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CONTAINING

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

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PATNA

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Bihar Agricultural Produce Markets Rules, *1975—Rule 64(ii)(c)—power of transfer an employee from one Market Committee to another conferred on the Bihar State Agricultural Marketing Board—whether ultra vires of the parent Act—Bihar Agricultural Produce Markets Act, 1960 (Act XVI of 1960). Section 20(4) and 52(1)-provisions of—whether suffer from the vice of excessive delegation to a subordinate authority—Bihar Agricultural Produce Markets Rules, 1975-rule 64(ii)(c)—power of transfer conferred on the Bihar State Agricultural Marketing Board from one Market Committee to another—whether covered by clause (XXIX) of sub- section (2) of section 52 of the Act under which the rule was framed—appointing authority of an employee being the Market Committee—Board whether can have the power to transfer such an employee—power of transfer also covered by general rule under section 52(1)—pre-condition of the existence of a common cadre, whether necessary for the exercise of the power of transfer.*

Rule 64(ii)(c) of the Bihar Agricultural Produce Market Rules, 1975, conferring the power of transfer on the Bihar State Agricultural Marketing Board from one Market Committee to another was within

the specific scope of clause (XXIX) of sub-section (2) of section 52 under which it could be framed. The power to transfer an employee from one place to another would come well within the scope of the word 'control' occurring therein.

The mere fact that the appointing authority was the market Committee would pose no bar to the power of the Board to transfer such employees when the statutory rule expressly confers such a power within the parameters of superintendence, discipline and control vested in the Board by the parent Act itself. Even assuming that rule 64(ii)(c) is not covered by section 52(2)(XXIX), it still seems to be plain that the same would be squarely within the ambit of the general rule making power under section 52(i). This expressly empowers the framing of rules for carrying out the purposes of the Act. The larger and broader purpose of the Act which emerges from the various provisions of the Act including section 33A (1) is the stringent power of superintendence, control and discipline vested in the Board over the Market Committee and their employees.

Held, therefore, that the power to transfer an employee of one Market

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Committee to another within the State expressly conferred on the Bihar State Agricultural Marketing Board by Rule 64(ii)(c) of the Bihar Agricultural Produce Markets Rules, 1975, is no way ultra vires of the parent Act namely, Bihar Agricultural Produce Markets Act, 1960.

Section 20(4) of the Bihar Agricultural Produce Markets Act, 1960, is not at all a provision which, in any way, delegates the legislative power to a subordinate authority and therefore, it does not suffer from the vice of excessive delegation. Sub- section (4) of section 20 merely places a limitation or a bar on the power of the Marketing Committees with regard to the conditions of service of its employees. Whilst conferring the power on the Marketing Committees to employ also such number of other officers and servants (apart from the Secretary, Engineers and other technical services), the same was hedged in by the limitation that these must be subject to the provisions of subsection (1), (2) and (3), as also to the rules and byelaws framed under the Act.

Section 52(1) of the Bihar Agricultural Produce Markets Act, 1960, also does not in any way suffer from the

vice of excessive delegation. If a policy or a guideline is specified or is implicit by necessary implication, then such delegation is not to be deemed excessive in any way, but, in fact, has become necessary and essential. Sub-section (1) of section 52 lays down that the rules are to be framed within two parameters. Negatively, these rules are not to run counter to the Act and positively for effectuating the express or implicit purposes of the Act. There is further safeguard that the rules have to be laid on the table of each House of the legislature for a total period of not less than 14 days. Therefore, in a way, the legislature, far from abdicating its functions, retained control over the framing of the said rules, which are subject to its sanctification. Sub-section (2) of section 52 specifies the special matters on which rules are to be framed hedged in by the conditions specified in sub-section (3) of previous publication.

Held, further that Rule 64(ii)(c) of the Bihar Agricultural Produce Markets Rules, 1975, in the form it is couched and the kind of control which it indicates, confers a general power for the transfer of employees and it is not to be out down or whittled on the pre-condition of the

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interpretation here is one of merely ironing out the creases and not changing the very fabric of the statute. As such, the issue of exhibition through a Video Cassette Recorder cannot be considered to be one of casus omissus in the statute and there is no question of supplying it by a process of strained interpretation.

Held, therefore, that the contention on the rule of casus omissus must fail and that the exhibition of films through a Video Cassette Recorder on a television screen would come within the ambit of the definition of 'cinematograph' under section 2b) of the Bihar Cinemas (Regulation) Act, 1954 and is consequently subject to the licensing provisions of section 3,4 and 5 thereof.

Held, further, that the commercial licence for the television set and Video Cassette Recorder under the Indian Telegraphs Act merely permits their use for 'receiving programmes and messages transmitted for general reception'. The licence does not permit the use of Video Cassette Recorder and television for playing pre-recorded cassettes of movies. When a Video Cassette Recorder is coupled with a television screen it becomes on independent set and

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Development and Social Change, Patna—Whether an autonomous Institute—Bihar Conduct of Examination Act, 1981—Section 3—First Information Report in the case making out offence under section 3—wrong mentioning of section 7 in the order taking cognizance—whether vitiates the order.

The Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, hereinafter called the Institute, is a autonomous Institute under the Magadh University under section 73 of the Bihar State Universities Act, 1976. The examinations conducted by the Institute including the Semester examination, are examinations which are duly recognized by the Magadh University. The examinations conducted by the Institute are also regulated by the Examination Board on which there are nominees of the Magadh University.

Held, that the Semester Examinations are not internal examinations of the Institute. The Institute is an authority of the Magadh University and the examination in question conducted by it falls squarely under the word "Under the authority of any University" occuring in Item 2 of the Schedule of the Bihar

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Conduct of Examinations Act, 1981, hereinafter called the Act.

Held, further, that the First Information Report in the case makes out a prima facie case under section 3 of the Act. Wrong mentioning of section 7 in the order dated 1.9.1983 passed the Subdivisional Magistrate, Sadar, Patna taking cognizance, must be taken to be redundant and it does not vitiate the order.

Arbind Kumar and Others v. The State of Bihar and Others (1985) ILR 64, Pat. 571

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956—*Sections 2(() and 11 (3) proviso—scope and applicability of—Kabaristan, whether within the ambit of the wide sweep of the definition of 'land'.*

A reference to section 2(9) would show that the definition of land is not a constructive one, but indeed is expansive. The provision uses the well-known phrase 'means' and 'includes'. It seems to be plain therefrom that the definition, far from confining the land to being strictly agricultural in nature, infact extents it to matters and things, which cannot strictly

be labelled as 'agricultural land'-for instance it includes 'homestead', and, by itself, a homestead is not an agricultural land Stricto Sentu. Similarly, a tank or a well are plainly agricultural land. Therefore, the wide ranging language employed in section 2(9) would far from excluding Kabaristan land therefrom (which even in ordinary terminology may be understood as land generally) would indeed squarely put it within the wide sweep of its definition.

The proviso to section 11(3) clearly indicates that Legislature expressly visualised a lawful change of assignment by the Consolidation Officer of land dedicated for cremation grounds or other religious purposes with the pre-condition of the approval of the village Advisory Committee. This clearly indicates that the statute visualises a cremation ground as squarely within the definition of 'land' and the ambit of consolidation. Plainly enough, if the argument is accepted that Kabaristan is not agricultural land, and, therefore, beyond the definition, then on a parity of reasoning, a cremation ground is equally not agricultural land either, and, would thus have to be treated on the same footing. Yet, the statute has clearly and in express terms put cremation

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ground within the ambit of the definition of land and the scope of consolidation. That being so, Kabaristan land would have to be treated identically. Neither of the two is agricultural land as such, and, therefore, if one is expressly within the scope of consolidation, one does not see why the other can logically be excluded therefrom.

Held, therefore, that Kabaristan is within the ambit of the wide sweep of the definition of land in section 2(9) of the Act.

Mirza Sulaiman Beg and others v. Harihar Mahto and others. (1985) ILR 64, Pat. 593

Bihar Foodgrains Dealer's Licensing Order, 1967—*Clause 7—licence-nature of—person granting licence, whether and when can demand the same—demand of licence in absence of the licensee—effect of—production of licence on demand, whether obligatory on the licensee.*

The licence is a document by which authority is conferred to do business as per terms and conditions mentioned therein. Persons granting that authority has, therefore, always the power to demand the licence whenever so required.

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Simply because the licensee is not present and in his absence the licence is demanded and is not produced then it is difficult to accept that prosecution can be lodged only against that person who was present in the shop and not against the licensee. Clause 7 of the Order makes it obligatory on a licensee to produce the licence if so required by the authorities.

Held, therefore, that if licence is not produced before the authorities, in the absence of the licensee, then it will amount to giving a big rope to the dealers to conduct their business in a calandestine manner which will frustrate the very object of granting the licence.

Held, further, that according to clause 7 the licensee has to abide by the terms and conditions of the licence. It is also not necessary to mention in the licence specifically that licence has to be produced on demand because it is a privilege given to some persons to carry on a business with certain terms and conditions and the authority granting that privilege has every right to demand the licence. Moreover, the grant of licence in Form C is a ministerial act and if some clerk deliberately, in league with the licensee, deletes the clause even then the

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authorised to discharge all functions of the collector of a district, whether can hear appeal against an order passed by Deputy Collector Land Reforms.

The Collector means the Collector of the district and any officer empowered by the State Government to discharge all or any of the functions of the collector under this Act. Section 11(1)(ii) provides that if an order is passed by any officer other than the collector of the district the appeal will lie to the collector. If a collector means also an Additional Collector and more so if an Additional Collector has been authorised to discharge all the functions of the collector of a district there is no reason why an Additional Collector or and Additional Deputy Commissioner cannot hear an appeal against an order passed by the Deputy Collector, Land Reforms.

Held, therefore, that in the instant case the Additional Deputy Commissioner was competent to hear the appeal.

Rajnath Jha v. The State of Bihar through the Deputy Commissioner, Santhal Parganas & ors. (1985), ILR 64, Pat. 539

Code of Civil Procedure, 1908— *Section 115 and Order 32, Rules 7(1) and*

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(2)—agreement for reference to arbitrators—prior leave of the court not obtained under Order 32 Rule 7(1)—award in favour of the plaintiffs including the minor plaintiffs—minor plaintiffs not challenging the agreement for reference—agreement for reference challenged by the defendant who was a major—challenge made by the defendant, whether maintainable in view of Order 32, Rule 7(2)—party, whether can challenge the finding of facts arrived at by the court in a Civil revision petition—petitioner to raise question of jurisdictional error only— Arbitration Act, 1940, section 30.

In the present case, before entering into an agreement for reference to the arbitrators, prior leave of the court under Order 32, Rule 7(1) of the Code of Civil Procedure, 1908, was not obtained on behalf of minor plaintiffs. The award was in favour of the plaintiffs including the minor plaintiffs. The minor plaintiffs did not challenge that the agreement for reference was violative of the provision of Order 32, Rule 7(1) of the Code of Civil Procedure. The agreement for reference is being challenged by the defendant no.1, who is a major, and not by the minor plaintiffs.

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Held, that in view of the provision of Order 32, Rule 7(2) of the Code of Civil Procedure, 1908, the challenge made by defendant no.1 to the agreement for reference to the arbitrators is not maintainable. The agreement for reference is voidable at the instance of the minor and not at the instance of any other party. In other words, the agreement for reference can be challenged by the minor, and not by the parties who are major. The courts below were, therefore, right in rejecting the submission made on behalf of the defendant on that court.

Held, further, that in a Civil rivision petition, a party cannot challenge the finding of facts arrived at, in the present case, by the lower appellate court. A party is not entitled to raise the question of fact in a civil revision petition but can argue only on the question of jurisdictional error.

Prabhu Dayal Singh and anr. v. Basudeo Singh and others (1985), ILR 64, Pat. 602

Code of Criminal Procedure, 1973— *Sections 161(3), 207 and 183(8)— statements recorded by Deputy Superintendent of Police (Criminal*

Investigation Department) under direction of State Government, whether further statement—whether statement recorded under section 161(3)—section 207—accused, whether entitled to get copies of statement of witnesses recorded by Deputy Superintendent of Police (Criminal Investigation Department).

It is evident that the Deputy Superintendent of Police (Criminal Investigation Department) could make investigation under the direction of the State Government and this could be further investigation within the meaning of section 173(8) of the Code of Criminal Procedure, 1973, hereinafter called the Code, as it related to a murder case and so the statement of witnesses recorded by the Deputy Superintendent of Police (Criminal Investigation Department) will also be treated as the statements recorded under section 161 of the Code. It cannot be doubted that under section 207 of the Code the accused is entitled to copies of the statements of witness recorded under sub-section (3) of section 161 of the Code of all persons whom the prosecution purposed to examine as its witnesses. The further investigation under section 173(8) of the Code is covered by the provisions of section 173(5) of the Code.

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Held, that the accused is entitled to get copies of those statements of witnesses recorded by the Deputy Superintendent of Police (Criminal Investigation Department) who are named in the chargesheet.

Nageshwar Sahai v. The State of Bihar (1985), ILR 64, Pat. 543

Inter University Board Act, 1981—*Section 5 sub-section (2)—statutes of the Universities fixing criteria for admission of teachers to the Post Graduate (Medical) Examination—approved by Chancellor on recommendation of State Government—Validity of—whether avoids discrimination.*

When one fixed standard in the nature of Final Examination is made applicable to the two categories of candidates; one who has undergone the course by virtue of obtaining admission by competitive examination and another by experience gained both by working in the field and serving as teachers, the apprehension of any deterioration in the standard cannot be said to be a valid one.

Where the Chancellor on the recommendation of the State Government had been pleased to approve the Statutes regarding admission of teachers to the

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Post Graduate (Medical) Examination under section 5(2) of the Inter University Board Act, 1981, and the same was sent to all the Vice Chancellors of different Universities including Ranchi University and was sent to the Principals of different Medical College who sent the same to all the Heads of Departments for implementation;

Held, that the statute is the outcome the powers conferred upon the Chancellor through the process of law based upon the existing law and has got all the force of statute binding upon all Universities. The statute has brought uniformity and has avoided the element of discrimination.

The law laid down in the statutes ensure a fair balance between the conflicting demand of the writ petitioner and the respondent No. 7 and 8 as it safeguards for the right which so far could not be made available to the teachers of other Universities excepting that of the Patna University for whom similar statute existed from before.

Dr. Bijay Kumar Mishra and Others v. State of Bihar and Ors. (1985), ILR 64, Patna. 611

Motor Vehicles Act, 1939—*Section*

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A person, for some reason or other, may seek transfer from one school to another but it does not mean that he can never go back to that school from where he was transferred. Moreover, transfer from one place to another is made on administrative grounds and also according to exigencies of the situation and courts normally do not interfere in such transfers except in few exceptional case if there has been no violation of any statutory values or procedure. In the instant case both the persons transferred were of the same cadre.

Held, therefore, that in that view of the matter, no question of discrimination arises and the order of the learned Single Judge cancelling the transfer is bad.

Held, further that where the creation of a separate cadre for teachers of High School and Middle School was neither pleaded nor argued, the order passed by the learned Single Judge for creating a separate cadre was equally bad and was beyond the scope of the writ application.

Union of India through the General Manager, Eastern Railway & Ors. v. Nityanand Jha & Another (1985), ILR 64, Pat. 636

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Specific Relief Act, 1963—*Section 16(c)—requirements of—averment in the plaint that the plaintiff was ready and willing to perform his part of the contract, whether mandatory—evidence adduced in absence of such averment, whether helpful to the plaintiff—Code of Civil Procedure, 1908.*

Order VI, Rule 17-amendment of plaint brought at a late stage after close of the case of the defendants without any explanation for the delay-amendment of plaint, whether liable to be rejected.

Held, that section 16(c) of the Specific Relief Act, 1963, requires that if a party fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, then in that case, a suit for specific performance of a contract must fail. It is, therefore, clear that section 16(c) of the Act requires that a party must aver in the plaint the fact that he has performed or has always been ready and willing to perform his past of the contract. In the absence of such assertion, the evidence adduced in the case to that effect will not help the plaintiff.

The amendment of the plaint to the

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FULL BENCH

1984/September, 4.

Before S.S.Sandhawalia, C.J., S. Sarwar Ali & B.P. Jha, JJ.

*Dhirendra Kumar Akela & Ors.**

v.

The State Agriculture Marketing Board and Others.

Bihar Agricultural Produce Markets Rules, 1975, *Rule 64(ii(c)—power to transfer an employee from one Market Committee to another conferred on the Bihar State Agricultural Marketing Board—whether ultra vires of the parent Act—Bihar Agricultural Produce Markets Act, 1960 (Act XVI of 1960), section 20 (4) and 52(1)—provisions of—whether suffer from the vice of excessive delegation to a subordinate authority-Bihar Agricultural Produce Markets Rules, 1975—rule 64(ii)(c)—power of transfer conferred on the Bihar State Agricultural Marketing Board from one Market Committee to another—whether covered by clause (XXIX) of subsection (2) of section 52 of the Act*

* Civil Writ Jurisdiction Case Nos. 884 & 3176 of 1983 and Civil Writ Jurisdiction case No. 766 of 1984. In the matter of applications under Articles 226 and 227 of the Constitution of India.
CWJC No. 3176 of 1983 - Om Prakash Narayan ... Petitioner
CWJC No. 766 of 1984 - Brahamdeo Prasad ... Petitioner

under which the rule was framed—appointing authority of an employee being the Market Committee—Board whether can have the power to transfer such an employee—power of transfer also covered by general rule making power under section 52(1)—pre-condition of the existence of a common cadre, whether necessary for the exercise of the power of transfer.

Rule 64(ii)(c) of the Bihar Agricultural Produce Markets Rules, 1975, conferring the power of transfer on the Bihar State Agricultural Marketing Board from one Market Committee to another was within the specific scope of clause (XXIX) of sub-section (2) of section 52 under which it could be framed. The power to transfer an employee from one place to another would come will within the scope of the word 'control' occurring therein.

The mere fact that the appointing authority was the Market Committee would pose no bar to the power of the Board to transfer such employees when the statutory rule expressly confers such a power within the parameters of superintendence, discipline and control vested in the Board by the parent Act itself. Even assuming that rule 64(ii)(c) is not covered by section 52(2)(XXIX), it still seems to be plain that the same would be squarely within the ambit of the general rule making power under section 52(1). This expressly empowers the framing of rules for carrying out the purposes of the Act. The larger and broader purpose of the Act which emerges from the various provisions of the Act including section 33A (1) is the stringent power of superintendence, control and discipline vested in the Board over the Market Committee and their employees.

Held, therefore, that the power to transfer an

employee of one Market Committee to another within the State expressly conferred on the Bihar State Agricultural Marketing Board by Rule 64(ii(c) of the Bihar Agricultural Produce Markets Rules, 1975, is in no way ultra vires of the parent Act, namely, Bihar Agricultural Produce Markets Act, 1960.

Section 20(4) of the Bihar Agricultural Produce Markets Act, 1960, is not at all a provision which, in any way, delegates the legislative power to a subordinate authority and therefore, it does not suffer from the vice of excessive delegation. Sub-section (4) of section 20 merely places a limitation or a bar on the power of the Marketing Committees with regard to the conditions of service of its employees. Whilst conferring the power on the Marketing Committees to employ also such number of other officers and servants (apart from the Secretary, Engineers and other technical services), the same was hedged in by the limitation that these must be subject to the provisions of sub-sections (1), (2) and (3), as also to the rules and bey laws framed under the Act.

Section 52(1) of the Bihar Agricultural Produce Markets Act, 1960, also does not in any way suffer from the vice of excessive delegation. If a policy or a guideline is specified or is implicit by necessary implication, then such delegation is not to be deemed excessive in any way, but, in fact, has become necessary and essential. Sub-section (1) of section 52 lays down that the rules are to be framed within two parameters. Negatively, these rules are not to run counter to the Act and positively for effectuating the express or implicit purposes of the Act. There is further safeguard that the rules have to be laid on the table of each House of the legislature for a total period of not less than 14 days. Therefore, in a way, the Legislature, far from

abdicating its functions, retained control over the framing of the said rules, which are subject to its sanctification. Sub- section (2) of section 52 specifies the special matters on which rules are to be framed hedged in by the conditions specified in sub-section (3) of previous publication.

Held, further, that Rule 64(ii)(c) of the Bihar Agricultural Produce Markets Rules, 1975, in the form it is couched and the kind of control which it indicates, confers a general power for the transfer of employees and it is not to be cut down or whittled on the pre-condition of the existence of a common cadre. Rule 64(ii)(c) in terms confers the power of transfer with a wide generality irrespective of the creation of the common cadre. Conwequently the provisions with regard to common cadre under section 33 of the Act and those within rule 64(ii)(c) of the Rules occupy two distinct and separate fields.

Krishna Kumar Shrivastava v. The Bihar State Agricultural Marketing Board and Others (1) Overruled.

Applications by the transferred employees.

The facts of the cases material to this report are set out in the judgment of S.S. Sandhawalia, C.J.

The cases were originally placed for hearing before a Division Bench, which referred them to a larger Bench for decision.

On this reference.

Mr. K.D.Chatterjee, Mr. Narayan Singh, and Mr. Narendra Prasad for the Petitioners.

Mr. K.P.Verma, Advocate General, Mr. R.N.Roy, Mr. Basudeva Prasad, Mr. Alakh Raj Pandey, and Mr. Ramesh Jha for the Respondents.

(1) (1983) Labour and Industrial Cases 931.

