prasad and Shivanugrah Narain, JJ.

INDRAJIT BAHADUR SINGH*
v.
THE STATE OF BIHAR & ANR.

1976

September, 3.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 202, 203 and 436—scope and applicability of—complaint-cum-protest petition—enquiry report submitted—absence of complainant on the date fixed—effect of—dismissal of complaint for default—Magistrate, whether and when can revive the complaint—revival of complaint without giving the accused an opportunity of being heard—principles of natural justice, whether violated—order stating that complaint is dismissed and the accused is discharged—meaning of.

Inspite of the dismissal of the complaint a Magistrate has jurisdiction to entertain a fresh complaint on the same facts though he will exercise this jurisdiction only in exceptional circumstances. There is no distinction in principle between entertaining a fresh complaint on the same facts and an order reviving the complaint which had been dismissed earlier. In the present case in the order, dated the 31st July 1974 dismissing the complaint the expression "hence the final report is accepted, the protest-cum-complaint is dismissed" occurs after the sentence "None responds on behalf of the complainant". In the context and because of the use of the expression "hence" it is crystal clear that the learned Magistrate dismissed the complaint because of the non-appearance of the complainant. Though the learned Magistrate has referred to the report of the inquiring officer and the opinion expressed by him, the learned Magistrate does not appear to have based his decision of dismissal of complaint on the result of the enquiry; he has based it only on the absence of the complainant.

Held, that after the complainant had been examined on solemn affirmation and the report of an inquiry order under section 202 of the

*Criminal Revision no. 1362 of 1974. Against an order of Mr. N. K. P. Sinha Chief Judicial Magistrate, Patna, dated the 2nd of August 1974.

Code of Criminal Procedure received the learned Magistrate may not dismiss the complaint merely on the ground of absence of the complainant. He can dismiss the complaint only if after considering the statement on oath of the complainant and the result of the inquiry under section 202, he was of the opinion that there was no sufficient ground for proceeding. The order of the learned Magistrate dismissing the complaint, therefore, is an order which was manifestly erroneous or foolish and, therefore, a fresh complaint on the same facts could be entertained or the complaint could be revived in accordance with law.

Prior to the issue of process, the person complained against has no *locus standi* in the case. It is well settled that the person complained against is not entitled to take any part in the inquiry under section 202 of the Code of Criminal Procedure. In these circumstances, there was no necessity of hearing the person complained against before recalling the over dismissing the complaint. It is significant that under section 436 of the Code which empowered the High Court or the Sessions Judge to direct further inquiry both into any complaint which had been dismissed under section 203 or sub-section (3) of section 204 and into the case of any person accused of an offence who had been discharged made it obligatory for the court directing further inquiry to give an opportunity to the person who had been discharged why such direction should not be made but it did not make it obligatory on the High Court or the Sessions Judge to give the person complained against an opportunity of showing cause why further inquiry should not be directed into a complaint which had been dismissed under section 203. If, as is clear from the provisions of section 436 of the old Code, there is no necessity of hearing the person complained against before setting aside the order of dismissal of complaint under section 203 even where the dismissal has been made after considering all relevant materials, there can be no necessity for affording an opportunity of being heard to the person complained against when the complaint was dismissed for default of appearance of the complainant.

Held, therefore, that in the instant case though in his order the learned Magistrate after stating that the complaint was dismissed went on to add "and the accused are discharged" it is obvious that the order was not an order discharging the accused within the meaning of the expression as used in section 436 for prior to issue of process there can be no order discharging the accused. The impugned order reviving the complaint is clearly an order setting aside the dismissal of the complaint and not an order discharging the accused.

Case laws discussed.

Application by the accused.

The facts of the case material to this report are set out in the judgment of S. Narain, J.

Messrs G. N. Singh, Suresh Prasad Singh and *M. M. Chaturvedi*, for the petitioner.

Messrs Nawal Kishore Prasad Sinha and *Sudhir Kumar Katariar*, for the opposite party.

SHIVANUGRAH NARAIN, J.—Petitioner Indrajit Bahadur Singh was at the relevant time an officer of Dena Bank Ltd., Patna while Sri Chandra Kant Pritam Lal Mehta, opposite party no. 2 was the Branch Manager thereof. On 18th June 1971 opposite party no. 2 sent a written report to the Officer-in-charge, Kotwali Police-station alleging that the petitioner had participated in the defalcation of two sums of Rs. 8,000 and Rs. 7,100 respectively which were withdrawn illegally from the Bank. In view of the contentions raised, it is not necessary to set out the allegations in any further detail. The police after investigation submitted what is to be popularly called a final report holding the allegations not proved. On behalf of opposite party no. 2 a protest petition was filed. On behalf of the petitioner a counter-petition was filed praying that the protest petition be rejected. By his order, dated the 22nd November 1972 the Subdivisional Magistrate, Patna saying that he would not accept the final report directed that the informant, meaning opposite party no. 2 should appear before the Court for the examination on solemn affirmation on 25th November 1972. On 25th November 1972 consequent upon that order the opposite party no. 2 (hereinafter called 'the complainant') was examined on solemn affirmation and the learned Magistrate after calling for the case diary, supervision note, etc., by his order, dated the 17th March 1973 directed Shri Lala Agam Prasad, Magistrate, First Class to hold judicial inquiry into the complaint. The inquiry report of the Magistrate Shri Lala Agam Prasad was put up before the learned Subdivisional Magistrate on 17th July 1974, who directed that the case be put up before the Chief Judicial Magistrate on 31st July 1974. On 31st July 1974 the complainant was absent and the Chief Judicial Magistrate, Patna before whom the case had come up passed the following order :—

> "Seen the report of the enquiring officer. He has reported that the complainant has failed to make out a *prima facie* case.

> Case called out several times. None responds on behalf of the complainant. Hence the final report is accepted, the protest-*cum*-complaint petition is dismissed, and the accused persons are discharged."

On 2nd August 1974 the complainant filed a petition alleging that inspite of his efforts the complainant's counsel or the counsel's clerk could not know about the date fixed in the case and, therefore, he could not appear on 31st July 1974 and that the inquiry report showing that no *prima facie* case had been made out was not correct and prayed that the order, dated the 31st July 1974 be recalled and the protest-*cum*-complaint petition be revived and heard on merits. Allowing this application on 2nd August 1974, the Chief Judicial Magistrate passed the following order :—

> "Complainant files a petition for recalling the order, dated the 31st July 1974 and reviving the protest-*cum*-complaint petition. Heard. In view of the ruling reported in A. I. R. 1962 Patna 316, the complaint petition should be revived as it was dismissed for default. Let the protest-*cum*-complaint petition be revived and be numbered as a complaint case and put up on 12th August 1974 for hearing on the petition against the report of the E. O."

The petitioner, the person complained against, being aggrieved by the aforesaid order, dated the 2nd August 1974 has come up in revision before this Court and prays that the aforesaid order, dated 2nd August 1974 reviving the complaint petition be quashed.

2. Mr. Gorakh Nath Singh, learned counsel for the petitioner first contended that the learned Chief Judicial Magistrate had no jurisdiction to recall the order, dated 31st July 1974 dismissing the complaint and to revive the complaint. This contention is plainly misconceived and is in the teeth of the decision of the Supreme Court in *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*(1). Kapur, J., who spoke for the majority of the Supreme Court in that case observed as follows :—

"An order of dismissal under section 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the

(1) 1962 A. I. R. (S. C.) 876.

same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced."

The aforesaid decision of the Supreme Court is, therefore, a clear authority for the proposition that in spite of the dismissal of a complaint a Magistrate has jurisdiction to entertain a fresh complaint on the same facts though he will exercise this jurisdiction only in exceptional circumstances. There is no distinction in principle between entertaining a fresh complaint on the same facts and an order reviving the complaint which had been dismissed earlier. That the Magistrate can in a proper case revive the complaint which had been dismissed earlier was specifically laid down by Das, J. (as he then was) who delivered the decision of bench in *Ram Narain Chaubey* v. *Panachand Jain*(1). Das, J. (as he then was) observed in that case as follows :—

"I do not think that the jurisdiction of the Magistrate necessarily depends on the filing of a fresh complaint; and the Magistrate has jurisdiction to revive the old complaint dismissed under section 203, Criminal Procedure Code."

A larger number of decisions were cited by Mr. Gorakh Nath Singh in support of his aforesaid contention, namely, (1) A. I. R. 1923 Patna 532 (*Gajo Chaudhary and another* v. *Debi Chaudhary and another*), (2) A. I. R. 1958 Patna 239 (*Rasik Tatma* v. *Bhagwat Tanti*), (3) A. I. R. 1967 Patna 309 (*Jyotish Kotwal and another* v. *Tanti Prosad Marwari and others*), (4) A. I. R. 1953 Allahabad 380 (*Sm. Shyama Devi v. Sadan Sawak*) and (5) A. I. R. 1949 Bombay 384 (*Hasanabai Sayaji Payagude* v. *Ananda Ganuji Payagude*). But as the law has been authoritatively laid down by the Supreme Court in clear and unequivocal terms, after a full consideration of the matter, I do not think it necessary to examine these decisions. The first contention must, therefore, fail.

3. Mr. Gorakh Nath Singh next contended that even assuming that the Magistrate had jurisdiction, this was not a fit case in which the

(1) 1949 A. I. R. (Pat.) 256.

jurisdiction to revive the complaint dismissed earlier should have been exercised. In my opinion, this contention is equally devoid of any substance. I have already set out the order dismissing the complaint and the order reviving the complaint. In the order, dated the 31st July 1974 dismissing the complaint, the expression "hence the final report is accepted, the protest-*cum*-complaint petition is dismissed" occurs after the sentence "None responds on behalf of the complainant" In the context and because of the use of the expression "hence", it is crystal clear that the learned Magistrate dismissed the complaint because of the non-appearance of the complainant. Though the learned Magistrate has referred to the report of the inquiring officer and the opinion expressed by him, the learned Magistrate does not appear to have based his decision of dismissal of complaint on the result of the inquiry; he has based it only on the absence of the complainant. In this connection, we should remember that the learned Magistrate himself construed his order, dated the 31st July 1974 as an order dismissing the complaint for default. In the order, dated the 2nd August 1974 he has stated—"In view of the ruling reported in A. I. R. 1962 Patna, 316, the complaint petition should be revived *as it was dismissed for default.*

4. Now after the complainant had been examined on solemn affirmation and the report of an inquiry order under section 202 of the Code of Criminal Procedure received the learned Magistrate may not dismiss the complaint merely on the ground of absence of the complainant. He can dismiss the complaint only if after considering the statement on oath of the complainant and the result of the inquiry under section 202, he was of the opinion that there was no sufficient ground for proceeding—*See* section 203 Cr. P. C. The order of the learned Magistrate, dated the 31st July 1974 dismissing the complaint, therefore, is an order which was manifestly erroneous or foolish and, therefore, a fresh complaint on the same facts could be entertained or the complaint could be revived in accordance with law laid down by the Supreme Court in the case referred to above. As I have stated earlier in the petition filed by the complainant on 2nd August 1974, he had alleged that he was unable to know that 31st July 1974 was the date fixed in the case in spite of enquiries by his agents. In these circumstances, if the Magistrate recalled his order dismissing the complaint, it must be held that the learned Magistrate was satisfied that the complainant had sufficient cause for not being present in Court when the case was called out on 31st July 1974.

5. The present case is on all fours with the decision of this Court in Criminal Revisions 2618 and 2622 of 1968 (*Keshab Prasad Bhagat* alias *Nepali Bhagat and others* v. *Ramnarain Choubey* alias *Ramnandan Choubey*) disposed of on the 14th April 1969 in which a learned single Judge of this Court G. N. Prasad, J. upheld an order of the Subdivisional Magistrate restoring a complaint which had been dismissed for default of appearance of the complainant. In that case his Lordship pointed out that "there are series of decisions on the point that the dismissal of a complaint under section 203 of the Code in default of the appearance of the complainant particularly in a warrant case, is no bar either to the revival of the complaint or to the entertainment of a second complaint on the same facts." The second contention of Mr. Singh must, therefore, also fail.

6. The last contention which Mr. Singh advanced before us is that the order of the learned Magistrate reviving the complaint is void, inasmuch as, it was passed in contravention of the principles of natural justice without giving the person complained against an opportunity of being heard for setting aside the order dismissing the complaint. Mr. Singh argues that after the complaint was dismissed a valuable right had accrued to the person complained against and as that right was being interfered with by the order reviving the complaint, he was entitled to be heard before such an order was passed. In my opinion, this contention is also misconceived. Prior to the issue of process, the person complained against has no *locus standi* in the case. It is well settled that the person complained against is not entitled to take any part in the inquiry under section 202 of the Code of Criminal Procedure *See* the decision of the Supreme Court in *Chandra Deo Singh* v. *Prokash Chandra Bose* alias *Chabi Bose and another*(1). In these circumstances, there was no necessity of hearing the person complained against before recalling the order dismissing the complaint. It is significant that section 436 of the Code of Criminal Procedure, 1898 which empowered the High Court or the Sessions Judge to direct further inquiry both into any complaint which had been dismissed under section 203 or sub-section (3) of section 204 and into the case of any person accused of an offence who had been discharged made it obligatory for the Court directing further inquiry to give an opportunity to the person who had been discharged why such direction should not be made but it did not make it obligatory on the High Court or the Sessions Judge to give the person complained against an opportunity of showing cause why further inquiry should not be directed into a complaint which had been dismissed under section 203.

(1) (1963) A. I. R. (S. C.) 1430.

Mr. Nawal Kishore Prasad Sinha, the learned Counsel for the opposite party rightly pointed out that if, as is clear from the provisions of section 436 of the old Code, there is no necessity of hearing the person complained against before setting aside the order of dismissal of complaint under section 203 even where the dismissal has been made after considering all relevant materials, there can be no necessity for affording an opportunity of being heard to the person complained against when the complaint was dismissed for default of appearance of the complainant. In the unreported decision of this Court to which I have just referred, G. N. Prasad, J. also held that "it was not at all necessary for the learned Subdivisional Magistrate to have given notice to the petitioners (meaning thereby the persons complained against) before deciding to restore the petition of complaint." Though in his order, dated the 31st July 1974 the learned Magistrate after stating that the complaint was dismissed went on to add "and the accused are discharged", it is obvious that the order was not an order discharging the accused within the meaning of the expression as used in section 436 Cr. P. C. for prior to issue of process there can be no order discharging the accused. The impugned order is clearly an order setting aside the dismissal of the complaint and not an order discharging the accused. The last contention of Mr. Singh must, therefore, also fail.

7. As the application must fail even if it is considered on merits and decided on the footing that the Code of Criminal Procedure, 1898 applies, it is not necessary to decide the preliminary objection raised on behalf of the opposite party that the present application must be governed by the Code of Criminal Procedure, 1973 and in view of the provisions of section 397(2) of the Code of Criminal Procedure, 1973, it is not maintainable because the impugned order, dated the 2nd August 1974 reviving the complaint is an interlocutory order against which no revision now lies.

8. I would accordingly dismiss the application.

MADAN MOHAN PRASAD, J.—I agree, subject to which I am going to state hereafter.

2. The point which I would like to add for the purpose of repelling the argument of the counsel for the petitioner that the order could not be recalled without giving a hearing to him, in view of the order passed

by the learned Magistrate discharging the petitioner is that in my view, that order did not amount to an order of discharge under any provisions of the Code other than section 173(3). From a reading of that section it would appear that when an accused had been released on his bail bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. In the present case, the final report was submitted wherein it was stated that the case was true, but there was no clue. The reporting officer further prayed that the accused might be discharged from the bail bond. It was this final report with which the Magistrate was dealing and his order, therefore, was one under section 173(3) of the Code. In that view of the matter, reliance on the meaning of the word 'discharged' in section 436 of the Code of Criminal Procedure (proviso) is misplaced. That refers to cases of discharge under other sections, e.g., sections 209 and 251A and not to discharge of bail bond under section 173(3) of the Code.

3. With regard to the application of the principles of natural justice, it is well settled that the principles of natural justice do not dictate giving a personal hearing to the person likely to be affected by the decision at any stage and in every circumstances. The question as to whether a personal hearing ought to be given has to be determined on the facts and the circumstances obtaining in each case. I have held so on good authority in the case of *Sm. Shivarani Kumari* v. *The President, Board of Secondary Education, Bihar and others*(1).

4. The question thus arises whether in the present case the principles of natural justice required a hearing to be given to the petitioner at the stage at which the Magistrate passed the impugned order. In the present case, the stage was much earlier to the summoning of the accused, and when he had no right to be heard. It must also be borne in mind that will have the right to be heard at a subsequent stage after he has been summoned, if at all, to take his trial. At this stage, therefore, even on the ground of principles of natural justice no hearing was necessary to be given to the accused. The argument is thus of no avail.

M. K. C.

Application dismissed.

(1) 1975 A. I. R. (Pat.) 12.

CIVIL WRIT JURISDICTION

Before Lalit Mohan Sharma and Govind Mohan Misra, JJ.

SRI VEENA CHANDRA & ORS.*

v.

THE MANAGEMENT OF THE VISHAWAMITRA PRESS & ORS.

1976

September, 3.

Industrial Disputes Act, 1947 (*Central Act no. XIV of* 1947), *section* 33C *sub-section* (5)—*filing of a single application in respect of any number of workmen employed under the same employer—legality of—provision of sub-section* (5) *not dependent on any rule being framed—operation of sub-section* (5) *not confined to application under sub-section* (1) *but also to application under sub-section* (2)—*Industrial Disputes* (*Bihar*) *Rules*, 1961—*Interpretation of Statutes—order passed in the notification under section* 33C(2), *whether effectively authorised Respondent no.* 2 *to dispose of the matter—order appointing K. N. S., presiding officer labour court, Muzaffarpur, as presiding officer labour court at Patna in addition to his duties—validity of.*

Sub-section (5) of section 33C of the Industrial disputes Act, 1947, unconditionally allows the filing of a single application in respect of any number of workmen employed under the same employer, but permits any rule to be framed either prescribing any procedure or modifying the provision or even depriving the parties the right to file a joint application. If such a rule is framed, it will override the provision of sub-section (5) of the section but so long there is no rule in existence, the applicants are entitled to file a single application as allowed by sub-section (5). The provision is not dependent on any rule being framed, it is only subject to any rule, if framed.

*Civil Writ Jurisdiction Case no. 1466 of 1973. In the matter of an application under Articles 226 and 227 of the Constitution of India.

The provision in sub-section (5) of section 33C of the Act, regarding a single application, cannot, for the purpose of any benefit capable of being computed in terms of money, apply at the stage contemplated in sub-section (4) of the section. Sub-section (5) in express terms applies not only to a case where a workman is entitled to receive any money, but also where he is entitled to any benefit capable of being computed in terms of money. The operation of sub-section (5) cannot, therefore, be confined to applications under sub-section (1) only. It is true that sub-section (2) does not mention specifically any application by the workman, but it must be assumed that by the very nature of the situation, an application is impliedly under contemplation. The party who can take advantage of the provision for reaping the benefits under an Award must be deemed to have a right to move the appropriate authority in this regard. The provision of sub-section (5), therefore, must apply to an application at this stage. Both sub-sections (1) and (2) have been similarly dealt with in sub-section (5) of the section for the question of maintainability of a joint application;

Held, that the labour court in the impugned order was not correct in dismissing the application of the writ-petitioners on the ground that there was a joint application on their behalf before it.

The language of Industrial Disputes Act and the Industrial Disputes (Bihar) Rules, 1961, does not admit of such vagueness which can permit a court of law to add words, which are not there. Besides, there does not appear to be any reason for adopting a rule of interpretation which would frustrate the decision of an authority given on a valid reference to the State Government after hearing the parties. The Industrial Disputes Act is a welfare statute and is aimed at ameliorating the economic position and improving working conditions of a working people. It is well-established that in interpreting the provisions of a welfare legislation, courts should adopt a beneficent rule of construction;

Held, that the appointment of Sri Kedar Nath Singh, Presiding Officer of Muzaffarpur Labour Court as Presiding Officer of Labour Court at Patna in addition to his existing duties, did not suffer from any defect on account of absence of a notification in the Official Gazette;

Held, further, that the order does not cut down or limit the functions of Sri Kedar Nath Singh as the Presiding Officer of the Patna Labour Court, instead, it is mentioned that he would also hear cases at Patna one or two days every week. The order of appointment of Sri Kedar Nath Singh as Presiding Officer of the Patna Labour Court was validly made and he was fully empowered to decide the case;

Held, also that the order passed in the notification under the provision of section 33C (2) of the Act effectively authorised respondent no. 2 to dispose of the matter in the instant case.

Case law discussed.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are set out in the judgment of L.. M. Sharma, J.

M/s. Anirudh Prasad Verma and *Karuna Nidhan Keshav*, for the petitioners.

M/s. T. K. Prasad, K. N. Gupta and *V. N. Sahay* and *M/s. R. B. Mahto (G. P. IV)* with *Harendra Prasad*, for the respondents.

LALIT MOHAN SHARMA, J.—In the present application under Articles 226 and 227 of the Constitution of India, the petitioners are challenging the order dated the 9th August, 1973, as contained in Annexure '11' to the writ application passed by the Presiding Officer, Labour Court, Patna, respondent no. 2 in the case.

2. The petitioners along with three other persons were workmen employed in the Vishwamitra Press, Respondent no. 1, an industrial establishment within the meaning of the Industrial Disputes Act (hereinafter referred to as 'the Act'). In 1957, they were dismissed by the management and in 1958 a reference was made by Respondent no. 3—State under section 10 of the Act to the Labour Court. Patna. Shri Ali Hassan was its Presiding Officer. In November, 1959, Shri Ali Hassan submitted his Award in favour of the management and the workmen challenged the same under Article 226 of the Constitution

before the High Court in M. J. C. 306 of 1960. The writ application was allowed on 9th November 1962 and the High Court passed an order remanding the case to the Labour Court. In the meantime, Shri Ali Hassan retired and, according to the case of the petitioners, Shri Kedarnath Singh, who was the Presiding Officer of the Labour Court at Muzaffarpur was appointed as the Presiding Officer of the Labour Court at Patna in addition to his duties at Muzaffarpur. The management, Respondent no. 1, challenges the appointment of Shri Kedarnath Singh. However, the case was taken up by Shri Singh in pursuance of the High Court's order and by his Award dated the 2nd May, 1964, he held that the dismissal order was illegal. Some of the workmen were held entitled to reinstatement as well as wages for the entire period, some others were entitled to reinstatement, but only portion of the back wages and the remaining workmen were held to be entitled to compensation only. The management, this time, came to the High Court in writ jurisdiction and the case was registered as M. J. C. 994 of 1964. The writ application was dismissed in limine on 3rd August 1964. On the management making an application, a certificate of fitness for appeal to the Supreme Court was granted, but as no appeal was actually lodged, leave was later on, cancelled. In the meantime, the management directed the workmen to join by certain orders passed in November and December, 1965, but none of them actually joined their posts. On the 2nd of August, 1966, the petitioners filed an application under section 33C (2) of the Act before the Labour Court for appropriate relief in terms of the Award. They, of course, could not and did not make any claim in regard to the period after they failed to join their posts. The application was registered as Misc. Case no. 3 of 1966. In the meantime, Shri Haribanshi Sahay was appointed Presiding Officer, Labour Court, Patna and had taken over charge from Shri Kedarnath Singh. Shri Sahay was succeeded by Shri S. S. Dayal, who by his order dated 17th July 1968 dismissed Misc. Case no. 3 of 1966 on the ground that the award of Shri Kedarnath Singh was without jurisdiction and inoperative. The petitioners challenged the judgment in C. W. J. C. 1044 of 1968. This application was allowed by the High Court on 13th January, 1971 and the matter was remanded with a direction that the Labour Court would determine all the contentions raised by the parties including any objection. The management, thereafter, filed a fresh application raising several objections. By the order impugned in the present case, Shri G. S. Verma, the next Presiding Officer of the Labour Court, again rejected the petitioner's application.