S.S.Sandhawalia, C.J. :- Whether, the power to transfer an employee of one Market Committee to another within the State expressly conferred on the Bihar State Agricultural Marketing Board by Rule 64(ii)(c) of the Bihar Agricultural Produce Markets Rules, 1975, is ultra vires of the parent Act has come to be the primarily significant question in this set of three writ petitions, now referred for an authoritative decision by a Full Bench. Equally at issue is the correctness of the earlier Division Bench decision in *Krishna Kumar Shrivastava vs. The Bihar State Agricultural Marketing Board and others (1)*

2. The representative matrix of facts may be taken from Civil Writ Jurisdiction Case No. 884 of 1983 *(Dhirendra Kumar Akela vs. The Bihar State Agriculture Marketing Board and others)*. The petitioner therein was appointed as a Typist by the Agricultural Produce Market Committee, Dinapore, on the 21st of April, 1979, and, it is averred on his behalf that thereafter he is continuing to perform his duties satisfactorily. However, by the impugned order dated the 14th January, 1983 (Annexure '1'), the Secretary of the Bihar State Agricultural Marketing Board (hereinafter referred to as the Board), directed the transfer of the petitioner's services from the Dinapore Market Committee to the Arrah Market Committee. The gravemen of the petitioner's case that he was an employee of the Dinapore Agricultural Produce Market Committee, which is a statutory body, and, there is no power or authority in the Board to transfer the petitioner's services to a different statutory body, like that of the Arrah Agricultural Produce Market Committee. On these premises the impugned order of transfer is sought to be assailed as wholly illegal and without jurisdiction.

(1) (1983) Labour and Industrial cases 931.

3. In the return filed on behalf of Respondents Nos. 2 and 3, the stand taken is that though under the Bihar Agricultural Produce Markets Act, 1960 (hereinafter called the Act), each Market Committee is a corporate body, yet it is wholly subservient and subordinate to the Board, which is the apex body at the State level. It is stated that the very purpose of the establishment of the Board under Section 33A of the Act is to exercise stringent superintendence and control over the Market Committees throughout the State. A reference is made to the various provisions of the Act and the Rules framed thereunder to highlight the facts that the functioning of the Market Committees including the service conditions of their staff and the employees is wholly under the control of the Board and consequently under the express powers conferred by Rule 64(ii)(c) of the Rules, those employees are transferable from one Market Committee to another.

4. These cases originally came up for hearing before a Division Bench and firm reliance on behalf of the petitioners was placed on *Krishna Kumar Shrivastava vs. The Bihar State Agricultural Marketing Board and others (1983 Labour and Industrial Cases 931- supra)*. However, on behalf of the respondent Board a frontal challenge was laid to the correctness of the view on the ground that the material provision of Rule 64(ii)(c) had gone unnoticed and the judgment had been rendered per incuriam. In view of the importance of the issue and the merit of the challenge raised, these cases were, therefore, referred for decision by a larger Bench.

5. However, when the matter originally came up before us, Mr. K.D. Chatterjee, learned Counsel for the petitioners, sought to assail the very validity and the vires of Rule 64(ii)(c) of the Rules, and, since this had not been expressly pleaded in the writ

petition, be sought leave to amend the same, which was granted. Supplementary affidavits have now been filed, assailing Rule 64(ii)(c) of the Rules as being ultra vires the Act, and, as required, the State of Bihar has been impleaded as a party.

7. Since admittedly the whole controversy herein focuses on Rule 64, it is apt to read the relevant part thereof at the very outset, with particular reference to sub-clause (c) of clause (ii) thereof:

> "64. TERMS AND CONDITIONS OF SERVICE OF SECRETARY AND STAFF OF MARKET COMMITTEE -
>
> (i) xx xx xx
>
> (ii)(a) The Market Committee may employ such other officer and servants as may be necessary for its proper and efficient working.
>
> (b) Such officer and servants shall be divided into superior and inferior classes.
>
> (c) The category member of posts in each category and terms and conditions of service of staff and servants of the Market Committee may be determined by the Market Committee with the approval of the Board and such staff and servant shall function under overall control and superintendence of the Board and *shall be transferrable from one Committee to other within the State.*
>
> (d) Appointment of superior staff shall be made by Market Committee subject to the prior approval of the Board. Any dismissal, removal or reduction in the rank of any staff shall be subject to the

approval of the Board.

(e) The Market Committee shall send a report of all appointments to the Board within a month."

8. With the inimitable fairness, Mr. K.D. Chatterjee conceded that Rule 64(ii)(c) in express terms conferred power on the Board to transfer an employee of one Market Committee to another, and, it, therefore, would be vain in his part to canvass that it does not, in fact, do so. Learned Counsel further stated that the earlier judgment is *Krishna Kumar Srivastava's case (supra)* has altogether missed to notice Rule 64(ii)(c), and, frankly conceded his inability to support that judgment. The sole challenge, therefore, was directed to the very validity of Rule 64(ii)(c) and herein also Mr. Chatterjee was fair enough to state that he was not attacking the entire provision, but only the penultimate part thereof which confers the power of transfer on the Board in the following words:-

"and shall be transferable from one Committee to other within the State."

Thus the attack herein spearheaded only to the limited extent of the power to transfer conferred by sub-clause (c) of Clause (ii) of Rule 64.

9. In focusing his basic submission, Mr. Chatterjee contended that herein the conferred power of transfer, though labelled as such, had been wrongly clothed in this garb and, in fact, involved the transplanting of an employee from one employer to another, and, from the services of one Market Committee to an altogether different Market Committee, which might well involve varied conditions of service. This, according to him, was not warranted by the provisions of the Act itself,

and, therefore, the relevant part of Rule 64(ii)(c) travelled far beyond the parameters of the Act and was, therefore, *ultra vires*. For substantiating this stand, our attention was first drawn to Section 17 of the Act, which provides that Market Committees are bodies corporate, and, according to the learned Counsel, they were, therefore, autonomous.

10. Somewhat curiously, a tenuous reliance was also placed on Section 20(4), which empowers the Market Committees to employ Officers and servants. Reference was then made to Section 33E (3) of the Act to indicate that the statute empowers the Board to create a common cadre for the employees of the Market Committee, and, it was contended that only when such a common cadre is created, it would be possible to transfer the employees *inter se* and not otherwise. Major reliance was, however, placed on Section 52, and, in particular sub-clause (xxix) of clause (2) thereof, for contending that these provisions confer the power to make rules within the narrow parameters of discipline and control of the officers and servants of the Committee and, according to the learned Counsel, this would not include the power of transplanting one employee of a Market Committee to the alien soil of altogether a different Market Committee.

11. More specifically Mr. Chatterjee, somewhat ambitiously, first sought to project before us that sub-section (4) of Section 20 was itself unconstitutional on the ground that it suffers from the vice of excessive delegation. It was contended that this provision, without any guideline or parameters, conferred a blanket power for framing of rules with regard to the conditions of the services of the employees of the Market Committee, and, therefore, amounted to an abdication of legislative

function. A number of cases, beginning with the *Delhi Laws Act case (1), Hamdard Dawakhana and others vs. The Union of India and others (2), Sales-tax Officer, Ponkunnam vs. K.T. Abraham (3), Messrs Devi Das Gopal Krishna vs. The State of Punjab and other (4), and The State of Punjab and another vs. Khan Chand (5)*, were cited on the larger principle that wherever the permissible limits of delegation were transgressed by the Legislature, the provision must be struck down as arbitrary on the ground of the vice of excessive delegation.

12. The submission aforesaid, though presented with erudition, is only to be noticed and rejected in the particular context of Section 20(4), which is in the following terms:-

> "20. APPOINTMENT AND SALARIES OF OFFICERS AND SERVANTS OF THE MARKET COMMITTEE -
>
> xx xx xx xx
>
> (4) Subject to the provisions of sub-sections (1), (2) and (3) and the rules and bye-laws, the Market Committee may employ also such number of other Officers and servants and pay such Officers and servants such salaries, as the Board may sanction."

Even a plain reading of the above would show that the same is in no way a delegating section at all. Herein, there seems not even a hint of delegation by the Legislature to any subordinate authority.

(1) (1951) AIR (SC) 332
(2) (1960) AIR (SC) 554
(3) (1967) AIR (SC) 1823
(4) (1967) AIR (SC) 1895
(5) (1974) AIR (SC) 543.

Even by the remotest analogy, one cannot read anything in this provision which can amount to any conferment of power on the State Government to frame subordinate legislation. That provision, as would be elaborated later, is contained primarily in Section 52. It is not the respondents' case, and, in fact, not anybody's case, that Rule 64(ii)(c), or for that matter any one of the statutory rules, have been framed under Section 20(4) of the Act. The categoric and virtually unchallengeable stand of the respondents is that these rules are framed under the wide-ranging powers under Section 52 only. As the heading of Section 20 indicates, the whole provision deals with the power of appointment and salaries of officers and servants of the Market Committees. Sub-section (4) thereof merely places a limitation or a bar on the power of the Market Committees with regard to the conditions of service of its employees. Whilst conferring the power on the Market Committees to employ also such number of other Officers and servants (apart from the Secretary, Engineers and other technical services), the same was hedged in by the limitation that these must be subject to the provisions of sub-sections (1), (2) and (3), as also to the rules and bye-laws framed under the Act. This limitation is neither exceptional nor in any way invalid, because it is exhumatic that the service conditions have to be subservient to the statutory provisions on the point. It flows enexorably that the scope and purpose of sub-section (4) of Section 20 is altogether different and alien to any delegation by the Legislature for the purpose of subordinate legislation.

13. Now, once it is held, as it must be, that sub-section (4) of Section 20 is not at all a provision which, in any way, delegates the legislative power to a subordinate authority, then the whole argument,

rested on these premises and that it suffers from the vice of excessive delegation, has to be rejected out of hand. If the very foundation of the alleged assumption of delegation is non-existent, then inevitably, the super-structure of the imaginary vice of excessive delegation must also crumble to the ground. It is,therefore, unnecessary to advert individually to the precedent cited by the learned Counsel, which, with respect, have, therefore, no relevance to the point. There is, and, indeed, there can be now no dispute to the basic principle that any abdication of the functions of the Legislature and an excessive delegation to a subordinate authority to make laws, without indicating any policy or guidelines, would be unsustainable. However, in a provision, where there is no delegation at all, no room for any inter play of these principles is attracted. Equally, learned Counsel's persistent reliance on the various observations in the *Delhi Laws Act case (supra)* was vain, because their Lordships themselves later, in *Kathi Raning Rawat vs. The State of Saurashtra (1)*, had observed as under:-

> "On the second point, the appellant's learned counsel claimed that the majority view in In re Constitution of India and *Delhi Laws Act, 1912 etc.*, 1951 SCR 747, supported his contention. He attempted to make this out by piecing together certain dicta found in the several judgments delivered in that case. While undoubted by certain definite conclusions were reached by the majority of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was

(1) (1952) AIR (SC) 123.

different, and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases."

To conclude on this aspect, the challenge to the constitutionality of Section 20(4) of the Act must, therefore, be categorically rejected.

14. In fairness to Mr. Chatterjee, one must also notice his somewhat veiled challenge to Section 52(1) on the same ground of excessive delegation. Though this aspect was not very pointedly presented, yet it was implicit in his submissions that the wide-ranging power given by sub-section (1) to frame rules which were not inconsistent with the Act or for carrying out the purposes of this Act was wholly an unguided power and bereft of laying down any policy, and, therefore, amounted to an abdication by the Legislature of its functions.

15. In evaluating the above submission, it must be noticed at the outset that sub-section (1) of Section 52 is not to be viewed in isolation of the other sub-sections thereof. Whilst this confers a general power on the State Government to make rules within the parameters of the purposes of the Act, sub-section (2) with miticulous details provides as many as 37 detailed specific items seriatim, empowering the making of the rules with regard thereto, but without prejudice to the generality of the power conferred by sub-section (1). Yet again, sub-section (3) mandates previous publication as a pre-condition and the further safeguard that every rule made under the section has to be laid before each House of the State Legislature, while it is in session for a total period of 14 days. Thus viewed in the whole mosaic, it seems to be plain that sub-section (1) is couched in the well- known form

and the accepted legislative terminology for the conferment of power on a delegate for the purpose of framing the rules to effectuate the purposes of the Act. It seems now well settled beyond cavil that the Legislature over-burdened as they are, cannot be bogged down into every minusoule detail of subordinate legislation, which, by necessity, has to be left to a designated delegated authority. If a policy or a guideline is specified or is implicit by necessary implication, then such delegation is not to be deemed excessive in any way, but, in fact, has become necessary and essential.

16. Again, sub-section (1) of Section 52 lays down that the rules are to be framed within two parameters. Negatively, these rules are not to run counter to the Act and positively for effectuating the express or implicit purposes of the Act. Therefore, a rule cannot be framed for any other purpose, except those which emerge directly or by necessary implication from the parent statute. This undoubtedly is one of the factors for providing a policy and the guideline for the purpose of the delegation to the subordinate.

17. Yet again, sub-section (3) provides for the laying of the rules on the table of each House of the Legislature for a total period of not less than 14 days. Therefore, in a way, the Legislature, far from abdicating its functions, retained control over the framing of the said rules, which are subject to its sanctification. Sub-section (4) provides that after such laying down, both the Houses may agree in making any modification in the rules or even in the total annulment thereof. It is unnecessary to elaborate the matter because it is now well settled on high authority that the provision for laying the rules on the table of the Legislature is one of the accepted and adequate safeguards against the vice

of excessive delegation. *See Express Newspaper (Private) Limited vs. The Union of India (1), D.S. Grewal vs. The State of Punjab and another (2), and, Delhi Cloth and General Mills Company Limited vs. The Union of India (3).*

18. Lastly, it deserves reiteration that sub-section (2) of Section 52 specifies the special matters on which rules are to be framed hedged in by the conditions specified in sub-section (3) of previous publication. The inevitable conclusion herein is that Section 52(1) also does not in any way suffer from the vice of excessive delegation.

19. Lowering his sights and becoming somewhat more specific the last arrow to the bow of the learned Counsel for the petitioners was his contention that the impugned part of Rule 64(ii)(c), conferring the power of transfer on the Board from one Market Committee to another was beyond the specific scope of clause (xxix) of sub- section (2) of Section 52, under which alone it could allegedly be framed. The submission was that this provision only conferred the power to make rule with regard to discipline and control and it was streneously argued that transfer was not within the ambit of either discipline or control, and, in any case, not the kind of transfer envisaged from one Market Committee to another.

20. Since the aforesaid submission turns specifically on Section 52(2)(xxix), it is apt to quote the same :

"82. POWER TO MAKE RULES - (1) The State Government may make rules not

(1) (1958) AIR (SC) 578, at p-635, para 232

(2) (1959) AIR (SC) 512, 518

(3) (1983) AIR (SC) 937, 950.

inconsistent with this Act, for carrying out the purpose of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the State Government may make rules with respect to all or any of the following matters :-

xx xx xx xx

(xxix) the discipline, control, punishment, dismissal, discharge, removal of officers and servants of the committee;"

Now, even assuming entirely for argument's sake that Rule 64(ii)(c) is framed exclusively under the aforesaid clause, it appears to me as clearly within its terms. Specifically herein the power is conferred to frame rules with regard to the discipline, control and punishment of the employees of the Market Committee. It is vain to say that the power to transfer would not be within the wide-ranging terminology of the word 'control', when used in the context of an employee. The word 'control' in the context of service terminology, would be nothing, if it does not include within its ambit the somewhat inormous power of shifting the situs of an employee from one place to another for administrative exigencies. On principle, therefore, one must hold that transfer would come well within the scope of the word 'control' herein.

21. Herein the learned Advocate General was on firm ground in drawing a meaningful and dual analogy from Articles 233, 234 and 235 of the Constitution. It was pointed out that thereby the appointment of District Judges and subordinate officers in the judicial service of a State is vested in the Governor but the control over the subordinate courts has nevertheless been given to the High Court. It was rightly pointed out that the word

'control' in Article 235 has been consistently construed to include within it the power of the High Court to have disciplinary jurisdiction and transfer the judicial officers from one place to another even to the exclusion of the Governor, who is the appointing authority. A reference in this connection may be made to the cases of the *State of West Bengal and another v. Nripendra Nath Bagchi (1); State of Assam v. Ranga Muhammad and others (2); N. Srivasan v. State of Kerala (3); Chief Justice, Andhra Pradesh and another v. L.V.A. Dikshitulu and others (4) and recently in Corporation of the City of Nagpur v. Ramchandra G. Modak (5).* It seems to be plain from this catena of cases that the final court has now unhestatingly held that the word 'control' carries within its wide sweep the power to transfer an employee from one place to another. In face of this binding precedent it seems to be somewhat vain now to contend that this power would lie beyond the jurisdiction of the controlling authority.

22. At this very stage one may also deal with the somewhat tenuous submission that because the appointing authority of an employee is its Market Committee therefore the Board inflexibly cannot have the power to transfer such an employee. The aforementioned decisions are also a warrant for the clear proposition that the power of transfer need not be coterminous with the power of appointment and where it is expressly as conferred it may be vested in an authority other than the appointing authority.

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(1) (1966) AIR (SC) 447, at p.p.-453 and 455

(2) (1967) AIR (SC) 903, para 9

(3) (1968) AIR (Kerala) 158 at p. 164 F.B.

(4) (1979) AIR (SC) 193 para 38

(5) (1984) AIR (SC) 626, para 3 and 4.

As noticed already, Articles 233 and 234 vest the power of appointment of the District Judges and the Subordinate Judges in the Governor. Nevertheless, by virtue of the control vested in the High Court by Article 235 the power of transfer lies with the High Court and not with the appointing authority, namely, the Governor. For identical reasons the mere fact that the appointing authority was the Market Committee would pose no bar to the power of the Board to transfer such employees when the statutory rule expressly confers such a power within the parameters of superintendence, discipline and control vested in the Board by the parent Act itself.

23. In view of the firm finding arrived at above that the power to transfer is within the ambit of 'control', it is unnecessary to examine the alternative submission that the same would be equally within the ambit of 'discipline' as embodied in section 52(2)(xxix). In fairness to the respondents it must be noticed that it was contended plausibly that the word 'discipline' in a broad context may also include the shifting of an employee from one place to another but, as already noticed, it is unnecessary to conclusively adjudicate on this alternative aspect. It must, therefore, be held that even assuming that rule 64(ii)(c) is framed wholly under clause (xxix) of sub-section (2) of section 52 the same is squarely within its sweep and it in no way transgresses the rule making power thereunder.

24. Even putting the case of the writ petitioners at the highest pedestal and assuming entirely for argument sake that rule 64(ii)(c) is not covered by section 52(2)(xxix), it still seems to be plain that the same would be squarely within the ambit of the general rule making power under section 52(1). This expressly empowers the framing of rules for carrying out the purposes of the Act. As

is expressly noticed, the provisions of sub-section (2) do not in any way make any inroad into the generality of this power. Now the larger scheme of the Act after the creation of the Board originally by Ordinance way back in 1974 and now by Chapter IVA of the Act would leave no manner of doubt that it was constituted to stringently superintend and control the workings of the Market Committees under it. Inevitably therefrom flows the power to equally control and superintend the functionaries and employees of the said Market Committees as well. What deserves highlighting herein are the provisions of section 33A(1), which are in the terms following:

> "For the purposes of exercising superintendence and control over Market Committees, and for exercising such other powers and performing such functions as are conferred or entrusted under this Act, the State Government shall, by notification in the official Gazette, establish a Board called the Bihar Agricultural Marketing Board."

It is plain from its language that the very purpose of the creation of the Board is the superintendence and control over Market Committees. Mr. Basudeva Prasad, the learned counsel for the respondent Board, therefore, highlighted the larger fact that under the Act the Board has now been put at the apex of the entire structure with the Market Committees virtually as its constituent units operating under its superintendence, control and directions issued. Tersely the submission plausibly was that ever since the creation of the Board the whole organisational structure has now become unitary in essence though perhaps federal in form. The Managing Committee by virtue of the various provisions, delineated hereinafter, are now wholly

subservient to the Board. Reference in this context was made to section 17 of the Act itself (on which much reliance was placed by learned counsel for the writ petitioners) to point out that though the Market Committees were enjoined to be bodies corporate they were in no way to function as either autonomous or independent bodies. Section 17 itself places these bodies as subject to Rules, Bye-laws and the provisions of this Act. Now a bird's eye view of the provisions of the Act, Rules and Bye-laws, to which the Market Committees are subservient, would make it manifest that far from being autonomous or independent bodies these are now stringently subordinated to the apex body, namely, the Board. The succeeding section 18 with regard to the powers and duties of the Market Committee subjects them to such directions as the Board may from time to time issue. Similarly section 20(1) denudes the Market Committees from appointing their principal executive, namely, the Secretary, and vests that power either in the State Government or on the Board on such terms and conditions as may be prescribed by the Rules. Again with regard to the appointment of Engineers and other technical service the power of appointment is not in the Market Committee but in the Board or the State Government. As already stands noticed, sub-section (4) of section 20 subjects the power of appointment by the Market Committees themselves to sub-sections (1), (2) and (3) and also to Rules and Bye-laws made under the Act. Again sub-section (5) renders the service conditions mentioned therein subject to the approval of the State Government or the Board. Section 20 leaves no manner of doubt that even with regard to the employees of the Market Committees the stringent control of both their

superior and inferior officers is vested either in the Board, or, in the alternative, in the State Government. Not only that, all disciplinary action in the nature of discharge, removal or dismissal by the Market Committee is subject to appeal to the Managing Director of the Board by virtue of section 26. The financial control over the Market Committees with regard to the power to borrow is again made subservient to the sanction of the Board by sub-section (3) of section 28. Under section 33E (3) it is vested in the discretion of the Board to constitute a common cadre of officers and other servants for all Market Committees as it may deem fit. Later section 33J (i)(ii) confers the power on the Board to give directions to Market Committees in general or any Market Committee in particular. The power of inspection of the Market Committees is evested in the Board which may be exercised by the Managing Director or even by officer authorised by him by general or special orders. Deviating from the seriatim order of the sections, it deserves notice that even as regards the power to make bye-laws by the Market Committees for their own working, the same is again subjected to the previous sanction of the Board or any officer specially empowered in this behalf. Lastly there is the overall revisional power under section 38 empowering the Managing Director of the Board, at any time, to call for and examine the proceedings of any Market Committee and after complying with the procedural requirements to pass such orders as he thinks fit and in the interrgnum to stay the order or decision of the Market Committee. It is unnecessary to advert to the statutory rules in this context. The aforesaid provisions make manifest beyond cavil the all pervasive control of the Board over the

Market Committees which would include their functionaries and employees generally, and as has been noticed in the context of certain provisions specifically as well. It would follow inexerably from the above that the larger and the broader purpose of the Act which emerges from all these provisions in the stringent power of superintendence, control and discipline vested in the Board over the Market Committees and their employees. Against this larger vista can it possibly be said that a rule expressly conferring the power of transfer of the employees of the Market Committees by the Board would go beyond the avowed purpose of the Act investing superintendence, control and discipline of the Market Committees in the hands of the Board. To my mind the answer is plain that such a power would squarely be within the parameters of the larger purposes of the Parent Act. Therefore, in the alternative, rule 64(ii)(c) would be equally within the framework of the generality of the power conferred by section 52(1) for the framing of the rules.

25. Perhaps, at this very stage it is apt to dispel the somewhat baseless apprehensions that the conditions of service in one Market Committee were radically different or onerous from the other. The learned counsel for the respondent Board was on firm ground in contending that in view of the powers conferred on the Board the service conditions of the employees of the Market Committees now have a broad uniformity if not virtual identity. Consequently the apprehension of any irreparable loss by transfer is rather ill-founded. Any individual hardship can of course be attended but to say that on such finical ground the very statutory power to transfer expressly conferred, and plainly salutary for administrative exigencies, would become ultra vires seems to me as wholly untenable.

26. To sum up on this aspect, it must be held that rule 64(ii)(c) is no way ultra vires of the parent Act. The answer to the question posed at the very outset is rendered in the negative.

27. In fairness to the learned counsel for the petitioners, reference must be made to the somewhat hypertechnical submission that rule 64(ii)(c) did not specify the authority who could pass the order of transfer from one Committee to another. This has only to be noticed and rejected. A plain reading of the rule and its penultimate part would leave no manner of doubt that specific reference is made to the overall control and superintendence of the Board and thereafter the power to transfer from one Committee to another within the State is conferred on the Board itself. Even otherwise in view of the structural organisation under the Act with the Board as the apex body, there remains no manner of doubt that this power of transfer by express conferment or necessary implication is vested in the Board itself.

28. Adverting now to the Division Bench judgment in Krishna Kumar Srivastava's case (supra), it deserves highlighting that it did not even remotely consider the focal point of rule 64(ii)(c) therein. As has been noticed already, the learned counsel for the writ petitioners Mr. K.D. Chatterjee was straightaway fair enough to concede that the aforesaid rule is directly attracted to the situation of transfer and in the event of its validity there was little else to urge against such a power. He had frankly stated his inability to support the view in *Krishna Kumar Srivastava's case.* However, the learned counsel for the respondent Board forcefully assailed the ratio thereof on the ground that the same was rendered per incuriam and since notice had not been taken of rule 64(ii)(c), which is the

core of the case here, the said judgment could not possibly hold the field in its context.

29. In all fairness it must be noticed that in *Krishna Kumar Srivastava's* case the writ petitioner had been promoted to the post of an accountant of the Market Committee and the case squarely set up on behalf of the respondent Board was that the post of accountant had been placed in a common cadre by virtue of section 33E (3) and he was, therefore, transferable on that ground. Consequently the matter was considered only within the narrow field of section 33E and on the point whether common cadre had in fact been created or the writ petitioner came squarely within its ambit. It was in this light that it was held that the respondent Board had failed to establish that the writ petitioner was appointed in the cadre which was constituted therein by Annexure D, and also on the ground that the writ petitioner had not himself opted to remain within the same which volition was given to him by the proviso to sub-section (4) of section 33E. Viewed in this aspect the case of *Krishna Kumar Srivastava* is in a way distinguishable.

30. However, *Krishna Kumar Srivastava's* case was streneously pressed by Mr. Narayan Singh, the learned counsel for one of the writ petitioners, for urging the proposition that until and unless a common cadre is created, there is no power in the Board to transfer one employee of the Market Committee to another. It was the submission that rule 64(ii)(c) is to be read as subservient to the provision with regard to the creation of common cadre and unless this pre-condition is satisfied no occasion for the exercise of power of transfer can arise.

31. The aforesaid submission appears to me as plainly untenable. There is no manner of doubt that

if a common cadre is created then the power of transfer would be implicit in its creation. Consequently no independent express conferment of power would arise. However, rule 64(ii)(c) in terms confers this power with a wide generality irrespective of the creation of the common cadre. Consequently the provisions with regard to common cadre and these within rule 64(ii)(c) occupy two distinct and separate fields. In the case of common cadre under section 33E (3) the power to transfer would flow from the said section itself with regard to the posts placed in such cadre. However, de hors the common cadre, in the other field, where there is no such common cadre, rule 64(ii)(c) is expressly intended to operate. The two fields are thus distinct and the provisions are to be separately applicable to each situation.

32. Again it must be noticed that the power conferred under section 33E (3) is discretionary and not mandatory. The Board may or may not constitute a common cadre and when it does so it may act as it may deem fit. There is no obligation to create a common cadre and it is entirely in the discretion of the Board to do so or not. Therefore, if the common cadre is not created or the discretion is not exercised, could it be said that despite the avowed purposes of the Act to vest the control in the Board and consequently the power to transfer therein yet the same would not be permissible ? I do not think so. Rule 64(ii)(c) in the form it is couched and the kind of control which it indicates, confers a general power for the transfer of employees and is not to be cut down or whittled on the pre-condition of the existence of a common cadre. It is equally to be noticed that even the creation of the common cadre is not compulsory and the proviso to sub- section (4) of section 33E gives the option to an employee

to choose whether he will join the common cadre or to remain out of it by giving notice in writing to the State Government. If the view canvassed by Mr. Narayan Singh were to be accepted, then despite rule 64(ii)(c) and even the creation of common cadre an employee may still render himself immune to transfer by opting out of the same. Again it has to be noticed that at best the common cadre is visualised only for one or a few classes of employees common to all Committees whilst others would remain out of it. As stands noticed earlier, the Bench itself only dealt with section 33E (3) and the counsel for the Board was somewhat remiss in either not relying on rule 64(ii)(c) or to frontally focus attention thereon. Consequently *Krishna Kumar Srivastava's* case took no cognizance of a different field with regard to cadres which are not common or where the discretion to create a common cadre had not at all been exercised. In that field rule 64(ii)(c) is pointedly one applicable and would squarely operate and indeed was so intended.

33. With the greatest respect if *Krishna Kumar Srivastava's* case is projected as a warrant for the proposition that there is no power in the Board to transfer an employee from one Market Committee to another unless a common cadre is created and the employee is within the same then it does not lay down the law correctly with regard to rule 64(ii)(c) and the same has to be overruled.

34. In the light of the above the basic challenge to the order of transfer on behalf of writ petitioner Dhirendra Kumar Akela has to be rejected and the writ petition being CWJC No. 884 of 1983 is dismissed but without any order as to costs.

35. No distinguishing feature could be pointed out with regard to CWJC No. 766 of 1984 *(Brahmdeo*

Prasad v. The Bihar State Agriculture Marketing Board and others) which must also fail for identical reasons and is hereby dismissed but without any order as to costs.

36. Learned counsel for the writ petitioner in CWJC No. 3176 of 1983 had faintly attempted to draw a distinction which seems to me as one not making any difference. It was sought to be pointed out that there was initial reluctance on the part of the transferee committee to accept the service of the writ petitioner in the wake of the order of transfer on the ground of some alleged economic position of the Market Committee. In my view this is a matter extraneuous to the issue. The power to transfer is not made dependent on the volition of either the Market Committee where the employee is serving or the Market Committee where he is directed to serve. If, as has been held, the Board has the power to transfer under rule 64(ii)(c), the same is in no way whittled down or affected by any such considerations. This writ petition must also fail and is hereby dismissed but without any order as to costs.

S.Sarwar Ali, J. I agree.

B.P. Jha, J., I agree.

S.P.J. Applications dismissed.

CIVIL WRIT JURISDICTION

1984/September, 14.

Before S.S. Sandhawalia, C.J. and

S. Ali Ahmad, J.

*Hotel Mangalam and Ors.**

v.

The State of Bihar & Others.

Cinemas (Regulation) Act, 1954 (Bihar Act XV of 1954) *sections 2(b), 3, 4 and 5—exhibition of films through a Video Cassette Recorder on a television screen—whether comes within the ambit of definition of 'cinematograph' under section*

* Civil Writ Jurisdiction Case Nos. 13, 2709, 2914, 2991, 2997, 511, 3004, 3003 of 1984 and 4861 of 1983. In the matter of applications under Articles 226 and 227 of the Constitution of India.
CWJC No. 2709 OF 1984 - M/s. Coffee House .. Petitioner
CWJC No. 2914 of 1984 - Devraj Narain .. Petitioner
CWJC No. 2991 of 1984 - M/s Chandan Restaurant .. Petitioner
CWJC No. 2992 of 1984 - M/s Chandra Lok Restaurant .. Petitioner
CWJC No. 511 of 1984 - M/s Rajani Gandha Restaurant .. Petitioner
CWJC No. 3004 of 1984 - Manoj Kumar .. Petitioner
CWJC No. 3003 of 1984 - Shivji Singh .. Petitioner
CWJC No. 4861 of 1983 - M/s Mamta Restaurant .. Petitioner.

2(b)—whether subject to the licensing provisions of sections 3,4 and 5—securing of commercial licence under the Indian Telegraphs Act, whether sufficient—exhibition of a film through Video Cassette Record in the the privacy of a home—whether subject to licensing under the Bihar Cinemas (Regulation) Act, 1954.

A purposeful schematic interpretation should be given to the Bihar Cinemas (Regulation) Act 1954 and the issue of interpretation here is one of merely ironing out the creases and not changing the very fabric of the statute. As such, the issue of exhibition through a Video Cassette Recorder cannot be considered to be one of casus omissus in the statute and there is no question of supplying it by a process of strained interpretation.

Held, therefore, that the contention on the rule of casus omissus must fail and that the exhibition of films through a Video Caseette Recorder on a television screen would come within the ambit of the definition of 'cinematograph' under section 2(b) of the Bihar Cinemas (Regulation) Act, 1954 and is consequently subject to the licensing provisions of sections 3, 4 and 5 thereof.

Senior Electric Inspector v. Laxminarayan Chopra (1) - relied on.

Held, further, that the commercial licence for the television set and Video Cassette Recorder under the Indian Telegraphs Act merely permits their use for 'receiving programmes and messages transmitted for general reception'. The licence does not permit the use of Video Cassette Recorder and television for playing pre-recorded cassettes of movies. When a Video Cassette Recorder is coupled

(1) (1962) AIR (SC) 159 at p. 163.

with a television screen it becomes on independent set and apparatus for representation of movie/picture/or series of pictures. As such it would not outside the licensing provisions of the Bihar Cinemas (Regulations) Act, 1954.

Held, also, that the exhibition of a film through Video Cassette Recorder in the privacy of a home would not subject it to licensing under the Bihar Cinemas (Regulation) Act, 1954. What section 3 of the Act requires to be licensed is an exhibition by means of cinematograph in a place. The word 'exhibition' would obviously mean a public display which presupposes a place where it has the right of ingress and egress. Strictly a private home hardly equates to that requirement.

Restaurant Lee and Others v. State of Madhya Pradesh and Others (1) - relied on.

Applications by the petitioners.

The facts of the cases material to this report are set out in the judgment of S.S.Sandhawalia, C.J.

M/s Balbhadra Prasad Singh, B.P. Rajgarhia, Pawan Kumar, N.K. Agrawal, Nawal Kishore Sharma, Nalini Kant Prasad Singh, Bankey Singh and Yugal Kishore for the Petitioners.

Mr. Ram Balak Mahto, Additional Advocate General, with Mr. Mahesh Prasad No. III, J.C. to Addl. A.G. in CWJC Nos. 13 and 511 of 1984 for the Respondents

Mr. Ramanand Kumar, S.C.II, with Mr. Satish Chandra Jha, J.C. to S.C. II, in CWJC No. 2914 of 1984 for the Respondents.

Mr. K.N. Keshav, G.P. No. 4, with Mr. Gopal Krishna Prasad, J.C. in CWJC Nos. 3004 and 3003 of 1984 for the Respondents

(1) (1983) AIR (Madhya Pradesh) 146.

Mr. Kamlapati Singh, G.P. No. 5 with Mr. Ishwari Singh, J.C. in CWJC No. 4861 of 1983 for the Respondents.

S.S.Sandhawalia, C.J. Would the exhibition of films through a Video Cassette Recorder on a television screen come within the ambit of the definition of 'cinematograph' under section 2(b) of the Bihar Cinema (Regulation) Act, 1954 and is consequently subject to the licensing provisions of sections 3, 4 and 5 thereof is the focal point in this set of nine connected writ cases.

2. Admittedly the common matrix of facts may be noticed with relative brevity from Hotel Mangalam v. State of Bihar and others (CWJC No. 13 of 1984). The petitioner is operating a hotel-cum- restaurant in the name and style of Hotel Mangalam in which he has installed a Video Cassette Recorder (hereinafter referred to as "V.C.R.") for the entertainment of his customers and it is averred that this is done without charging anything specifically therefor. However, somewhat suddenly the officer-in-charge of the police station having jurisdiction over the area came to the hotel premises and directed its proprietor to stop the exhibition of films through the V.C.R. failing which stringent legal action would be initiated against him. On further enquiry it transpired that the Subdivisional Oficer had issued instructions that no video shows were to be permitted in Jhanjharpur Bazar. It is then averred that the petitioner being a law abiding citizen had stopped the exhibition on the verbal orders of the police authorities. However, in assailing the authorities for the issuance of such orders, it is the stand of the writ petitioner that the exhibition of films through the V.C.R. on a television set does not come within the definition of 'cinematograph' and consequently the same is not at all covered by the Bihar Cinemas (Regulation)

Act, 1954 (hereinafter referred to as "the Act"). It is pleaded that the Act is only applicable to public cinema halls and has nothing to do with the operation of the V.C.Rs., which are commonly used in restaurants, hotels and in private houses.

3. The common stand taken on behalf of the respondent State is that the V.C.R. is an apparatus which comes fairly and squarely within the wide ranging definition of 'cinematograph' as laid down in section 2(b) and consequently the exhibition of films straightway attracts the licensing provisions of section 3, 4 and 5 of the Act and Bihar Cinemas (Regulation) Rules, 1974, framed under the Act.

4. Now a stone-wall of recent precedents against them directly in Restaurant Lee and others v. State of *Madhya Pradesh and others (1); Dineshkumar Hanumanprasad Tiwari v. State of Maharashtra(2)* and Civil Writ Petition No. 2419 of 1983 of the Delhi High Court (against which S.L.P. No. 2767 of 1984 stands dismissed in limine on the 1st of March, 1984), and by way of analogy in *Prakash Chand Anand, Mandi and others v. State of Himachal Pradesh (3) and M/s. Gueta Enterprises and others v. State of U.P.(4)* have rendered the learned counsel for the writ petitioners to somewhat lukeworm in pressing their basic stand that the exhibition of films through V.C.R. is beyond the scope of the definition of 'cinematograph'. It, therefore, sufficie to briefly repel the half-hearted submissions raised on behalf of the writ petitioners rather than to traverse all over again the well-trodden ground in the authorities noticed above.

(1) (1983) AIR (MP) 146

(2) (1984) AIR (Bom.) 34

(3) (1984) AIR (HP) 47

(4) (1983) AIR (SC) 1098.

5. Now the solitery argument raised by Mr. Balbhadra Prasad Singh (apparently in view of host of contrary precedents), who spearheaded the somewhat blunted challenge on behalf of the writ petitioners, was that the issue of exhibition through V.C.R. was in essence one of casus omissus in the statute and this could not be supplied merely by a process of strained interpretation. The stand was that in the original Cinematograph Act of 1918 and its substitution by the later Cinematograph Act of 1952 and later by other State Acts including Bihar Cinemas (Regulation) Act 1954 the very concept of an exhibition of films through V.C.R. was not visualised and consequently could not have been intended to be provided for. The submission was that the Legislature could not intend to licence something which they did not imagine. Our attention was sought to be drawn to rule 3 of Bihar Cinemas (Regulation) Rules, 1974 (hereinafter called 'the Rules'), which provides the procedure for the grant of permission for constructing a permanent cinema house for the purpose of license and Appendix A thereto requiring the necessary particulars therefor, for highlighting the stand that by the very nature of things this can apply to regular and permanent cinema houses and not to the minuscule use of V.C.Rs. in a small hotel or restaurant. A similar submission was raised on the basis of rule 4 providing restriction in regard to the location of the cinema house and in particular sub-rule (c) thereof requiring space for parking of cars etc., which according to the learned counsel was wholly incongruous in the context of exhibition of films through V.C.R. On these premises the ultimate submission was that the Act cannot be extended to meet a case for which provision had clearly not been made therein. Reliance was placed on In *re The*

Regulation and Control of Aeronautics in Canada 54(1).

6. The submission aforesaid brings considerable credit to the ingenuity of the learned counsel but is nevertheless untenable. The learned Additional Advocate General Mr. R.B. Mahto for the respondents rightly highlighted the fact that it was neither mandatory nor inevitable that each and every provision for licensing a permanent cinema house would be made applicable for the purpose of licensing exhibition of films through V.C.R. It was pointed out that the Regulations provide for the grant of temporary licenses and also of the licensing in temporary buildings etc., which would not require the stringent provisions for a permanent cinema house having a regular licence and housed in a permanent building as defined in rule 2(v) of the Rules. Reliance was also rightly placed on section 10 which vests the power in the State Government to exempt any cinematographic exhibition from any of the provisions of the Act or the Rules made thereunder. Equally it deserves notice that even in the judgment in *re The Regulation and Control of Aeronautics in Canada (supra)* relied upon by the learned counsel for the writ petitioners it seems to have been held by a process of extended interpretation that serial navigation was within the ambit of the British North America Act which was enacted in 1867 and this could hardly be visualised at that stage. The contention on the rule of casus omissus, therefore, must fail.

7. Apart from the above, I am unable to agree with the learned counsel for the petitioners that a purposeful schematic interpretation should not be given to the Act. On is reminded of the oft quoted

(1) (1932) App. Cases 54.

words of Denning, L.J., in *Seaford Court Estate Ld. Asher (1):*

> "A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsmen. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written words so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon*'s case [(1584) 3 Co. Rep. 7a], and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume *Eyston v. Studd* [(1574) 2 Plowden, 465]. Put into homely metaphor it is thus: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out ? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

(1) (1949) 2 K. B. 481.

I am inclined to take the view that the issue of interpretation her is one of merely ironing out the creases and not changing the very fabric of the statute. However, a more direct and categoric answer to the contention of the learned counsel is provided by the authoritative decision in *Senior Electric Inspector v. Laxminarayan Chopra (1):*

"But in a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the resolutionary changes brought about in social, economic, political and scientific and other fields of human activity."

The primary submission on behalf of the writ petitioners must, therefore, be repelled.

8. Mr. Rajgarhia, the learned counsel for one of the writ petitioners, has raised the ancillary submission that since the writ petitioner in CWJC No. 4861 of 1983 had secured commercial licenses for its television set and Video Cassette Recorder under the Indian Telegraphs Act it would be exempt or outside the licensing provisions of the Act and in any case there was a frontal conflict between the two statutes.

9. The aforesaid submission cannot be better answered than in the words of G.P.Singh, C.J., speaking for the Division Bench, in *Restaurant Lee's case (supra):*

"The learned counsel for the petitioners

(1) (1962) AIR (SC) 159 at 163.

laid stress that the petitioners held commercial licences for the VCRs installed in their restaurants which entitle them to use these sets for purposes of exhibiting motion pictures on pre-recorded cassettes. This argument is also devoid of any substance. The commercial licence merely permits the use of VCR and TV in business premises 'for receiving programmes and messages transmitted for general reception'. The licence does not permit the use of VCR and TV for playing pre-recorded cassettes of movies. As already seen such a use of these appliances is outside the Central Acts and the rules made thereunder. It was also argued that on a matter covered by the Central Acts the State Act cannot operate. This argument which proceeds on the basis of the doctrine of occupied field has no application here. The Central Acts do not cover the topic of licensing of VCR and TV for exhibiting motion pictures from pre-recorded cassettes nor do they cover the topic of licensing of places where such an activity is carried on. The State Act viz., the Madhya Pradesh Cinema (Regulation) Act which covers licensing of such places thus operates in a field which is unoccupied by the Central Acts."

10. It was then said with some superficial plausibility that if the stand of the respondent State were to be accepted then every television set simpliciter would also come within the somewhat widely couched definition of 'cinematograph' and thus require licensing under the Act. In this context what deserves notice is that a television set simpliciter cannot by itself exhibit a film or represent moving pictures or series of pictures. It only reflects or receives what is broadcast elsewhere. The source

exhibition is the station and when the same is not broadcasting the television receiver cannot exhibit anything. However, when a VCR is coupled with a TV screen it becomes an independent set and apparatus for representation of movie picture or series of pictures. This aspect of the matter has also been adequately considered with and dealt in *Restaurant Lee's (supra)* with which reasoning I would entirely agree. It, therefore, suffices to briefly quote the following observation therefrom:

> "The Telegraph Act and the Wireless Telegraphy Act amongst other deal with transmission and reception of radio and TV broadcasts. A VCR is not an apparatus for transmission of broadcasts. It can be used when fitted with RF tuner sections and/or monitors for reception of broadcast programmes, and therefore, such VCRs need broadcast receiver licence. Neither the Telegraph Act nor the Wireless Telegraphy Act cover a VCR when it is merely used for playing back pre-recorded tapes on the TV screen. In these petitions we are not concerned with the use made of VCR and TV sets as receivers of broadcast from TV stations. Indeed, most of the petitioners have their restaurants at places which are not covered by any television station for in our State we have television stations only at Raipur, Bhopal and Indore. In these petitions we are only concerned with the use made of VCR and TV sets for playing back pre-recorded cassettes of movies. Such a use of these appliances is not covered by the aforesaid two Central Acts and the learned counsel is not right in his submission that the entire field in relation to VCRs and TVs is covered by those Acts."