3. In view of the points raised on behalf of both the parties, only three of the objections raised in the court below are required to be stated.. They are:

(a) The application under section 33C (2) of the Act was not maintainable;

(b) The Award given by Shri Kedarnath Singh was without jurisdiction and, therefore, unenforceable in law;

(c) Shri G. S. Verma, the present Presiding Officer of the Labour Court was not legally authorised to deal with the applications under section 33C (2) of the Act;

4. Dealing with the third point mentioned above, the Respondent no. 2, who is admittedly the Presiding Officer of the Labour Court, Patna, held that by a notification dated 10th February, 1973, the Labour Court has been authorised to entertain and decide applications under section 33C(2) of the Act and he is, therefore, legally empowered to deal with the application. Both the other questions were decided against the petitioners and, as a result thereof, the application was dismissed.

5. The learned Counsel for the petitioners contended that the judgment of the Presiding Officer, so far it goes against the petitioners, is entirely illegal. A single application was filed on behalf of all the petitioners before the Labour Court and it was contended by the management that the application was not by workmen themselves. It was asserted that the petition had been filed by the General Secretary of the Bihar Working Journalists' Union. It is, however, admitted that on that application, there were signatures purporting to be in the hands of the petitioners. From the statement in paragraph 11 of the impugned order, it appears that the management did not accept the genuineness of the purported signatures of 13 or 14 of the workmen. One of them, namely Sukhdeo Singh did not accept his signature. The learned Counsel for the petitioners contended before us that all the signatures appearing on the application before the Labour Court are genuine and the statement of Sukhdeo was as a result of confusion. He also said that in view of the signatures on the application, it should be treated by them and the fact that the General Secretary of the Bihar Working Journalists' Union was also helping them, did not

render the application defective. Relying on sub-sections (2) and (5) of section 33C of the Act, it was further argued that a single application was maintainable. Unfortunately, however, Respondent no. 2 has not recorded his clear finding on the genuineness of the disputed signatures of the petitioners. It has been held that assuming in favour of the petitioners that the application was a joint one on behalf of all the petitioners, it was not maintainable inasmuch as a joint petition under sub-section (5) could not be filed, as no rules contemplated therein have been framed by the Bihar Government. The relevant portion of sub-section (1) of section 33C of the Act is as follows:

> "Where any money is due to a workman from an employer under a settlement or an Award or under the provisions of Chapter V-A, the workmen himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workmen, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue."

The learned Advocates appearing before us have made elaborate arguments on the question of interpretation of sub-sections (2) to (5) of section 33C of the Act, which are in the following terms:—

> "(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government.
>
> (3) For the purpose of computing the money value of a benefit, the Labour Court may, if it so thinks fit,

appoint a Commissioner who shall after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case;

(4) The decision of the Labour Court shall be forwarded by it to the appropriate Government and any amount found due by the Labour Court may be recovered in the manner provided for in sub-section (1)."

"(5) Where workmen employed under the same employer are entitled to receive from him any money or any benefit capable of being computed in terms of money, then, subject to such rules as may be made in this behalf, a single application for recovery of the amount due may be made on behalf of or in respect of any number of such workmen."

The words "subject to such rules as may be made in this behalf" have been referred to by Mr. T. K. Prasad, appearing for Respondent no. 1 with great emphasis. He argued that a joint application could be maintainable only after rules were framed in that regard. Admittedly, the Bihar Rules framed under the provisions of the Act are silent so far this matter is concerned. Respondent no. 2 has held that in absence of any rule permitting a single application, the provision of sub-section (5) cannot be availed of for filing such an application. Supporting this view, Mr. T. K. Prasad contended that the applicability of the relevant provision of sub-section (5) is dependant on a rule being framed permitting a single joint application. On a perusal of the language of sub-section (5), the argument does not appear to be sound. The sub-section unconditionally allows the filing of a single application, but permits any rule to be framed either prescribing any procedure or modifying the provision or even depriving the parties the right to file a joint application. If such a rule is framed, it will over-ride the provision of sub-section (5) but so long there is no rule in existence, the applicants are entitled to file a single application as allowed by sub-section (5). The provision is not dependant on any rule being framed, it is only *subject* to any rule, if framed. I, therefore, hold that the view taken by Respondent no. 2 on this point is entirely illegal and must be set aside.

6. The next question, however, arises as to whether the provisions of sub-section (5) of section 33C of the Act are applicable to an application under sub-section (2) of section 33C. Mr. T. K. Prasad urged that sub-section (5) is applicable only to an application under sub-section (1) and is not attracted to an application under sub-section (2). A joint application is contemplated "for the recovery of the amount due" and it is said that sub-section (2) could not be in contemplation. Under sub-section (1), an application can be made to the appropriate Government by a workman or by an authorised agent "for the recovery of the money due to him". So far as sub-section (2) is concerned, it entitles a workman to "receive from the employer any money or any benefit which is capable of being computed in terms of money". In case of a dispute as to the amount due, a Labour Court subject to any rule can decide the controversy. As mentioned in sub-section (3), the Labour Court may appoint a Commissioner for computing the money value of the benefit. The decision of the Labour Court in this regard has, under sub-section (4) to be forwarded to the appropriate Government and the amount may, thereafter, be recovered in accordance with the provisions of sub-section (1). It is contended by Mr. Prasad that only at this stage, the provision of sub-section (5) regarding single application can be applied.

7. The interpretation put by Mr. Prasad does not appear to be correct. After the Labour Court decides any question as to the amount of the money due or as to the amount at which the benefit under an Award should be computed, it has to forward its decision to the Government for recovery, and the word 'shall' in the sub-section indicates that the Labour Court has no discretion in the matter. The workman is not required to move the Court by filing an application. Under the statutory mandate itself, the Labour Court will have to act. It must, therefore, follow that the provision in sub-section (5) regarding a single application cannot for the purpose of any benefit capable of being computed in terms of money, apply at the stage contemplated in sub-section (4). The sub-section (5) in express terms applies not only to a case where a workman is entitled to receive any money, but also where he is entitled to any benefit capable of being computed in terms of money. The operation of the sub-section cannot, therefore, be confined to applications under sub-section (1) only. It is true that sub-section (2) does not mention specifically any application by the workman, but it must be assumed that by the very nature of the situation, an application is impliedly under contemplation. It is not

expected of the Labour Court to go on making a comprehensive enquiry as to whether any Award has remained unexecuted. It will have to depend upon the assistance of the interested parties in this regard. The party who can take advantage of the provision for reaping the benefits under an Award must be deemed to have a right to move the appropriate authority in this regard. The provision of sub-section (5), therefore, must apply to an application at this stage. Both the sub-sections (1) and (2) have been similarly dealt with in sub-section (5) for the question of maintainability of a joint application and I hold that the Labour Court in the impugned order was not correct in dismissing the application of the petitioners on the ground that there was a joint application on their behalf before it.

8. Mr. Prasad relied upon the decisions in *U. P. Electric Supply Co., Ltd.* v. *Meena Chatterji*(1), and *Yad Ram* v. *Labour Court, Delhi*(2). The question was whether on the death of a workman, who had made an application under section 6H(2) of the U. P. Industrial Disputes Act, similar to section 33C(2) of the Central Act, his heirs could be brought on the record by way of substitution. The Single Judge of the Allahabad High Court deciding the case held that the right was given to the workman alone and not to his heirs and assigns. The learned Judge reached the conclusion without any discussion on the point. A similar question arose before the Delhi High Court in *Yad Ram* v. *Labour Court* (*Supra.*) The Delhi High Court also took a similar view. This decision appears to be mainly founded on the Central rules framed under the Act which applied to Delhi. It has been admitted by the parties before us that there are no relevant rules applicable in Bihar. As has been observed earlier, the provisions of sub-section (2) are subject to any rules framed under the Act and it cannot, therefore, be suggested that the rules, if applicable, have no part to play in finding out the correct position. The decision of the Delhi Court based upon the rules applicable there, cannot be relevant in Bihar. Besides, it was also pointed out by the Delhi High Court that the Labour Court was not expected to go into the intricate question of title and succession which might arise on an application by the heirs of the deceased workman. This aspect of the matter is not applicable to the case before us where the benefit is to go to the workman himself who continues to be alive. In circumstances similar to those in cases before the Allahabad and Delhi High

(1) (1969) 36 F. J. R. 808.
(2) (1974) 45 F. J. R. 292.

Courts, the Bombay High Court in *Sitabi Naruna Pujari* v. *Auto Engineers*(1), took a contrary view. However, it is not necessary for me in this case to express any opinion as to whether the heirs of a deceased workman can file and continue an application under section 33C(2).

9. On behalf of the petitioners, it has not been argued before us that the application before the Labour Court had been filed by a duly authorised agent of the petitioners. The stand which the petitioners have taken is that they had personally joined in filing a single application. As pointed out above, there is no clear finding of the Labour Court on the factual aspect, but from the discussion in paragraph 11 of the judgment, it appears that it cannot be denied that the petitioners, excepting those whose signatures were challenged by the management, had in fact signed the application personally. The relief prayed for by them in the application cannot be refused on the erroneous view that a joint application was not maintainable. So far as the other petitioners are concerned, the question has to be decided by the court below, unless the matter can be settled finally by a decision on the other points. If, after a decision on all the three points, the writ application has to be allowed, the matter will have to be sent back to Respondent no. 2 again on remand. I am fully conscious of the fact that this is an old case which came to this Court earlier on several occasions and should not be prolonged any further, if possible; but in the circumstances, it cannot be helped.

10. The other finding recorded by Respondent no. 2 against the petitioners is that Shri Kedar Nath Singh was not legally appointed as the Presiding Officer of the Labour Court and, consequently, his Award being without jurisdiction is void. The argument which has prevailed before Respondent no. 2 is that for a valid appointment of a Presiding Officer of the Labour Court, it is essential that there should be a notification under sections 7 and 8 of the Act. On the retirement of Shri Ali Hassan, a vacancy arose in place of the Presiding Officer of the Labour Court at Patna and an order appointing Shri Kedar Nath Singh in that place was passed on the 28th August, 1962, as quoted in paragraph 13 of the impugned judgment, in the following terms:

"Muzaffarpur Shram Nyayalaya ke Pithasin Padadhikari Shri Kedar Nath Singh agle adesh tak apne kartavyon ka

(1) (1971) 40 F. J. R. 124.

atirikt Pithasin Padadhikari, Sharan Nyayalaya, Patna ka karya karne ke liya niyukt kiye jate hain. Unka Mukhyalaya Muzaffarpur hi rahega.

Pithasin Padadhikari, Shram Nyayalay, Muzaffarpur saptah mey do ek din Patna akar Shram Nyayalaya, Patna me mamley ki sunwai karenge."

The order stated that Shri Kedar Nath Singh, Presiding Officer of the Muzaffarpur Labour Court was being appointed in addition to his existing duties to function as the Presiding Officer of the Labour Court at Patna; his head office would be at Muzaffarpur; and that he would come to Patna for one or two days in a week and would hear the cases. The Respondent no. 2 has held that a notification of the appointment in the Official Gazette was not made and the omission is fatal. To appreciate the point, it is necessary to consider sections 7 and 8 of the Act. Sub-section (1) of section 7, which is in the following terms refers to the mode of constitution of a Labour Court :—

"7. *Labour Court.*—(1) The appropriate Government may by notification in the Official Gazette, constitute one or more Labour Courts for the adjudication of industrial dispute relating to any matter specified in the second Schedule and for performing such other functions as may be assigned to them under this Act."

As has been held in *East Indian Pharmaceutical Works, Ltd.* v. *G. S. Verma*(1), this sub-section is self-contained so far the constitution of the Labour Court is concerned. As soon as the notification under this sub-section is issued, a Labour Court is constituted. The Government may take time to appoint a person as the Presiding Officer, but that appointment cannot be held to be a part of the constitution of the Labour Court. Sub-section (2) says that a Labour Court shall consist of only one person and sub-section (3) lays down the qualification of the Presiding Officer. The language of section 7(1) would clearly show that it does not relate to the appointment of another person as the Presiding Officer, if a vacancy arises. This

(1) (1973) L. I. C. 1501.

matter is dealt with in section 8. There is no challenge to the valid constitution of the Patna Labour Court. If Shri Ali Hassan had continued in office, it is not suggested that he could not have dealt with the matter. The objection is to the appointment of Shri Kedar Nath Singh. In this context, the provision of section 8, quoted below, may be examined.

> "8. *Filling of vacancies.*—If, for any reason a vacancy (other than a temporary absence) occurs in the office of the Presiding Officer of a Labour Court, Tribunal or National Tribunal or in the office of the Chairman or any other member of a Board or Court, then, in the case of a National Tribunal, the Central Government and in any other case, the appropriate Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy, and the proceeding may be continued before the Labour Court, Tribunal, National Tribunal, Board or Court, as the case may be, from the stage at which the vacancy is filled."

It will be observed that unlike section 7, a notification in the Official Gazette is not required for appointment under section 8. Mr. Prasad, the learned Counsel, appearing for Respondent no. 3, referred to Rule 5 of the Industrial Disputes (Bihar) Rules, 1961 framed under section 38 of the Act, which is in the following terms:—

> "5. *Notification of appointment of Board, Court, Labour Court or Tribunal.*—Constitution of Board, Court, Labour Court or Tribunal and the appointment of persons to preside over such Board, Court or Tribunal or the appointment of persons to the office of Chairman, or any other member of the Board or Court shall be notified in the Bihar Gazette."

He argued that the requirement of notification of the appointment in the *Bihar Gazette*, as mentioned in the rule, has not been fulfilled and, for that reason, Shri Kedar Nath Singh must be held to be not a

legally appointed Presiding Officer of the Patna Labour Court. Although the Act itself has made a clear distinction between the constitution of a Labour Court and appointment of a Presiding Officer in a case of vacancy, the argument proceeds that there is no such distinction so far as the rules are concerned. On a perusal of the language of the rule, the contention does not appear to be correct. While the rule deals with the constitution of (*i*) Board, (*ii*) Court, (*iii*) Labour Court, and (*iv*) Tribunal, it excludes the Presiding Officer of a Labour Court, when it comes to deal with the appontment of the officers. The persons to preside over the Board, Court or Tribunal are clearly mentioned and the Presiding Officer of a Labour Court is omitted. Mr. Prisad urged that the word 'Court' in the second portion of the rule refers to 'Labour Court', but this does not appear to be correct. The terms 'Court' and 'Labour Court' are distinctly separable and refer to different authorities and cannot be confused with each other. The 'Court' is defined in section 2(*f*) of the Act as a Court of enquiry constituted under section 6 of the Act, while the 'Labour Court' is defined in section 2(*kka*) as one constituted under section 7. They function in different fields and the procedure, authority and jurisdiction are all separately dealt with in the Act. It is, therefore, not permissible to read the word 'Court' as meaning 'Labour Court'. Mr. Prasad argued that on a comparison of sections 5, 6 and 7, it will be seen that the term 'Presiding Officer' is applicable only to a Labour Court and not to a Court of Enquiry or Board and this suggests that when the latter portion of Rule 5 mentions the Presiding Officer of a Court, it must be understood to refer to the Presiding Officer of the Labour Court. There are several fallacies in this argument The rule 5 does not mention 'Presiding Officer'; the relevant portion of the rule mentions appointment of "*Persons to preside* over such Board, Court or Tribunal". (Emphasis is mine). The drafting of the rule is inartistic, but its meaning can be, nonetheless, understood without any difficulty. By the term 'persons to preside' is meant every person on the Board of Conciliation or the Industrial Tribunal. The plain grammatical meaning of rule 5 is free from any ambiguity and must, therefore, be interpreted accordingly and it does not refer to the appointment of the Presiding Officer of the Labour Court. Mr. Prasad urged that if sections 5, 6, 7 and 8 of the Act and Rule 5 of the Bihar Rules be interpreted in the light of the object of the legislature, they would lead to an inference in favour of the management. He said that there could not be any reason as to why in Rule 5, the Presiding Officer of the Labour Court

would be left out. It was suggested that the Government must have, while framing Rule 5, intended to include the Presiding Officer of the Labour Court also, but by an inadvertent omission, it has been left out. There are two difficulties in accepting the point of view of the employer-respondent. The language of the Act and the Rule does not, to my mind, admit of such vagueness which can permit a Court of law to add words, which are not there. Besides, there does not appear to be any reason for adopting a rule of interpretation, which would frustrate the decision of an authority given on a valid reference by the State Government after hearing the parties. The Industrial Disputes Act is a welfare statute and is aimed at ameliorating the economic position and improving working conditions of a working people. It is well established that in interpreting the provisions of a welfare legislation, Courts should adopt a beneficient rule of construction. I could, therefore, be reluctant to put an interpretation either on the statutory provisions or on the order of appointment of Shri Kedar Nath Singh, which would prejudice the rights and welfare of the workman or would render the Award a nullity. It is significant to mention in this regard that when Shri Kedar Nath Singh took up the hearing of the matter, his jurisdiction was not challenged by the employer. His Award was challenged by Respondent no. 3 by a writ application in M. J. C. 991 of 1964 and it is stated by Mr. Prasad that the point was taken there. The High Court, however, dismissed the case in limine. After considering all the relevant materials, held that the appointment of Shri Kedar Nath Singh did not suffer from any defect on account of absence of a notification in the Official Gazette.

11. Mr. Prasad further contended that the language of the order appointing Shri Kedar Nath Singh indicates that the appointment was not made under section 8. It was a case of casual filling up of the place of the Presiding Officer authorising Shri Kedar Nath Singh to do the day to day administrative work of the Patna Labour Court and he could not hear and decide cases. According to the learned Counsel, this amounted to an arrangement for the continuity of the Labour Court and its normal routine work. He emphasised on the fact that section 8 was not mentioned in the order of appointment, nor was the nature and duration of vacancy indicated. He has, however, not indicated any other section or any other provision of law under which the order of appointment could have been passed. So far as duration is concerned, section 8 excludes a temporary

absence of the Presiding Officer. Admittedly, Shri A. Hassan had retired and there was a substantive vacancy. The section does not require that the filling up must be on a permanent basis only. I, therefore, do not find any defect on these two points. I also do not agree that the order of appointment will not be effective in law unless the provision under which it is made is mentioned in the order itself. The order, in the present case, does not cut down or limit the functions of Shri Kedar Nath Singh as the Presiding Officer of the Patna Labour Court. Instead, it is mentioned that he would also hear the cases at Patna one or two days every week. Mr. Prasad relied upon the decisions in *The United Commercial Bank, Ltd.* v. *Their workmen*(1), *Fedders Lloyd Corporation (Pvt.), Ltd.* v. *Lt. Governor, Delhi through Under-Secretary (Labour) Delhi*(2) and *Blue Star Engineering Co. (Bombay) Private Ltd.* v. *The Labour Court*(3). In the case of *The United Commercial Bank, Ltd.* v. *Their Workmen*, Mr Chandra Shekhar Aiyar, one of the members of the Industrial Tribunal was nominated a member of the Indo-Pakistan Boundary Disputes Tribunal and his services ceased to be available. The other two members of the Industrial Tribunal held sittings and dealt with certain issues of the case. After Mr. Chandra Shekhar Aiyar was relieved from the Boundary Disputes Tribunal, he again started sitting on the Industrial Tribunal. The two questions debated before the Supreme Court were (*i*) whether after Mr. Chandra Shekhar ceased to be available, the remaining two members had to be re-appointed to constitute a Tribunal and (*ii*) whether after Mr. Chandra Shekhar Aiyar again started sittings, it was imperative to issue a fresh notification. By a majority view, it was decided that after the services of a member ceased to be available, the remaining members by themselves could not act as a Tribunal without the Government reconstituting the Tribunal as a Tribunal of the remaining members, and that the absent member could not sit again with the other members to form the Tribunal in absence of a fresh notification. This case was governed by the Act before it was amended in 1956. The old section 7 was substituted by the present sections 7, 7A, 7B and 7C, and the decision has to be appreciated in the background of the old section. Section 8 of the old Act was also quite different.

(1) (1951) A. I. R. (S. C.) 230.
(2) (1970) L. I. C. 421.
(3) (1975) L. I. C. 1171.

These sections have been quoted in paragraph 3 of the reported judgment and clearly show that the case was not concerned with the question which arises in the present writ application. In *Fedders Lloyd Corporation (Pvt.), Ltd.* v. *Lt. Governor, Delhi through Under-Secretary (Labour) Delhi*, Mr. R. K. Baweja, Presiding Officer of the Labour Court, went on leave and for that period Mr. Desh Deepak was appointed as the Presiding Officer. It was held that an appointment under section 8 could not be made to fill up a vacancy due to a temporary absence. It has been pointed out that in the present writ case, Shri A. Hassan had retired and it was not a case of temporary vacancy in which Shri Kedar Nath Singh was appointed. Similar was the situation in *Blue Star Engineering Co. (Bombay) Private Ltd.* v. *The Labour Court.* None of the cases relied upon by Mr. Prasad therefore, appears to be relevant. For all these reasons, I reject the contention raised on behalf of the management and hold that the order of appointment of Shri Kedar Nath Singh as the Presiding Officer of the Patna Labour Court was validly made and he was fully empowered to decide the case.

12. Mr. Prasad also attempted to support the decision by challenging the finding of Respondent no. 2 on the last point mentioned in paragraph 3 above. The notification which empowered the Labour Courts in Bihar to entertain and decide applications under section 33C(2) of the Act has been quoted in paragraph 7 of the judgment and runs as follows:—

> "In exercise of the powers conferred by sub-section (2) of section 33C of the Industrial Disputes Act, 1947, (XIV of 1947) the Governor of Bihar is pleased to specify within their respective jurisdiction the Labour Courts Constituted in the Labour and Employment Department notification III/DI-1204/67/L & E—635 dated the 30th January, 1967, and read with notification no. 963 dated 26th October, 1971 as the Labour Courts for determining the amount of money or any benefit capable of being computed in terms of money which any workman is entitled to receive from the employer in accordance with the provisions of sub-section (1) of section 33C of the said Act."