11. Lastly another supposed anomaly allegedly resulting from the respondents' stand was that this would render even the exhibition of a film through VCR in the privacy of a home also subject to licensing which would hardly be the intent of the Legislature. This submission has only to be noticed and rejected. What section3 of the Act requires to be licensed is an exhibition by means of cinematograph in a place. The word 'exhibition' would obviously mean a public display which presupposes a place where it has the right of ingress and egress. Strictly a private home hardly equates to that requirement. Herein again the observation in *Restaurant Lee's case (supra)* is equally pertinent:

> "Section 3, as already seen, prohibits the exhibition by means of a cinematograph elsewhere than in a place licensed under the Act. A 'place' is defined by section 2(b) to include a house, building etc. The restaurants of the petitioners come within the definition of 'place'. One of the meanings of 'exhibit' is 'to show publicly for the purpose of amusement or instruction'. 'Exhibition' means a public display, i.e. a display to which public is admitted. [See Oxford English Dictionary, Vol. III pages 408-409 and the Random House Dictionary. Unabridged Edition, page 499]. It in this sense that the word 'exhibition' as used in section 3 has to be underhas to be understood. For example if a VCR is used for playing a pre-recorded cassette of a movie in one's own residence and the show is restricted to the family members or friends and the public is not admitted the show will not be an exhibition coming within the prohibition of section 3. The petitioners, however, show the

movies with the help of VCR and TV sets in their restaurants where public is admitted. This clearly amounts to exhibition by means of a cinematograph bringing the activity within the ban of section 3. The petitioners cannot indulge into this activity unless they obtain a licence for their restaurants under the Act."

It was very fairly conceded at the Bar that there was no precedent in support of the view canvassed on behalf of the writ petitioners and the weight of the precedents was wholly on the other side without exception. No meaningful challenge could either be raised to the decisions referred to above nor any convincing attempt was made to distinguish the same.

12. Learned counsel for the parties were agreed that since the issues of fact and law are common, this judgment would govern all of them.

13. As the representative submission sought to be raised on behalf of the writ petitioners fail, all the writ petitions are hereby dismissed. In the circumstances there will be no order as to costs.

S.Ali Ahmad, J., I agree.

S.P.J. Petitions dismissed.

CIVIL WRIT JURISDICTION

1984/September, 28.

Before Hari Lal Agrawal and Yadunath Sharan Singh, JJ.

*Jang Bahadur Singh.**

v.

Baidyanath Prasad & Ors.

Bihar Money Lenders Act, 1974 (Act XXII of 1975), *section 12—scope and applicability of—non obstante clause in section 12—defect of—anomalous mortgage coupled with delivery of possession—mortage bond containing personal covenant—protection under section 12, whether available to the mortgagor.*

The effect of the non obstante clause in section 12 is a clear indication of the legislative intent that it has to be given an overriding effect over all other existing laws. The makers of the law have clearly intended that if the mortgagee has remained in possession of the land and enjoyed the usufruct thereof, then the mortgage bond shall be eemed to be fully satisfied out of the usufruct and the mortgage shall be deemed to have been wholly redeemed and on expiry of the period of 7 years

*, Civil Writ Jurisdiction Case Nos. 225 and 226 of 1979. In the matter of applications under Articles 226 and 227 of the Constitution of India.
Mosst. Ram Sakhi Devi and ors. .. Respondents in CWJC No. 226/79

from the date of execution of the mortgage bond in respect of such land the mortgagor shall be entitled to recover possession in the manner prescribed. The crux of the matter is the enjoyment of the usufruct of the mortgaged land for the purpose of invoking this beneficient provision in favour of the mortgagor and if that is established then simply an account of the fact that the mortgage bond includes certain other matters and stipulations and thereby it having been classified as an anomalous mortgage the protection provided under section 12 to the mortgagor cannot be taken away.

Held, therefore, that the executive authorities in the instant cases have taken an erroneous view of the matter and have committed an apparent error of law. The dues in respect of the usfructuary mortgage bonds in question must be deemed to have been fully satisfied and the mortgage bond fully redeemed and the mortgagor is accordingly entitled to recover possession of the mortgaged lands in the prescribed manner.

Sushil Kumar Singh v. Brij Mohan Singh (1) - relied on.

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

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

Mr. P.K. Joshi for the petitioners in both the cases.

Mr. Rajendra Kishore Prasad for the respondents in both the cases.

Hari Lal Agrawal, J. - Both these cases have been heard together as common questions of fact

(1) (1981) AIR (Pat.) 172.

and law arise in them and they are being disposed of herewith. The petitioner in both the cases is the same and the question arising therein is as to whether an anomalous mortgage in which delivery of possession of the mortgaged property has been given to the mortgagee but with a personal covenant of repayment of the mortgage money, can be covered under section 12 of the Bihar Money Lenders Act.

2. The facts, briefly stated, are that the petitioner had borrowed Rs. 12,000/- from respondent no. 1 under two mortgage bonds of Rs. 6,000/- in each case, on the basis of certain agricultural lands. From the recitals made in the mortgage bonds, it is clear that the mortgagees were given possession of the mortgaged properties and they were to remain in cultivating possession thereof until the mortgage bonds were redeemed. The mortgagees were also saddled with the liability to pay the rent of the land and a period of five years was fixed in the document besides a personal covenant that in case the mortgagees suffered any loss on account of the defect of title, then they will be entitled to recover the dues from the person or property of the petitioner.

3. On coming into force of the Bihar Money Lenders Act, 1974, the petitioner made applications in the year 1978 under section 12 of the said Act before the Anchal Adhikari Ramgarhwa (respondent no. 2) for redemption of the mortgage as the period of 7 years stipulated in section 12 of the redemption of mortgage bond had already expired. He accordingly prayed for recovery of possession of the mortgaged lands from respondent no. 1 of the respective cases. The Anchal Adhikari by his order (Annexure 2) as well as the Deputy Collector, Land Reforms, by his order (Annexure 3) on appeal held

that the nature of the documents being not purely usufructuary mortgage bond, the petitioner was not entitled to the benefits of the provisions of automatic redemption after the expiry of the period of 7 years provided under section 12. In coming to this conclusion they have referred to the personal covenant already stated earlier, and the five years period mentioned in the mortgage bonds. And on reference to various authorities they have come to the conclusion that the nature of the transaction being anomalous mortgage, the petitioner had no right of relief under the above provisions of the Act.

4. In the counter-affidavit it has not been disputed that the petitioner had delivered possession of the mortgaged property to the mortgagees and that they have been enjoying the usufruct of the land. In my considered opinion, the effect of the non obstante clause in section 12 is a clear indication of the legislative intent that it has to be given an overriding effect over all other existing laws. The makers of the law have clearly intended that if the mortgagee has remained in possession of the land and enjoyed the usufruct thereof, then the mortgage bond shall be deemed to be fully satisfied out of the usufruct and the mortgate shall be deemed to have been wholly redemed and on expiry of the period of 7 years from the date of execution of the mortgage bond in respect of such land the mortgagor shall be entitled to recover possession in the manner prescribed. The crux of the matter, therefore, is the enjoyment of the usufruct of the mortgaged land for the purpose of invoking this beneficient provision in favour of the mortgagors and if that fact is established, then, in my view, simply on account of the fact that the mortgage bond includes certain other matters and stipulations and thereby it having been classified as an

anomalous mortgage, the protection provided under section 12 to the mortgator cannot be taken away. I may take support for this view from the case of *Sushil Kumar Singh v. Brij Mohan Singh (AIR 1981 Patna 172)*. In that view of the matter, the Executive authorities have taken an erroneous view of the matter and have committed an apparent error of law. It has, therefore, to be held that all the dues in respect of the usufructuary mortgage bonds in question must be deemed to have been fully satisfied and the mortgage bonds fully redeemed. The petitioner is accordingly entitled to recover possession of the mortgaged lands in the prescribed manner.

5. In the result, both the applications are allowed. Since the respondent no. 1 of each of the cases have remained for several years in possession of the mortgaged property, to which otherwise they were not so entitled, I shall award costs to the petitioner in both the cases to offset the said loss to some extent. Hearing fee is accordingly assessed at Rs. 250/- in each case.

Yadunath Sharan Singh, J. I agree.

M.K.C. Applications allowed.

CIVIL WRIT JURISDITION

1984/December, 13.

Before Birendra Prasad Sinha, J.

*Rajnath Jha.**

v.

The State of Bihar through the Deputy Commissioner, Santhal Pargana & ors.

Bihar Public Land Encroachment Act, 1956 (Act XV of 1956), *section 2(1) and 11(1)(ii)—word 'Collector'—meaning of—section 11(1)(ii)—provisions of—Additional Collector authorised to discharge all functions of the Collector of a district, whether can hear appeal against an order passed by Deputy Collector Land Reforms.*

The Collector means the Collector of the district and any officer empowered by the State Government to discharge all or any of the functions of the collector under this Act. Section 11(1)(ii) provides that if an order is passed by any officer other than the collector of the district the appeal will lie to the collector. If a collector means also an Additional Collector and more so if an Additional Collector has been authorised to discharge all the functions of the collector of a district there is no reason why an Additional Collector or an Additional

* Civil Writ Jurisdiction Case No. 1321 of 1980. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Deputy Commissioner cannot hear an appeal against an order passed by the Deputy Collector Land Reforms.

Held, therefore, that in the instant case the Additional Deputy Commissioner was competent to hear the appeal.

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 Birendra Prasad Sinha, J.

M/s. G.Sanyal, Ganpati Trivedi, Ashok Kumar Sinha No. 4 & Mathura Dhish Pandeya for the petitioner

M/s. J.N. Pandey, G.P. II and Ram Krishna Singh, J.C. to G.P. V.

Birendra Prasad Sinha, J. In this writ application the petitioner has challenged the orders contained in Annexure 3 and 4. A proceeding under the Bihar Public Land Encroachment Act (hereinafter referred to as 'the Act') was initiated against the petitioner and by an order dated 10.2.1976 the Deputy Collector Land Reform directed the petitioner to vacate the encroachment by 1.3.1976. Against that order he filed an appeal, which was registered as Case No. 182 of 1977-78. The Additional Deputy Commissioner, who heard the appeal dismissed the same on 8.2.1980/9.2.1980. These two orders are contained in Annexures 3 and 4.

2. Learned counsel appearing on behalf of the petitioner has submitted that the Additional Deputy Commissioner had no jurisdiction to hear and decide the appeal and, therefore, the appellate order contained in Annexure-4 is without jurisdiction.

3. An appeal against an order under sections 6, 7 and 8 can be filed under section 11 of the Act.

If such an order is passed by any officer other than the Collector of the district then the appeal lies to the Collector of the district or to any officer specially empowered by the State Government by the notification under section 11 of the Act. It is contended by learned counsel for the petitioner that a general notification empowering the Additional Collectors to discharge all or any of the functions of the Collector is not sufficient. For the purpose of hearing an appeal, according to learned counsel, a notification, as contemplated in section 11 of the Act, has to be made.

4. The definition of Collector is given in section 2(1) of the Act. The Collector means the Collector of the district and any officer empowered by the State Government to discharge all or any of the functions of the collector under this Act. It appears that all Subdivisional Officers and Additional Collectors within a district were empowered by the State Government to discharge all or any of the functions of the Collector under this Act by a notification in the official gazette. Section 11(1)(ii) provides that if an order is passed by any officer other than the Collector of the district the appeal will lie to the Collector. If a collector means also an Additional Collector and more so if an Additional Collector has been authorised to discharge all the functions of the Collector of a district there is no reason why an Additional Collector or an Additional Deputy Commissioner cannot hear an appeal against an order passed by the Deputy Collector Land Reforms. The learned Additional Deputy Commissioner has noted, as stated in the impugned order, that the Additional Deputy Commissioner has same power of the Deputy Commissioner and there were specific mentions of this in this in the original notification appointing an Additional Deputy Commissioner. I do

not see any substance in the arguments of the learned counsel. The Additional Deputy Commissioner was competent to hear the appeal. No other point has been raised before me in support of the application. I do not see any reason to interfere with the impugned orders.

5. The application, therefore, fails and is dismissed but without costs.

M.K.C. Application dismissed.

MISCELLANEOUS CRIMINAL

1984/November, 13.

Before S.S.Sandhawalia, C.J. and Nazir Ahmad, J.

*Nageshwar Sahai.**

v.

The State of Bihar.

Code of Criminal Procedure, 1973 *(Central Act No. II of 1974) sections 161(3), 207 and 173(8)—section 173(8)—statements recorded by Deputy Superintendent of Police (Criminal Investigation Department) under direction of State Government, whether further statement—whether statement recorded under section 161(3)—section 207—accused, whether entitled to get copies of statement of witnesses recorded by Deputy Superintendent of Police (Criminal Investigation Department).*

It is evident that the Deputy Superintendent of Police (Criminal Investigation Department) could make investigation under the direction of the State Government and this could be further investigation within the meaning of section 173(8) of the Code of Criminal Procedure, 1973, hereinafter called the Code, as it related to a murder case and so the statement of witnesses recorded by the Deputy

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* Criminal Miscellaneous No. 2276 of 1982. In the matter of an application under section 482 of the Code of Criminal Procedure, 1973.

Superintendent of Police (Criminal Investigation Department) will also be treated as the statements recorded under section 161 of the Code. It cannot be doubted that under section 207 of the Code the accused is entitled to copies of the statements of witness recorded under sub-section (3) of section 161 of the Code of all persons whom the prosectuion purposed to examine as its witnesses. The further investigation under section 173(8) of the Code is covered by the provisions of section 173(5) of the Code.

Held, that the accused is entitled to get copies of those statements of witnesses recorded by the Deputy Superintendent of Police (Criminal Investigation Department) who are named in the chargesheet.

State of Bihar v. J.A.C. Saldanna (1), State of Kerala v. Raghavan etc. (2) and R.P. Kapur and ors. v. Sardar Pratap Singh Kairon and others (3)-followed.

Khatri and ors. v. State of Bihar (4)-distinguished.

Application by the accused.

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

Messrs Surendra Prasad and Deo Govind Prasad for the petitioner

Messers Awadhesh Kumar Datta and Rajendra Prasad for the State.

Nazir Ahmad, J. This application has been filed

(1) (1980) Cr.L.J. 98

(2) (1974) Cr. L.J. 1373

(3) (1961) AIR (SC) 1117

(4) (1981) BBCJ (SC) 124.

under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code), by petitioner Nageshwar Sahai, for a direction to the Additional Sessions Judge II, Patna, to furnish copies of the statements of the prosecution witnesses cited in the chargesheet and recorded by the Deputy Superintendent of Police (Criminal Investigation Department) in the course of further investigation relating to the accused persons in Sessions Trial No. 36 of 1981.

2. This application was originally placed before a single Judge of this Court and he referred the matter for hearing by a Division Bench, vide order dated 8.7.82, as the points involved in this case are whether after the submission of the charge-sheet by the officer-in-charge of the Police Station the State Government can direct an enquiry by the D.S.P., C.I.D. and whether the report submitted by the D.S.P., C.I.D. and the evidence recorded by him should be treated as further investigation in respect of the offence under section 173(8) of the Code, and hence the matter has been placed before a Division Bench.

3. The case of the petitioner may be briefly stated. The petitioner is employed as Section Officer in the Public Works Department of the Government of Bihar and is posted at Patna Secretariat. The petitioner and five others are undergoing a trial in the Court of Sri Om Prakash, Additional Sessions Judge II, Patna in Sessions Trial No. 36 of 1981.

4. According to the petitioner, the prosecution case is to the effect that on 1.2.1979 at about 4 P.M. accused Nityanand son of accused Lallan Prasad made a gesture with his hand from across the road to Kanti Devi, daughter of Rameshwar Dutt, the deceased. At about 6 P.M. the deceased

accompanied by his family members went to the apartment of accused Lallan Prasad, with a view to remonstrate about the conduct of the accused Nityanand. Accused Lallan Prasad was not found present at his house, but a quarrel developed between the ladies of the two families and there was also an exchange of abuses. At about 11 P.M. accused Lallan Prasad with his two sons, namely, Nityanand and Satyanand, his Sala Rewati Raman and some others went to the apartment of the deceased. Accused Lallan Prasad began to beat the outer door of the apartment of the deceased and as the door was at first not opened, there was an exchange of hot words between accused Lallan Prasad and the deceased Rameshwar Dutta. When the door was opened, accused Lallan Prasad, his two sons Nityanand and Satyanand, his Sala Rewati Raman and two or three others entered the flat of the deceased. Those who went inside the flat, began to assault the deceased Rameshwar Dutt and his son Vijoy Kumar Dutt. Subsequently, accused Lallan Prasad and his son Nityanand caught hold of the deceased and pushed him down accross the railing of the inner verandah. The deceased Rameshwar Dutt fell down from the second floor of the building and he died. On the next day Vijoy Kumar Dutt, the son of the deceased, gave a written report about the occurrence to the officer-in-charge of Shashtri Nagar Police Station on the basis of which the present case was instituted.

5. According to the petitioner, Braj Kishore Prasad Sinha, one of the accused, occupied a flat in the same building and the petitioner is said to be his friend and that the petitioner and accused Braj Kishore Prasad Sinha were also found present at the spot, although the petitioner has claimed that they were outside the door and that they did not go

inside the flat and that they continued to stand at the door.

6. In the petition it has also been asserted that sometime after the charge-sheet was submitted, it came to the notice of the State Government that the investigation in the case was not conducted justly and fairly, and the State Government directed a further investigation of the case by an officer of the rank of a Deputy Superintendent of Police in the Criminal Investigation Department. Shri Nalini Kant Mishra, D.S.P. who conducted the further investigation, examined some of the prosecution witnesses afresh and he also examined some more persons residing in the locality.

7. It has also been asserted in the application that on further investigation the Deputy Superintendent of Police came to the conclusion that the petitioner as well as accused Braj Kishore Prasad Sinha were wholly innocent and they have been falsely implicated.

8. When the trial commenced before the learned Additional Sessions Judge II, Patna, the petitioner filed an application before him making a prayer that the report of the Deputy Superintendent of Police and the record of the statements of the witnesses examined by him might be called for from the Home Department of the State Government, so that the materials disclosed during further investigation might be considered while determining the question of framing a charge against the petitioner and also to enable the petitioner to defend himself effectively at the trial. By order dated 18.11.81 the learned Additional Sessions Judge II held that the report of the Deputy Superintendent of Police (C.I.D.) and the statements of the witnesses recorded by him in the course of further

investigation are not necessary in the case at this stage of hearing on charge and the same may be relevant at a later stage. He also directed for calling for the above report and the copies of the statements from the Home Department of the State Government. This will be evident from Annexure 1 to this application.

9. Against the aforesaid order the petitioner filed Criminal Misc. No. 300 of 1982 which was withdrawn with liberty to the petitioner to file a fresh application vide order dated 22.1.82 of this Court vide Annexure 2.

10. Subsequently, charges were framed against the accused persons including the petitioner and so a prayer was made for calling for the report of the Deputy Superintendent of Police and the statements of the witnesses recorded by him from the Home Department of the State Government. By order dated 6.3.82, vide Annexure 3, charge under section 302 of the Indian Penal Code (hereinafter referred to as the Penal Code), was framed against Lallan Prasad and Kumar Nityanand, and charge under section 302/149 of the Penal Code was framed against accused Rewati Raman Prasad, Brij Kishore Prasad Sinha and petitioner Nageshwar Sahai, and under section 323 of the Penal Code against Rewati Raman Prasad and Kumar Nityanand, and under section 449 of the Penal Code against all the accused persons. By the same order the learned Additional Sessions Judge II, Patna, allowed the prayer of the petitioner and called for the entire file from the Home Commissioner, Bihar.

11. On 20.3.82 the report of the Deputy Superintendent of Police and the record of the statements of witnesses examined by the Deputy Superintendent of Police were produced before the

learned Additional Sessions Judge II by the Home Department of the State Government and then a prayer was made that copies of the statements of prosecution witnesses recorded by the D.S.P. in course of further investigation might be supplied to the petitioner. By order dated 22.3.82 the learned Additional Sessions Judge II, rejected the prayer of the accused persons and he expressed his view that the accused persons were not entitled to get copies of the statements of the witnesses recorded by the D.S.P. (C.I.D.). Hence this application has been filed for a direction to furnish copies of the statements of the prosecution witnesses cited in the chargesheet recorded by the D.S.P. (C.I.D.) in the course of further investigation.

12. The argument in the case was heard on 18.9.1984. Mr. Surendra Prasad, on behalf of the petitioner, relied on the assertions made in paragraph 7, 8 and 9 of the application, which have been supported by an affidavit dated 13.4.1982, that after submission of the charge-sheet, it came to the notice of the State Government that the investigation in the case was not conducted justly and fairly and the State Government directed a further investigation of the case by the Deputy Superintendent of Police in the Criminal Investigation Department and that Shri Nalini Kant Mishra, D.S.P. who conducted the further investigation examined some of the prosecution witnesses afresh and he also examined some more persons residing in the locality, and the D.S.P. found that the petitioner as well as accused Braj Kishore Prasad Sinha had been falsely implicated in the case.

13. Mr. Awadhesh Kumar Dutta, on behalf of the State of Bihar-opposit party, submitted that he was not aware as to under what circumstances the

further investigation was made by Shri Nalini Kant Mishra, D.S.P. He also submitted that even if the State Government directed an investigation, it was an administrative investigation and not a judicial investigation under section 173(8) of the Code and so the petitioner is not entitled to get copies of the statements of witnesses examined by the D.S.P. (C.I.D.).

14. I find that the records of the Home Department are in the file. It appears that at the direction of the Chief Minister a further investigation was directed by the State Government and ultimately the D.S.P. (C.I.D.) submitted a report dated 28.1.81 in which he gave details of the occurrence and also the place of occurrence and he recorded the statements of various witnesses. The occurrence had taken place on 1.2.79 and the information was lodged at 7 A.M. on 2.2.79. Further investigation was conducted in view of the complaint made to the Chief Minister that innocent persons had been implicated. It also appears that accused Braj Kishore Prasad Sinha and accused Lallan Prasad are in service in the Patna Secretariat and it cannot be doubted that they manoeuvred through political leaders to get a further investigation made. The question may arise as to what was necessity of further investigation after lapse of two years when the police had already investigated the case and submitted the charge-sheet.

15. It appears that after submission of the charge-sheet the petitioner and Braj Kishore Prasad Sinha were released on bail but they were placed under suspension by the department and as such they were anxious to be relieved from suspension and so they wanted further investigation in the case. Thus it is evident that further investigation has been

made at the instance of the petitioner and Braj Kishore Prasad Sinha. It will be for the trial court to see as to what reliance can be placed on the statements of the witnesses recorded by the D.S.P. (C.I.D.) after a lapse of two years. However, the question is whether this further investigation is covered by section 173(8) of the Code. Section 173(8) of the Code lays down that 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 further report or reports regarding such evidence in the form prescribed; and the provisions of sub-section (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). The report of the D.S.P. (C.I.D.) is not in any prescribed form as it was a report to the Additional Inspector General of Police, Criminal Investigation Department. However, if there is any further investigation at the instance of the State Government then it can be only under section 173(8) of the Code and although the report was not forwarded to the Magistrate at that time but now in view of the orders dated 18.11.81 and 6.3.82, vide Annexure 1 and 3, the entire file has been called for.

16. Learned Advocate for the State, Mr. Awadhesh Kumar Datta, has submitted that further investigation was an administrative investigation and so no action should be taken on the report of the D.S.P. (C.I.D.).

17. Mr. Surendra Prasad, learned Advocate for the petitioner, has placed reliance on the case of

State of Bihar and another vs. J.A.C. Saldanna and others (1). In this decition under the direction and orders of respondent no. 3, respondent no. 4 had already submitted final report on February 6, 1979. A communication was addressed to respondent no. 5, Superintendent, Railway Police, one Mr. Mohammad Sulaiman, who had taken over in the meantime from respondent no. 6 who was transferred, to move the Court not to accept the final report and await report of the police after completion of the further investigation which was directed by the Government in the matter and the Additional Chief Judicial Magistrate passed order to await report of further investigation. In these circumstances the effect of various sections were considered.

A reference was made to section 3 of the Indian Police Act, where it has been laid down that the Superintendent of the Police throughout a general police district shall vest in and, shall be exercised by the State Government to which such district is subordinate; and except as authorised under the provisions of this Act, no person, officer or Court shall be empowered by the State Government to supersede or control any police functionary. It has also been stated that section 12 confers power on the Inspector General of Police, subject to the approval of the State Government, to make rules and the Bihar Police Manual, 1978 was issued. It has also been held in this decision that the Inspector-General, Vigilance, being appointed for the whole of the State, is a police officer considered to be on duty for all purposes of the Act in the whole of the State and it is open to the State Government to employ him as police officer in any

(1) (1980) Cr. L.J. 98.

part of the general district, and so it was held that the Inspector General, Vigilance could be directed by the State Government in exercise of its executive administrative function to take over investigation of a cognisable offence registered at railway police station because when he was directed to take over the investigation it would mean that he was employed as a police officer in that police station for the detection of the crime. For this purpose reliance was placed on section 36 of the Code which lays down that police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. It was also held that the use of the word 'rank' in section 36 of the Code comprehends the hierarchy of police officers and it is equally clear that the Inspector General of Police will have jurisdiction over the whole of the State. It has also been held that if the Inspector General of Police is an officer superior in rank to an officer in charge of a police station, he could in view of section 36 of the Code exercise the powers of an officer in charge of a police station throughout the local area to which he was appointed meaning thereby the whole of Bihar State as might be exercised by an officer in charge of a police within the limits of his police station. In this decision it has also been held that the State of Bihar is governed by the Indian Police Act, 1861. It has also been observed in paragraph 16 of this judgment that the general power of superintendence as conferred by section 3 of the Indian Police Act, 1861, would comprehend the power to exercise effective control over the actions, performance and discharge of duties by the members of the police force throughout the general district and that the word

'superintendence' would imply administrative control enabling the authority enjoying such power to give directions to the subordinate to discharge its administrative duties and functions in the manner indicated in the order. It has also been held in this decision that the power of superintendence would comprehend the authority to give directions to perform the duty in a certain manner, to refrain from performing one or the other duty, to direct some one else to perform the duty and no inhibition or limitation can be read in this power unless the section conferring such power prescribes one. It has also been held in paragraph 17 of this decision that section 173(8) of the Code enables an officer in charge of a police station to carry on further investigation even after a report under section 173(2) of the Code is submitted to Court. It has also been held that if the State Government has otherwise power to direct further investigation it is neither curtailed, limited nor denied by section 173(8), more so, when the State Government directs an officer superior in rank to an officer in charge of police station thereby enjoying all powers of an officer in charge of a police station to further investigate the case, and such a situation would be covered by the combined reading of section 173(8) with section 36 of the Code and such power is claimed as flowing from the power of superintendence over police to direct a police officer to do or not to do a certain thing because at the stage of investigation the power is enjoyed us executive power untrammelled by the judiciary. It has also been held in paragraph 18 of this decision that section 3 of the said Act does not prescribe any special procedure for investigation contrary to one prescribed in the Code. It has also been held that an officer superior in rank to an officer in charge of a

police station could as well exercise the power of further investigation under section 173(8) in view of the provision embodied in section 36 of the Code. It has also been observed in paragraph 19 of this decision that the High Court was in error in holding that the State Government in exercise of the power of superintendence under section 3 of the said Act lacked the power to direct further investigation into the case, as provided in section 173(8) of the Code. It has also been observed in paragraph 25 that on a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in section 173(8). Thus it is evident that a further investigation under section 173 (8) is possible even after cognizance of the offence is taken.

18. In view of the aforesaid decision, which is a decision of their lordships of the Supreme Court, I have only to see whether the D.S.P. (C.I.D.) is appointed for the whole of the State of Bihar. The report of the D.S.P. (C.I.D.) shows that the D.S.P. (C.I.D.), Bihar is posted at Patna in the Secretariat. Thus, it cannot be doubted that in Patna district, if not for the whole of the State of Bihar, the D.S.P. (C.I.D.) is superior in rank to the officer- in-charge of Gardanibagh police station. I hold that as the D.S.P. (C.I.D.) is posted in the Secretariat, he will be a superior officer to the officer-in-charge in whole of the State of Bihar, and this is why the report has been submitted to the Additional Inspector General of Police in Criminal Investigation Department, Bihar, Patna. Thus in view of the aforesaid decision of their lordships of the Supreme Court the State Government could entrust investigation to him. The notings in the file clearly goes to show that the matter was placed before the Chief Minister through the Additional Chief Secretary and the Home

Commissioner. This will be evident from the note in the file dated 28.4.81. Of course the Chief Minister took the view that no further action in the matter is necessary as the trial was proceeding and so this report was not forwarded to the trial court, but it has been forwarded to the trial court after it was called for from the Home Commissioner, Bihar.

19. Learned Advocate for the petitioner, Mr. Surendra Prasad, has referred to rules 410, 411, 426, 429 and 431 of Chapter 15 of the Bihar Police Manual, 1978. Chapter 15 relates to Criminal Investigation Department. Rule 409 shows that the Criminal Investigation Department is under the control of an officer generally not below the rank of a Deputy Inspector General of Police. Rule 410 shows that the functions of the Criminal Investigation Department shall include such crimes about whom the Inspector General gives special orders. It also shows that murder squad is also a branch of the Criminal Investigation Department. Rule 411 lays down that "Investigation" has the meaning attached to it in the Code. Rule 426 shows that the Deputy Inspector General, Criminal Investigation Department, may cause inquiry to the conducted by officers of the Criminal Investigation Department under his immediate control instead of through the Superintendent. Rule 429 lays down that the position of officers of the department vis-a-vis subordinate local officers shall be determined by their relative rank. Rule 431 lays down that under section 36 of the Code Inspectors and superior officers of the C.I.D. are superior in rank to an officer-in-charge of a police station. Thus, it cannot be doubted that the D.S.P. (C.I.D.) is an officer-in-charge of a police station.

20. Mr. Surendra Prasad, learned Advocate for the petitioner, has placed reliance on the case of

Khatri and others vs. State of Bihar and others(1). In this decision the effects of sections 162 and 172 of the Code were considered but the effect of section 173 of the Code was not considered in this decision and so it is not helpful for the decision of this case.

21. Learned Advocate for the petitioner has also relied on the case of *State of Kerala vs. Raghavan etc. (2)* where it has been held that the prosecution cannot pick and choose and refuse to supply to the accused the copies of the statements which was contradictory to the prosecution case on the ground that the prosecution is not going to rely on the statements of those witnesses, otherwise it would mean deviation from the mandatory provisions of criminal law and to deny the accused the just and fair trial. In this case a prayer was made that a copy of the statements recorded on 14.2.73 from CW2 Vishwambharan by the Circle Inspector of Police, Shertallai, during the course of investigation might be given to the petitioners-accused. The objection of the State to the grant of the copy was on the ground that the prosecution did not propose to rely on that statement recorded by Circle Inspector, Shertallai, and therefore the accused were not entitled to it. The case of the State was that in terms of the provisions contained in section 173(4) of the Code the accused is entitled, as a matter of right, only to the copies of those documents or extracts thereof on which the prosecution seeks to rely, and that in that case subsquent to the questioning of CW2 done by the Circle Inspector of Shertallai, the investigation was taken over by the Crime Branch and the Detective Inspector, Crime Branch, C.I.D. had questioned the very same witness on 20.2.73

(1)(1981) BBCJ 124 (SC)

(2) (1974) Cr.L.J. 1373.

and it is that investigation made by the Detective Inspector that had culminated in the final report on which alone the prosecution sought to rely in the trial court and so it is only copies of those statements on which the prosecution seeks to rely, need be furnished to the accused under the mandatory provisions of section 173(4) of the Code. It has been observed in paragraph 5 of this decision that if there are embllishments or contradictions in the statements given by the very same witness on different occasions, the voracity and trustworthiness of the evidence of the witness have to be tested in cross-examination with the aid of such materials. It has also been observed that it should not certainly be the concern of the prosecution in such circumstances to deviate from or circumvent the relevant provisions incorporated in the Code with a view to ensure that the accused gets every opportunity to meet the case brought against him. It was also held that in fairness, and according to law, the copies of the statements recorded from the witness on 14.2.1973 and 20.2.1973 ought to be furnished to the accused. It has also been finally observed that where the statements given by a witness on different occasions during the course of investigation are of conflicting nature on material points the position of the Public Prosecutor undoubtedly is not uneviable; even then he is expected to display a sense of detachment and fairplay without being unduly influenced by a desire to secure the conviction of the accused at any cost. If this decision is taken in view then the copies of the statements recorded by the D.S.P. (C.I.D.) have to be made available to the petitioner whatever be the worth of the same.

'22. Mr. Surendra Prasad, learned Advocate for the petitioner, has also placed reliance on the case

of *R.P.Kapur and others vs. Sardar Pratap Singh Kairon and others(1)* where it has been held in paragraph 10 that the Additional Inspector General of the Police to whom the Sethi's complaint was sent, was without doubt, a plice officer superior in rank to an officer-in-charge of a police station and that Sardar Hardayal Singh, Deputy Superintendent of Police, C.I.D., Amritsar, was also an officer superior in rank to an Officer-in-charge of a police station and that both these officers could, therefore, exercise the powers, throughout the local area to which they were appointed, as might be exercised by an officer-in-charge of a police station within the limits of his police station. It has also been held in this decision that both of them have jurisdiction throughout the State. This decision supports the case of the petitioner.

23. Learned Advocate for the petitioner has also relied on the case of *A. Banka Kandaswamy Reddy vs. State of Andhra Pradesh (2)*. In this decision the accused persons who were being tried for various offences before the Sessions Judge and the case was being investigated into by the local police, relation of one of the accused in the said case sent a petition to the D.I.G. of Police alleging that the local police were colluding with the prosecution party and requested investigation to be entrusted to C.B., C.I.D. Under the instruction from the D.I.G. a C.B., C.I.D. Inspector examined some witnesses and submitted a report. The accused applied under section 91 Cr.P.C. to summon the petition made to the D.I.G. and the statements of witnesses recorded by the Inspector, C.B., C.I.D. during the inquiry conducted by him. The

(1) (1961) AIR (SC) 1117

(2) (1982) Cr.L.J. 393.

Superintendent of Police, C.B., C.I.D. while producing the documents, claimed previlege under section 124 on the ground that "public interests' would suffer by the disclosure and in those circumstances it was held that neither the petition made to the D.I.G. nor the statements recorded by the Inspector, C.B., C.I.D. constituted documents relating to any affairs of the State and they did not also answer the description of communication made to a police officer in official confidence and that the documents were in the nature of communication made by the private persons to a public officer. It was, therefore, held that the claim of privilege was improper.

24. From various decisions mentioned above it is evident that the D.S.P. (C.I.D.) could make investigation under the direction of the State Government and this could be further investigation within the meaning of section 173(8) of the Code as it related to a murder case and so the statements of witnesses recorded by the D.S.P. (C.I.D.) will also be treated as the statements recorded under section 161 of the Code. It cannot be doubted that under section 207 of the Code the accused is entitled to copies of the statements of witnesses recorded under sub-section (3) of section 161 of the Code of all persons whom the prosecution proposed to examine as its witnesses. The further investigation under section 173(8) of the Code is covered by the provisions of Section 173(5) of the Code. Under such circumstances I hold that the petitioner is entitled to get copies of those statements of witnesses recorded by the D.S.P. (C.I.D.) who are named in the charge-sheet.

25. The petitioner has prayed for copies of the statements of those prosecution witnesses whose statements have been recorded by the D.S.P.

(C.I.D.) and whose names are found in the charge-sheet submitted by the officer-in-charge of the police station. I,therefore, hold that the petitioner is entitled to get copies of those statements in view of my discussions made above and in view of the decisions referred to above. It is for the trial court to consider the worth of the statements of witnesses recorded by the D.S.P. (C.I.D.) after a lapse of about two years from the date of occurrence. However, I do not express any opinion regarding the merits of the statements recorded by the D.S.P. (C.I.D.). I, therefore, direct that the petitioner should be furnished copies of the statements recorded by the D.S.P. (C.I.D.) of those witnesses who are mentioned in the charge-sheet submitted by the Officer-in-charge of Gardanibagh police station who will be examined in the case.

26. In the result the application is allowed and the order dated 22.3.1982 of the learned Additional Sessions Judge II, Patna, passed in Sessions Trial No. 36 of 1981 is hereby set aside.

S.S.Sandhawalia, C.J. I agree.

R.D. Application allowed.

APPELLATE CIVIL

1984/November, 15.

Before B.P.Jha and S.K. Choudhari, JJ.

*Tara Pada Roy.**

v.

Dwijendra Nath Sen & others.

Motor Vehicles Act, 1939 *(Central Act No. IV of 1939) section 95(2)—provisions of—expression 'any one accident' meaning of—insurer—liability of.*

The word 'accident' is used in the expression, 'any one accident' in section 95(2) of the Motor Vehicles Act, 1939, hereinafter called the Act, from the point of view of various claimants, involved in the accident, each of whom is entitled to make a separate claim for the accident suffered by him and not from the point of view of the insurer.

Appeals from Original Orders nos. 198, 199, 200, 201, 202, 203 & 204 of 1974. Against an order of Shri A.H.M.Q. Khan, District Judge (Motor Accident Claims Tribunal), Dhanbad, dated 21st May, 1984.

M.A.109/74..Khalid Latif & others ... Respondents.

M.A.200/74..Minor Subodh Kumar Sen & anr. ... Respondents.

M.A.201/74..Smt. Sibani Rani Day & anr. ... Respondents.

M.A.202/74..Khalid Latif & anr. ... Respondents.

M.A.203/74..Khalid Latif & others ... Respondents.

Held, that the owner of the Vehicle is not liable to pay any amounnt to any of the claimants but the amount awarded by the Motor Accident Claims Tribunal to the claimants should be paid the insurance company to the extent of their liability.

Motor Owners Insurance Co. Ltd. v. Jadsoji Keshavji Modi and ors.(1)-followed.

Appeal by the owner of the Vehicle.

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

Messrs Kalyan Kumar Ghose & Sudhir Chandra Ghose for the appellant.

None for the responndents

S.K.Choudhuri, J. - These appeals have been heard together as they involve common question of law and are being disposed of by this judgment.

All these appeals have been preferred by the owner of the vehicle against the judgment and award dated 21st of May, 1974 passed by the District Judge (Motor Accident Claims Tribunal), Dhanbad. By this judgment several claim cases, which were registered as title suits, were disposed of.

2. On 26th September, 1970 the passenger bus (public vehicle) named 'Sri Durga Bus Service' bearing registration no. WOW 91 was going from Ranchi to Jharia with passengers. Unfortunately this bus met with an accident at a place known as 'Chas' near village Chautand, Police-station Chas on the same day at about 4.30 p.m. Several persons were injured and some of the passengers also died in that accident. This accident gave rise to different claim cases. The bus was admittedly insured at the relevant time with the Innsurance Company known

(1) (1981) AIR (SC) 2059.

as 'Oriental Fire & General Insurance Co. Ltd.'. The seven appeals to which this Court is concerned arise out of the claim petitions, which were registered as title suits and for convenience they are being mentioned in the following charg. .

Appeal no.	Suit No.	Claimant	Compensat ion allowed
M.A.198/74	T.S.47/1970	Dwijendra Nath Sen	Rs. 5000/-
M.A.201/74	T.S.48/1970	Smt. Sibani Rani Dey	Rs. 2000/-
M.A.200/74	T.S.49/1970	Minor Subodh Kumar Sen & others	Rs. 5000/-
M.A.204/74	T.S.7/1971	Khalid Latif	Rs. 4300/-
M.A.203/74	T.S.8/1971	Khalid Latif	Rs. 24000/-
M.A.202/74	T.S.9/1971	Khalid Latif	Rs. 2000/-
M.A.199/74	T.S.10/1971	Khalid Latif & another	Rs. 4300/-

In the operative part of the judgment the claims tribunal has held that under the new Act, the liability of the Insurance Company was up to 75,000/-, but as the insurance policy was issued before the new Act came into force, the liability of the Insurance Company will be only up to Rs. 20,000/-. Accordingly, the claims tribunal held that the concerned Insurance Company is liable only up to Rs. 20,000/-, but as the total amount awarded in different claim cases to different persons comes to Rs. 42,600/-, the balance liability beyond Rs. 20,000/- would be of the owner Tara Pada Roy. It further ordered that the amount of compensationn awarded in title suit no. 8 of 1971 being Rs. 20,000/, the said sum should be paid by the Insurance Company to the claimant of that case and the remaining amount of Rs. 22,600/- would be satisfied by the owner of the bus, namely, Tara Pada Roy.

3. The claimant in title suit no. 47 of 1970 was himself injured in the accident and the amount of claim of compensation was Rs. 10,000/-. The claimant in title suit no. 48 of 1970 was also an injured lady who is Smt. Sibani Rani Dey wife of one Shristi Dhar Dey, who claimed Rs. 5,000/- as compensation. In title suit no. 49 of 1970 one Smt. Mukta Rani Sen wife of Dwijendra Nath Sen died and the claimants were minor son and daughter of the deceased along with her husband. The claim made in that case dwas for a sum of Rs. 20,000/-. In title suit no. 7 of 1971, the claimants were the father and a brother of the deceased Munna. The amount of compensation claimed was Rs. 40,000/-. In title suit no. 8 of 1971 one Hazra Khatoon wife of Khalid Latif died. Claimant no. 1 Khalid Latif was the husband and claimant no. 2 Akhtar Hussain was the minor son of the deceased. The amount of compensation claimed was Rs. 75,000/-. In title suit no. 9 of 1971, the claimant Khalid Latif was the injured injured person. He claimed Rs. 5,000/- as compensation. In title suit no. 10 of 1971, the claimants were the heirs of one Shabnam Parvin daughter of Khalid Latif. Claimant no. 1 was Khalid Latif and claimant no. 2 Akhtar Hussain was minor son of Khalid Latif and the amount of compensation claimed was Rs. 40,000/-. I have already menntioned above in the chart the amount of compensation allowed in different title suits.

4. It appears that out of the judgment and award passed in title suit no. 8 of 1971, which has given rise to Miscellaneous Appeal no. 203 of 1974 (filed by the owner of the bus), a separate appeal was filed before the Ranchi Bench by the concerned Insurance Company, which was registered as Miscellaneous Appeal no. 188 of 1974. This appeal was heard by a Division Bench and allowed in part

by the judgment dated 18th May, 1980. The operative portion of the judgment reads thus:-

> "...We allow this appeal only to the extent that the compensation awarded for the death of the wife off respondent no. 1 againnst the appellant would be reduced to Rs. 2,000/-. Counsel for the appellant undertakes to deposit Rs. 2,000/- in this Court with uptodate Interest within three months from today.
>
> In the result, the appeal is allowed in part as indicated above; but in the circumstances of the case there will be no order as to costs."

The said judment relying upon the cases of *M/s. Sheikhupura Transport Company Limited vs. Northern India Transporters Insurance Company Limited and another (1) and Shrimati Manjushri Bana and others vs. B.L. Gupta and others (2)* held that "in absence of any contract to the contrary, the statutory liability off the insurer to indemnify the injured in the case of a vehicle allowed to carry more than six passengers extens only up to Rs. 2,000/- in respect off each passenger and the total liability would not go beyond Rs. 20,000/-." Thus by the operative part of the said judgment, already quoted above, the Bench hearing the said appeal fixed the liability of the Insurance Company at a figure off Rs. 2,000/- and thus allowed the appeal in part.