In Bihar, there have been three Labour Courts at Patna, Muzaffarpur and Ranchi. The above order was passed vesting them with powers under section 33C(2) of the Act. Mr. Prasad contended that the quoted notification entitled the Labour Court to determine the amount of money only in accordance with the provisions of sub-section (1) of section 33C, as mentioned towards the latter part of the order. This interpretation cannot be accepted, firstly, for the reason that sub-section (2) is expressly mentioned towards the beginning of the order and, secondly, because the words "or any benefit capable of being computed in terms of money" mentioned in the order cannot refer to sub-section (1). Mr. Prasad strenuously contended that the general rule of interpretation of a statutory provision of a private document cannot be applied to an order passed by the Governor. Unless sub-section (2) is not specifically mentioned, the Labour Courts cannot pass any order thereunder. The argument does not appear to have any force. The result of accepting the construction pressed on behalf of the respondent would be to ignore the words "for determining the amount of money or any benefit capable of being computed in terms of money" in the above quoted Government notification. At the highest, the respondent can say that, by using section 33C(1) towards the end of the notification, there has crept in an ambiguity which must be resolved. By obstinately sticking to section 33C(1) mentioned in the order, one would fail to attribute a sensible meaning to the contents of the order and this would defeat its real object. If the language of a document leads to a manifest contradiction not intended by its author and may result in frustrating its very purpose, it should be so construed as to avoid the contradiction and make it effective. There is no reason for limiting this principle which is based on commonsense to statutory provisions only and for depriving executive orders of its benefits. In the present case, there is no difficulty in finding out the purpose of the relevant notification. The Government is undoubtedly empowered to pass the order which would authorise the Labour Court to determine the benefits to which a workman is entitled to, as mentioned in sub-section (2) of section 33C. The only error appears to be in mentioning sub-section (1) instead of sub-section (2) towards the end of the order. In *Hukumchand Mills* v. *The State of Madhya Pradesh*(1), it was held

(1) (1964) A. I. R. (S. C.) 1829.

that the impugned notification was not vitiated for the mere mistake in the notification in reciting the source of power. In *Lekhraj Satharamdas Lalvani* v. *Dy. Custodian, Bombay*(1), the Supreme Court rejected the argument challenging an order on the ground that wrong provision of law had been mentioned. In that case reliance was placed on the decision in P. *Balakotaiah* v. *The Union of India*(2), where it was held that validity of an order should be judged on a consideration of the substance and not its form and that the reference of a wrong rule should be disregarded as due to a mistake. I, therefore, hold that the order passed in the above-quoted notification under the provision of section 33C(2) of the Act effectively authorised Respondent no. 2 to dispose of the matter in the present case. Besides, the question appears now to be of academic importance, as the matter has to go back to the Labour Court, Patna, for a fresh decision. It has been stated at the bar that with a view to remove any misapprehension, a fresh notification has been issued in more clear terms authorising the Patna Labour Court to deal with such applications. If that is the position, there cannot be any objection of the Respondent no. 2 in considering and deciding the dispute after remand.

13. For the reasons stated above, I allow this application and quash the order as contained in Annexure '11' to the writ application. The matter will now go back to the Labour Court, Patna, for reconsideration and decision in accordance with the observations made above. In the circumstances of the case, there will be no order as to costs.

GOVIND MOHAN MISRA, J.—I agree.

R. D.

Application allowed.

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(1) (1966) A. I. R.. (S. C.) 334.

(2) (1958) A. I. R. (S. C.) 282.

CIVIL WRIT JURISDICTION

1976.

December, 20.

Before K. B. N. Singh, C. J. and D. P. Sinha, J.

SULTAN GHALIB.*

v.

STATE OF BIHAR & ORS.

Bihar Minor Mineral Concession Rules 1972, *rules* 44(1), 45 *and* 46(3) *and Bihar Minor Mineral Concession Rules*, 1964, *rule* 24(1)— *and scope and applicability of—order of Collector passed during the operation of* 1964 *Rules—revision application by aggrieved person filed before Commissioner of Mines and Geology, Bihar under* 1972 *Rules—maintainability of—Commissioner, Mines and Geology Bihar setting aside the order of the Collector—order, whether without jurisdiction.*

Application for grant of mining lease was made by petitioner on April, 13, 1972 and by respondent no. 5 on March, 15, 1972 to the Collector of Monghyr and the Collector passed orders on April, 19, 1972 granting leases in their favour. Respondent no. 5 filed a revision petition before the Collector which was rejected on November, 21, 1972. Thereupon respondent no. 5 filed an application in revision before the Commissioner of Mines and Geology, Bihar against the order of Collector dated November, 21, 1972 but subsequently prayed that as the application in revision against the impugned order was not maintainable, the same be treated as an application against the order of Collector dated April. 19, 1972 which was allowed and after hearing the Commissioner of Mines and Geology, Bihar by his order dated August, 16, 1974 set aside the order of Collector dated April, 19, 1972.

Held, that the entertainment of the revision preferred by respondent no. 5 and the order passed by Commissioner of Mines and Geology, Bihar in setting aside the Collector's order dated the 19th April, 1972 was without jurisdiction.

*Civil Writ Jurisdiction case no. 1507 of 1974. In the matter of an application under Articles 226 and 227 of the Constitution of India.

It is quite obvious from the provisions of rule 44(1) of the 1972 Rules, which came into force from July 31,, 1972, that 1964 Rules had been kept alive as regards things done or omitted to be done before the commencement of the 1972 Rules. Thus the provisions of Rule 21(1) of the 1964 Rules had been continued and, therefore, the proper authority before whom a person aggrieved by the order of the Collector passed under the 1964 Rules could have preferred an appeal continued to be the Commissioner of the Division and it was the Commissioner of the Division who could have entertained an appeal against the Collector's order.

Case laws discussed.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of D. P. Sinha, J.

Messrs. L. S. Sinha and *D. P. Sharma* for the petitioner.

Messrs. A. N. Chatterji and *S. N. Jha* and *Sudhakar Choudhary* for the respondents.

D. P. SINHA, J.—This is a Civil Writ application under Articles 226 and 227 of the Constitution of India in which Sultan Ghalib, the petitioner, has prayed that the order dated the 16th August, 1974 which is Annexure 1 to this application passed by the Commissioner of Mines and Geology, Bihar, respondent no. 2, in Revision Case no. 1 of 1973, setting aside an order dated the 19th April, 1972 of the Collector of Monghyr granting mining lease of an area of 3 acres in favour of the petitioner, be set aside and an appropriate writ or direction as may be deemed fit, be issued.

2. The undisputed facts on which the prayers are based are these: The petitioner as also Rup Chand Sao, respondent no. 5 and Tilak Prasad, respondent no. 6, applied for grant of mining leases in respect of different areas. On the recommendation of the Mining Officer, the Collector by his order dated the 19th April, 1972 granted mining leases in their favour of areas which were much smaller than the areas applied for by them. The grant was made in favour of the petitioner of an area of 3 acres and of 3.5 acres in favour of opposite party no. 5 and an area of 1.5 acres in favour of opposite party no. 6. In this case there is no dispute relating to the area approved in favour of opposite party no. 6. So far as opposite party

no. 5 is concerned, he felt aggrieved because of the fact that a portion of the area applied for by him was included in the area of 3 acres which was ordered by the Collector to be settled with the petitioner.

3. Opposite party no. 5 made an application on the 25th April, 1972 before the Collector for a review of the order dated 19th April, 1972. In the meatime, the lease in favour of the petitioner was executed on 27th April, 1972 and registered. The Collector rejected the application for review on the 21st November, 1972 holding that he had no power to review the order. Thereupon respondent no 5 made an application for revision before the Commissioner of Mines and Geology (respondent no. 2) against the order dated the 21st November, 1972 by which the Collector had rejected his review application. That application was admitted on the 20th February, 1973. On the 14th April, 1973 respondent no. 5 filed a petition saying that the revision had been preferred for setting aside the order of the Collector dated the 21st November, 1972 by which he had rejected the prayer for review but the revision was not maintainable and that, therefore, the revision application be treated as an application for revision of the order dated the 19th April, 1972 passed by the Collector. The prayer appears to have been allowed and after the parties concerned were heard, respondent no. 2 by his order dated the 16th August, 1974 set aside the order of the Collector dated the 19th April 1972. It is the validity of the said order of respondent no. 2 which has been challenged in this application.

4. The aforesaid order appears to have been passed by respondent no. 2 in exercise of the powers conferred on him under rule 45 read with rule 46 (3) of the Bihar Minor Mineral Concession Rules 1972 (hereinafter referred to as the 1972 Rules) made by the Government of Bihar under section 15 of the Mines and Mineral (Regulation and Development), Act, 1957, hereinafter referred to as 'the Act' and all other powers in that behalf. The said rules came into force on the 31st July, 1972 and prior to the 31st of July, 1972 the Bihar Minor Mineral Concession Rules—hereinafter referred to as the 1964 Rules—made by the Government of Bihar under the same powers, were in force. The petitioner had filed his application for grant of the mining lease on the 13th April, 1972 and respondent no. 5 had applied for the same on the 15th March, 1972. The Collector had passed the order granting the leases on the 19th April, 1972. It would thus appear that the applications for grant of the mining leases and also the Collector's order granting the leases had been made during the operation of the 1964 Rules.

5. Under sub-rule (i) of rule 24 of the 1964 Rules any person aggrieved by an order passed by the Collector under the said rules, except under rule 19 (rule 19 is not relevant for the present purpose) could within a period of 60 days from the date of such order, prefer an appeal to the Commissioner of the Division whose decision thereon was to be final: provided that the appellate authority could condone any delay in filing the appeal on reasonable grounds. On such appeal, the appellate authority could confirm, set aside or modify the order under appeal, after giving the applicant opportunity of being heard, if necessary, after considering the report of the officer who gave the order under appeal. Admittedly, respondent no. 5 did not prefer any appeal before the Commissioner of the Division against the Collector's order dated the the 19th April, 1972 as such after the expiry of 60 days from that date his right of appeal became barred. The period of sixty days expired on the 18th June, 1972. As already mentioned the 1972 Rules came into operation on the 31st July, 1972 i.e., about 43 days after expiry of the period of limitation for filing an appeal against the Collector's order under the 1964 Rules. There was no provision for revision under the said Rules. In the 1972 Rules which replaced the 1964 Rules there was no provision for appeal but a provision for revision to the Commissioner of Mines and Geology i.e. respondent no. 2 was made in rule 45 read with rule 46 of the Rules.

6. The contention of the petitioner is that respondent no. 2 had acted beyond his jurisdiction in intertaining the revision preferred by respondent no. 5, because the 1972 Rules had no retroactive operation and the remedy by way of appeal provided in the 1964 Rules not having been availed of by respondent no. 5, had already lapsed and become time barred and that, therefore, he had no right to prefer revision before respondent no. 2. On the other hand, learned Counsel appearing on behalf of respondent no. 1, namely, the State of Bihar as also the learned Counsel appering on behalf of respondent no. 5 contended that the 1972 Rules would apply because they had replaced the 1964 Rules and respondent no. 2 was competent by virtue of the proviso to rule 45 of 1972 Rules to condone the delay in filing the application if the applicant satisfied him that he had sufficient cause for not making the application within time and that respondent no. 2 had considered the matter and condoned the delay and that, therefore, the order passed by him setting aside the Collector's order was valid and not liable to challenge.

7. I do not think the contention of respondent has any force. It was not disputed that 1972 Rules were not retrospective. In the circumstances those rules could not apply to matter which had been

dealt with and disposed of under the 1964 Rules. The provisions of rule 44(*i*) of 1972 Rules may also be noticed. They are as follows :

> "44(*i*) On the commencement of these rules, the Bihar Minor Mineral Concession Rules 1964 shall cease to be in force except as regards things done or omitted to be done before such commencement."

It is quite obvious from the said provisions that 1964 Rules had been kept alive as regards things done or omitted to be done before the commencement of the 1972 Rules. Thus the provisions of Rule 24(*i*) of the 1964 Rules had been continued and, therefore, the proper authority before whom respondent no. 5 could have preferred an appeal continued to be the Commissioner of the Division, and it was the Commissioner of the Division who could have entertained an appeal against the Collector's order and it was he who could have condoned the delay made by not filing the appeal within 60 days of that order on reasonable grounds, as empowered by the proviso to sub-rule (*i*) of rule 24.

8. For the aforesaid reasons the entertainment of the revision preferred by respondent no. 5 and the order passed by respondent no. 2 setting aside the Collector's order dated the 19th April, 1972 was without jurisdiction.

9. Learned Counsel appearing on behalf of rsepondent no. 5, cited the following cases in support of his argument : *Rambyas Singh and others* vs. *State of Bihar*(1), *Sangram Singh* vs. *Election Tribunal, Kotah and another* (2) and *Sitaram Motilal Kalal* vs. *Santanu Prasad Jai Shankar Bhatt*(3). None of those decisions is of any help in this case because they had been decided on the peculiar facts of those cases were wholly disimilar to the facts of this case.

10. Since the impugned order of respondent no. 2 was wholly without jurisdiction this writ petition is allowed. A writ *of certiorari* be issued quashing the order dated the 16th August, 1974 of respondent no. 2 contained in Annexure 1. Respondent no. 5 shall pay to the petitioner a sum of Rs. 100 as hearing fee.

K. B. N. SINGH, C.J.—I agree.

M. K. C.

Application allowed.

(1) (1976) P. L. J. R. 874.
(2) (1955) A. I. R. (S. C.) 425.
(3) (1966) A. I. R. (S. C.) 1697.

CIVIL WRIT JURISDICTION

1977.

January, 27

Before K. B. N. Singh, C. J. and B. S. Sinha, J.

SURYADEO SINGH & ORS.*

v

DEPUTY COLLECTOR, LAND REFORMS DINAPUR & ORS.

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section 48E—scope of—proceeding under section 48E—whether can be kept pending indefinitely.*

In view of the provisions of section 48E of the Bihar Tenancy Act, 1885 it is apparent that the Land Reforms Deputy Collector, before whom the proceeding is pending, has to dispose of the proceeding under the B. T. Act. He cannot keep the proceeding pending indefinitely. He has to dispose of the proceeding in accordance with the provisions of the Act one way or the other;

Held, therefore, that the action of the Land Reforms Deputy Collector in not passing final orders in the case as Land Ceiling cases were pending was illegal.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set-out in the judgment of the Court.

Messrs, Kailash Roy and *Parmanand Sharan Sinha*, for the petitioners.

Messrs. S. N. Jha (S. C. II) and *Shardanand Jha (J. C.)* for the respondents.

*Civil Writ Jurisdiction Case no. 883 of 1976 in the matter of an application under Articles 226 and 227 of the Constitution of India.

K. B. N. SINGH, C. J. & B. S. SINHA, J.—In this writ application the petitioners have prayed for quashing of an order dated the 22nd September, 1975, marked as Annexure 9 to this writ application, passed by the Deputy Collector, Land Reforms, Dinapur (Respondent no. 1). postponing passing of final orders in Batai Case no. 250 of 1974—77 in which a compromise petition has been filed by the parties, on the ground that certain ceiling cases involving the same lands are pending.

2. The aforesaid prayer has been made on the following averments made in the writ application: In 1349 Fasli, the petitioners' ancestor Kishun Singh took Batai settlement of 5.7 acres of land, the details of which are to be found at pages 3 to 5 of the writ application, from Sudama Prasad Singh, ancestor of respondents no. 2 to 11, at a Nazrana Rs. 600. Subsequently, in 1354 Fasli a Hukumnama (Annexure 1) by way of Yaddast in support of the aforesaid settlement was issued in favour of the ancestor of the petitioners. Since the date of the Batai settlement the petitioners' ancestor and thereafter the petitioners continued cultivating the aforesaid lands as Bataidars under the ancestor of the said respondents and thereafter under the respondents till 1974, in which year respondents no. 2 to 11 tried to create trouble and disturb the peaceful possession of the petitioners over the said Batai lands. Subsequently, on the 23rd September, 1974, the petitioners filed a petition (Annexure 2) under section 48E of the Bihar Tenancy Act before respondent no. 1 for declaration of their rights as Bataidars in respect of the aforesaid lands. That petition was registered as Batai Case no. 250 of 1974 and a show cause notice was issued against respondents no. 2 to 11 by respondent no. 1 on the same date. On the 23rd December, 1974 respondents no. 2 to 11 filed a show cause (Annexure 3) alleging that the petitioners gave up Batai cultivation long ago and praying for rejection of their petition. On the 2nd January, 1975 respondent no. 1 ordered for issue of notice for constitution of a Board under section 48E(3) of the Bihar Tenancy Act. In response to this notice, the petitioners nominated one Shri Tipan Singh as their Panch and respondents 2 to 11 nominated one Shri Ram Balak Verma as their Panch vide Annexures 4 and 5. Respondent no. 1 by his order dated the 6th May, 1975, nominated one Shri Ram Jatan Singh as the Chairman of the Board. The Board made an attempt to bring about amicable settlement of the dispute between the parties, as a result of which the petitioners and respondents no. 2 to 11 filed a compromise petition (Annexure 6) before the Chairman of the Board, in which the claims of the petitioners were accepted by respondents no. 2 to 11. The Board by its order

dated the 15th September, 1975 (Annexure 7) accept this compromise. This was followed by a report to this effect (Annexure 8) submitted by the Board to respondent no. 1, requesting the latter to pass final order on it. On receipt of this report, respondent no. 1 on the 22nd September, 1975, passed the impugned order to the effect that as Land Ceiling Cases no. 1 to 8 of 1973-74 concerning the same lands were pending, final orders in this case (Batai Case no. 250 of 1974-75) would be passed after the disposal of the aforesaid land ceiling cases.

3. The petitioners have also filed three supplementary affidavits stating therein that the petitioners have less than four acres of land and respondents no. 2 to 11 have 227 acres of land; that respondent no. 2 had also filed a petition before respondent no. 1 in Land Ceiling Case no. 8 of 1973 stating that on most of his land there are Bataidars: and that on the basis of that petition, by a notification published in the Patna District Gazette (Extraordinary), dated the 21st June, 1976. the surplus land of respondent no. 2 was notified, from which it is apparent that the lands claimed by the petitioners in Batai Case no. 250 of 1974-75 have been declared as surplus lands. It is further stated in one of the supplementary affidavits, that, on the basis of the above facts and on the basis of the fact that Land Ceiling Cases no. 1 to 8 of 1973-74 have been disposed of, the petitioners filed an application (Annexure 10) before respondent no. 1, for passing final orders in the Batai Case, and on this petition respondent no. 1, ordered that as a writ case is pending in the High Court, no order can be passed in the matter—vide copy of the order at Annexure 11.

4. A counter-affidavit has been filed on behalf of respondent no. 1, stating that under section 22(1) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961—hereinafter to be referred to as 'the Act'—the claim of an under-*raiayt*, who is to be recognied as an occupancy *raiyat*, can only be decided when the land vests in the State: but in the instant case, the land in question has only been notified under section 15(1) of the Act and has not vested in the State, and, therefore, final order has not been passed regarding the claim of the petitioners as under-*raiyats*.

5. Mr. Kailash Roy, learned Counsel appearing on behalf of the petitioners, has contended that the action of Respondent no. 1 in not passing orders is wholly illegal, inasmuch as under sub-section (8) of section 48E of the Bihar Tenancy Act, he is bound to pass orders after the proceeding is submitted to him by the Board appointed under the

said section. Sub-sections (6) and (7) of section 48E lay down the procedure which has to be followed by the Board, after a reference of a Batai Case. Under sub-section (6), after the parties appear, the Board is bound to make an effort to bring about an amicable settlement of the dispute, and, in case such an amicable settlement is arrived at, the Board is bound to submit a report containing the terms on which the settlement is brought, to the Collector, who (the Collector) may dispose of the proceeding in accordance with the terms of the report. Sub-section (7) provides that where no settlement is brought about, an inquiry will be made and the Board will submit its final report on the dispute, recording its findings, to the Collector, who may dispose of the proceeding in accordance with the terms of the findings. In case of a disagreement with the report or the findings of the Board, the Collector has to follow the procedure laid down in sub-section (8), which reads as follows :—

"(8) In case of disagreement with the report or findings of the Board, the Collector shall, after recording his reasons for such disagreement and after giving the parties concerned a reasonable opportunity of being heard, make such enquiry, if any, as he thinks necessary and on being satisfied that—

"(*i*) the person threatened with ejectment is an under-Raiyat, the Collector shall declare the thereatened ejectment illegal and direct that the landlord shall not interfere with the possession of the under-Raiyat in his tenancy or any portion thereof;

(*ii*) the land under dispute is in the tenancy of the under-Raiyat, the Collector shall declare possession of the under-Raiyat and order the crop or produce, or the sale-proceeds thereof, as the case may be, to be divided between the under-Raiyat and his landlord in accordance with the provisions of sections 69 to 71 of the Act;

(*iii*) the person alleged to have been ejected was an under-Raiyat of the disputed land on the date of ejectment and was ejected within twelve years before the commencement of proceeding under this section, in contravention of section 89, the Collector shall order

that the landlord, or, where any other person, is in possession of the land comprised in the under-Raiyat's tenancy or portion thereof under any claim derived from the landlord, such person shall restore the under Raiyat to possession of the tenancy or portion from which he was so ejected."

Sub-section (9) lays down that the orders of the Collector under sub-sections (6), (7) or (8) shall be in writing and shall state the reasons on which it is made and the period, which shall not exceed six months from the date of the order, within which his order shall be carried out. Sub-section (11) provides that the person disobeying the order of the Collector shall be on a complaint filed by the Collector, punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both. Sub-section (13) lays down that no Civil or Criminal Court shall have any jurisdiction over the subject-matter of dispute after a proceeding is initiated under sub-section (1) by the Collector, save as expressly provided in this Act.

6. In view of the aforesaid provisions, it is apparent that the Land Reforms Deputy Collector, before whom the proceeding is pending, has to dispose of the proceeding under the B. T. Act. He cannot keep the proceeding pending indefinitely. He has to dispose of the proceeding in accordance with the provisions of the Act one way or the other. We are not for a moment suggesting as to what orders he should pass, nor it is a matter for our consideration. as. in the first instance, it is for Respondent no. 1 to pass appropriate orders. It seems that the pendency of this application has also been standing in the way of the Collector in disposing of the proceeding pending before him, as would appear from his order dated the 19th July, 1976 (Annexure '11'). We accordingly allow this application and direct Respondent no. 1 to dispose of the Batai Case no. 250 of 1974-75, as expeditiously as possible. In the circumstances of the case, we make no order as to costs.

M.K.G.

Application allowed.

APPELLATE CRIMINAL

1977

February, 28.

Before Madan Mohan Prasad, J.,

RAM CHANDRA SINGH.*

v.

THE STATE.

Penal Code, 1860 (*Act XLV of* 1860) *sections* 299, 300 *and* 304A *scope and applicability of—case falling under section* 299 *or section* 300—*applicability of section* 304A *excluded—confession before police constables incharge of guarding the treasury at that moment—admissibility of—Evidence Act*, 1872 (*Act I of* 1872), *section* 25—*statement of the accused merely admission of a gravely incriminating circumstance, whether and when amounts to a confession.*

If the act by which death has been caused has been done with the intention or the knowledge as mentioned in section 299 or those mentioned in section 300 of the Penal Code, the application of section 304A is entirely excluded;

Held, therefore, that the case having fallen within section 300 of the Penal Code, there is no room for application of section 304A.

Where the alleged confession was made to the constables who were undoubtedly police constables even though at the moment incharge of guarding the treasury;

Held, that, there is nothing even to show that whatever powers they had as police constables had ceased to be theirs by virtue of the fact that they were guards of the treasury so as to give rise to the question whether at the moment they could have exercised powers of a police officer or not. Police constables are undoubtedly police officers within the meaning of section 25 of the Evidence Act. Any confessional statement of the accused before such persons was undoubtedly hit by section 25 of the Evidence Act and ought, therefore, to be excluded from consideration.

* Criminal Appeal no. 885 of 1971. From a decision of Mr. Chandra Shekhar Prasad Singh, Sessions Judge, Patna, dated the 8th September, 1971.

State of Punjab v. *Barkat Ram*(1) relied on;

Held, further, that the mere statement of the accused that he had fired the rifle would by itself not amount to an admission of the guilt and would be merely a gravely incriminating circumstance but when considered in the light of the surrounding circumstances and the charge against the accused, it may amount to a confession.

Appeal by the accused.

The facts of the case material to this report are set out in the judgment of Madan Mohan Prasad, J.

The case in the first instance came before S. P. Sinha and Uday Sinha, JJ. who differed in their opinions.

On this difference of opinion.

M/s. Nageshwar Prasad and *B. M. Tewary*, for the appellant.

Mr. K. N. Jha, for the State.

MADAN MOHAN PRASAD, J.—This appeal has been placed before me on a difference between the two learned Judges of this Court who heard it—S. P. Sinha and Uday Sinha, JJ.

2. The appellant had been convicted by the trial court under section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. After hearing the appeal S. P. Sinha, J. came to the conclusion that the offence committed by the appellant fell within the purview of section 304A of the Indian Penal Code. Accordingly he altered the conviction and awarded the sentence of two years' rigorous imprisonment. Uday Sinha J., however, disagreed and held that the offence was clearly one under section 302 of the Indian Penal Code. Accordingly he dismissed the appeal without any modification in the order of conviction or sentence.

3. The prosecution case, briefly stated, is that on the 28th of October, 1969 at about 10.30 P.M. the appellant had shot dead a fellow police constable in the following circumstances. The appellant, the

(1) (1962) A. I. R. (S. C.) 276.

deceased and three other constables were on that date on deputation to guard the treasury of the Islampur Block. Each one of them had to be on duty for two hours successively. The appellant was put on duty from 10 P.M. to 12 midnight. Before that constable Manager Singh was on duty. Soon after the appellant had taken over the post from him at about 10.30 P.M. a gun report was heard. At that time constable Manager Singh was cooking his meal and two others Indrasan Tiwary and Brijnandan Singh had retired to their barracks to sleep. These two were, however, still awake when they heard the gun report. They came out of the barrack. Manager also rushed to the place. They saw the appellant standing opposite north of the place where the deceased lay sleeping on his bed. Indrasan Tiwary questioned the appellant as to what the matter was. The appellant said that he had fired the gun and asked them to take him to the police-station. The appellant then changed his clothes and was taken to the police-station by Indrasan Tiwary and Brijnandan Singh. At 10.45 P.M. Indrasan lodged the first information report at the police-station which was situated a quarter of a mile away from the place of the occurrence.

4. The Officer Incharge of the police-station took up investigation. inspected the place of occurrence, sent the dead body for post-mortem examination and seized the rifle which had been used by the appellant, as also the belt of cartridges showing that one out of the total had been fired. He also seized the discharged cartridge and sent it for examination by the Ballastic Expert. As a result of the post-mortem examination it was found that the deceased had an ante-mortem injury caused by a firearm which was fatal. After completing investigation, the police submitted charge-sheet and the accused was committed to the court of sessions with the result stated earlier.

5. The defence of the appellant is that he was not on duty when the occurrence took place; that he was forcibly taken to the police-station while returning from a tea shop to join his duty; and that the constables had conspired with each other to implicate him falsely.

6. The prosecution examined eleven witnesses in all. Of these the witnesses to the occurrence are the three constables Indrasan Tiwary (P.W. 4), Manager Singh (P.W. 5) and Brijnandan Singh (P.W. 6). As stated earlier, these three witnesses heard the gun report and then witnessed whatever they did. Obviously. therefore, they are not witnesses who claim to have seen the appellant firing the

gun. Their evidence is thus in respect of the circumstances. It has, therefore, to be seen first as to what are the circumstances which have been proved by these three witnesss.

7. P.W. 4 Indrasan says that there were five Chaukies kept in the barrack on which the constables used to sleep. At the relevant time on the date of occurrence he was sleeping on his cot. P.W. 6 Brijnandan and the deceased Kuer Singh were also sleeping on their cots. In the absence of the Havildar, Incharge of these constables, this witness was acting as the Havildar Incharge. Constable Manager Singh was on duty until 10 P.M. when the appellant took over from him. He heard the gun report at about 10.30 P.M. and he went to the exit on the eastern side and saw the appellant standing with his rifle near the western exit. He asked the appellant as to what happened and the appellant replied that he had fired the gun and that they should reach him to the police-station. The witness with folded hands prayed to the appellant to keep the rifle aside. The appellant then handed over the rifle and the belt of cartridges to this witness and took off his uniform and kept it on the chouki. The appellant asked for his Hawai shirt and *lungi* which P.W. 6 Brijnandan brought from the hanger and gave to the appellant and then Brijnandan, the appellant and this witness went to the police-station and lodged the first information report. The witness further says that Kuer Singh was sleeping on the cot kept on the western extremity and that after getting the gun shot injury he had fallen down from the chouki and was dead.

In his cross-examination the witness has said that the cot adjacent east to that of the deceased was the one occupied by constable Manager Singh, the next one east to that was occupied by this witness and the one next to that was occupied by Brijnandan. The cot next to that was the one which used to be occupied by the appellant. Further, that half of the cot occupied by the deceased faced the door on the western side. He says that he was not fast asleep at the time of hearing the gun report. When he heard the report he went to the eastern door and therefrom saw the appellant standing below the verandah at the western exit of the barrack. The length and breadth of this barrack is said to be 15 cubits and 5-6 cubits respectively. He has denied the defence suggestions, one of them being that the constables were up against the appellant because he used to have a common mess with the Muslim constable Hashim, the other being that the occurrence had taken place while constable Manager was on duty and not this appellant and that he was arrested while coming from the tea shop and forcibly

taken to the police-station, the third one being that they had stated falsely about the admission made by the appellant. He proves the duty chart (Ext. 4) which was written by him and the signature of the appellant thereon (Ext. 4/4) in token of the acceptance of the assignment of duty.

8. P.W. 5 Manager Singh gives substantially the same story as P.W. 4 Indrasan. He has stated that he was on duty from 8 to 10 P.M. and handed over charge to the appellant who was to be on duty from 10 P.M. *to* 12 o'clock midnight. He had been given a rifle and 20 cartridges which he handed over to the appellant at the time of change of post. Thereafter he came away and went to cook his food when he heard the gun report, came out to the barrack, found Indrasan and Brijnandan there; Indrasan questioned the appellant upon which the latter said that he had fired the gun and wanted to be taken to the police-station. The appellant on being asked, kept the rifle and the cartridges-belt; he took out one charge of cartridges from the rifle, each charge consisted of five cartridges of which one had been fired and four were loaded. The rest of the cartridges were on the belt; the appellant then asked for his clothes and changed and was taken to the police-station by the aforesaid two other witnesses and he remained on duty.

In his cross-examination nothing material has been elicited which would help the appellant. It has been elicited from him that he did not remember the number of the rifle which he was carrying while on duty, but in the next breath he said that Kuer Singh had been shot dead with the rifle which had Butt no. 228. In the committing court he had, however, said that he did not remember the number of the rifle with which Kuer Singh had been shot dead. He has denied the defence suggestion that he had fired the rifle and that he along with the other two witnesses had falsely implicated the appellant because they were against the appellant on account of the fact that he used to dine along with Hashim.

9. The next witness P.W. 6 Brijnandan Singh states that he was lying on his chouki but awake when he heard the gun report and went to the eastern door, saw the appellant standing there with a rifle; Indrasan asked the appellant as to what had happened whereupon the latter said that he had fired and requested to be taken to the police-station. Thereupon he asked him to keep the rifle and the cartridges away. The appellant did so and he found that one of the cartridges had been fired. The appellant then changed his clothes and was taken to the police-station by this witness and Indrasan.

In his cross-examination he has candidly admitted that he did not see anybody firing the gun; he has also admitted that there was no light burning in the barrack at the time of the occurrence but it could be found that Kuer was injured because of his groan. He also refuted the defence suggestion that these three witnesses had falsely implicated the appellant. He was not examined in the committing court but was examined under section 164 of the Code of Criminal Procedure.

10. The question is whether the evidence of these three witnesses ought to be relied upon. Nothing has been elicited from any of them, which would make their evidence unreliable. The defence suggestion that they were annoyed with the deceased because the latter used to have a common mess with the Muslim constable Hashim has not been substantiated. From the evidence it is obvious that these three witnesses upon the defence suggestion itself did not have a common mess with the deceased and Hashim. The question thus is whether the fact that Kuer Singh was having a common mess with Hashim would go to annoy them so much as to one of them, namely, Manager, shooting him dead. It is difficult to accept this story as plausible. It has been suggested, by the defence that the appellant had raised his voice against the protest made by these three witnesses at Kuer's having a common mess with Hashim. The suggestion was refuted by the witnesses. Hashim has not been examined in this case to support the defence story that the deceased was having a common mess with Hashim or that the appellant had raised his voice against the protest made by the three witnesses aforesaid. The defence suggestion appears to be cock and bull story. No other circumstance appears on the record to show that these witnesses had conspired to implicate this appellant falsely. There is no evidence or circumstance to substantiate the defence suggestion that the appellant was not at all at the place of occurrence but was at the tea shop and was arrested by these witnesses while he was returning. There is thus nothing on the record to make the statements of these witnesses unreliable.

11. The evidence of these three witnesses thus proves certain circumstances beyond any manner of doubt. Two of them, namely, Brijnandan and Indrasan. were lying on their cots in the barrack itself and were awake; Manager was in the kitchen wherefrom he rushed to the place; all of them heard the gun report; all of them saw the appellant standing at the western exit from the barrack; the cot on which Kuer Singh was sleeping, was nearest to the western door; the appellant had a rifle in his hand; the appellant made an admission that

he had fired the gun; Kuer Singh was found dead; the appellant was on duty at the time they heard the gun report and was entrusted with the rifle and cartridges and when he laid them. one of the cartridges in the charge inside the rifle had been found fired; and the appellant on his own request was then taken to the police-station. These are facts which are conclusively proved by these three witnesses.

12. In view of admission of one of the witnesses that it was dark inside the barrack, it may be urged that identification was not possible. But this argument is not available in the circumstances of the present case. True, there was no light inside the barrack. It could not, however, have been that dark outside the barrack and the appellant was standing outside the barrack at the door. Then he was in uniform with the rifle in his hand. There were not any other person at or nearabout the place of occurrence besides the three witnesses, the appellant and the deceased. Hashim was away on leave. The three witnesses had rushed outside the barrack to the door. The barrack itself was merely 27 feet long east to west and 8 feet 9 inches wide north to south. The distance between the witnesses and the appellant was thus obviously only a few yards. Besides this, the date of occurrence, the 28th of October, 1969 corresponded to the third day of the dark fortnight (Krishna Paksh of Kartik. 2026). On that date the moon rose at 7.21 P.M. as would appear from the Vishwa Panchang of the year published by the Benares Hindu University. The time of the occurrence was near about 10.30 P.M. Therefore, it could not have been difficult at all for these witnesses to identify this appellant as the man with the rifle standing close to the deceased who had been shot dead.

13. Let us now turn to the other evidence on the record. P.W. 1 is the doctor who held the post-mortem examination. He found on the dead body of Kuer Singh one round injury with punctured margin on the left side of the abdoman in the gastric region measuring 1" in diameter with omentum protruding outside the injury. The margin was averted. There was no blackening. On inspection thereof he found dark clotted blood coming out of the anal canal and abrasion of the anal verge all round. On dissection, he found huge quantity of dark clotted blood with fascal matter in the abdominal cavity, peritonial covering and omentum torn and lacerated, stomach punctured at greater curvature ½" in diameter, small intestines congested, torn and lacerated at two places, pelvic colon, rectum and upper third of the anal torn and extremely lacerated, the lower two-thirds bruised and

ecchymosised, lower portion of the intestines charred and blackened. During exploration, metallic (brass) portion of the bullet was recovered from the wound which was embedded in the injury no. 1. He found another injury. The second injury, namely, the wound on the anal canal was the wound of entrance and injury no. 1 was the wound of exit. According to him, injury no. 1 was fatal and caused by some firearm and death was result of that injury. Further, he said that the injuries appeared to have been inflicted from a very close range; the barrel, it appeared, had been placed on the body at the time when the gun was fired. The evidence of this witness thus leaves no room for doubt that the deceased was killed as a result of a gun shot injury inflicted by placing the gun against the body.

14. In this connection it will be relevant to mention the report of the Forensic Science Expert (Ext. 9). The rifle and the fired cartridge both had been sent to the Expert and the report says that the barrel of the rifle was found coated with fouling indicating thereby that it had been fired: further that the empty cartridge had been fired from the same weapon. Obviously the aforesaid conclusions were reached after the Expert had examined the barrel of the rifle and fired a cartridge therefrom and compared the striker's marks on the percussion cap of the empty cartridges sent to him for examination and the one fired by him. The rifle sent was a .303 rifle bearing no. F. 13261, and Butt no. 228.

15. The Officer Incharge of the Police-Station (P.W. 8) Raj Kumar Mishra recorded the first information report, examined the informant Indrasan, P.W. 6 Brijnandan Singh and the accused; reached the place of occurrence at 11.10 P.M.; held inquest and sent the dead body through P.W. 3, constable Gauri Shankar Singh, for post-mortem examination. He examined P.W. 5 Manager Singh and seized the rifle bearing no. F. 13261 having Butt no. 228 and the magazine which was meant to contain 21 cartridges but had only 19 and one was empty. He sent them for examination by the Forensic Expert. He also seized the articles belong to the deceased, the Duty Register (Ext. 2/10), and inspected the place of occurrene. He found the barrack facing north having two doors on the northern side and one on the southern side. He found five cots spread over there and the chouki of the deceased was on the western extremity close to the western door opening towards the north. He found blood spots below the chouki. He found two kitchens, one to the south of the barrack and one to the west of the barrack. The barrack was 27 feet

in length from east to west and 8 feet 9 inches wide north to south. The Treasury was situated to the north of this barrack. This witness also sent the writing of the accused on the Duty Register to the Handwriting Expert. After completing investigation he submitted charge-sheet.

16. P.W. 2 is a witness of inquest and seizure. He proves the inquest report which was signed by him and the Block Development Officer. He also proves his own and the Block Development Officer's signatures on the seizure lists—(1) relating to the seizure of bed. mosquito net, etc.. (2) relating to seizure of Duty Register, (3) relating to the seizure of the rifle and the catridges, and (4) relating to the seizure of clothes. P.W. 3 is the constable who carried the dead body. P.Ws. 9, 10 and 11 are Magistrates who took specimens of the writing of the appellant on different sheets of paper. P.W. 7 is the Handwriting Expert who examined the Duty Register with the specimen writings and found that the endorsement alleged to have been made by the appellant in the Duty Register was in the same hand as in the specimen writing. It would thus appear that the fact that the appellant was on duty from 10 P.M. onwards is corroborated by the Duty Register and his endorsement therein.

17. The evidence of the Investigating Officer would show that the rifle and the cartridges which were at the place of occurrence had been seized. I may mention in this respect some statements elicited from the witnesses in cross-examination. P.W. 4 Indrasan said that there were five rifles in all, one of the Havildar and four of the constables, but he did not remember if there was any rifle allotted to the appellant. He, however, said that there were two kinds of deputation, one was called 'full guard' which meant that all the five constables and the Havildar would be on duty and carry their rifles at a time. The other was 'by turns' and in such a case when one constable on duty has the rifle, the one who goes to relieve him does not carry another rifle with him and he gets the same rifle which the man being relieved from duty has in his possession and further that when after duty he comes back, he does so without the rifle. He further said that at the time of occurrence the appellant had the same rifle with him which was with Manager Singh earlier. I have already referred to the evidence of P.W. 5 Manager in this respect. Although there is some discrepancy between his evidence in the committing court and the sessions court regarding the number of the rifle issued to him and subsequently handed over to the appellant, the fact remains that his evidence is positive

that he had handed over the rifle which he was carrying, to the appellant. That this was the practice, appears from the evidence of P.W. 4 Indrasan as well. P.W. 6 Brijnandan says that no rifle had been issued to him and he did not remember as to which rifle had been allotted to which constable, but he says that he was acting as Guard at the Anchal since three months prior to the occurrence and he had seen during this period that the Guard did not carry his own rifle while on duty but used to do so with whichever rifle he was given. The aforesaid evidence would thus conclusively show that the constables were not carrying their own rifles. if any, while acting on duty. The evidence of P.W. 5 Manager that he had handed over the rifle to the appellant cannot be suspected and must be taken to have been proved beyond reasonable doubt. In any case, the Investigating Officer found this only rifle, which he had seized, at the place of occurrence. If there were other rifles they must have been kept elsewhere. At least they were not at the place of occurrence and this was the rifle which is proved by the Ballastic Expert to have been fired. There was thus no question of any other rifle being used to kill Kuer Singh. The evidence of the three witnesses P.Ws. 4, 5 and 6, proves beyond doubt that it was this very rifle which had been kept by the appellant on the cot. The circumstances is thus proved that the rifle seen in the hand of this appellant and laid aside by him after the occurrence and subsequently seized and sent to the Ballastic Expert was the rifle handed over to the appellant and used for the shooting.

18. I now come to the question as to what is the conclusion which ought to be drawn from the proved circumstances in this case. I have already enumerated the circumstances so proved by the witnesses which stand beyond any reasonable doubt. Apart from the admission made by the appellant, I will consider the effect of the remaining circumstances. Even at the cost of repetition, it may be stated that the appellant was on duty at the relevant time, the rifle aforesaid and 20 cartridges had been handed over to him while he took charge of duty, that the witnesses heard the gun report, came out and saw the appellant standing with the rifle near the door close to which was the deceased lying on his chouki. They saw the deceased lying dead; the deceased had an injury caused by the cartridge which had been fired through the rifle aforesaid. as stated by the Expert and in view of the medical evidence, the injury caused was fatal. The medical opinion further proves that the injury was likely to have been caused by putting the rifle against the body of the deceased. This fact is proved by the

circumstance that on the external side of the injury towards the anal canal, there was no blackening or charring marks whereas on dissection it was found that the lower portion of the intestines were charred and blackened. It must also be borne in mind that the appellant was standing near the western door and the chouki on which the deceased was lying was absolutely close to the western door. The circumstances thus conclusively show that it was this appellant who had fired the rifle putting it close to the body of the deceased and shot him dead.

19. The question on which my two learned brethren have differed is as to whether the offence committed by this appellant came within the mischief of section 302 of the Indian Penal Code or of section 304A thereof. On this question, I am in respectful agreement with the answer given by brother Uday Sinha to the effect that the offence clearly falls under section 302 of the Indian Penal Code. In view of section 300 of the Indian Penal Code :—

> "...culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—
>
> *Secondly.*—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—
>
> *Thirdly.*—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—
>
> *Fourthly.*—If the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

In order to find out whether culpable homicide is murder, the act must come within the purview of one of the four clauses and it has to be seen as to which clause covers the case in hand. In the present case, in view of my finding and even so in view of the findings of the two learned Judges, the appellant had shot dead the deceased. I have further come to the conclusion that the shooting was done by putting the rifle against the body of the deceased. Intention of a person has to be gathered from the circumstances of a case. When a man does act in the aforesaid manner what else can be deemed to be his intention except the intention of causing death. Here is the appellant in

this case who was firing a cartridge with a rifle. Could it be said that he did not know that it would cause death. No same person would take such a plea. In the absence of any plea of insanity the appellant must have known it and with this knowledge fired the rifle. The knowledge that it was a dangerous firearm most likely to cause the death of the person and the fact that he had put the rifle against the body of the victim, goes to show that he could not have done it except with the intention of causing the death of this person. It is impossible to imagine that there could be any other intention except causing death. In my view, therefore, the offence comes within the first clause of section 300 of the Indian Penal Code and amounts to murder.

20. Assuming that it is not so, still the offence would be covered by the third clause. If the appellant fired the rifle at the deceased, as he did, could he have any other intention except causing the bodily injury. And if the bodily injury caused was sufficient in the ordinary course of nature to cause death, it is still the offence of murder. In the present case, when the appellant fired the rifle close to the body. by no stretch of imagination can it be said that he did not intend to cause the bodily injury. Even so, by no stretch of imagination it can be said that the injury caused was not sufficient to cause death. For these reasons again, it is the offence of murder.

21. It may also be stated that the act of the appellant is not covered by any of the exceptions to section 300, Indian Penal Code. The first exception where a man causes the death of another on account of grave and sudden provocation is not applicable. The second exception relating to private defence of person or property, equally has no application, nor does the third exception has any relevance. The fourth exception where culpable homicide is committed in course of a sudden fight has also no relevance to the present case. The deceased was lying asleep. The fifth exception too has no relevance. If the act constituting the offence is covered by any of the clauses of section 300 of the Indian Penal Code and not covered by the exception, it is an offence of murder within the definition given by section 300 and is punishable under section 302, Indian Penal Code.