5. Mr. Sudhir Chandra Ghose learned Counsel in all the appeals by the owner of the bus contended that the trial court has taken a wrong view of law in holding that the new amended Act came into force on 2nd September, 1973 and therefore it would not apply to the present cases as the insurance policy

(1) (1971) AIR (SC) 1624

(2) (1977) AIR (SC) 1158.

(Ext. B) was issued on 13th February, 1970. He contended that the liability of the Insurance Company under the new amended Act would be to the extent of Rs. 75,000/- and as the total claim awarded in all the claim cases comes to Rs. 42,000/-, the whole amount should have been directed to be paid by the Insurance Company. According to the learned counsel, therefore, the direction to the Insurance Company that the liability of the said Company is only to the extent of Rs. 20,000/- is erroneous and, therefore, the operative part of the judgment of the trial court should be modified, accordingly.

The accident which gave rise to the present claim cases, took place on 26th September, 1970 and, therefore, the cause of of action for the claim cases arose on that very date. It is well settled that the liability of the insurer to pay a claim under a motor-cum-accident policy arises on the occurrence of the accident and not before, and, therefore, the law as was in force on the date of the accident would be the determining factor in awarding compensation to different claimants and the extent of the insurance company's liability would be determined accordingly, *(see the case of Padma Sriniwasan vs. Premier Insurance Co. Ltd. (1).*

6. Nobody has appeared on behalf of the Insurance Company or the claimants to oppose any of the appeals. It appears from the judgment of the Claims Tribunal that the liability under the amended Act of the insurer would be up to the limit of Rs. 75,000/-. This position, as appears from the judgment of the trial court, was not disputed, if the amended Act would apply. The total liability of the insurer, therefore, would be to the extent of Rs.

(1) (1982) AIR (SC) 836.

75,000/- and the Insurance Company is accordingly liable to pay the whole amount awarded to the different claimants in the different claim cases.

However, there is a big obstacle in the way in giving complete relief to the owner of the vehicle, who is the appellant before this court, in view of the judgment of the Division Bench in Miscllaneous Appeal no. 188 of 1974 aforesaid.

7. In order to obviate this anomalous situation created by the aforesaid Bench decision, Mr. Ghose in his argument relied upon a subsequent Bench decision of this Court in the case of *National Insurance Co. Ltd. vs. Chunnu Ram(1)* taking a contrary view and supporting fully the submission of Mr. Ghosh. It has been pointed out by learned Counsel Mr. Ghose that one of the learned Judges, who was a member of the Bench which delivered the judgment in Miscellaneous Appeal no. 188 of 1974 was also a member of this Bench decision. Be that as it may, it appears that when the previous unreported judgment was delivered on 16th May 1980, the judgment of the Supreme Court in the *Motor Owners Insurance Co. Ltd. vs. Jadsoji Keshavji Modi and others (2)* was not pronounced interpreting the correct position of law. In this Supreme Court decision the relevant words appearing in Section 95(2) of the Motor Vehicles Act (IV of 1939), 'any one accident' have been interpreted. The said expression has been interpreted to mean, 'accident to any one'. It has been held that the word 'accident' is used in the expression, 'any one accident' from the point of view of various claimants each of whom is entitled to make a separate claim for the accident suffered by

(1) (1984) AIR (Pat.) 1

(2) (1981) AIR (SC) 2059.

him and not from the point of view of the insurer.

Following this Supreme Court decision, the Ranchi Bench in *National Insurance Co.'s case (supra)* observed,' 'in view of the decision of the Supreme Court, the court may perhaps in a given case award the maximum compensation even to only one passenger who might be a victim of the accident in the type of the bus he was travelling against the Insurance Company'. In the result, the appeal which was preferred by the Insurance Company was dismissed and the order of the Claims Tribunal awarding Rs. 20,000/- to the claimant, holding the same to be proper and justified was upheld.

8. It cannot, therefore, be disputed that the law as interpreted by the Supreme Court in the *Motor Owners Insurance Co. Ltd. (supra)* has to be followed in deciding the present appeal also.

9. In view of the discussions made above, Miscellaneous Appeal nos. 198 of 1974, 201 of 1974, 200 of 1974 and 204 of 1974 have to be allowed and it is held that the owner of the vehicle, namely, the appellant Tara Pada Roy is not liable to pay any amount to any of these claimants, but the amount awarded by the Claims Tribunal to the claimants of these cases should be paid by the Insurance Company.

However, there is a big obstacle in allowing Miscellaneous Appeal No. 203 of 1974, in view of the judgment passed in Miscellaneous Appeal no. 188 of 1974. The judgment passed by the Ranchi Bench in the said appeal has become final and the parties in that appeal as also in Miscellaneous Appeal no. 203 of 1974 are common. As the judgment in Miscellaneous Appeal no. 188 of 1974 has become final, Miscellaneous Appeal no. 203 of 1974 cannot be allowed because in such a situation a conflicting

decision would come into existence which would create anomaly. It is, therefore, held that in so far as Miscellaneous Appeal no. 203 of 1974 is concerned, the judgment passed in Miscellaneous Appeal no. 188 of 1974 has binding effect between the parties and as the said judgment cannot be disturbed by this Court, Miscellaneous Appeal no. 203 of 1974, is dismissed, but without costs.

Miscellaneous Appeal no. 202 of 1974 and Miscellaneous Appeal no. 199 of 1974 stand on the same footing as the other four appeals which have been allowed. Accordingly, these two appeals are also allowed and the amounts covered by these two appeals are also directed to be paid by the Insurance Company and not by the bus owner, the appellant.

10. In the result, Miscellaneous Appeal no. 203 of 1974 is dismissed and the rest six appeals mentioned above are allowed, as indicated above. In the circumstances of the case, there will be no order as to costs.

B.P.Jha, J. I agree

R.D. Order accordingly.

MISCELLANEOUS CRIMINAL

1984/December,17.

Before P.S. Sahay and Ashwini Kumar Sinha, JJ.

*Arbind Kumar and Others.**

v.

The State of Bihar and another.

Bihar Conduct of Examinations Act, 1981, *(Bihar Act No. I of 1982) section 3,7 and Schedule of the Act—Item no. 2 of the Schedule—Semester examination conducted by the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, whether falls under Item no. 2 of the Schedule—Bihar State Universities Act, 1976 (Bihar Act no. XXIII of 1976) section 73—Lalit Narain Mishra Institute of Economic Development and Social Change, Patna—whether an autonomous Institute—Bihar Conduct of Examination Act, 1981—section 3—First Information Report in the case making out offence under section 3—wrong mentioning of section 7 in the order taking cognizance—whether vitiates the order.*

The Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, hereinafter called the Institute, is a autonomous institute under the Magadh University under section 73 of the Bihar State Universities Act, 1976. The examinations

* Criminal Miscellaneous No. 8522 of 1983. In the matter of an application under section 482 of the Code of Criminal Procedure.

conducted by the Institute including the Semester examination, are examinations which are duly recognised by the Magadh University. The examinations conducted by the institute are also regulated by the Examination Board on which there are nominees of the Magadh University.

Held, that the Semester Examinations are not internal examinations of the Institute. The Institute is an authority of the Magadh University and the examination in question conducted by it falls squarely under the word "Under the authority of any University" occuring in item 2 of the Schedule of the Bihar Conduct of Examinations Act, 1981, hereinafter called the Act.

Held, further, that the First Information Report in the case makes out a prima facie case under section 3 of the Act. Wrong mentioning of section 7 in the order dated 1.9.1983 passed by the Subdivisional Magistrate, Sadar, Patna taking cognizance, must be taken to be redundant and it does not vitiate the order.

Application by the accused.

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

M/s Yaduvansh Giri and S. Tiwary for the petitioners

Mr. Ganesh Prasad Jayaswal (for State)

Mr. (Dr.) Sadanand Jha and Mr. Anil Kumar Tiwary for Opp. Party no. 2.

Ashwini Kumar Sinha, J. By this application the petitioners have prayed for quashing the order dated 1.9.83, passed by the Sub- Divisional Magistrate, Sadar, Patna, by which cognizance has been taken under sections 7 and 8 of the Bihar Conduct of Examinations Act, 1981 (Bihar Act No. 1 of 1982)

(hereinafter referred to as 'the Act').

2. The present case involves an interesting and important question of law. The decision in the case depends upon the interpretation of Item no. 2 of the Schedule of the Act. This Schedule is under section 2(i) of the Act. Item no.2 of the Schedule runs as follows:-

> "Examination conducted by or under the authority of any University established by an Act of the State Legislature."

3. The petitioners were appearing at the examination for Diploma Course in Marketing and Sales Management (1980-81 Batch) on 16.8.82 conducted in the premises of the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna (hereinafter referred to as 'the Institute'). In the second Semester in paper 6th of the Marketing Research the petitioners were found using unfair means by copying from pieces of papers directly related to the main questions and the petitioners were expelled from the examination and debarred from appearing at the subsequent papers of Semester.

4. On the written report dated 16.8.82 of Shri Chakradhar Singh, the Controller of Examination and Senior Superintendent of the Institute, an information was lodged at the Kotwali Police Station. It was numbered as Kotwali P.S. Case No. 769(8)82. The informant (the Controller of Examination and Senior Superintendent of the Institute), in the aforesaid F.I.R. on the aforesaid facts, prayed for legal action to be taken against the petitioners. This case lodged on 16.8.82 was under section 7 and 8 of the Act.

The F.I.R. has been marked as Annexure-2 to the application.

It appears from the F.I.R. that the investigation was conducted by the Deputy Superintendent of Police, Law and Order, Patna, and ultimately charge-sheet was submitted against the petitioners (a copy of the charge-sheet dated 11.4.83 has been marked as Annexure-3 to the petition). Thereafter, on the basis of the charge- sheet, the Sub-Divisional Magistrate, Sadar, Patna, took cognizance by the impugned order dated 1.9.83 (as contained in Annexure-1 to the petition).

5. Learned counsel appearing for the petitioners has submitted that Item no.2 of the Schedule under the Act was not applicable to the facts of the case and hence cognizance taken by the Sub- Divisional Magistrate, Sadar, Patna, under sections 7 and 8 of the Act was bad in law and needed to be quashed. Learned counsel for the petitioners also submitted that the Act itself being not applicable to the examination in question conducted by the Institute, no provision of the Act was applicable on the facts of the instant case and hence the question of contravening section 7 or section 10 did not arise at all.

6. These were the only submissions advanced by the learned counsel for the petitioners and no other point was raised before us. In fact, the two submissions, mentioned above, are inter-linked and the point to be determined is mainly whether Item no. 2 of the Schedule under the Act was applicable on the facts of the present case. As stated hereinbefore, though apparently, the point seems to be simple, but, in my opinion, is substantial and important one, as such a question, on such a fact, has not been raised in any earlier case (as informed to us at the bar). Learned counsel for the petitioners has fairly conceded that if Item no. 2 of the Schedule under the Act, as it

stands, was applicable to the facts of the present case, it was difficult for the petitioners to challenge the impugned order of cognizance taken by the court concerned.

In short, the learned counsel for the petitioners has submitted that the examination in question was not conducted under the authority of any University established by an Act of State Legislature, in other words, the submission was that the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, was not an authority of any University established by an Act of State Legislature, hence, the examination in question conducted by it was not covered under the Schedule of the Act; and, hence, no cognizance would be taken under the Act.

7. Thus, the thrust of the submission was that the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, was not an *authority of any University and, hence, the examination in question conducted by it was not under the authority of any University.*

8. This case was earlier listed before the learned Single Judge, who, in view of the importance of the point involved (as to what is the correct interpretation of Item no.2 of the Schedule under the Act), referred the case to a Division Bench for authoritative decision by his order dated 15.2.1984.

9. In order to appreciate the submissions advanced by the learned counsel for the petitioners, it is essential to state some important relevant facts.

Prior to 10th of June, 1975, the Institute was named and known as the Bihar Institute of Economic Development, which was situate at Boring Canal

Road, Patna. At that stage also it was known as Bihar Institute of Economic Development. It was recognised by the Magadh University as an Institute for the purpose of research as per the provision of section 2(i) of the then Magadh University Act. This is obvious from a letter written by the Deputy Registrar of the Magadh University dated 2.3.1974 (Annexure A/2 in the counter affidavit filed by the Institute-Respondent no.2). Thereafter, on the death of Shri Lalit Narain Mishra, the Government of Bihar, Department of Education, vide its Resolution dated 10.6.1975, resolved to establish Lalit Narain Mishra Institute of Economic Development and Social Change, i.e. the Institute, by changing the name of the erstwhile Bihar Institute of Economic Development. By the same Resolution the Government decided that the entire expenses of the Institute would be borne by the State Government (Education Department) and for this annual grant would be made. It was further ordered to publish the aforesaid Resolution in the Bihar Gazette (this Resolution dated 10.6.75 has been marked as Annexure B/2 in the counter affidavit filed by the Institute). Then by another Resolution dated 21.11.1975, the Education Department of the Government of Bihar, made certain improvements, the important one being for the proper management and development of the Institute, it resolved that there shall be nominees of the State Government and of the University in the governing body of the Institute and out of such nominated members, there shall be one member each of the Education Department and the Finance Department of the State and one nominee was to be from the Magadh University. Apart from this, the said Resolution provided for a representative of other

Universities in turns according to alphabetical order in the name of the University (a copy of this Resolution has been marked as Annexure C/2 to the counter affidavit filed by the Institute).

10. Subsequently, the Institute approached the Magadh University for granting the Institute the status of an autonomous Institute under the provisions of the Bihar State Universities Act, 1976 (hereinafter referred to as 'the Universities Act').

11. The Institute was recognised by the University of Ranchi by letter dated 31.3.1976 (a copy of which has been marked as Annexure G/2 to the counter filed by the Institute).

12. The Institute was also recognised by the Patna University - vide its letter no. G/11622 dated 15.5.1976 (copy of this letter has been marked as Annexure F/2 in the counter filed by the Institute).

13. The Institute was also recognised by the Bihar University, Muzaffarpur - vide letter No. 8/15554 dated 12.6.1976 (a copy of this letter has been marked as Annexure H/2 to the counter filed by the Institute).

14. Thereafter, on 18.3.1977, the Registrar of the Magadh University, Bodh Gaya, - vide letter no. 5412 informed the then Director of the Institute that the Vice-Chancellor was pleased to pass orders declaring the Institute to be an autonomous Institute under the Magadh University under section 73 of the Universities Act. The Vice-Chancellor was further pleased to constitute a committee to prepare draft of relevant transitory regulations and syllabi for the examination to be conducted by the Institute. The personnel of the committee was also named in the aforesaid letter (a copy of this letter has been

marked as Annexure D/2 to the counter filed by the Institute).

This was in pursuance of the approach made by the Institute, as already state above.

Subsequently, on 23.3.77, a regular Notification was issued by the Magadh University and a copy of which was sent to the Director of the Institute under Memo No. 580/G dated 23.3.77 (a copy of this notification has been marked as Annexure F/2 to the counter filed by the Institute).

15. Thereafter the Chairman of the Institute, on 16.8.77, wrote to the Vice-Chancellor of Magadh University, Bodh Gaya, that under section 73 relating to the autonomy, the Institute had already constituted different bodies like Board of Courses of Studies, Examination Board, Academic Council and the University had already nominated three members on the Board of Courses of Studies but no members had been nominated by the Magadh University in the Examination Board and in the Academic Council as provided under section 73(c) and 73(d) of the Ordinance; and, hence, the University was requested for immediate action as the results were ready for consideration of the Examination Board (a copy of this letter has been marked as Annexure I/2 to the counter filed by the Institute).

16. The Magadh University, Bodh Gaya, in reply to the letter just referred to above, deputed Dr. B. Ganguli, Head of the Post Graduate Department (Economics) as a nominated member in the Examination Board and further informed that the names of the nominees to represent the University in the Academic Council would be sent later. A copy of this letter dated 7.10.77 has been marked as Annexure J/2 to the counter filed by the Institute.

17. In due course the Magadh University, by its

letter dated 19.9.79 wrote to the Government of Bihar, Education Department, for according concurrence for the grant of autonomous status to the Institute and requested that the decision of the Government be communicated at an early date to the University. In pursuance of this letter of the Magadh University dated 19.9.79, *the Joint Secretary to the Government of Bihar, Department of Education, informed the Registrar of the Magadh University that the State Government had agreed to declare the Institute an autonomous Institute.* (a copy of this letter of the Government of Bihar has been marked as Annexure K/2 to the counter filed by the Institute).

18. Though, as just stated above, the Institute was granted autonomous status, the Institute, by way of abundant caution, approached the Magadh University specially to recognise the diploma course conducted by the Institute and upon which the Registrar of the Magadh University - vide letter dated 21.11.79, informed the Director of the Institute that several courses *including the Post-graduate Diploma Courses in Marketing and Sales Management* were recognised by the University (a copy of this letter dated 21.11.79 has been marked as Annexure L/2 to the counter filed by the Institute).

19. Thereafter the autonomous status granted to the Institute was extended by the Magadh University for a period of three years - vide letter dated 19.4.1980, with effect from 16.5.1980.

Thus, on facts stated just above, the examination in question in which the petitioners were appearing "for the session 1980-81" (examination held in the year 1982) had the specific recognition of the Magadh University.

20. Thereafter, the Inspector of Colleges, Magadh University, by his letter dated 2.3.1982, wrote to the Joint Secretary, Education Department, Government of Bihar, that the Institute was an Autonomous Institute and its Director had requested for permanent affiliation and the same had already been considered by the Vice-Chancellor, who had recommended for granting permanent affiliation to the Institute (a copy of this letter has been marked as Annexure M/2 to the counter filed by the Institute): *In response to this letter the Government of Bihar, Department of Education, approved/ granted permanent affiliation to the Institute (a copy* of this letter dated 16.4.82 has been marked as Annexure N/2 to the counter filed by the Institute).

21. The relevant facts stated hereinbefore about the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, have not been controverted by the petitioners, as no reply to the counter filed by the Institute (Respondent no. 2) was filed by the petitioners. Thus, the facts, as stated above, stand uncontroverted.

Thus, on the accepted facts, as above, it has to be seen whether the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, is "an authority of any University" and if so whether the examination in question was under such an authority.

22. Learned counsel for the petitioners, in support of his submission, that the Institute was not an authority of the University, relied upon section 15 of the Magadh University Act, 1961, and also section 17 of the Bihar State Universities Act, 1976. Under section 15 of the Magadh University Act, 1961, the authorities of the University were (1) The Senate, (2) the Syndicate, (3) the Academic Council, (4) the

Faculties, (5) the Examination Board, (6) the Finance Committee, and (7) such other authorities as may be declared by the Statutes to be the authorities of the University.

Under section 17 of the Bihar State Universities Act, 1976, the authorities of the University were (1) the Senate, (2) the Syndicate, (3) the Academic Council, (4) the Faculties, (5) the Examination Board, (6) the Finance Committee, (7) the Planning and Evaluation Committee, and (8) such other authorities as may be declared to be the authorities of the University by the statutes.

23. Learned counsel for the petitioners submitted that neither under Item 7 of the Magadh University Act, 1961, nor under Item no. 8 of the Bihar State Universities Act, 1976, referred to above, the statute had not declared any other authority.

So far as the submission of the learned counsel for the petitioners that the statute had not declared any other authority under Item no. 7 of the Magadh University Act, 1961 (referred to above), is concerned, it is enough to say that the submission advanced was absolutely under a misconception because the Magadh University Act, 1961 (Act 4 of 1962) was repealed by section 81 of the Bihar State Universities Act, 1976 (Bihar Act XXIII of 1976) which had received assent on 31.12.76 and was published in the Bihar Gazette (Extraordinary No. 507 dated 16.5.77). Thus, it remains only to be seen whether the Institute was declared as an authority of the University under Item no. 8 of the Bihar State Universities Act, 1976, (referred to above).

24. No counter affidavit has been filed by the State of Bihar (respondent no. 2). As already stated above, the counter affidavit, controverting the facts/submissions made by the petitioners in

the petition, was filed by the Institute (Respondent no. 2).

Learned counsel for the Institute (Respondent no. 2) contended that the Institute squarely fell "under the authority of any University" of Item no. 2 of the Schedule of the Bihar Conduct of Examinations Act, 1981 (Bihar Act No. 1 of 1982) and in support of his submission he referred to the Bihar Ordinance no. 106 of 1981 - known as Conduct of Examinations Second Ordinance, 1981. It seems, the life of the Ordinance was extended by the Third Ordinance, 1981 (Bihar Ordinance 176 of 1981). It is after the repeal of the Third Ordinance (Bihar Ordinance No. 176 of 1981) that the Bihar Conduct of Examinations Act, 1981 (Bihar Act no. 1 of 1982) came into force having received the assent of Governor on 21.2.82 and published in the Bihar Gazette (Extraordinary on 23.1.82).

Learned counsel for the petitioners, in support of his submission, that the Institute squarely fell under the Schedule of the Act (Bihar Conduct of Examinations Act, 1981), referred to sections 2(1), section 3 and Item no. 2 of the Schedule under the Ordinance.

Section 2(i), section 3 and Item no. 2 of the Schedule under the Ordinance are as follows:-

S. 2(i) "Recognised examination" means any of the examinations enumerated in the Schedule and includes an examination held under the authority of the State Government or by anybody constituted under State enactments.

S. 3 Prohibition of the use of unfairmeans or cheating at exeminations - No person shall take recourse to unfairmeans or resort to

cheating at any of the examinations enumerated in the Schedule.

Item no. 2 of the Schedule - University Examinations.

25. Learned counsel for the Institute (Respondent no. 2) contended that when the Bihar Conduct of Examinations Act, 1981 (Bihar Act 1 of 1982) came into force after repealing the Third Ordinance (Bihar Ordinance No. 176 of 1981), the entire complexion was changed and section 2(i), section 3 and Item no. 2 of the Schedule under the Act were enacted as follows:-

S. 2(i) "recognised examination" means any of the examinations enumerated in the Schedule as also examination held under the authority of the State Government or by any body constituted under State enactments; and includes evaluation, tabulation, publication of results and all matters connected with the examination and publication of results; and.....

S. 3. Prohibition of the use of unfairmeans or cheating at examinations:- No person shall take recourse to unfairmeans or resort to cheating at any of the examinations enumerated in the Schedule or any examination held under the authority of the State Government or by any body constituted under State enactments, or in any evaluation or tabulation work or with respect to any matter of the recognised examination.

Item 2 of the Schedule:- Examination conducted by or under the authority of any University established by an Act of the State Legislature.

26. Thus, the learned counsel for the petitioners submitted that under the Item no. 2 of the Schedule of the Ordinance, the examination was to be conducted by the University; WHEREAS under the Item no. 2 of the Schedule of the Act, the examination was either to be conducted by the University or under the authority of an University. The learned counsel for the Institute, thus, submitted that item no. 2 of the Schedule of the Act widened/enlarged the scope and any examination conducted *under the authority* of the University fell squarely within Item no.2 of the Schedule of the Act.

27. Learned counsel for the Institute (Respondent no.2) also referred to section 73 of the Bihar State Universities Act, 1976 (Bihar Act XXIII of 1976) and contended that the Institute was a body under the Bihar State Universities Act, 1976.

Section 73 of the Bihar State University Act, 1976, states as follows:-

S. 73. Autonomous College or institute -

Notwithstanding anything contained in any provision of this Act, the University may, subject to its adequate supervision and the manner prescribed in the relevant statutes confer upon any College or institute, having outstanding caliber and fulfilling the prescribed conditions the powers to make or modifications in the courses of studies prescribed by the University for its students, and the privilege to take examinations in such modified course of study and management thereof and such other powers in respect of other matters, as it may deem fit and such institute or college, as the case may be, shall be

declared autonomous institute or College."

28. Learned counsel contended that the Institute, admittedly, being an autonomous authority was ipso facto empowered to conduct the examination under section 73 of the Bihar State Universities Act, 1976.

29. It would appear from the facts stated above, (vide Annexure L/2 dated 21.11.79) that several courses, *including the Post-graduate Diploma Course in Marketing* and Sales Management were recognised by the University, the Government of Bihar, declared the Institute as a permanent autonomous Institute on 8.8.1980 - vide Annexure K/2 sent by the Joint Secretary to the Government of Bihar, Department of Education, to the Registrar of the Magadh University.

30. Learned counsel for the Institute (Respondent no. 2) submitted, on the uncontroverted facts, that the Bihar Conduct of Examinations Act, 1981 (Bihar Act 1 of 1981) had radically changed the schedule as it stood in the Ordinance and in item no. 2 of the Schedule of the Act (Bihar Conduct of Examinations Act), it included not only the examination conducted by the University (as originally it was in the Ordinance) but it included also an examination conducted *under the authority of the University* after the word 'or'.

31. The Act in question, i.e., the Bihar Conduct of Examinations Act, 1981, neither defines nor explains the words "under the authority" used in item no. 2 of the Schedule of the Act and, hence, the word "authority" must be construed according to its ordinary meaning, and, therefore, must mean a legal power given by one person to another to do an act. A person is said to be authorised or to have an

authority when he is in such a position that he can act in a certain manner without incurring liability, to which he would be xposed but for the authority, or, so as to produce the same effect as if the person granting the authority had for himself done the act. There clearly arises in such a case the relationship of a principal and an agent. The words "under the authority of" mean pursuant to the authority, such as where an agent or a servant acts under or pursuant to the authority of his principal or master.

32.

This, in my opinion, is the meaning/interpretation of the word "under the authority of".

33. The question then is whether the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna, has conducted the examination in question under the authority of the University.

In my opinion, once the Institute was granted autonomous status, it became entitled to conduct examinations and its courses of studies also got recognised by the Magadh University including the Post-graduate Diploma Course in Marketing and Sales Management (The examination in question). The Institute was duly declared an autonomous Institute not only by the Magadh University but also by the State Government, Department of Education, Bihar. The entire expenses of the Institute is borne by the State Government, Department of Education. As stated earlier, the Institute was also recognised by the Patna University as well as by the Ranchi University (vide Annexure F/2 and G/2 respectively).

For the reasons hereinbefore stated, in my opinion, the examinations conducted by the Institute, including Semester examination, are

examinations which are duly recognised by the Magadh University. These examinations conducted by the Institute are also regulated by the Examination Board on which there are nominees of the Magadh University. I hold that the Semester examinations are not internal examinations of the Institute as contended by the learned counsel for the petitioners. I further hold that the Institute being an autonomous body (vide Annexure K/2), has the right and power to conduct the examinations which it does.

Thus, for the reasons stated hereinbefore, I hold that the Lalit Narain Mishra Institute of Economic Development and Social Change, Patna (Respondent no. 2) is an authority of the University (Magadh University) and the examination in question conducted by it falls squarely under the words "under the authority of any University" and thus the examination in question conducted by it fell within Item no. 2 of the Schedule of the Act. I further hold that the Act (Bihar Conduct of Examinations Act, 1981) was fully applicable to the examination in question conducted by the Institute and thus the provisions of the Act were fully applicable in the instant case.

34. In view of what I have held above, the main submission advanced by the learned counsel for the petitioners fails and is without any substance.

35. Having held as above to the effect that, the Bihar Conduct of Examinations Act, 1981, was applicable in the instant case. The only question that remains to be considered is whether the cognizance taken by the Sub-Divisional Magistrate, Sadar, Patna, under section 7 and 8 of the Act (in Kotwali P.S. Case No. 769(8)/82) suffers from any illegality.

36. The present application is under section 482 of the Code of Criminal Procedure, 1973, in other words, the petitioners have asked this Court to exercise its inherent power to quash the cognizance.

The inherent power of the High Court under section 482 of the Code of Criminal Procedure, 1973, is at par with the earlier Section 561(a) of the Old Code of Criminal Procedure. It is well settled that the inherent power of the High Court cannot be exercised in regard to the matters specifically covered by the other provisions of the Code. It is also well settled that the inherent jurisdiction of the High Court can be exercised to quash the proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceeding at an inter-locutory stage. It is also settled that it is not possible, desirable or expedient to lay down any inflexible rule, which would govern the exercise of this inherent jurisdiction. However, if there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged, the criminal proceeding can be quashed. Again, if the allegations in the F.I.R. or the complaint taken at their face value do not constitute the offence alleged, the criminal proceeding can be quashed. In exercising its jurisdiction under section 482 of the Code of Criminal Procedure, the High Court would not embark upon an enquiry as to whether the evidence in question was reliable or not. This is the function of the trial magistrate and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the

evidence the accusation made against the accused would not be sustained.

Broadly stated, this is the nature and scope of inherent jurisdiction of the High Court under section 482 of the Code of Criminal Procedure, 1973, in the matter of quashing the criminal proceeding.

The aforesaid principles are well settled by several judicial decisions dealing with the nature and scope of the inherent jurisdiction of the High Court.

37. The aforesaid principles of law being well settled, it is to be seen whether the cognizance taken in the instant case suffers from such an illegality which warrants interference by the High Court by exercising its inherent jurisdiction.

38. Section 3, 7 and 10 of the Bihar Conduct of Examinations Act, 1981 (Bihar Act 1 of 1982) are as follows:-

S.3. Prohibition of the use of unfair means or cheating at examinations:- No person shall take recourse to unfair means or resort to cheating at any of the examinations enumerated in the Schedule or any examination held under the authority of the State Government or by any body constituted under State enactments, or in any evaluation or tabulation work or with respect to any matter of the recognised examination.

S. 7. Restriction on fake papers :- No person shall procure, possess, distribute or otherwise publicise or cause to be publicized any question paper as being the one or purporting to be the one that is to be given or likely to be given at an ensuing recognised examination.

S. 10. Penalty - Whoever contravenes any of the provisions or the provision of sections 3 to 9 shall be punished with imprisonment which may extend to six months but shall not be less than one month or with fine which may extend up to rupees two thousand or with both.

39. Cognizance in the instant case has been taken under section 7 and 10 of the Act, as stated above. Learned counsel for the Institute (Respondent no. 2) has fairly conceded that the cognizance taken under section 7 of the Act (as quoted above) was bad in law; as taking the face value of the F.I.R., no case has been made out under section 7 of the Act against the petitioners.

40. As would appear from section 10 of the Act (quoted above) it deals with the penalty for contravention of any of the provisions of the Act or of the provisions of sections 3 to 9 of the Act.

Learned counsel for the the parties have taken me to the F.I.R. (Annexure-2 to the petition). A mere perusal of the F.I.R. is enough to show that a prima facie case is made out under section 3 of the Act and by the impugned Annexure (Annexure-1) dated 1.9.83, the court below has taken cognizance in the case. It is true that in the impugned order taking cognizance section 7 has been mentioned and not section 3 under which a prima facie case is made out. On perusal of the F.I.R. the question remains whether wrong mentioning of the section in the order of cognizance makes the order illegal so as to warrant interference by this Court. In my opinion, mentioning of section 7 of the Act in the impugned order (Annexure-1) must be taken to be as redundant and hence it does not vitiate the cognizance taken.

If the Act was applicable in the instant case (as I have already held above that the Act was applicable in the instant case), one who take recourse to unfair means or resort to cheating at any of the examinations enumerated in the schedule fall within the ambit of section 3 of the Act. The F.I.R. (Annexure-2) given its face value makes out a prima facie case against the petitioners under sectopm 3 pf tje Act. Whether there is contravention of this statutory provision enacted in section 3 of the Act is a matter still to be adjudicated. In my opinion, it would be unwise to ignore the existence of section 3 of the Act and to dispose of the proceeding as if section 3 was not there. Thus I hold that, as the F.I.R. in the present case makes out a prima facie case under section 3 of the Act, wrong mentioning of section 7 in the impugned order must be taken to be redundant and in that view of the matter I hold that it does not vitiate the order.

41. Learned counsel for the petitioners has not contended that taking the face value of the F.I.R. and accepting the same in its entirety it does not constitute an offence. Thus, the faint argument advanced by the learned counsel for the petitioners that the impugned order (Annexure-1) should be interfered with as cognizance taken under section 7 was bad also fails.

42. Learned counsel for the petitioners also faintly submitted that if there were two reasonable constructions (with regard to Item no. 2 of the Schedule of the Act), the Court must give the more lenient one as that, according to the learned counsel for the petitioners, was the settled view for the construction of penal sections. Broadly speaking this submission advanced by the learned counsel for the petitioners has received judicial approval, but in the instant case I hold, for the reasons stated

above, that Item no.2 of the Schedule of the Bihar Conduct of Examinations Act, 1981 (Bihar Act 1 of 1982) does not suffer of two reasonable constructions. It could only be construed in the way in which I have construed above, and thus this submission of the learned counsel for the petitioners also fails.

43. In the result, the application is dismissed and I direct that the court below will proceed in accordance with law.

(The words in this judgment have been underlined by me for emphasis).

P.S. Sahay, J. I agree.

R.D. Application dismissed.

REVISIONAL CIVIL

1985/January,4.

Before S.S.Sandhawalia, C.J. and Lalit Mohan Sharma, J.

*Mirza Sulaiman Beg and others.**

v.

Harihar Mahto and others.

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 *(Act XXI of 1956), section 2(9) and 11(3) proviso—scope and applicability of—Kabaristan, whether within the ambit of the wide sweep of the definition of 'land'.*

A reference to section 2(9) would show that the definition of land is not a constrictive one, but indeed is expansive. The provision uses the well-known phrase 'means' and 'includes'. It seems to be plain therefrom that the definition, far from confining the land to being strictly agricultural in nature, in fact extends it to matters and things, which cannot strictly be labelled as 'agricultural land'-for instance it includes 'homestead', and, by itself, a homestead is not an agricultural land Stricto Sensu. Similarly, a tank or a well are plainly not agricultural land. Therefore, the wide ranging language employed in section 2(9) would far from excluding Kabaristan land therefrom (which even in

* Civil Revision No. 188 of 1979. From an order of Mr. B.N.Prasad, 4th Additional Munsif, Sasaram, dated the 24th of January, 1979.

ordinary terminology may be understood as land generally) would indeed squarely put it within the wide sweep of its definition.

The proviso to section 11(3) clearly indicates that Legislature expressly visualised a lawful change of assignment by the Consolidation Officer of land dedicated for cremation grounds or other religious purposes with the pre-condition of the approval of the village Advisory Committee. This clearly indicates that the statute visualises a cremation ground as squarely within the definition of 'land' and the ambit of consolidation. Plainly enough, if the argument is accepted that Kabaristan is not agricultural land, and, therefore, beyond the definition, thereon a parity of reasoning, a cremation ground is equally not agricultural land either, and, would thus have to be treated on the same footing. Yet, the statute has clearly and in express terms put cremation ground within the ambit of the definition of land and the scope of consolidation. That being so, Kabaristan land would have to be treated identically. Neither of the two is agricultural land as such, and, therefore, if one is expressly within the scope of consolidation, one does not see why the other can logically be excluded thereform.

Held, therefore, that Kabaristan is within the ambit of the wide sweep of the definition of land in section 2(9) of the Act.

Application by the plaintiffs.

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

Messrs S.S.Asghar Hussain and Jamilur Rahman for the petitioner

Mr. Keshari Singh for the opposite party.

S.S.Sandhawalia, C.J. : Whether a Kabaristan is within the ambit of the wide sweep of the

definition of 'land' in Section 2(9) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter to be referred to as the Consolidation Act) is the significant question necessitating this reference to the Division Bench.

2. The petitioner, Mirza Sulaiman Beg and others, had instituted a Title Suit in their individual as well as representative capacity on behalf of the Muslim public for the alleged removal of encroachment made by the defendants and others over a portion of a Kabaristan situated in Muradabad Kalan and for restraining the defendants from interfering with the land or the trees thereon. It was averred that the aforesaid land is a very old Kabaristan and the dead bodies of the Muslims residing in the localities were being buried there from time immemorial. On this premise, it was the stand that the same was not agricultural land within the meaning of the Consolidation Act. In contesting the suit, the defendants in the written statement pleaded, inter alia, that they had taken a settlement of ten decimals out of the disputed plot of land and constructed a house and other appurtenance thereon and further denied the Kabaristan-character of the plot. On the 25th of April, 1978, defendant No. 2 filed a petition claiming that the suit had abated in view of the notification under Section 3 of the Act with respect to the area in which the plot of land is situated. The petitioners in rejoinder to the said petition took the stand that the land in question was outside the purview of the Consolidation Act and, therefore, Section 4(c) of the Act was inapplicable. By the impugned order dated the 24th of January, 1979, the learned Additional Munsif, Sasaram, without adverting in detail to the character of the land as Kabaristan and whether the same

would be the land within the meaning of Section 2(9) of the Consolidation Act, proceeded to hold on the basis of the notification that the suit was hit by Section 4(c) and ordered that the same stood abated.

3. This civil revision originally came up before my learned Brother Sharma, J., sitting singly. Before him, the learned counsel for the parties relied on Section 2(9), 4(c) and 11(3) of the Consolidation Act to buttress their respective stand. Considering the significance of the question, the matter was referred to be decided by a larger Bench.

4. Inevitably the issue herein has to be considered in the light of the language of the Statute. What herein call for pointed notice are the provisions of Sections 2(7), 2(9) and 11(3), which may be quoted in extenso for facility of reference :-

"2. Definitions - In this Act, unless there is anything repugnant in the subject or context -

xxx xxx xxx

(7) 'Holding' means a parcel or parcels of land held by a raiyat and forming the subject matter of a separate tenancy;

xxx xxx xxx

(9) 'Land' means agricultural land, and includes horticultural land, Kharaur land, land with bamboo clumps, pasture land, cultivable waste land, homesteads, tanks, wells and water channels";

11. Preparation of Draft Scheme -

(3) For the purpose of sub-section (1), it shall be lawful for the Assistant Consolidation Officer -

(i) to declare that any land specifically

assigned for any public purposes ceases to be so assigned and to assign any other land for such public purposes;

Provided that it shall not be lawful for the Assistant Consolidation Officer to direct that any land specifically assigned for cremation ground or other religious purposes shall cease to be so assigned unless it is approved by the village Advisory Committee;"

5. Learned Counsel for the petitioners had primarily pressed his contention that land under a Kabristan was not agricultural land, and, would, therefore, stand out of the definition under Section 2(9) of the Bihar Consolidation of Holdings and prevention of Fragmentation Act, 1956 (hereinafter referred to as the Act). On this premise it was further contended that consequently, the whole sweep of the consolidation proceeding would be excluded altogether and no question of the abatement of the suit under Section 4(c) would arise. Reliance was also sought to be placed on the proviso to Section 11(3) of the Act, and, on *Syed Mohd. Salie Labbai vs. Mohd. Hanifa (1).*

6. Perhaps, at the very outset, it calls for notice that the learned counsel for the petitioners was fair enough to concede that there was no precedent in favour of his stand. The matter has, therefore, to be examined primarily on principle and the language of the statute. What first meets the eye herein is the wide amplitude in which the Legislature has sought to cast the definition of 'land' under section 2(9) of the Act. But, apart from that, it would seem plain that even in common parlance a graveyeard and the land under it would still be

(1) (1976) AIR (SC) 1569.

ordinarily understood as land. The learned counsel for the petitioners had virtually conceded this aspect, but emphasis was sought to be placed by him that though this would be 'land', it is not 'agricultural land'. A reference to Section 2(9) would show that the said definition is not a constrictive one, but indeed is expansive. The provision uses the well-known phrase 'means' and 'includes'. It seems to be plain therefrom that the definition, far from confining the land to being strictly agricultural in nature, in fact extends it to matters and things, which cannot strictly be labelled as 'agricultural land' - for instance, it includes 'homesteads', and, by itself, a homestead is not an agricultural land stricto sensu. Similarly, a tank or a well are plainly not agricultural land. Therefore, the wide ranging language employed in Section 2(9) would, far from excluding Kabaristan land therefrom (which, even in ordinary terminology may be understood as land generally), would indeed squarely put it within the wide sweep of its definition.

7. Somewhat surprisingly, learned counsel for the petitioners had also sought to place reliance on section 11(3) and, in particular, the proviso thereto. However, it appears to me that a reference to the proviso would rather boomerang on the stand of the petitioners. This clearly indicates that the Legislature expressly visualised a lawful change of assignment by the Consolidation Officer of lands dedicated for cremation grounds or other religious purposes with the pre-condition of the approval of the village Advisory Committee. This clear indicates that the statute visualises a cremation ground as squarely within the definition of 'land' and the ambit of contolidation. Plainly enough, if the argument of the petitioners is accepted that a Kabristan is not agricultural land, and, therefore, beyond the

definition, then on a parity of reasoning, a cremation ground is equally not agricultural land either, and, would thus have to be treated on the same footing. Yet, the statute has clearly and in express terms put cremation ground within the ambit of the definition of land and the scope of consolidation. That being so, Kabristan land would have to be treated identically. In fairness, one must notice some shade of distinction in the matter, because in a graveyard the dead bodies stand interred in the land, whilst it is not so in a cremation ground. Nevertheless, neither of the two is agricultural land as such, and, therefore, if one is expressly within the scope of consolidation, one does not see why the other can logically be excluded therefrom. Learned Counsel for the respondents had rightly placed some reliance on the recent judgment in *Abdul Jalil and others vs. State of U.P. and others (1)*, wherein it has been observed as under:-

> "Moreover, during the present hearing we persistently inquired of counsel appearing on both the sides as to whether there was anything in the Holy Koran which prohibited shifting of graves and counsel for the Sunni Muslims was not able to say that there was any to be found in the Koran. On the other hand, Shri Ashok Sen appearing for Shia Muslims categorically stated that there is no text in the Holy Koran which prohibits removal or shifting of graves; he also stated that his clients (Shia Muslims) do not regard removal or shifting of a grave (whether of a Sunni Muslim or a Shia Muslim) from one place to another as un-Islamic or contrary to Koran. That it is neither un-Islamic nor contrary to Koran is

(1) (1984) 2 SCC 138.

proved by two things. First, as pointed out in one of the affidavits, in a meeting convened by the Divisional Commissioner on October 4, 1983, Muslims Abdul Salam Nomani, Pesh Imam of Gyan-Vapi Masjid, Varanasi was present and when the Commissioner asked him regarding the shifting of the graves as directed by this Court, be replied that a grave can never be shifted except only in the circumstances when the graves are dug on the land belonging to others and the graves are set up illegally on others' land. (In our order dated September 23, 1983, we have pointed out that the two graves in question have come up on the land of Maharaja unauthorisedly and illegally in contravention of Court's injunction). Secondly, two historical instances of such removal have been placed on record before the Court, namely, the grave of Mumtaz Mahal was removed from Burhanpur and brought to Taj Mahal at Agra and the grave of Jahangir was removed from Kashmir and taken to Lahore. There is, therefore, no question of this Court's direction being un-Islamic or contrary to Koran or amounting to desecration of the two graves as suggested."

8. However, it has to be assumed that the consolidation authorities under Section 11 would give the greatest consideration to the fact that the land is consecrated as a Kabristan. But, as a matter of law, it will be both erroneous and anomalous to exclude it from that scope on merely grounds of sentiment. It calls for notice that under section 11(3) of the Act, other lands specifically assigned for religious purposes are also expressly placed within the ambit of consolidation. These may also be other than agricultural, but the fact that the same are

consecrated or dedicated to religious purposes would not, in any way, take it out of the scope of consolidation or the powers of the Assistant Consolidation Officer in the preparation of a draft scheme.

9. In fairness of Mr. S.S. Asghar Hussain, learned counsel for the petitioners, reference must be made to Syed Mohd. Salie Labbai's case (supra). This, however, merely lays down the larger incidents of Wakf property and of Kabristans, including family or private graveyards and a public graveyard. There is no quarrel with the general proposition laid down therein. But, I am unable to see how this, in any way, advanced the case of the petitioners with regard to the ambit and applicability of the Act to the said lands.

10. To conclude, the answer to the question posed at the outset is rendered in the affirmative and it is held that a Kabristan is within the ambit of the wide sweep of the definition of 'land' in Section 2(9) of the Act.