22. Out of my respect for brother S. P. Sinha, J., I would now like to consider whether in any view of the matter it could constitute an offence. as he has held, under section 304A of the Indian Penal Code. The section provides—

> "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall

be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

In order to bring an offence within the purview of this section there are two things which must be proved, firstly that the act was rash or negligent and secondly, that it did not amount to culpable homicide, Culpable homicide is defined in section 299 of the Indian Penal Code which provides as follows :—

> "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

The distinction between sections 299 and 300 of the Indian Penal Code has been discussed and illustrated in a large number of cases beginning with the case of *Regina* v. *Govind*(1). It is not necessary at this late stage to repeat it. It will appear, however, from the decisions on the point that where death is caused with the intention of causing death it is culpable homicide and. unless covered by the exceptions in section 300, amounts to murder. The second clause of section 299 is regarding the intention of causing such bodily injury as is likely to cause death. Under section 300, however, in third clause it is different inasmuch as if the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, it amounts to murder. The difference is thus only in the degree of probability. If the injury is only likely to cause death, it is culpable homicide, but it becomes murder when the injury is sufficient in the ordinary course of nature to cause death. In order to find out what was the degree of probability, the nature of the weapon used, the manner in which the blow was inflicted, the site of the injury—all have to be taken into account. In respect of the third clause of section 299, it may be pointed out that in this case the offender does not intend but he has the knowledge that the act is likely to cause death. The fourth clause of section 300 may be read to see the distinction between the two sections. which provides that the knowledge must be that the act *is so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death. Here again, one may notice that in

(1) (1876) I. L. R. 1 Bom. 342.

one case the knowledge is that the act is likely to cause death whereas in the other case the knowledge is that it must in all probability cause death. Here again, one notices the degree of probability of the result of the act, though it is in respect of the knowledge of the offender. In other words, if death is the likely result it is culpable homicide; if it is the most probable result, it is murder. The second clause of section 300 relates to a case where the offender knows that the act is likely to cause the death of a person to whom the harm is caused. For instance, where an offender knows that the victim is suffering from a particular disease and a blow to him at that diseased spot would be fatal. Even though such a blow may not be fatal to an ordinary man of good health, in the particular circumstances of the case, it would amount to murder.

23. With great respect, brother S. P. Sinha, J. has not considered as to whether the offence in the present case amounted to culpable homicide or not, which is a condition precedent to the application of section 304A of the Indian Penal Code. It is well known that the offence covered by section 304A are cases where there is no intention to cause death and no knowledge that the act would in all probability cause death. It only applies to cases of rash and negligent acts which are obviously done without any criminal intent. It will appear from sections 300 and 304 of the Indian Penal Code that they cover cases of culpable homicide amounting to murder and those not amounting to murder. Obviously, therefore, if the act by which death has been caused has been done with the intention or the knowledge as mentioned in section 299 or those mentioned in section 300, the application of section 304A is entirely excluded. Thus a rash or negligent act resulting in death is different from an act done intentionally or with the knowledge that it is likely to cause death. It is well settled that a rash act is primarily an over-hasty act and is thus opposed to a deliberate act and even if it be deliberate, it is done without due deliberation and caution. The act is done without the intention of causing death or bodily injury, but the actor does it in a reckless way or being absolutely uncareful about the consequences of his act. It is too late in the day to require authorities in support of the proposition aforesaid. Negligence is known to be the omission to do something which a reasonable man in the circumstances of a case would do. Criminal negligence is gross negligence to do that which a reasonable man would do having regard to all the circumstances. Everyone is aware of cases of rash or negligent driving resulting in death of persons. It is, however, obvious that in such cases there is no intent to cause death or bodily injury.

There is no knowledge either that death or injury as is likely to cause death would be the result. As is well known, this section contains within itself the offence which is called "man-slaughter by negligence" in English law.

24. The question thus is whether in view of the aforesaid principles of law the appellant in the present case can be said to have fired the rifle without intending to cause death or such bodily injury as was likely to cause death or without the knowledge that he was likely by such act to cause death; in other words, whether the offence of culpable homicide is excluded in the circumstances of the present case. I have already held earlier that in the present case it is quite obvious that the appellant intended to cause death and cause such bodily injury as was sufficient in the ordinary course of nature to cause death. The case having fallen within section 300, there is no room for application of section 304A. Brother S. P. Sinha has, however, considered some circumstances which appeared to him to bring the offence within section 304A. Even though he has noticed that the medical evidence established that the barrel of the rifle was placed on the body of the deceased at the time when the rifle was fired, with great respect, he failed to draw the inference resulting therefrom with regard to the intention of the appellant. My learned brother has gone on other circumstances, namely, that no motive has been alleged in the present case; that there was no light in the barrack; that after firing the shot the appellant did not move from his place; that he surrendered the rifle and the magazine and volunteered to be taken to the police-station; that he did not enter the room where the deceased was sleeping and that he did not name the person whom he had killed while confessing and had only said that he had fired. These aspects of the evidence created the doubt in the mind of my learned brother as to whether the firing was an act of negligence or was intentional. I am afraid, I am unable to treat any of these circumstances as pointing towards a rash or negligent act by the appellant. The absence of motive in a criminal case is immaterial. In the present case the prosecution has not alleged any motive whatsoever. On the other hand, it is the defence which alleged a motive on the part of witnesses to falsely implicate because of the fact, as alleged, that the appellant had a common mass with a Muslim constable. It is well settled that where the prosecution does not allege a motive, that fact by itself would not lead a court to hold, if the evidence points otherwise, that the case did not establish a case of culpable homicide. I have dealt at some length with the question of light and the possibility of identity beyond doubt.

That has no relevance to the question of the act of the accused-appellant being rash or negligent. His subsequent behaviour is also no pointer in that direction. How the rifle came to be fired was a matter within the special knowledge of the appellant himself. He did not make out any case of rash or negligent behaviour on his part or even about the accidental firing of the rifle. As I have said earlier, when a man puts a rifle against the body of a person and fires, it is impossible to imagine that it was an act done without intent of causing death or bodily injury as is likely to cause death. It cannot either be said to be accidental or a rash or negligent act. I am unable to subscribe to the view that if the appellant had intentionally fired on the deceased he would have also named the person on whom he had fired. There was no question of naming the person—the person was very much on the chouki and he was known to them all and the witnesses had seen as to who was the victim. There was no occasion for the appellant to inform them about the name of the victim. There was, however, an occasion to inform them about the person who had fired the rifle. I may point out another objection to the consideration of this. My learned brother has relied on the confessional statement for the purpose of giving the benefit to the accused by relying on the omission in that statement, to come to the finding that it was a negligent act. If the statement is to be excluded, this circumstance would not be available. I will deal with the question as to whether the aforesaid statement was admissible in evidence, later. In no view of the matter, therefore, I can persuade myself to hold that it was a case covered by section 304A of the Indian Penal Code.

25. That brings me to the only question remaining to be considered, namely, whether the statement of the accused was a confessional statement made to a police officer and in view of section 25 of the Evidence Act, ought to be excluded. On this point again, my two learned brethren have come to entirely two opposite conclusions. Brother S. P. Sinha has held that the confession was not hit by section 25 of the Evidence Act. Brother Uday Sinha has, however, come to the opposite conclusion. The reason given by brother S. P. Sinha is that a police constable acting as a guard of a treasury is not a person acting as a police officer. In his view, a confession made to a police officer when he is so placed "that extortion of confession could not be ruled out" is alone hit by section 25 of the Evidence Act. He has relied upon the decision in the case of *Balkishan A. Devi Dayal* v. *State of Maharashtra*(1). where the Bombay High Court held that

(1) (1975) Cr. L. J. 1891.

a member of the Railway Protection Force was not a police officer within the meaning of section 25 of the Evidence Act, *Emperor* v. *Shanker*(1) where a confession had been made to a private individual in the presence of the Choukidar, and *Sita Ram* v. *State of Uttar Pradesh*(2) where a letter addressed to a Sub-Inspector of Police confessing a guilt had been discovered. I am unable to find good reasons for coming to the conclusion that these decisions help the proposition of law laid down by my learned brother. In the case of *Balkishan A. Devi Dayal* (supra) the decision was so obviously because members of the Railway Protection Force are not police officers enrolled under the Indian Police Act. Section 3 of the Railway Protection Force Act, 1957 itself provides for the creation of this Force and section 10 says that they would be railway servants. True, some power similar to that of the police have been given to the members of the Railway Protection Force but that by itself would not make them police officers. In the case of *Emperor* v. *Shanker* (supra) the statement had been made to a person other than a police officer but in the presence of the Choukidar who was treated to be a police officer. It is well settled that a statement made to a person other than a police officer, even though it be in the presence of such an officer, cannot be excluded merely because of the presence of the police officer. What is important to be noted in this connection is that the statement was not made to the Choukidar who was a police officer. In the case of *Sita Ram* v. *State of Utter Pradesh* (supra) also the Supreme Court clearly said that the letter was not a statement made to a police officer even though it was addressed to a police officer, because it was not made in the presence of a police officer. None of the three cases aforesaid, I say with great respect, support the proposition that confessions made to police officers only while they are acting as such are hit by section 25 of the Evidence Act and not otherwise. I am tempted to cite the decisions in the cases of *Emperor* v. *Mallangowda Parwatgowda and another*(3) and *Jagjitsingh Tannasingh* v. *State of Kutch*(4). The latter decision placed reliance on the earlier decision of the Bombay High Court where Batchelor, J. held that there was no reason for importing into sections 25 and 26 of the Evidence Act a notion that confessions made to a police officer described therein in general terms

(1) (1934) A. I. R. (Oudh) 222.
(2) (1966) A. I. R. (S. C.) 1906.
(3) (1917) A. I. R. (Bom.) 180.
(4) (1956) A. I. R. (Kutch) 1.

"must be restricted to confessions made to a police officer while he was acting as a police officer". Reliance was placed in this case also on the decision of the Supreme Court in *Zwinglee Ariel* v. *State of Madhya Pradesh*(1) where it was held that a confession made to the police before he became an accused, was hit by the aforesaid section. In other words, the confession was made to a police officer before he was investigating into the case and was in a position to extort a confession. It is unnecessary to state that section 25 has been held to use the words "police officer" in its popular and comprehensive sense to be construed in a wide and liberal manner in *State of Punjab* v. *Barkat Ram*(2). It was said by the Supreme Court in the aforesaid case of *State of Punjab* v. *Barkat Ram*, that "there seems to be no dispute that a person who is a member of the police force is a police officer. A person is a member of the police force when he holds his office under any of the Acts dealing with the police..... There is no denying that these persons are police officers and are covered by that expression in section 25". Their Lordships, however, said that the definition of "police" in section 1 of the Police Act of 1861 is not restrictive but indicates that persons other than those enrolled under that Act can also be covered by the word "police". In this perspective they were considering in the case aforesaid, the question as to whether Customs Officers could be said to be Police Officers. The aforesaid decision of the Supreme Court clearly rules out the argument that even though a person may be enrolled under the Police Act he would not be treated to be a Police Officer within the meaning of section 25 if at the relevant time of the confession being made to him he was not discharging all the duties of a police officer. I am constrained, therefore, to say with regret that I cannot concur in the view taken by brother S. P. Sinha and I must express my agreement with the view taken by brother Uday Sinha.

26. In the present case the alleged confession was made to the constables who were undoubtedly police constables even though at the monent incharge of guarding the treasury. There is nothing even to show that whatever powers they had as police constables had ceased to be theirs by virture of the fact that they were guards of the treasury so as to give rise to the question whether at the moment they could have exercised powers of a police officer or not. Police constables are undoubtedly police officers within the meaning of section 25 of the Evidence Act. Any confessional statement of the accused before such

(1) (1954) A. I. R. (S. C.) 15.
(2) (1962) A. I. R. (S. C.) 276.

persons was undoubtedly hit by section 25 of the Evidence Act and ought, therefore, to be excluded from consideration.

27. That brings me to the question whether the statement of the appellant was confessional in nature. Both my learned brethren have proceeded on the footing that the statement was confessional and come to their different conclusions about its admissibility. The prosecution evidence proves that when the witnesses asked him as to what had happened the appellant had replied that he had fired the gun and he asked them to take him to the police-station. The question is whether the aforesaid statement amounts to a confession. Stephen in his Digest of the Laws of Evidence defines 'confession' as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed the crime. This definition was adopted in *Queen-Empress* v. *Babu Lal and another*(1). In some cases, however, it was held that only statements which were direct acknowledgment of guilt should be regarded as confessions, not accepting the definition given by Stephen [see *Queen-Empress* v. *Jagrup and another*(2)]. According to the latter view, a mere inculpatory admission which falls short of being an admission of guilt, would not be considered to be confession. The point was settled, however, by the Judicial Committee of the Privy Council in the case of *Pakala Narayan Swami* v. *Emperor*(3) which was accepted and relied upon by the Supreme Court in the cases of *Palvinder Kaur* v. *The State of Punjab*(4) and *Om Prakash* v. *State of U.P.*(5). Their Lordships of the Judicial Committee said—

".....a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession"

and ultimately that—

"it would not be consistent with the natural use of language (in the Evidence Act) to construe confession as a statement by an accused 'suggesting the inference that he committed the crime'."

This definition accepted by the Supreme Court does not appear to have been given up in any subsequent decision of that court; at least none

(1) I. L. R. 6 All. 509 F. B
(2) I. L. R. 7 All. 646.
(3) (1939) A. I. R. (P. C.) 47.
(4) (1952) A. I. R. (S. C. 354.
(5) (1960) A. I. R. (S. C.) 409.

has been brought to my notice. In a subsequent case of *Prabhoo* v. *State of Uttar Pradesh*(1) however, it appears that their Lordships excluded all statements of incriminating facts and said that they were hit by section 25 of the Evidence Act. In another case of *K.Padayachi* v. *State of Tamil Nadu*(2) their Lordships referred to an observation made by Shah, J. in the case of *State of U. P.* v. *Deoman Upadhyaya*(3) referring to a confession as a statement made by a person "stating or suggesting the inference that he had committed a crime" and said that "from that isolated observation it is difficult to say whether he widened the definition than the one given by the Privy Council". Their Lordships further referred to *Palvinder Kaur's* case (supra) and held that an admission of a fact, however, incriminating but not by itself establishing the guilt of the maker of such admission would not amount to a confession within the meaning of sections 24 to 26 of the Evidence Act. In the case of *Veera Ibrahim* v. *State of Maharashtra*(4) again the question regarding the definition of a confession arose and their Lordships said that—

"It is now well settled that a statement in order to amount to a 'confession' must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of an incriminating fact, howsoever, grave is not by itself a confession..."

Reliance was again placed on the earlier cases of *Pakala Narayana Swami* (supra) and *Palvinder Kaur* (supra) The law thus stands well settled on the point.

28. The question is whether in the light of the principles aforesaid, the statement of the appellant that he had fired the rifle can be taken into evidence or it amounted to a confession. It is well settled that in order to find out whether a particular statement amounts to a confession, the charge against the accused, the actual words of the statement made by him and the surrounding circumstances have to be taken into consideration. Turning to the facts of the present case, apparently the statement would appear to be merely admission of a gravely incriminating circumstance. namely, that the appellant had fired the rifle. He does not say that he had fired to kill or to cause such bodily injury as was likely to result in the victim's death. It can be said that the mere statement that he had fired the rifle would by itself not amount to an admission of the guilt. It may be said that he

(1) (1963) A. I. R. (S. C.) 1113
(2) (1972) A. I. R. (S. C.) 66.
(3) (1960) A. I. R. (S. C.) 1125.
(4) (1976) A. I. R. (S. C.) 1167.

had fired not knowing that there was anybody sleeping on the cot or that he had fired because accidentally his fingers had pressed the trigger, or may be, any such other explanation for firing the rifle. The bald statement that he had fired the rifle taken by itself may appear at first sight to be merely a gravely incriminating circumstance which, if coupled with the other proved circumstances, would go to show that the appellant was guilty. In a case like this, however, a court has to be cautious in judging the nature of the statement. Since there is no rider attached to this statement, it must be taken in its plain meaning. Bereft of any explanation, the statement that he had fired the rifle may be taken to mean an admission of the charge that it was he who had fired the rifle. In the circumstances of the present case I doubt whether it can be conclusively said that the aforesaid statement does not amount to a confession when considered in the light of the surrounding circumstances. The charge against the appellant is that he had shot dead Kuer Singh with the rifle he was carrying. The circumstances are that Kuer Singh was found dead; he had a gun-shot injury which caused his death and thus the only question remaining to be answered by the prosecution is as to who had fired the rifle causing death. The appellant is said to have admitted this fact of firing the rifle by him. In such circumstances, therefore, it may amount to a confessional statement. It is well settled that the accused must have the benefit of the doubt and I am accordingly inclined to take the view that in the light of the surrounding circumstances and the charge against the appellant, the statement may amount to a confession. This conclusion receives support from the fact that he asked the witnesses to take him to the police-station. Here again, the statement may mean two things or more. He could have asked them to do so so that he could explain to the police as to how the firing took place. It could as well be to be proceeded against in law. It is significant that he did not make any confessional statement after he was taken to the police-station. It is further well settled that a confession like any other statement must be taken as a whole. I am conscious of the fact that in some cases the Supreme Court has held that a part of the confession may be relied upon and the other part which is disproved may be discarded. That is, however, for the purpose of use as evidence against maker of the confession. But where the question is of judging whether the statement is confessional, in my view it ought to be taken as a whole. Thus, the statement that he had fired the gun and he should be taken to the police-station taken together in the circumstances of the present case viz. when the

man was lying dead with gun-shot injuries and the witnesses had asked him as to how it had happened, may very well amount to a confession. The confession was obviously made to police constables and is thus hit by section 25 of the Evidence Act and must be excluded from consideration.

29. I have already held that the evidence in this case, leaving aside the confessional statement, proves beyond any manner of reasonable doubt that it was this appellant who had fired the rifle putting it close to the body of the deceased obviously with the intention of causing death or at least with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death. There is no escape from the conclusion thus that the appellant is guilty under section 302 of the Indian Penal Code.

30. At the end, I would like to refer to the arguments advanced by Mr. Nageshwar Prasad, counsel for the appellant, which I have already considered and disposed of. At first Mr. Prasad tried to support the finding of brother S. P. Sinha that it was a case under section 304A of the Indian Penal Code. Facing the difficulty of absence of circumstances to show that the act was only rash and negligent without intention or knowledge of its being likely to cause death, he gave up this argument and conceded that it was either a case of murder or no offence at all. His argument in order to show that it was no offence, was that it appears to have been an unintentional and accidental act. There is no material on the record in support of this argument. He conceded that the appellant's statement could be said to be only the admission of a gravely incriminating circumstance and by itself not amounting to confession. Even so, apart from this confession, I have come to the conclusion that it could amount to a confession in the light of the surrounding circumstances and the alleged offence. Nothing else of importance was urged on behalf of the appellant.

31. That brings me to the question of sentence. In the circumstances of this case the appellant deliberately killed the deceased. I find no circumstance which would lead me to take a view different from the one taken by the trial court. I would, therefore, not interfere with the order of sentence. I would accordingly convict the appellant under section 302 of the Indian Penal Code and sentence him to rigorous imprisonment for life. The appeal must accordingly be dismissed.

Appeal dismissed.

S. P. J.

LETTERS PATENT APPEAL

1977

April, 11.

Before S. K. Jha and Shivanugrah Narain, JJ.

HEMAYAT ALI & ORS.*

v.

NAGINA CHAMAR & ORS.

Abatement—joint decree by the first appellate Court—second appeal against the joint decree—one appellant dying during pendency of second appeal—abatement not set aside under Order 22 rule 9, Code of Civil Procedure—second appeal allowed and case remanded—legality of—conflicting decree in second appeal—Order of remand by Single Judge in second appeal—whether a judgment within the meaning of clause 10 of Letters Patent—Code of Civil Procedure, 1908 (Act V of 1908), order 22, rule 9.

A suit filed for joint decree in favour of the plaintiffs for declaration of their title and confirmation, in the alternative for recovery of possession was decreed by the first appellate court and during the pendency of second appeal by the defendants, one of the appellants died and the abatement was not set aside under Order 22, rule 9, Code of Civil Procedure and the second appeal was allowed and the case was remanded by a learned Single Judge. On an appeal under clause 10 of the Letters Patent by the plaintiff;

Held, that the decree being joint and indivisible, it cannot be dissected to enure to the advantage of some of the decree-holders with the possibility of decree being set aside with regards to others. If the decree against the deceased, one of the defendants, become final, any interference with the judgment and decree of the first appellate court would result in the possibility of a conflicting decree;

Letters Patent Appeal no. 11 of 1968.

* From a decision of the Hon'ble Mr. Justice Rajkishore Prasad, an ex-Judge of this Court, dated 1st February, 1968.

Held, further, that the Second Appeal before the Single Judge had become incompetent on account of it having abated against the deceased defendant, who was appellant no. 2 in the Second Appeal. The learned Single Judge had. therefore, manifestly erred in law in passing the impugned order.

An order of Single Judge in Second Appeal remanding the case to the first appellate Court for fresh hearing is a judgment within the meaning of clause 10 of the Letters Patent and hence is appealable.

Case law discussed.

Appeal by plaintiffs.

The facts of the case material to this report are set out in the judgment of the Court.

S. K. JHA AND SHIVANUGRAH NARAIN, JJ.—These appellants were the plaintiffs in the suit from which ultimately this Letters Patent Appeal arises. Leave to appeal under clause 10 of the Letters Patent having been granted by the learned Single Judge it is directed against the judgment dated 1st February, 1968 of Rajkishore Prasad, J. in Second Appeal no. 642 of 1965.

2. The appellants had instituted a suit for declaration of title and confirmation in the alternative recovery of possession over 86 dec. of land in plot no. 2227 of Khata no. 328 of village Bojpur Jadid and for a further declaration that the order of the Block Development Officer commuting rent in the suit land in the name of the defandants was illegal. The claim was also based on a declaration that the entry in the Record of Rights had been wrongly made. The trial court had dismissed the suit. The appellants preferred an appeal. which was registered as Title Appeal no. 303/64 of 1961/63 and was finally heard by the 3rd Additional Subordinate Judge, Arrah, who by his judgment and decree dated 10th June, 1965 allowed the appeal and decreed the suit with costs all through. The possession of the appellants was confirmed on a declaration of their title. The entry in the Record of Rights was held to be wrong. Against the aforesaid judgment and decree of the 1st appellate court respondents in this appeal filed the

aforesaid Second Appeal. One of the points taken in the Second Appeal had been that Manik Chamar (appellant no. 8 in the Second Appeal) had died during the pendency of the appeal in the first appellate court. As chance would have it, however, on 9th March, 1967 during the pendency of the Second Appeal in this Court Ramsurat Chamar, a defendant, who was appellant no. 2 in that appeal died. An affidavit was filed to that effect by the plaintiffs (appellants here). On 9th January, 1968 a note to that effect was made in the records of the Second Appeal. On 25th January, 1968 the Second Appeal was taken up for hearing when the present appellants raised objection that the Second Appeal had abated as a whole and had become incompetent and therefore, no judgment or decree could be passed by the learned Single Judge. By the impugned judgment the learned Single Judge after setting aside the judgment and decree passed by the first appellate court remanded the case to that Court with certain directions.

3. In this appeal the only point, which was raised is that the Second Appeal having become incompetent as a whole the learned Single Judge could not, in law pass any order of remand. Before I take up this point it is worthwhile to mention that at one stage a doubt had been raised as to whether the order of the learned Single Judge could be said to be a judgment within the meaning of clause 10 of the Letters Patent and with regard to the maintainability of this appeal. The point is, however, settled by two Bench decisions of this Court. In the cases of *Tapesar Raut and others* v. *Ram Jatan and others*(1) *and Jagarnath Ram and another* v. *Thakur Prasad and others*(2), it has been held that an order of Single Judge in Second Appeal remanding the case to the appellate court below for fresh hearing is a judgment within the meaning of clause 10 of the Letters Patent and hence, appealable. It has further been held in the case of Jagarnath Ram (supra) that if an appeal lies from an order of remand and no appeal is preferred, then the correctness of that order cannot be challenged subsequently. There can be, thus, no doubt that the present appeal is maintainable.

4. It was argued by the learned Counsel for the appellants that if there had occurred an abatement in the Second Appeal itself, then if the abatement was not set aside under Order 22, Rule 9 of the Civil Procedure Code, 1908 the effect of abatement was virtually a decree. It was therefore, argued that the learned Single Judge was far less

(1) (1962) A. I. R. (Pat.) 60
(2) (1963) A. I. R. (Pat.) 165.

competent to pass any order in respect of that appeal by setting aside the judgment and decree of the first appellate court and remanding the case to that court. I think there is sufficient force in this contention. As has been held by a Full Bench of this Court in the case of *Awadh Bihari Tewari and another* v. *Sudarsan Rai and others*(1) the effect of abatement, if it is not set aside under Order 22, Rule 9 is virtually a decree and the order of abatement is considered to have determined the rights between the parties and it operates as a decree in favour of the deceased defendants. That decree becomes final as a result of abatement. The Legislature has equated the abatement of a suit with its dismisal so far as the deceased person is concerned. There can, therefore, be no doubt that in so far as Ram Surat Chamar (appellant no. 2 in the Second Appeal) is concerned, the appeal had abated against him. That means a decree in his favour affirming the judgment and decree of the lower appellate court followed in law, as the abatement occurring on account of his death had not been set aside. If that be so, then the only question that remains to be seen is, as to whether the entire Second Appeal has become incompetent or not. As I have already stated earlier, the suit was one for joint decree in favour of the plaintiffs for declaration of their title and confirmation, in the alternative recovery of possession. That had been decreed by the first appellate court. None of the plaintiffs had claimed any specific share in the suit land. The decree being joint and indivisible it cannot be dissected to enure to the advantage of some of the decree-holders with the possibility of the decree being set aside with regard to the others. If the decree against the deceased Ram Surat Chamar, one of the defendants became final, any interference with the judgment and decree of the first appellate court would result in the possibility of a conflicting decree. In such circumstances, it has always been held that the entire appeal must be held to have become incompetent. In the case of *State of Punjab* v. *Nathu Ram*(2) there was a joint award passed by an arbitrator fixing higher compensation. Against that there was an appeal. One of the decree holders died during the pendency of the appeal and no substitution was effected. It was held by the Supreme Court that the entire appeal was incompetent, because to hold otherwise may result in conflicting decrees. Similarly in the case of *Ram Sarup* v. *Munshi*(3) the same principle was applied. There was a pre-emption suit. The decree was joint one. A part of that decree had

(1) (1965) A. I. R. (Pat.) 427 F. B.
(2) (1962) A. I. R. (S. C.) 89.
(3) (1963) A. I. R. (S. C.) 553.

become final on account of abatement. The sale was not a sale of any separated item of property in favour of the deceased appellant. The whole appeal was held to have become incompetent on account of abatement. Some of the principles have been, very succintly, if I may say so with great respect, laid down in *Ramagya Prasad Gupta and others* v. *Murli Prasad*(1). It has been held that under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defect but because it is part of the substantive law. No exhaustive statement can be made as to the circumstance under which an appeal in such cases cannot proceed. But the Courts have applied one or the other of three tests. The Courts will not proceed with an appeal (*a*) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent. (*b*) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court, and (*c*) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed. These three tests are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal.

5. The instant case is covered by the first test laid down by the Supreme Court. It is no use multiplying decisions of the High Courts in this regard which are all one way in favour of the appellants. It is, therefore, clear that the Second Appeal before the Single Judge had become incompetent on account of it having abated against defendant Ram Surat Chamar, who was appellant no. 2 in the Second Appeal. The learned Single Judge had, therefore. manifestly erred in law in passing the impugned order. This appeal accordingly succeeds and is allowed and the judgment of the learned Single Judge in Second Appeal no. 642 of 1965 is set aside. The suit of the appellants stands decreed. The appellants shall be entitled to their costs throughout.

Appeal allowed.

R. D.

(1) (1972) A. I. R. (S. C.) 1181.

CIVIL WRIT JURISDICTION

1977

April, 19.

Before B. D. Singh and Birendra Prasad Sinha, JJ.

PRAYAG NARAYAN.*

v.

THE STATE OF BIHAR & ORS.

Constitution, Articles 311(2), 14 *and* 16—*whether violated—promotion to the post of Assistant Engineer—technical qualification of the promotee relaxed and his retrospective appointment as Overseer made—power of the State Government—retrospective appointment when can be made—legal right, whether appertains to officiating post as temporary Assistant Engineer—jurisdiction of State Government to pass order appointing the promotee as Assistant Engineer in place of person officiating temporarily after creation of Zila Parishad—Order also adopted by Zila Parishad—Bihar Panchayat Samitis and Zila Parishads Act*, 1961 (*Bihar Act VI of* 1962), *section* 66.

Where the State Government relaxed the technical qualifications of respondent no. 4 in the instant case, and appointed him as overseer retrospectively with effect from 11th March, 1959, and on that basis promoted him as Assistant Engineer by reverting the petitioner under Annexures 2 and 8;

Held, that the State Government have the power for making retrospective appointment without infringing the rights of the petitioner and that the petitioner has not possessed any legal right with regard to his officiating post as temporary Assistant Engineer and in that view of the matter the petitioner had no legal right which could have been infringed. The orders contained under Annexures 2 and 8 were, therefore, not violative of Articles 311(2), 14 and 16 of the Constitution;

*Civil Writ Jurisdiction Case no. 1417 of 1974. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, further, that the impugned order contained under Annexure 2 by which respondent no. 4 had been appointed as Assistant Engineer in place of the petitioner was passed by the State Government after creation of Zila Parishad in place of District Board of Singhbhum under section 66 of the Bihar Panchayat Samities and Zila Parishads Act, 1961 and the said order, having been adopted by the Zila Parishad, it could not be said that the State Government had no jurisdiction to pass the impugned order.

Application by the petitioner.

The facts of the case material to this report are set out in the judgment of the Court.

Messrs. Sarojendu Mukherji and *Rudra Deo Kumar Sinha*, for the petitioner.

Messrs. S. B. M. Singh, G. P. for Respondents nos. 1, 2, 3 and 5, *Prabhunath Roy, S. C. to G. P. II, S. C. Ghose, Rana Pratap Singh no.* 2 for the respondent no. 4 and Sukumar Sinha.

B. D. SINGH AND BIRENDRA PD. SINHA, JJ.—This application by Prayag Narayan under Articles 226 and 227 of the Constitution of India read with the supplementary affidavit filed by the petitioner on 28th of November, 1974 is directed against the order dated 3rd of December, 1973 (annexure 2) and order dated 12th of September, 1974 (annexure 8) passed by the State of Bihar (respondent no. 1). It may be noticed that, in the main application which was filed on 3rd of September, 1974, the petitioner had challenged merely the order dated 17th of August, 1974 (annexure 4) whereby the petitioner was transferred from the post of Assistant Engineer, Zila Parishad, Singhbhum, to the post of Overseer as Sectional Officer at Hat Gambharia Zila Parishad Branch. As according to him that amounted to his reduction in rank from the post of Assistant Engineer to the post of Overseer without rhyme and reason and was arbitrary. But, in course of argument, learned counsel for the petitioner submitted that the petitioner does not now challenge the impugned order contained under annexure 4. At present, the petitioner as mentioned earlier, is praying only for quashing annexures 2 and 8. Annexure 2 is a letter written on behalf of respondent no. 1 to the Secretary, Zila Parishad,

Singhbhum (respondent no. 3), the relevant portion of which reads as thus :

"आपके पत्र संख्या ६७४, दिनांक ११ मई १९७१ एवं २१०, दिनांक २७ फरवरी १९७२ का निर्देश करते हुए निर्देशानुसार मुझे यह कहना है कि सरकार ने सिंहभूम जिला परिषद् में सहायक अभियंता के पद पर श्री प्रयाग नारायण को दी गई, प्रोन्नति के विरुद्ध श्री नारायण सिंह के अभिवेदन पर विचार करने के बाद उसे स्वीकृत किया है।

अतः सहायक अभियंता के पद पर वेतनमान ३००—२०—४०० द० रो० २५—५००—द० रो०—२०—७००—२५—८४० में श्री प्रयाग नारायण के स्थान पर श्री नागनाथ सिंह को प्रोन्नत किया जाता है.

सरकार ने श्री नागनाथ सिंह को तकनीकि योग्यता को मान्यता देते हुए यह भी निर्णय किया है कि उन्हें दिनांक ११ मार्च १९५९ से ही अधिदर्शक के पद पर नियुक्त माना जायेगा।"

The effect of annexure 2 was that in place of the petitioner respondent no. 4 was promoted and, considering the qualification of respondent no. 4, it would be deemed that respondent no. 4 was appointed as Overseer since 11th of March, 1959. Annexure 8 is another letter written on behalf of respondent no. 1 addressed to respondent no. 3, the relevant portion of which is to this effect :

"निर्देशानुसार मुझे यह कहना है कि उपर्युक्त विषय के कानूनी पहलुओं पर सावधानी पूर्वक पुनर्विचार करने के बाद सरकार ने श्री नागनाथ सिंह, अधिदर्शक, सिंहभूम जिला परिषद् की सहायक अभियंता के पद पर प्रोन्नति संबंधी लगाई गई रोक को उठा लेने का निर्णय लिया है। अतः सरकारी पत्रांक ९२२६, दिनांक १० मई १९७४ द्वारा दिया गया आदेश रद्द किया जाता है। इस संबंध में सरकारी पत्रांक ३०८९, दिनांक ३ दिसम्बर १९७२ द्वारा दिया गया आदेश कायम रहेगा और उसके अनुसार आवश्यक कारवाई की जाय।"

It may be seen that by this annexure 8 the order contained in annexure 2 was reiterated.

2. In order to appreciate the points involved in this application, it will be necessary to state some material facts stated by the petitioner in his application and his supplementary affidavit and as stated by respondent nos. 1 and 4 in their counter-affidavit. The petitioner has stated, in his application, that he was a qualified overseer and was

appointed as a Overseer in the District Board, Singhbhum, Chaibassa on 27th of December, 1962 and to which post he joined on 12th of October, 1963 and was doing his job with best of his ability and efficiency and to the satisfaction of superior officers of the District Board whereas Nag Nath Singh (respondent no. 4) was appointed as Sub-Overseer on 11th of March, 1959 and was promoted as Overseer on 1st of January, 1971. The service records of all the Overseers including the petitioner and respondent no. 4 employed in the District Board, Singhbhum were examined by the then District Engineer of the District Board, Singhbhum. The confidential character roll was found satisfactory and he was recommended for promotion to the post of Assistant Engineer which had fallen vacant on account of the promotion of the then incumbent to the post of higher rank. The petitioner being one of the seniormost Overseer under the Board was promoted as Assistant Engineer temporarily from the date of his joining the post on the same scale of pay and allowances as he was drawing as Overseer plus acting allowance of Rs. 100 only per month, by the order dated 4th of May, 1971 passed by Administrator, District Board, Singhbhum (vide annexure 1). In annexure 1 it was further mentioned that the pay of the petitioner as Assistant Engineer would be fixed on receipt of Government order regarding fixation of pay scale for Assistant Engineers of the Board. On the same date of the order contained under annexure 1, the petitioner joined the post of Assistant Engineer. Respondent no. 4 then filed a representation before respondent no. 1. On his representation, one of the impugned orders, namely, contained under annexure 2 dated 3rd of December, 1973, was passed. Later some of the members of the Legislature represented before respondent no. 1 against the promotion of respondent no. 4 in which doubt was expressed on the recognition of technical qualification of respondent no. 4 and accordingly the technical qualification of respondent no. 4 was examined again by the Bihar State Technical Education Board through which it was learnt that the institution, from which respondent no. 4 had obtained the certificate, was not a recognized institution. The Deputy Secretary, therefore, on behalf of respondent no. 1, under letter dated 10th of May, 1974 (annexure 3), ordered that the post of Assistant Engineer would be kept vacant and the recognization of the qualification of respondent no. 4 under annexure 2 would be withdrawn and a bar was imposed upon the promotion of respondent no. 4 as Assistant Engineer as contained under annexure 2. The petitioner stated, in paragraph 9 of his application, that the District Board, Singhbhum was converted into Zila

Parishad, Singhbhum on 11th of June, 1973 by Gazette notification and he submitted that, according to section 50(3) Proviso of the Bihar Panchayat Samitis and Zila Parishad Act, 1961 (Bihar Act VI of 1962) (hereinafter referred to as 'the Act'), the petitioner was deemed to have been appointed to the post of Assistant Engineer under the Zila Parishad, Singhbhum. In the supplementary affidavit, the petitioner has stated that on investigation with reference to the certificate of respondent no. 4 in diploma in Civil Engineering the Ministry of Education and Social Welfare Department of Education, New Delhi, Government of India by its letter dated 30th of April, 1974 (annexure 6) intimated the Deputy Director of Technical Education (T), Government of Bihar, Department of Industries and Technical Education, Bihar, Patna that the diploma in Civil Engineering awarded by the Madras College of Engineering Madras was not recognised by the Government of India for the purpose of recruitment to the post and services under the Central Government. Accordingly, Mr. J. P. Choudhary, Director Technical Education (T), Government of Bihar, Department of Industries and Technical Education, Bihar, Patna, conveyed the said information to Mr. K. G. Hajari, Deputy Secretary, Community Development and Panchayat, Government of Bihar, Patna, under letter dated 22nd of July, 1974 (annexure 7).

3. During the pendency of the application of the petitioner, on behalf of respondent no. 1 direction was made to respondent no. 3 under letter dated 12th of September, 1974 (annexure 8) that, on considering the legal implications, the State Government had decided to withdraw the bar with respect to the promotion of respondent no. 4 to the post of an Assistant Engineer in Singhbhum Zila Parishad and, hence, the order contained under annexure 3 was cancelled and it was further directed that the order with respect to letter dated 3rd of December, 1973 contained under annexure 2 would stand and that necessary action might be taken according to the direction contained under annexure 2. The petitioner further submitted, in paragraph 10 of the supplementary affidavit, that the petitioner was promoted to the post of Assistant Engineer according to the rules provided under section 33 of the Bihar and Orissa Local Self-Government Act, 1885 read with section 50 of the Zila Parishad Act and, in the appointment letter of the petitioner, it was mentioned that the Government order regarding fixation of pay scale for the petitioner as Assistant Engineer of the Board would be made later. But instead of fixation of the pay scale for the petitioner as Assistant Engineer, the respondent no. 1

promoted respondent no. 4 to the post of Assistant Engineer who was not at all a deserving candidate. In paragraph 11 of the supplementary affidavit, the petitioner further stated that the orders on behalf of respondent no. 1 under annexures 2 and 8 amounted to exercise of double standard in passing such orders as under another order dated 4th of July, 1974 (annexure 10) which was a letter written on behalf of respondent no. 1 addressed to the Secretary, Zila Parishad, Giridih in respect of promotion of Shri Bishun Dayal Singh to the post of Assistant Engineer it was mentioned that the Zila Parishad was competent enough to give promotion to the post of Assistant Engineer.

4. A counter-affidavit on behalf of respondent no. 4 has been filed on 28th of November, 1974, *inter alia*, justifying the impugned orders contained under annexures 2 and 8 enclosing annexures A, B, C and D. The petitioner thereafter filed a rejoinder to the counter-affidavit filed by respondent no. 4 on 16th of December. 1974, enclosing various annexures. On behalf of respondent no. 4 also a rejoinder was filed to the supplementary affidavit filed by the petitioner on 20th of December, 1974, enclosing various annexures, namely, E, F and G. On 21st of December, 1974, a counter-affidavit was filed on behalf of respondent no. 1, *inter alia*, supporting the impugned orders contained under annexures 2 and 8 including the order dated 11th of May, 1971 whereby the petitioner on appointment as Assistant Engineer it was clarified that he would be entitled to the same pay as in the scale of Overseer which he was already drawing plus a special pay of Rs. 100 per month together with the house rent allowance of Rs. 50 per month. Payment of special pay and house rent would be, however, subject to the Government sanction. The said order is marked as annexure A to the said counter-affidavit. Another letter issued by the District Engineer on 12th of January, 1974 (annexure B) addressed to the petitioner communicating to him the order passed in the letter dated 3rd of December, 1973 contained under annexure 2. The petitioner thereafter filed a rejoinder dated 10th of January, 1975 to the counter-affidavit filed on behalf of respondent no. 1 enclosing certain annexures and another rejoinder was filed by the petitioner to the rejoinder filed by respondent no. 4 on 10th of January, 1975. Still there is another reply by respondent no. 4 on 28th of August, 1975 containing some annexures including annexure I. Still there is another affidavit on behalf of the petitioner in reply to the rejoinder on behalf of respondent no. 4 filed on 26th of February, 1975.

5. Learned counsel for the petitioner has assailed the impugned orders contained under annexures 2 and 8 and has raised the following points for consideration by us :—

(*i*) Relaxation by respondent no. 1 of the technical qualification of respondent no. 4 by annexure 2 retrospectively from 11th of March, 1959 was arbitrary and without jurisdiction.

(*ii*) Retrospective appointment of respondent no. 4 by respondent no. 1 as Overseer with effect from 11th of March, 1959 and on that basis promoting respondent no. 4 as Assistant Engineer by reverting the petitioner under annexures 2 and 8 was violative of the petitioners fundamental rights under Articles 14 and 16 of the Constitution.

(*iii*) The order under annexure 8 was passed on *malafide* and false report submitted by the District Engineer, Singhbhum Zila Parishad which vitiated the order contained under annexure 8.

(*iv*) The orders contained under annexures 2 and 8 were passed without giving any opportunity to the petitioner and, therefore, they are in violation of natural justice and in violation to the provisions contained under Article 311 of the Constitution.

(*v*) The orders contained under annexures 2 and 8 were violative of the provisions contained under section 84 of the Local Self-Government Act, 1885 and sections 50 and 63 of the Zila Parishad Act, 1961.

6. It will be convenient to deal with point nos. 1 and 2 together as they are allied. It may be noticed that in the application with the supplementary affidavit the petitioner has prayed for quashing the orders contained under annexures 2 and 8 passed by respondent no. 1. Learned counsel for the petitioner submitted that respondent no. 1 has erred in relaxing the technical qualifications of respondent no. 4 retrospectively from 11th March, 1959 and appointing him as Overseer retrospectively with effect from 11th of March, 1959 and on that basis

promoting respondent no. 4 as Assistant Engineer by reverting the petitioner under annexures 2 and 8 was violative of the petitioner's fundamental rights under Articles 14 and 16 of the Constitution of India. In order to fix support to his contention he relied on *N. P. Mathur and others* v. *State of Bihar and others*(1) and he drew our attention to paragraph 59 where it was observed that

"the State Government have power to make an appointment with retrospective date provided it does not affect adversely the right of anybody else."

In that case it was further observed that when the petitioner could not make out a case with success of infringement of their rights by the regular order of appointment contained in annexure 2 it was not possible to take the view that the order of retrospective appointment contained in annexure 10 had adversely affected their right. In our opinion the observation made in the above case do not help the contention of the learned counsel for the petitioner. As pointed out it was held that the State Government have such power for making retrospective appointment. Now it has to be seen as to whether the appointment of respondent no. 4 in the present case has infringed the right of the petitioner. Learned counsel for the petitioner has then relied on another Full Bench decision of this court in *Madan Mohan Prasad and others* v. *Government of Bihar and others*(2) and he referred to paragraph 16 at pages 440 and 441 where it was observed approving the Full Bench decision of the Allahabad High Court in *Ram Autar Pandey* v. *State of U. P.*(3) that

"the Government has no power to make changes in the service conditions of their personnel with retrospective effect by mere executive instructions."

In that case also, however, a similar observation was made that retrospective appointment could not be made if it affects the rights of other. Therefore, the main question to be considered in this regard is as to whether the petitioner's right has been infringed. First of all in this regard it will be necessary to examine the terms of original appointment of respondent no. 4. Reference may be made to annexure 19 which is a representation dated 5th of July, 1971 filed by respondent no. 4 to the Administrator, District Board, Singhbhum. In that

(1) (1971) P. L. J. R. 471.
(2) (1970) A. I. R. (Pat.) 432.
(3) (1962) A. I. R. (All.) 928.

representation he has quoted the relevant portion from his original appointment letter which reads thus:

"(*i*) If your qualification is recognised by the State Government as equivalent to subordinate Engineering service then you will be allowed to higher scale of pay of Rs. 100—5—130—E.B.—6—190 as applicable to subordinate Civil Engineering.

(*ii*) You shall have to remain as probation for one year as sub-overseer and if your qualification is recognised as overseer then you will have to remain on probation for 2 years."

It may be recalled that respondent no. 4 is a diploma-holder in Civil Engineering from Madras College of Engineering. The relevant portion of which as gathered from annexure 16 reads thus:

"This is to certify that Shri Nagnath Singh has completed a course of Instruction in the following subjects in Civil Engineering to the standard required for the Madras Government Technical Examination in the Grade shown against each subject with the prescribed practical training and is placed in the second class. His conduct is V. good."

Learned counsel for the petitioner, however, referred to paragraph 7 of the reply on affidavit filed by the petitioner on 16th of December, 1974 to the counter-affidavit filed by respondent no. 4 wherein it was *inter alia* stated that the certificate obtained by respondent no. 4 was not recognised by the State Board of Technical Education and Training nor did he pass any examination of Diploma course in Civil Engineering. The State Government. however, have recognised the said certificate and his qualification and thereafter had passed the impugned order contained under annexure 2 stating therein that respondent no. 2 would be deemed to have been appointed as Overseer since 11th of March, 1959. Learned counsel for the petitioner has, however, also relied on an unreported judgment dated the 16th of November, 1974 in Civil Writ Jurisdiction Case nos. 190 of 1973 (*Ramavtar Prasad Sinha* v. *State of Bihar*), 407 of 1974 (*Braj Kishore Choudhary & others* v. *State of Bihar*) and 521 of 1974 (*Bimla Prasad Mitra and others* v. *State of Bihar*) and he referred to paragraph 27 of the judgment where it was observed *inter alia* that it was true that the Government was entitled to revise the rules relating to the conditions of service of its employees and they were bound by unilateral decision of the Government, but it is also well-settled that the revised rules could not take away any vested right of the Government employees. It may be noticed that the observation

made in that judgment is not applicable to the instant case. It may be seen that in that very paragraph it is mentioned that if, however, Government had framed definite rules and issued firm executive instructions for determination of seniority *inter se* of the employees with those rules and instructions and on the basis of the decision in the said case, the matter cannot be reopened and in that background the said observation was made. In the instant case no such rule of seniority has been placed by learned counsel for the petitioner. Besides this, we will discuss hereinafter that the petitioner has not possessed any legal right with regard to his officiating post as temporary Assistant Engineer. Now we have to examine as to whether the said retrospective appointment of respondent no. 4 as Assistant Engineer as contained under Annexures 2 and 8 has infringed the right of the petitioner. The petitioner himself has stated in paragraph 4 of his application that the District Board had promoted the petitioner as Assistant Engineer temporarily from the date of his joining the post and it is admitted position that the petitioner was temporarily holding the post of an Assistant Engineer till the orders contained under Annexures 2 and 8 were passed. In that view of the matter in our opinion the petitioner had no legal right which could have been infringed. It appears that he was merely officiating as Assistant Engineer temporarily. Reference may be made to annexure 1 which is an order dated 4th of May, 1971 by the Administrator of the District Board, Singhbhum where it is clearly mentioned that the petitioner was promoted as Assistant Engineer temporarily from the date of his joining the post on the same scale of pay and allowances as he was drawing as Overseer plus acting allowance of Rs. 100 per month. It is further mentioned therein that his pay would be fixed as Assistant Engineer after receipt of the Government order regarding fixation of pay scale for Assistant Engineer. It may be noticed that the pay scale of the petitioner as Assistant Engineer was not yet approved by the State Government as it would be apparent from annexures 18 and 18A, which are mere recommendations. Annexure 18A is by the Administrator, District Board, Singhbhum. In annexure 18A in paragraph 3 it is mentioned that the petitioner was promoted and appointed as Assistant Engineer on 4th of May, 1971 and joined on 4th of May, 1971. Fixation of pay in Assistant Engineer's scale is justified as per provisions of Bihar Service Code. Admittedly, therefore, the petitioner was asked to temporarily act as Assistant Engineer. Reference may also be made to annexure 4 by which the petitioner was reverted from the officiating post of Assistant Engineer and transferred from Chaibasa to Hatgomaria as Overseer. In that very annexure it is also clearly mentioned that the post of Assistant

Engineer would be kept vacant for the time being. The relevant portion of annexure 4 reads thus :

> "बिहार सरकार, योजना एवं विकास, सामुदायिक विकास एवं पंचायत विभाग (जिला पर्षद् शाखा) के पत्र संख्या ३०८९, दिनांक ३ दिसम्बर १९८३ के अनुसार श्री प्रयाग नारायण के प्रोन्नति को अस्वीकृत किया गया है, तथा पत्र संख्या १२२६, दिनांक १० मार्च १९८४ के अनुसार सहायक अभियंता के पद को रिक्त रखने का आदेश दिया गया है।"

Reference may be made to *Pashupati Narain Singh* v. *Union of India*(1) where it was observed at page 20 that the petitioner had been put to officiate as a Chief Booking clerk at Gaya as a stop-gap measure he could hardly contend that by annexure 5 he had been reduced to rank from a higher post which he was holding on an officiating basis. Learned counsel for the petitioner has, however, placed reliance in *Parshotam Lal Dhingra* v. *Union of India*(2) and he referred to paragraph 28 at page 49 where it was observed :

"If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post of rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such case is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty."

In this connection he has also relied on *Madhav Laxman Vaikunthe* v. *State of Mysore*(3). There also the above observation made in

(1) (1971) A. I. R. (Pat.) 18.
(2) (1958) A. I. R. (S. C.) 36.
(3) (1962) A. I. R. (S. C.) 8.

A.I.R. 1958 Supreme Court, 36 (Supra) had been approved. Learned counsel on the basis of the above observation submits that in the instant case also the petitioner has lost his seniority in his substantive post. In this regard he referred to paragraph 12 of the supplementary affidavit wherein he stated that the orders contained under annexures 2 and 8 were violative of Article 311(2), 14 and 16 of the Constitution of India and the rules for promotion and seniority as provided in the Bihar Public Works Department Code Vol. II which also guides the service conditions of Engineers of Zila Parishad.

7. In our opinion the petitioner has not placed any specific material before us to show as to how it has affected his seniority and his future right of promotion and we see no ground for holding that any of the rights of the petitioner was infringed by those impugned orders. In that view of the matter the contention of learned counsel for the petitioner on point nos. 1 and 2 are not acceptable.

8. Now we turn to consider the submission of learned counsel for the petitioner on point no. 3. Under this point learned counsel for the petitioner submitted that the order contained under annexure 8 was passed on a *mala fide* and false report of the District Engineer, Singhbhum. In our opinion there is no materials on record to come to the conclusion that the orders contained under annexure 8 was passed on *mala fide* ground. Learned counsel, however, drew our attention to Annexure G to the affidavit in reply filed by respondent no. 4 to the supplementary affidavit filed by the petitioner on 20th of December, 1974. Annexure G is a letter written by the Secretary of Zila Parishad, Chaibasa Singhbhum to respondent no. 1 in which *inter alia* it was mentioned that the resolution under which respondent no. 4 was proposed to be appointed as Assistant Engineer was confirmed on 20th of April, 1974. In our opinion there can be said to be any specific allegation of *mala fide*. It is well settled that for allegation of *mala fide* it is for the petitioner to make such an allegation in his petition. He has referred to the affidavit of respondent no. 4 which was filed in reply to the supplementary affidavit filed by the petitioner. Besides Annexure G also does not disclose any *mala fide* action on the part of the members of the Zila Parishad. Learned counsel for petitioner submitted that the said resolution of the members of the Zila Parishad was passed on the report of the District Engineer, Zila Parishad, Singhbhum. But unfortunately in the instant case the District Engineer of Zila Parishad, Singhbhum has not been impleaded

as one of the respondents. It would not be proper to hear any allegation of *mala fide* against him behind his back. Thus in our opinion there is no substance in point no. 3 also.

8A. Now we turn to consider, briefly, the submission of learned counsel for the petitioner under point no. 4. Under this point learned counsel for the petitioner submitted that the impugned order contained under annexures 2 and 8 were passed without giving any opportunity to the petitioner and, therefore, it was violative of the principles of natural justice and provisions contained under Article 311 of the Constitution of India. In our opinion this submission of the learned counsel for the petitioner is hardly tenable in view of our finding that the petitioner was officiating merely temporarily as an Assistant Engineer and by the impugned order he was asked to join his substantive post and it had not resulted any civil consequences. Besides under annexures 2 and 8 respondent no. 4 has been appointed as Assistant Engineer in place of the petitioner who was, as mentioned earlier, officiating as an Assistant Engineer temporarily and he was asked to join his substantive post by annexure 4. It may be mentioned here that the petitioner has already conceded that he is not at present challenging the order contained under annexure 4. Therefore, in our opinion there is no merit in the submission of the learned counsel on point no. 4.

9. Lastly, we turn to consider the contention of the learned counsel for the petitioner under point no. 5 wherein he urged that the State Government had no jurisdiction to pass those impugned orders contained under annexures 2 and 8. He pointed out that Zila Parishad of Singhbhum was constituted on 14th of June, 1973 in place of District Board under section 66 of the Bihar Panchayat Samitis and Zila Parishads Act, 1961 (Bihar Act VI of 1962) (hereinafter referred to as 'the Act'). The relevant portion of which reads thus:

> "66. *Abolition of District Boards.*—(1) Notwithstanding anything in the Bihar and Orissa Local Self-Government Act of 1885 (Bengal Act III of 1885) or any other law for the time being in force the State Government may be notification in the Official Gazette abolish any District Board with effect from such date as may be specified therein."

The impugned order contained under annexure 2 was passed on 3rd of December, 1973 on behalf of respondent no. 1 the State of Bihar whereas Annexure 8 was passed on 12th of September, 1974 on behalf of respondent no. 1. After creation of Zila Parishad in place of District

Board of Singhbhum the petitioner as well as respondent no. 4 became the employee of the Zila Parishad as section 50(3) of the Act provides. In that view of the matter learned counsel for the petitioner submitted that the State Government had no jurisdiction to pass the impugned order. In our opinion this submission of learned counsel for the petitioner is also not tenable. Reference may be made to annexure F to the affidavit in reply on behalf of respondent no. 4 filed on 20th of December, 1974 which is resolution of the Zila Parishad. Wherein *inter alia* it was resolved adopting the order passed at the instance of the State Government under annexure 2. In other words the Zila Parishad also resolved that respondent no. 4 be promoted to the post of Assistant Engineer. Thereafter by another meeting of the Zila Parishad dated 13th of July, 1974 (Annexure I to the said affidavit) the proceeding of the earlier meeting contained in the resolution dated 20th of April, 1974 (Annexure F) was confirmed. It may be noticed that the petitioner has not challenged the resolution of the Zila Parishad contained under Annexures F and I and whatever irregularity was there while passing the order contained under Annexure 2 has been cured as now the Zila Parishad has adopted it. It may also be observed that under Annexure 8 the relevant portion of which we have already quoted above does not contain any order regarding promotion of respondent no. 4 as Assistant Engineer. In fact, it simply mentions that whatever bar was imposed upon respondent no. 4 with regard to his qualification that bar after investigation was withdrawn and the order as passed under annexure 2 was directed to be given effect to. As regards the order contained under annexure 2 we have already explained that the said order was also adopted by the Zila Parishad. It may also be pointed out that under section 68 of the Zila Parishad Act the State Government has been conferred with the power to cancel or suspend the resolution of the Panchayat Samiti or of a Zila Parishad. If at all the petitioner was aggrieved with the resolution contained under Annexures F and I he ought to have moved the State Government under section 68 of the Act. Besides, in the instant case we have already held that the petitioner had no legal right to challenge the impugned orders as he was temporarily working as an Assistant Engineer.

10. In the result, therefore, after having considered the case of the petitioner from various angles we dismiss the application of the petitioner with cost of Rs. 200 and affirm the orders contained under annexures 2 and 8.

Application dismissed.

S. P. J.

CIVIL WRIT JURISDICTION

Before K.B.N. Singh, C.J. and S. Ali Ahmed, J.

1977

April, 22.

PROFULLA KUMAR BANERJEE.*

v.

DEPUTY COMMISSIONER, HAZARIBAGH & ORS.

National Cadet Corps Act, 1948 (*Act XXXI of* 1948) *section* 10 *and notification, dated 9th September*, 1965 *issued by the Ministry of, Defence, Government of India—scope and applicability of—Cadet, whether under an obligation for active military service—duties prescribed under the notification, whether have nexus to the task of securing the defence of India—house requisitioned under section* 29 *of the Defence of India Act, whether can be put in possession of National Cadet Corps—Defence of India Act*, 1962 (*Act LI of* 1962), *section* 29.

Section 10 of the National Cadet Corps Act makes it abundantly clear that the Cadet will be under no obligation for active military service but will be only liable to such duties and obligation as may be prescribed. The duties that have been prescribed under the notification makes it clear that they have no nexus to the task of "securing the defence of India". The duties assigned under the notification are such which in times of Emergency and need be rendered by such persons who have received some training in the task they are assigned, but they cannot be said to be for securing the defence of India. The arms and ammunitions are given to the National Cadet Corps to impart training to its Cadets. The purpose for which the arms and ammunitions are stored and kept in the stores of the National Cadet Corps is not for securing the defence of India but for the purpose of imparting training to the boys and girls. The responsibility for the defence of India lies on the armed forces of the Union and there is no obligation on the National Cadet Corps to secure the defence of India;

*Civil Writ Jurisdiction no. 2895 of 1975. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, therefore, that there is no direct or close nexus between the National Cadet Corps and "securing the defence of India" on the basis of which the house requisitioned for securing the defence of India can be put in possession of the National Cadet Corps and as such a writ in the nature on *mandamus* directing to derequisition the premises can be issued.

Smt. Saraswati Devi v. *District Magistrate, Deoria* (1) and *Union of India* v. *Ram Kauwar* (2), relied on.

Application under Articles 226 and 227 of the Constitution of India.

The facts of the case material to this report are set out in the judgment of S. Ali Ahmad, J.,

Ms. S. B. Sanyal, Choudhary S.N. Mishra and *N. C. Ganguli*, for the petitioner.

Mr. A.K. Sinha, for respondents 3 to 5 and 7.

Mr. S.B.N. Singh (G. P. II) and *Mrs. Indu Prabha Singh (J.C.)*, for respondents 1, 2 and 6.

S. ALI AHMAD, J.—This is an application under Articles 226 and 227 of the Constitution of India. The prayer is to quash Annexure 1 to the application an order dated 22nd March 1963 requisitioning a house named 'Sunny View' belonging to the petitioner under section 29 of the Defence of India Act, 1962 (hereinafter to be referred to as the Act) read with Notification no. GRS—1716, dated the 13th December, 1962 of the Government of India, Ministry of Home Affairs. A further prayer for issue of a writ in the nature of mandamus directing the respondents to remove themselves from the house and to deliver vacant possession of the property requisitioned under Annexure 1 has also been made.

2. Undisputedly, the petitioner owned a house known as 'Sunny View' situated in Muhalla Nawabganj in the town of Hazaribagh, bearing Holding no. 158, Ward no. 9 within the Hazaribagh Municipality. The house along with its compound was requisitioned by the Deputy Commissioner, Hazaribagh, respondent

(1) (1965) A.I.R. (All.) 237
(2) (1962) A.I.R. (S. C.) 247.

no. 1. under section 29 of the Act by an order, dated 22nd March, 1963. In pursuance of the order of requisition as contained in Annexure 1, the respondents came in possession of the house sometime in the month of April, 1963. The petitioner sent a letter, dated 21st April, 1973, to the District Magistrate, Hazaribagh, respondent no. 1, requesting him to deliver vacant possession of the premises within seven clear days from the receipt of the letter. The basis for such a request, as is evidenced from the letter, was that the property could no longer be kept under requisition after the 11th March, 1973, in view of certain legislation. A copy of the letter has been marked as Annexure 3 to the writ application. The respondent Deputy Commissioner sent a letter to the Deputy Secretary, Education Department, that the house was requisitioned under section 29 of the Act and that it was till then in occupation of a Battalion of National Cadet Corps as its office. It further stated that the petitioner had requested for vacating the house. The opinion of the Government Pleader was sought for, who also advised that the requisition lapsed after the 11th March, 1973. A request, therefore, was made by the Deputy Commissioner that necessary arrangement might be made forthwith for shifting the present office from the house in question so that vacant possession of the house might be given to the petitioner. A copy of the communication has been marked as Annexure 4 to the writ application. Since no step was taken by the respondent even after the request made by the Deputy Commissioner to the Deputy Secretary, Education Department, Government of Bihar, the petitioner served a notice on the Deputy Commissioner under section 80 of the Code of Civil Procedure. On receipt of the notice under section 80 of the Code of Civil Procedure the Deputy Commissioner again wrote to the Deputy Secretary, Education Department, Government of Bihar, to release the property at an early date with a copy to the Commissioner, Chotanagpur Division and to the Commandant, National Cadet Corps Battalion, Hazaribagh, for information and immediate action. The Deputy Commissioner also by a letter marked as Annexure 6 to this application, informed the petitioner that on receipt of the notice under section 80 of the Code of Civil Procedure, action had been taken and request had been made to the Deputy Secretary, Education Department, Government of Bihar to vacate the premises at an early date. The Deputy Commissioner also made a request to the petitioner to allow a few months' time to enable the authority to make an alternatice arrangement.

3. The Assistant Administrative Officer for Director, National Cadet Corps, Bihar, thereafter addressed two letters, dated the 5th July, 1974 and 15th July, 1974 [Annexures 7 and 7(*a*) respectively] to the petitioner saying that in spite of their best efforts no suitable accommodation for the office and stores of the Battalion has been arranged. It was further stated in those letters that it was the duty of the State Government to arrange for necessary accommodation and unless a suitable alternative was made, it would not be possible to vacate the house. The petitioner thereafter waited for about nine months hoping that the respondents will find out some alternative accommodation but nothing seemed to have been done in that direction. Under the circumstances, the petitioner sent another letter (Annexure 8), dated the 21st April, 1975, to the Deputy Commissioner, respondent no. 1. In that letter, it was said that since the house was not being vacated in spite of several assurances, the petitioner will be obliged to hand over the matter to his lawyer for necessary legal action. Since this letter also yielded no result, the petitioner filed the present application in this Court and obtained a rule.

4. A counter-affidavit was filed on behalf of respondents nos. 3, 4, 5 and 7 wherein, *inter alia*, the continuance of requisition was justified. It was also stated that on receipt of the letter of the petitioner, dated 21st April, 1975, the State Government vide letter no. 7001/E/2/PERS (State)/5, dated the 25th June, 1975, directed the Deputy Commissioner, Hazaribagh to provide an alternative accommodation for the 22nd Bihar Battalion, National Cadet Corps Hazaribagh, so that the building in question might be vacated. An assurance was also made that a follow up action was being taken in the matter. A copy of the letter has been marked as Annexure A to the counter-affidavit.

5. Mr. Sanyal appearing for the petitioner first contended that the Deputy Commissioner, who had requisitioned the house under Annexure 1 had, in effect, derequisitioned it by Annexure 4 inasmuch as he asked the Deputy Secretary, Education Department, Government of Bihar to make necessary arrangement forthwith for shifting the present office from the house in question so that vacant possession might be delivered to the house owner. He also referred in that connection to Annexures 6, 7 and 7(*a*) to establish that even respondent no. 4 had agreed to vacate the premises after an alternative accommodation was made available for which follow up action had been

taken. It is not possible to accept this contention that the house was de-requisitioned merely because a request was made by the Deputy Commissioner to the Deputy Secretary, Education Department to vacate the house or because respondent no. 4 informed the petitioner that the house will be vacated after an alternative arrangement was made. At best, these letters indicated that the authorities were contemplating de-requisitioning the house. But unless a specific order to that effect was made, the house would be deemed to have continued to be under requisition that was made by an order, dated 22nd March, 1963 (Annexure 1). Mr. Sanyal also urged that the statements made in Annexures 7 and 7(*a*) to the effect that follow up actions to get an alternative accommodation are being made were maliciously false. He urged that if the statements in the counter-affidavit that efforts are being made to obtain a suitable accommodation were true, the State with all its might and resources must have got one. According to him, no effort in that direction was at all made and the statements to that effect in the counter-affidavit was just a pretence to keep the house in question. There may be some justification for this argument. It is rather surprising that the respondents could not make an alternative arrangement even after four years of the follow up action. I am constrained to observe that the respondents were not serious in searching for an alternative accommodation and the statements in the counter-affidavit that follow up actions are being taken cannot be accepted. Be that as it may the application cannot be allowed on this ground.

6. Mr. Sanyal next submitted that the house as evidenced by Annexure 1 was requisitioned for securing the defence of India but it was never used for that purpose; rather after requisitioning the house, it was handed over to a Battalion of the National Cadet Corps for keeping its office and stores. He submitted that the National Cadet Corps is not even remotely connected with securing defence of India and, as such, the petitioner was entitled to de-requisition of the property. Learned Standing Counsel appearing for respondents 3, 4, 5 and 7 objected to this plea on the ground that there was no foundation for this and that he did not have an opportunity to controvert this statement. On the materials on the record, in my opinion, there is sufficient material for the petitioner to advance this argument. The different annexures show that the house was requisitioned for securing the defence of India and that after requisition it was put in possession of a battalion of the National Cadet Corps.

The case, however, was adjourned and a supplementary counter-affidavit on behalf of respondents nos. 3, 4, 5 and 7 was filed on 1st April, 1977 when the case was taken up for further hearing.

7. The statements made in this supplementary counter-affidavit also support the petitioner to the extent that the house which was acquired for securing the defence of India was put in possession of the National Cadet Corps in which its offices and stores are located. Statements have also been made in the counter-affidavit to show that the National Cadet Corps is an integral part of the defence forces and, as such, are connected with the task of securing the defence of India. The moot question, therefore, is to ascertain the function of the National Cadet Corps. In case it is held that the National Cadet Corps is an integral part of the defence forces then the application has to be dismissed; but in case it is held that there is no nexus between the National Cadet Corps and the defence of India then the application has to be allowed.

8. The National Cadet Corps was raised and is maintained by virtue of the National Cadet Corps Act, 1948 (Act XXXI of 1948) (hereinafter to be referred to as the 1948 Act). The objects and reasons for the Act as presented before the Parliament were as follows :—

> "It is considered that the present university officers training corps should be overhauled, but at the same time it is felt that full development of character and the capacity for leadership will be possible only when the requisite training is given to boys and girls while they are young and impressionable.
>
> The problem is essentially educational which can be solved adequately only if the educational authorities take an active interest in this aspect of training and make it an integral part of cadet training in schools and universities. With that object in view the present bill has been drafted."

A perusal of the objects and reasons that I have quoted above clearly indicates that the legislation was made to give an opportunity to boys and girls while they are young and impressionable to develop their character and capacity for leadership. It also shows that the

problem was educational in character and, therefore, the Educational Authorities were expected to take active interest in this aspect of training and make it *an integral part of school education*. According to Mr. Sanyal, the National Cadet Corps is not, in any way, responsible for securing the defence of India. He said that the provision of the 1948 Act and the Rules framed thereunder only authorise raising of the National Cadet Corps under section 3 of the 1948 Act. According to him, the fact that Army, Naval and Air Officers are deputed to impart training to the boys and girls, will not make the unit responsible for securing the defence of India. Section 10 of the 1948 Act makes it abundantly clear that no person subject to the 1948 Act will be liable for active military service but shall be liable to perform such duties and discharge such obligation as may be prescribed. Under section 8 of the 1948 Act, a member of the National Cadet Corps is "entitled to receive his or her discharge from the corps on the expiration of the period for which he or she was enrolled or on his or her ceasing to be borne on the roll of the University or the school to which he or she may belong". The learned Standing Counsel for the Union of India, on the other hand, contended that the army, Naval and Air Officers are deputed to impart training to the boys and girls, and the Army, the Navy and the Air force supply arms and ammunitions, etc., which can be used for defence purposes to the corps. He also referred to a Notification, dated the 9th September, 1965 issued by the Ministry of Defence, Government of India, which is as follows :—

"In exercise of the powers conferred by section 10 of the National Cadet Corps Act, 1948 (31 of 1948), the Central Government hereby prescribes the following duties which shall be performed by the National Cadet Corps Officers (Senior, Junior and Girls Division) and Cadets (including girls) of the Senior Division who are of the age of seventeen years and above, namely :—

(*a*) Passive Air Defence including rescue work, first aid, evacuation of casualties, fire-fighting and removal of debris.

(*b*) Manning of Civil Defence posts including civil defence patrols and look-outs.

(*c*) Maintenance of essential services such as motor transport, pioneer and engineer services, water supply and power supply.

(*d*) Traffic control.

(*e*) Manning of static signal installations.

(*f*) Messenger service.

(*g*) Duties in hospitals,

(*h*) Administration and running of camps in case of movement of civil population, and

(*i*) Any other allied duties."

This is a Notification issued in exercise of the powers conferred by section 10 of the 1948 Act. Learned counsel on the basis of the duties that can be assigned to a cadet urged that they had nexus to the securing the defence of India. In my opinion, the argument advanced by the learned Standing Counsel for the Union of India must be rejected. Section 10 of the 1948 Act makes it abundantly clear that the cadet will be under no obligation for active military service but will be only liable to such duties and obligation as may be prescribed. The duties that have been prescribed under the Notification (Supra) makes it clear that they have no nexus to the task of "securing the defence of India". The duties assigned under this Notification are such which in times of Emergency and need be rendered by such persons who have received some training in the task they are assigned, but they cannot be said to be for securing the defence of India. Likewise the argument that the arms, ammunitions, etc., given by the Army which are kept in the premises can be used for securing the defence of India, has no merit. We are not concerned as to what can be or cannot be used for securing the defence of India. What we are concerned with is as to whether the arms and ammunitions kept in the stores are meant for securing the defence of India. Admittedly they have been given to the National Cadet Corps to impart training to its cadets. Therefore, the purpose for which they have been stored there is not for securing the defence of India but for the purpose of imparting training to the boys and girls. The responsibility for the defence of India lies on the armed forces of the Union and there is no obligation on the National Cadet Corps to secure the defence of India. In the circumstance, there is no direct or close nexus between the National Cadet Corps and "securing the defence of India" on the basis of which the

house requisitioned for securing the defence of India can be put in possession of the National Cadet Corps.

9. In the case of *Smt. Saraswati Devi* v. *District Magistrate, Deoria*(1), it has been held that although it was possible that some members of the National Cadet Corps subsequently join the regular armed forces but there was no obligation on them to join the same The learned Judge, therefore, held that the acquisition of the house, which was requisitioned for securing the defence of India and conduct of military operations and which was put in possession of the National Cadet Corps, was not legal. He, therefore, directed the respondents to deliver back the possession of the house in dispute to its owner. In the case of the *Union of India* v. *Ram Kanwar*(2), it has been held that if the purposes for which the property was requisitioned ceased to exist, the proviso to section 6 of 1952 Act made it obligatory for the Government to release the property. It is admitted case that the premises was requisitioned for the use and occupation of the National Cadet Corps and it has, ever since the requisition, been in its possession. I have held above that the National Cadet Corps has no close or direct nexus with securing the defence of India. The position, therefore, is that the requisitioned house has never been used for securing the defence of India, the purpose for which it was requisitioned. Therefore, there is no alternative but to issue a writ in the nature of mandamus directing respondent no. 1 to de-requisition the premises. In view of the concession made by learned counsel for the petitioner that the petitioner has no objection to allowing a further time of six months to the respondents to enable them to make alternative arrangements for the office of respondent no. 4, respondent no. 4 may remain in possession of the premises in question for a maximum period of six months from today, on the expiry of which he must deliver vacant possession of the house to the petitioner.

10. In the result, the application is allowed and writs and direction should be issued in the terms indicated above. There will be no order as to costs.

K. B. N. SINGH, C.J.—I agree.

M. K. C. *Application allowed.*

(1) (1965) A.I.R. (All.) 287.
(2) (1962) A.I.R. (S. C.) 247.

CRIMINAL WRIT JURISDICTION

1977

May, 4.

Before S. K. Jha and Muneshwari Sahay, JJ.

THE TATA IRON STEEL COMPANY LTD. & ANR.*

v.

THE LABOUR ENFORCEMENT OFFICER (CENTRAL) CHAIBASA & ORS.

Contract Labour (Regulation and Abolition) Act, 1970, (*Central Act no. XXXVII of* 1970), *section* 24—*complaint under—cognizance taken by Chief Judicial Magistrate under section* 26 *for violation of rule* 25((2)(v)(*a*) *of Central Labour (Regulation and Abolition) Central Rules*, 1971—*validity of—rule* 25(2)(v)(a)—*legislative intent in using the expression "similar kind of work" in the rule—whether ambiguous*—mens rea, *exclusion of.*

Where the Labour Enforcement Officer (Central) Chaibasa issued a notice against the writ-petitioners for violation of Rule 25(2) (*v*) (*a*) of the Contract Labour (Regulation and Abolition) Central Rules, 1971, and the writ-petitioners filed show cause denying contravention of provisions the Contract Labour (Regulation and Abolition) Act, or rule 25 of the Rules by them but without any reply to them and without getting the matter adjudicated, by the authorities under the Act on account of the disagreement with regard to the nature of work of the employees of the principal employer and that of the contractors, filed a complaint petition before the Chief Judicial Magistrate Chaibasa under section 24 of the Act and the Chief Judicial Magistrate took cognizance under section 26 of the Act;

Held, that it is clear that the show cause notice issued to the writ-petitioners and the petition of complaint do not disclose any offence. Mere statement in the counter-affidavit that Labour Enforcement

* Criminal Writ Jurisdiction Case nos. 5 and 6 of 1976(R). In the matter of applications under Articles 226 and 227 of the Constitution of India.

Officer was satisfied that the two classes of workmen were doing same or similar kind of work will not improve the matter, since on the petition of complaint, as they stand, no penal provision can be said to be attracted. The prosecution of the petitioner as also all proceedings on the basis of the complaint petitions filed against them and the cognizance taken under section 26 of the Act are, therefore, liable to be quashed.

The legislative intent in using the expression same or similar kind of work in Rule 25(2)(*v*)(*a*) of Contract Labour (Regulation and Abolition) Central Rules, 1971 is not at all ambiguous. What is necessary for attracting the provisions of the aforesaid sub-rule is 'the same or similar kind of work done by the two classes of employees'. The wages cannot be fixed on the general nature of work, namely, skilled, semi-skilled and unskilled. The provision of the rule do not make any reference to clarification of workers as skilled, semi-skilled or unskilled but lay emphasis upon the work which the employees of the contractors do *vis-a-vis* the employees of the principal employer.

Mens rea is an essential ingredient of criminal offence although a statute may exclude the element of *mens rea*. On the question whether the element of guilty mind is excluded from the ingredients of an offence, the mere fact that the object of the statute was to promote welfare activities or eradicate social evil is by itself not decisive. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that *mens rea* may, by necessary implication, be excluded from a statute. The nature of *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof. On the facts of the instant cases, there cannot be said to be any ingredient of *mens rea* on the part of writ-petitioners.

Case law discussed.

Applications under Articles 226 and 227 of the Constitution.

The facts of the cases material to this report are set out in the judgment of S. K. Jha, J.

Messrs. S. B. Sanyal, N. C. Ganguli and *P. D. Agrawal*, for the petitioners in both cases.

Mr. Ram Nandan Sahai Sinha, for the respondents in both cases.

S. K. JHA, J.—In both these criminal writ applications under Articles 226 and 227 of the Constitution of India an involved common questions of law. Hence, this common judgment. In both these applications the prayer made is for issuance of appropriate writ or direction quashing the prosecution launched against the petitioners under section 24 of the Contract Labour (Regulation and Abolition) Act, 19 (hereinafter referred to as 'the Act') of which the cognizance has been taken under section 26 of the Act. Before taking up the common question of law, it is worthwhile to narrate the facts of the two cases separately.

2. *Facts of Cr. W. J. C. no. 5 of 1976(R).*—Petitioner no. 1, the Tata Iron and Steel Company Ltd. is a Public Limited Company with its registered office at Bombay and petitioner no. 2 is the Manager of Pelletizing Plant situate at Noamundi under petitioner no. 1. In the Pelletizing Plant pellets are manufactured from iron ore fines which are charged to the blast furnace at the petitioner's works at Jamshedpur for ultimate manufacture of steel at the said works. On 11th August, 1975 there was an inspection of the aforesaid Plant by the Labour Enforcement Officer (Central), Chaibassa, respondent no. 1. He issued a show cause notice as to why legal action should not be taken against the petitioners because M/s. G. Patel and Company Contractors were paying to their unskilled workers at the rate of Rs. 3.50 per day whereas as per rule 25(2)(*v*)(*a*) of the Contract Labour (Regulation and Abolition) Central Rules, 1971 [hereinafter referred to as 'the Rules') the workers engaged by the aforesaid contractors were required to be paid at the rate of Rs. 195 plus dearness allowance at Rs. 30 plus variable dearness allowance per month which was being paid by the principal employer, namely, petitioner no. 1 to those categories of workers employed directly. It was further stated in that notice that the petitioners should show cause within ten days of the receipt of the letter endorsing a copy thereof to the Regional Labour Commissioner (Central) Dhanbad. A copy of the aforesaid notice has been marked annexure 1. The petitioners showed cause in their letter dated the 16th September, 1975 contending, *inter alia*, that the employees of the Contractors were not doing the same and similar kind of work in comparison with the workers directly employed by the principal employer. The unskilled employees of the principal employer were given vocational training under the Vocational Training Rules, 1966 and they were required to work with complicated machineries of the plant with more hazard and risk than the Contractors' workers who were employed in cleaning the spillage

and removal of scraps from the plant. The work of the Contractors' workers was of casual nature and involved no skill, no training and no experience in the line and they were merely mazdoors. So far as the principal employer's workmen were concerned, they required mechanical and electrical skill to do the job and the wages of the Company (principal employer) permanent workers were fixed keeping in mind the job content. The Contractors had engaged Rezas (female workers) for cleaning of spillage and removal of scraps whereas the petitioners had no female employees excepting a creche attendant on their roll. It was, therefore, submitted that the petitioners had not committed any contravention of the provisions of the Act or rule 25 of the Rules. A copy of the aforesaid show cause dated the 16th September, 1975 submitted by the petitioners has been marked annexure 2. The petitioners' case is that without any reply to the aforesaid show cause filed by the petitioners and without getting the matter adjudicated by the authorities under the Act on account of the disagreement with regard to the nature of work of the employees of the principal employer and that of the contractors, a complaint petition dated 7th November, 1975 was filed by respondent no. 1 against the petitioners under section 24 of the Act in the Court of the Chief Judicial Magistrate, Chaibassa, a copy whereof has been marked annexure 3. The allegations contained in the petition of complaint were the same as those contained in the show cause notice dated 11th August, 1975 (annexure 1). A reference to that notice was also made in paragraph 5 of the petition of complaint. On 24th November, 1975 the Chief Judicial Magistrate took cognizance against the petitioners under section 26 of the Act and transferred the case to the Court of Shri S. Prasad, Judicial Magistrate, First Class, Chaibassa, respondent no. 2, who issued summons to the petitioners. A copy of the order dated 24th November, 1975 has been marked annexure 4. The case has been registered as no.C2, C2(3)-151/75. The prayer made is for quashing of the prosecution.

3. *Facts of Cr. W. J. C. no.* 6 *of* 1976(R).—Petitioner no. 1 is the same as that in Cr. W. J. C. no. 5 of 1976(R). The Company owns Iron Ore Mines at Noamundi in the district of Singhbhum which ore is ultimately consumed in its works at Jamshedpur for manufacturing iron steel. Petitioner no. 2 is the Manager of the said Mines. The petitioners' case is that the petitioner Company has a big township at Noamundi where contractors are employed for the construction of quarters, bungalows and for repairs thereof. The petitioners do not

have any departmental employees of their own for construction of houses and quarters in the township. The petitioners engaged in this particular case M/s. N. C. Das and Sons as the contractors for the construction of quarters in the township at Noamundi. The petitioners, on the other hand, engaged masons for their refractories works, who were helped by mazdoors in Mines and Plants in laying of glazed tiles in sewerage line and strictly adhering to safety rules required of a person working in the Mines. They have to maintain registers, log books and appropriate *proforma*. The mazdoors are given job training and vocational training at regular intervals before they are deputed to work. The job performed by the masons and mazdoors attached to the petitioners are around complicated machineries. Their services are transferable from one section to another and, therefore, they are required to know the method of works of different jobs. The masons are required to fix heavy machine foundations and they must conform to the requirements laid down by the Jamshedpur Technical School of Tisco Ltd. The petitioners also engaged contractors to remove spillage from the conveyor belt to the destination by ordinary Tata Merecidiz Benz trucks and the truck drivers are helped by the Khalasis and piece-rated mazdoors. The job is simple in nature requiring no extra calibre and their responsibility and accountability is very low compared with the drivers engaged by the petitioners, inasmuch as, the drivers engaged by the petitioners directly have to take 25 tons dumpers from the Mine phase to crushers and unload the same and they have to drive explosive vans which are to be handled with extreme skill and care. They are also required to drive diesel. tankers fully loaded with high speed diesel, as well as to take the children to school and the employees to station, and their jobs are transferable to any of the aforesaid works. The jobs performed by the Company's drivers are not of the same or similar kind as those performed by the contractors. The petitioners have no departmental employees or the drivers to do the spillage removal works which are done exclusively by the contractors' workmen, the contractors with regard to such work being M/s. B. N. Oberai and Sons. The petitioners further claim that they have no category of unskilled piece-rated workers of their own. The petitioners' workers are all monthly rated workers and their jobs are entirely different.

4. On 23rd April, 1975 the Labour Enforcement Officer (Central), Chaibassa, respondent no. 1 inspected the Mines of the petitioners. By a notice dated 5th May, 1975 (annexure 1) issued by respondent no. 1 the petitioners were called upon to show cause as to why legal

action should not be taken against them for breach of section 21(4) of the Act, inasmuch as, the workers of the principal employer and those of the aforesaid contractors M/s. N. C. Das and Sons and M/s. B. N. Oberai and Sons were not paid the same wages. Even earlier a similar show cause notice had been issued by the Assistant Labour Commissioner (Central), Chaibassa and the petitioners had shown cause and asserted that the contractors' employees did not perform the same and/or similar kind of work as done by the workers directly employed by the principal employer. After the petitioners had shown cause to that notice no action was taken under the Act. In reply to annexure 1, therefore, the petitioners again filed their show cause reiterating their stand as mentioned above. Copies of the show cause dated 22nd February, 1975 and 19th May, 1975 filed in response to the earlier notice as well as to annexure 1 have been marked annexures 2A and 2 respectively. Without adjudication and determination of the disagreement, with regard to the type of works performed by the petitioners' workers and those of the contractors and without saying anything with regard to the show cause filed by the petitioners, respondent no. 1 filed a petition of complaint on 18th July, 1975 before the Chief Judicial Magistrate, Chaibassa, who took cognizance on that very day and transferred the case for disposal to the Court of Shri S. Prasad, Judicial Magistrate, First Class, Chaibassa, respondent no. 2. Copies of petition of complaint and the order dated 18th July, 1975 have been marked annexures 3 and 3A, respectively. Respondent no. 2 issued summons to the petitioners. It is this prosecution which is sought to be quashed.

5. In the counter-affidavit filed on behalf of the respondents, it has been submitted that respondent no. 1 was satisfied that the unskilled workers employed by the contractors were doing the same or similar type of work as was being done by the unskilled workers employed directly by the petitioners and, therefore, he did not approach the Chief Labour Commissioner (C), New Delhi, who was the competent authority for his decision in the matter. It has further been submitted that since there was no dispute or disagreement on the facts in issue, there was no occasion for any reference for their adjudication or for the decision of the authority. The prosecution had to be launched within three months from the date of inspection under section 27 of the Act and as the irregularity committed by the company was communicated to the petitioners for rectification, the complaints were filed.

6. The points urged by Mr. Sanyal, learned Counsel for the petitioners in support of these applications, are the following :—

(*i*) The facts mentioned in the petitions of complaint do not constitute any offence as on such facts it cannot be said that the petitioners had contravened the provisions of rule 25(2)(*v*)(*a*) of the Rules.

(*ii*) There being a disagreement between the parties with regard to kind of work done by the workers employed by the principal employer and the contractors, it ought to have been referred to the Chief Labour Commissioner (Central) for his decision as enjoined in the proviso to rule 25(2)(*v*)(*a*) of the Rules.

(*iii*) The petitioners having been served with a show cause notice, they had explained the position in reply to the show cause notice and they having kept silent in the matter for a long time, the prosecution is wholly unwarranted as in any event there could not be said to be any *mens rea* or guilty intention on the part of the petitioners.

(*iv*) There being no averment that petitioner no. 2 of each of the two cases was responsible for the affairs of the company, their prosecution was not warranted in law.

7. The relevant part of rule 25 reads thus—

"25(1) Every licence granted under sub-section (1) of section 12 shall be in Form VI.

(2) Every licence granted under sub-rule (1) or renewed under Rule 29 shall be subject to the following conditions, namely—

(*i*) to (*iii*) * * *

(*iv*) The rates of wages payable to the workmen by the contractor shall not be less than the rates prescribed under the Minimum Wages Act, 1949 (11 of 1948), for

such employment where applicable, and where the rates have been fixed by agreement, settlement or award, not less than the rates so fixed;

(*v*)(*a*) in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by the principal employer of the establishment on the same or similar kind of work:

Provided that in the case of any disagreement with regard to the type of work the same shall be decided by the Chief Labour Commissioner (Central) whose decision shall be final."

Learned Counsel for the petitioners to substantiate his first point urged that rule 25(2)(*v*)(*a*) expressly lays down that where the workmen employed by the contractor perform the same or similar kind of work as those employed by the principal employer, the conditions of service of the former shall be the same as those of the latter for the same or similar kind of work. From the petitions of complaint read with the initial show cause notice, it appears that the petitioners were being sought to be prosecuted on the allegation that the workers of the contractors were not being paid at the rate which was being paid to the workmen engaged by the principal employer for those categories of workers. The term 'category' is referable in its turn to skilled, semi-skilled or unskilled workers. It was, therefore, argued that on the petitions of complaint no violation of rule 25(2)(*v*)(*a*) could even *prima facie* be shown. In my view, there is sufficient force in this contention. The legislative intent in using the expression 'same or similar kind of work' is not at all ambiguous. What is necessary for attracting the provisions of the aforesaid sub-rule is the same or similar kind of work done by the two classes of employees. The wages cannot be fixed on the general nature of work, namely, skilled, semi-skilled or unskilled. The provisions of the rule do not make any reference to classification of workers as skilled, unskilled or semi-skilled but lay emphasis upon the work which the employees of the contractors do *vis-a-vis* the employees of the principal employer. Reliance was placed

in this connection on a Bench decision of the Gujarat High Court in Special Civil Application no. 1150 of 1975 (*M/s. Amardeep Trading Co.* v. *The Union of India*) decided on 10th December, 1975. I respectfully agree with the view of the Gujarat High Court that—

"...the basic idea of rule 25(2)(*v*)(*a*) of the Rules is that there should not be any dissimilarity in the nature of work and condition of service in the same establishment. This principle is incorporated in order to avoid discontent and to do equality between the workmen who discharge the same or similar kind of function."

and further—

"What is to be noticed is that in order to attract the liability under the said provisions the workmen of the contractors and the workmen of the principal employer must be doing the same or similar kind of work, that is, the same or substantially same type of work. The said provisions make no reference to the classification of the workers as skilled, semi-skilled or unskilled. Such a broad classification is not comtemplated by the provisions. By putting such a construction it is to note that the provisions of the said rule are made redundant as the legislature has provided in rule 25(2)(*v*)(*b*) of the Rules, that in cases not falling in rule 25(2)(*v*)(*a*) of the Rules the wages and conditions of service of the workmen of the contractor shall be such as may be specified in this behalf by the Chief Labour Commissioner (Central). Therefore, those cases which are not covered by rule 25(2)(*v*)(*a*) of the Rules are covered by the provisions of clause (*b*) and thus the legislature has provided effective control over the contractors in respect of wages and other service conditions of their employees. The power has been given to the Chief Labour Commissioner to lay down the service conditions of the workmen of the contractors and thus to have a control over the contractors in respect of the wage rates as well as other conditions of service of their labourers."

It is thus clear that the show cause notices issued to the petitioners and the petitions of complaint do not disclose any offence. Mere statement in the counter-affidavit that respondent no. 1 was satisfied that the two classes of workmen were doing same or similar kind of work will not improve the matter since on the petitions of complaint, as they stand, no penal provision can be said to be attracted.

8. The second point urged by the learned Counsel is also of substance. It will appear from the proviso to rule 25(2)(*v*)(*a*) quoted above that where there is a disagreement with regard to the type of work, the same shall be decided by the Chief Labour Commissioner (Central) whose decision shall be final. In the show cause petition filed by the petitioners they have specifically pointed out the dissimilarity of the kinds of work performed by the contractors' employees *vis-a-vis* the principal employer's employees. The proper course, therefore, as contemplated by the proviso seems to be a reference to the Chief Labour Commissioner (Central) whose decision in the matter would have the element of finality. The submission in the counter-affidavit that such reference was not necessary as there was no difference on the facts in issue is not borne out by the material on record. As already stated above, the petitioners had pointed out the differences in their show cause petition filed before respondent no. 1. This by itself, however, would not have carried the petitioners' case far if the facts as alleged in the petitions of complaint *ex-facie* would attract the provisions of rule 25(2)(*v*)(*a*). On the facts of the instant cases, however, the point assumes some importance as till long after the submission of the show cause petition by the petitioners before respondent no. 1, nothing was done in this regard and only when the period of limitation was running out, prosecution was launched in a rush. As a matter of fact, this point goes as necessary corollary along with the first point.

9. It was next urged that on the facts on record it could not be said that there was any *mens rea* on the part of the petitioners to attract the penal provision. A show cause notice had been issued against the petitioners. The petitioners duly showed cause pointing out the reasons as to why the provisions of rule 25(2)(*v*)(*a*) could not be said to be attracted. There was no reference or adjudication of the facts in controversy by the competent authority, namely, the Chief Labour Commissioner (Central). The prosecuting respondent kept quiet over the matter. Only when time was running out, the complaint petitions were filed without even formally communicating to the petitioners that respondent no. 1 had satisfied himself with regard to the same or similar kind of work performed by the two classes of employees. On these facts and in such circumstances, in my view, the principle enunciated by the Supreme Court in *Nathulal* v. *State of Madhya Pradesh*(1) has rightly been pressed into service. *Mens rea*

(1) (1966) A. I. R. (S. C.) 43.

is an essential ingredient of criminal offence, although a Statute may exclude the element of *mens rea*. On the question whether the element of guilty mind is excluded from the ingredients of an offence, the mere fact that the object of the Statute was to promote welfare activities or eradicate social evil is not by itself decisive. Only where it is absolutely clear that the implementation of the object of the Statute would otherwise be defeated that *mens rea* may, by necessary implication, be excluded from a Statute. The nature of the *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof. On the facts obtaining in the instant cases, there cannot be said to be any ingredient of *mens rea* on the part of the petitioners.

10. In the view that I have taken with regard to the aforesaid points, it is not necessary to go into the validity or otherwise of the fourth contention put forth by learned Counsel for the petitioners.

11. For the reasons aforesaid, I am constrained to allow these applications and quash the prosecution of the petitioners as also all proceedings on the basis of the complaint petitions filed against them and the cognizance taken under section 26 of the Act.

MUNESHWARI SAHAY, J.—I agree.

Applications allowed.

R. D.

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