11. In the light of the above, the solitary argument raised on behalf of the petitioners must necessarily fail. The revision petition is accordingly rejected, but without any order as to costs.

Lalit Mohan Sharma, J. I agree.

M.K.C. Application dismissed.

REVISIONAL CIVIL

1985/January, 7.

Before S.S.Sandhawalia, C.J. and B.P.Jha, J.

*Prabhu Dayal Singh and another.**

v.

Basudeo Singh and others.

Code of Civil Procedure, 1908, *(Act V of 1908), section 115 and Order 32, Rules 7(1) and (2)—agreement for reference to arbitrators—prior leave of the court not obtained under Order 32 Rule 7(1)—award in favour of the plaintiffs including the minor plaintiffs—minor plaintiffs not challenging the agreement for reference—agreement for reference challenged by the defendant who was a major—challenge made by the defendant, whether maintainable in view of order 32, Rule 7(2)—party, whether can challenge the finding of facts arrived at by the court in a civil revision petition—petitioner to raise question of jurisdictional error only—Arbitration Act, 1940 (Act X of 1940), section 30.*

In the present case, before entering into an agreement for reference to the arbitrators, prior leave of the court under Order 32, Rule 7(1) of the

* Civil Revision No. 797 of 1980. Against a decision of Mr. S.C. Mukerji, Additional District Judge, Third Court, Patna, dated the 5th February, 1980, reversing a decision of Mr. Kashinath Prasad, Subordinate Judge, Second Court, Patna, dated the 23rd November, 1973.

Code of Civil Procedure, 1908, was not obtained on behalf of minor plaintiffs. The award was in favour of the plaintiffs including the minor plaintiffs. The minor plaintiffs did not challenge that the agreement for reference was violative of the provision of Order 32, Rule 7(1) of the Code of Civil Procedure. The agreement for reference is being challenged by the defendant no.1, who is a major, and not by the minor plaintiffs.

Held, that in view of the provision of Order 32, Rule 7(2) of the Code of Civil Procedure, 1908, the challenge made by defendant no. 1 to the agreement for reference to the arbitrators is not maintainable. The agreement for reference is voidable at the instance of the minor and not at the instance of any other party. In other words, the agreement for reference can be challenged by the minor, and not by the parties who are major. The courts below were, therefore, right in rejecting the submission made on behalf of the defendant on that count.

Kaushalya Devi and others v. Baijnath Sayal (deceased) and ors. (1), relied on.

Held, further, that in a civil revision petition, a party cannot challenge the finding of facts arrived at, in the present case, by the lower appellate court. A party is not entitled to raise the question of fact in a civil revision petition but can argue only on the question of jurisdictional error.

Messrs S.C. Ghosh and Hari Narain Singh for the petitioners

Messrs K.D. Chatterjee and Dhrub Narain for the opposite party.

B.P.Jha, J. - This civil revision petition arises out of an award filed by the arbitrators.

(1) (1961) AIR (SC) 790.

2. The dispute was referred to the arbitrators by an agreement of all the parties. The award was filed in Court for making it a rule of the Court. An objection was filed by the defendants under section 30 of the Arbitration Act (hereinafter referred to as the 'Act') for setting aside the award of the arbitrators on various grounds. The award was set aside on the ground that the Punches misconducted themselves. In appeal, the lower appellate court set aside the order of the trial court and held that the award was in accordance with law. It is against the appellate order that the present civil revision petition has been filed before this Court.

3. Learned counsel for the petitioners challenges the validity of the agreement for reference on the ground that no leave of the Court under Order 32, Rule 7(1) of the Code of Civil Procedure was obtained on behalf of minor plaintiffs before entering into agreement for reference.

4. It is an admitted position that in the present case, before entering into an agreement for reference, prior leave of the Court was not obtained. The award is in favour of the plaintiffs including the minor plaintiffs. The minor plaintiffs are not challenging that the agreement for reference was violative of the provision of Order 32, Rule 7(1) of the Code of Civil Procedure. In this view of the matter, the trial court and the lower appellate court rejected the argument advanced on behalf of the learned counsel for the petitioners.

5. In this connection the learned counsel for the Opposite Party made reference to the provision of Order 32, Rule 7(2) of the Code of Civil Procedure which runs as follows:

> "Any such agreement or compromise entered into without the leave of the court so

recorded shall be voidable against all parties other than the minor."

A reference was also made to the decision of the Supreme Court in *Kaushalya Devi and others vs. Baijnath Sayal (deceased) and others (1).* In that case, the Supreme Court interpreted Order 32, Rule 7(2) of the Code of Civil Procedure. It has been held by the Supreme Court (1) that any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor; (2) that the impugned agreement can be avoided by the minor against the parties who are major and that it cannot be avoided by the parties who are major against the minor, and (3) that the agreement is voidable and not void. It is voidable at the instance of the minor and not at the instance of any other party.

In other words, the agreement for reference can be challenged by the minor, and not by the parties who are major. The agreement for reference in the present case is not in accordance with the provision of Order 32, Rule 7(1) of the Code of Civil Procedure. It is being challenged by the defendant No. 1, who is a major. It is not being challenged by the minor plaintiffs. In view of the provision of Order 32, Rule 7(2) of the Code of Civil Procedure, the challenge made by defendant No. 1 to the agreement for reference is not maintainable. Hence the Courts below were right in rejecting the submissions made on behalf of the petitioners.

6. Learned counsel for the petitioners also challenged the findings of fact arrived at by the lower appellate Court. In a civil revision petition, a party cannot challenge the finding of facts arrived at by the lower appellate Court. The trial Court set

(1) (1961) AIR (SC) 790.

aside the award on the ground that the Punches had misconducted themselves. This order was set aside by the lower appellate Court after considering the evidence on the record. The appellate Court has the power to set aside the finding of facts arrived at by the trial Court after considering the materials on the record. The lower appellate Court considered all the materials on the record and was right in setting aside the finding of facts arrived at by the tiral Court. Hence I shall not interfere with the finding of facts arrived at by the lower appellate Court that the Punches had not misconducted themselves and that the Punches did hold deilberations.

7. In a civil revision petition, counsel for the petitioner can argue only about jurisdictional error. In the present case, learned counsel for the petitioners did not argue on the question of jurisdictional error. A party is not entitled to raise the question of fact in a civil revision petition. Hence I reject the second contention raised by the counsel for the petitioners.

8. In the result, the civil revision petition is dismissed; but without any costs.

S.S. Sandhawalia, C.J. I agree.

S.P.J. Petition dismissed.

REVISIONAL CIVIL

1985/January 7.

Before S.S. Sandhawalia, C.J. and B.P.Jha, J.

*Ramswaroop Singh and others.**

v.

Bijoy Kumar Singh.

Specific Relief Act, 1963 *(Act XLVII of 1963), section 16(c)—requirements of—averment in the plaint that the plaintiff was ready and willing to perform his part of the contract, whether mandatory—evidence adduced in absence of such averment, whether helpful to the plaintiff—Code of Civil Procedure, 1908 (Act V of 1908), Order VI, Rule 17—amendment of plaint brought at the late stage after close of the case of the defendants without any explanation for the delay—amendment of plaint, whether liable to be rejected.*

Held, that section 16(c) of the Specific Relief Act, 1963, requires that if a party fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, then in that case, a suit for specific performance of a contract must fail. It is, therefore, clear that section 16(c) of the Act requires that a party must aver in the plaint the fact that he has performed or has always been ready and willing to

* Civil Revision No. 144 of 1982. Against an order of Mr. S.N. Choudhary, Third Additional Munsif, Sasaram, dated the 21st January, 1982.

perform his part of the contract. In the absence of such assertion, the evidence adduced in the case to that effect will not help the plaintiff.

The amendment of the plaint to the effect that the original plaintiff was ready and willing to perform his part of the contract brought at a late stage after the close of the case of the defendants without any explanation for the delay in filing the amendment petition was, therefore, liable to be rejected. The matter would be quite different if such an amendment of the plaint is brought at a stage when the parties have not begun adducing evidence in the case.

Mr. Chittranjan Sinha No. I for the petitioners

Messrs Thakur Prasad and Murli Manohar Prasad for the Opposite Party.

B.P.Jha, J. This civil revision petition has been filed against the refusal of the Court below to allow amendment of the plaint.

2. The plaintiffs filed a petition for amendment of the plaint to the effect that the original plaintiff was ready and willing to perform his part of the contract. This amendment was pressed after the close of the case of the defendants. The delay in filing the amendment petition was not explained by the plaintiffs.

3. It is a settled law that if a party fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, then specific performance of the contract cannot be enforced in favour of a plaintiff. It is an admitted position that this averment was not mentioned in the plaint. It is also an admitted position that there is evidence to the effect that the original plaintiff was ready and willing to perform his part of the contract. On the basis of the said

evidence, the plaintiffs now intend to amend the plaint.

4. It is also a settled law that a fact can be proved by evidence provided there is allegation to that effect in the plaint. If the plaint is silent, then the plaintiff is not entitled to prove a fact that he is ready and willing to prove his part of the contract.

5. Section 16(c) of the Specific Relief Act, 1963, runs as follows:

> "Personal bars to relief - Specific performance of a contract cannot be enforced in favour of a person -
> (a) ....
> (b).....
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant."

Section 16(c) of the Act requires that if a party fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, then in that case, a suit for specific performance of a contract must fail. It is, therefore, clear that section 16(c) of the Act requires that a party must aver in the plaint the fact that he has performed or has always been ready and willing to perform his part of the contract. In the absence of such assertion, the evidence adduced in the case to that effect will not help the plaintiff. Section 16(c) requires that there must be averment to the effect that the plaintiff has performed or has always been ready and willing to performed the essential terms of the contract. If there is no such averment in the plaint, then no

amount of evidence can help the plaintiff in getting a decree in his favour.

6. I agree with the finding of the trial Court and hold that such amendment of the plaint should not have been brought at such a late stage. The matter would be quite different if such an amendment of the plaint is brought at a stage when the parties have not begun adducing evidence in the case.

7. Learned counsel for the petitioners did not raise any question of jurisdictional error. It is within the discretion of the Court to allow or reject amendment of the plaint. There is no question of jurisdictional error. Hence I uphold the impugned order passed by the Court be low and dismiss the revision petition, but without any costs.

S.S.Sandhawalia, C.J. I agree.

S.P.J. Petition dismissed.

CIVIL WRIT JURISDICTION

1985/January 22.

Before Anand Prasad Sinha and Madan Mohan Prasad, JJ.*

*Dr. Bijay Kumar Mishra and Others.***

v.

State of Bihar and Others.

Inter University Board Act, 1981 *(Bihar Act No. XXVII of 1982), Section 5 sub-section (2)—statutes of the Universities fixing criteria for admission of teachers to the Post Graduate (Medical) Examination—approved by Chancellor on recommendation of State Government—Validity of—whether avoids discrimination.*

When one fixed standard in the nature of Final Examination is made applicable to the two categories of candidates; one who has undergone the course by virtue of obtaining admission by competitive examination and another by experience gained both by working in the field and serving as teachers, the apprehension of any deterioration in the standard cannot be said to be a valid one.

Where the Chancellor on the recommendation of the State Government had been pleased to approve the Statutes regarding admission of

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* Sitting at Ranchi.

** Civil Writ Jurisdiction Case No. 1134 of 1984(R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

teachers to the Post Graduate (Medical) Examination under section 5(2) of the Inter University Board Act, 1981, and the same was sent to all the Vice-Chancellors' of different Universities including Ranchi University and was sent to the Principals of different Medical College who sent the same to all the Heads of Departments for implementation;

Held, that the statute is the outcome of the powers conferred upon the Chancellor through the process of law based upon the existing law and has got all the force of statute binding upon all Universities. The statute has brought uniformity and has avoided the element of descrimination.

The law laid down in the statues ensure a fair balance between the conflicting demand of the writ petitioner and the respondent No. 7 and 8 as it safeguards for the right which so far could not made available to the teachers of other Universities excepting that of the Patna University for whom similar statute existed from before.

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 Anand Prasad Sinha, J.

M/s. Debi Prasad, Amreshwar Sahay and V. Shivnath for the petitioners

Mr. Ram Balak Mahto, Addl. A.G., & Miss Indrani Choudhuri for the State.

M/s. S.B.Sinha & M.M. Banerjee for Respondent no.s 7 and 8.

Anand Prasad Sinha, J. The validity of the Statute (Annexure-2) laid down by the Chancellor regarding conditions enabling teachers of Medical College to appear at the Post Graduate University Examination challenged by the petitioners is under

consideration and is sought to be disposed of at the admission stage itself. The parties have been noticed and all concerns have duly appeared and counter affidavits have been filed on behalf of the respondents.

2. The relevant facts involved in this writ application may be stated as follows:-

Since 1979 admission in the Post Graduate Medical Courses in the different departments are made on the basis of competitive examination and for that criteria of eligible candidates has been indicated by the Medical Council of India. The qualifications and criteria for taking up such examination is also indicated in the prospectus issued by the Chairman, Post Graduate Medical Admission Test in the year 1982, which is Annexure-1 to this writ application. The examinations have to be conducted by the University. The prominent condition appears to be that full registration with the State Council of Medical Registration and the candidate must have worked in the capacity of housemanship in the hospital/institutions approved and recognised by the Medical Council of India and Universities of Bihar. Different periods have been indicated for different subjects which is not of much relevancy for consideration in detail for the disposal of this writ application.

3. Other important conditions are that a candidate has to submit a thesis and also to do practicals in addition of having worked as housemanship. Alternatives have also been indicated like being worked as full time Post Graduate students in the department concerned in a manner equivalent to housemanship, having worked in a hospital approved by the Indian Medical Council

for Internship training for a period of three years; having worked in the Bihar State Medical Service or Armed Forces Medical Service or other equivalent service for a period of at least 5 years or 2 1/2 years which will be counted as equivalent to one year or six month's Housemanship respectively. There is also an indication that admission to the Post Graduate studies will be done strictly on merit.

4. A letter bearing No. BSU-16/83-1592-GS(I) dated 24.8.1983 from the Governor's Secretariat has been issued to the Vice-Chancellor of Magadh University, Ranchi University, Bhagalpur University, Bihar University and L.N. Mithila University on the subject "Statutes regarding admission of teachers to the post-graduate (Medical) Examination. The operative portion of the alleged Statutes is indicated below:-

> "A teacher working in any educational institution under the University or of a College or Department (within the territorial jurisdiction of the University) transferred or retransferred to the control of the State Government, atleast for a continuous period of eighteen months immediately preceding the date of his application, may be permitted by the Academic Council to appear at an examination, conducted by the University; provided that where the examination involves practical work also, he shall have fulfilled the prescribed requirements regarding the same."

5. It appears that the Chancellor has approved the aforesaid letter dated 24.8.1983, a copy of which is Annexure-2 to this writ application (hereinafter to be referred to as the Statute) on the recommendation of the State Government under section 5(2) of the Inter University Board Act, 1981

(hereinafter to be referred to as the Act). Consequent to this, Office Order dated 7.2.1984 has been issued from the Ranchi University as contained in Annexure-3 to this application and it runs as follows:

"RANCHI UNIVERSITY, RANCHI

OFFICE ORDER

In the light of the statutes regarding admission of teachers to the P.G. (Medical) Examination contained in letter No. BSU-16/83-1592-GS(I) dated 28.8.83 from the Under Secretary to the Governor, Bihar, the Vice-Chancellor has been pleased to allow the registration of teachers for the same Department for M.D./M.S Examinations.

Accordingly Dr. Dilip Kumar & Dr. K.K. Mishra who have completed 18 months service are registered for M.D./M.S. examination & are allowed to appear at the Examination.

BY ORDER OF THE VICE CHANCELLOR

Sd. M. Oraon
Registrar,
Ranchi University, Ranchi."

6. Petitioner Nos. 1 and 2 had passed their M.B.B.S. Examination in the year 1977. The petitioners had applied for admission to the Post Graduate studies consequent to the prospectus issued as contained in Annexure-1 to this application. The duration of the courses of studies for certain subjects is two years and for certain subjects like M.Ch. (Neuro-Surgery) is four years. Petitioner No. 1 had appeared in the Competitive Admission Test held in November, 1982 and was subsequently admitted in the M.D. (Medicine) Post Graduate Medical Course in June, 1983. This course is for the duration of two years. Petitioner No. 2 also

appeared in the same test and was admitted in M.Ch. (Neur- Surgery) in June, 1983 which is four years' course. Petitioner No. 3 had competed in June 1980 and was admitted in September, 1980 in M.Sc. (Neuro Surgery) for the session 1980-84. According to the petitioners, the number of seats available in medicine in the Rajendra Medical College, Ranchi is limited to 12 and in the M.Sc. (Neuro Surgery) there is only one seat in the whole of the State and that also in the Rajendra Medical College, Ranchi only. Further it appears that different number of seats are fixed in different Departments in the different Medical Colleges of the State which are recognized by the Medical Council of India. Consequent to the studies undertaken by the three petitioners, petitioner No. 1 will appear in the Final University Examination of Post Graduate in M.D. (Medicine) after completing the course in April, 1985 and petitioner No. 2 who has been admitted in the M.Ch. (Neuro Surgery) after completing the four years' course, will appear in the Final University Examination in the year 1987 and similarly petitioner No. 3 in the session 1980-84 of which the examination was scheduled to be held in the month of September, 1984 but it appears that the same has not still been held and is likely to be held in the month of February, 1985. Thus in view of the incorporation of the Statute as contained in Annexure-2 to this writ application the teachers having 18 months' experience for appearing in the Post Graduate Medical Examination becomes eligible for taking up the examinations and naturally without undergoing the prescribed courses of studies and without appearing at the competitive admission test. Respondent Nos. 7 and 8 are thus taking up the examination on the basis of the aforesaid Statute. However, the fact that they have been the teachers

and was otherwise qualified in accordance with the Statute aforesaid has not been challenged, but the only objections raised are as follows:-

"i) The Chancellor (respondent No.4) had no authority to issue Annexure-2 and it has no statutory force.

ii) Annexure-2 over rides the conditions laid down in the prospectus Annexure-1 and thus Annexure-2 cannot be given effect to.

iii) No conditions excepting as laid down in the Prospectus (Annexure-1) can be laid down for appearing in the University Examination for the Post Graduate Medical Courses.

iv) Actions of respondent Nos. 4, 5 and 6 exercising powers under section 5(2) of the Act in issuing Annexures 2 and 3 are ultra vires. It does not apply to the Post Graduate Medical Courses.

v) Permission accorded to respondent Nos. 7 and 8 for taking up the Examination is illegal and against the law.

vi) In addition, two prominent facts raised are that respondent Nos. 7 and 8 had, as a matter of fact, appeared at the competitive test held in the year 1980 and they had failed and thus if they are permitted to appear in the examination that will circumvent the criteria for appearing at the Examination and the interest of the petitioners is likely to be put to jeopardy as respondent Nos. 7 and 8 may qualify at the Post Graduate Degree Examination before the petitioners. The Academic Council of the

concerned University has to accord permission to the respondents 7 and 8 for taking up the Examination and they have not been permitted.

7. Before I take up the real issue involved in this writ application, it becomes necessary to clarify some of the facts. From the counter affidavit filed on behalf of the respondents it is established that the Academic Council has accorded permission to respondent Nos. 7 and 8 to take up the examination. They are fully qualified for taking up the Examination based upon the criteria laid down in the Statute. Further, it appears that the conditions for undertaking practicals and submission of thesis have been made applicable to them and respondent Nos. 7 and 8 have fulfilled that criteria also who have already done practical and have submitted the thesis which according to the counter affidavit filed on behalf of respondent Nos. 7 and 8 have already been accepted.

8. On the basis of the facts stated above, it will appear that the objections raised on behalf of the petitioners are directed and objected against the taking up of the examination by respondent Nos. 7 and 8. That being so, the criteria indicated in Annexure-1 which is a copy of prospectus based upon the recommendations of the Medical Council of India approved as 'Regulations' under Section 33 of the Indian Medical Council Act, 1956, cannot be said to be in direct conflict with the taking up of the examination because both the prospectus (Annexure-1) and the criteria laid down by the Medical Council of India is primarily related to obtaining admission in the Post Graduate Medical Courses. Absolutely, there is no indication either in the prospectus or in the criteria laid down under the Regulation that no other channel can be available

for any one to take up the Examination. Much emphasis has been put on the intention of the prospectus and the criteria that the admission should be made strictly in accordance with the merit but that will not necessarily mean that any one else is completely excluded from taking up the Examination. The prospectus as also the criteria laid down relates to stage prior to the taking up of the examination and that being so, the points for consideration would be as to whether a candidate having fulfilled the conditions and qualifications laid down in the Statute as indicated in Annexure-2 is completely debarred from taking up the Examination as he has not got himself admitted in the courses of studies as in the case of the petitioners. I am afraid, such candidate cannot be absolutely debarred and independently in itself on consideration of the Statute and its legal validity, there are good reasons in support of the fact that the permission accorded to respondent Nos. 7 and 8 are on the basis of the valid reasons.

9. The apprehension of the petitioners that if respondent Nos. 7 and 8 are permitted to take up the Post Graduate Examination on the basis of the Statute as contained in Annexure-2, it will deteriorate the standard of Post Graduate Medical Degrees and likely to be derecognized by the Medical Council of India is without any basis. Respondent No. 7 had passed the M.B.B.S. Examination in the year 1973 and respondent No. 8 in the year 1972. After completing full Housemanship respondent No. 7 had joined the Bihar State Health Service in August, 1976 as Civil Assistant Surgeon in different blocks. Respondent No. 8 had joined the Bihar State Health Service as Civil Assistant Surgeon in August 1976 and was selected as Resident Medical Officer (Teacher) in the

Department of Medicine in Rajendra Medical College, Ranchi and joined on 8.3.1982. Respondent No. 7 was selected for Resident Medical Officer in the Department of Medicine, Rajendra Medical College, Ranchi, and joined on 26.2.1982. Respondent No. 7 had qualified in the Competitive examination and respondent No. 8 had already done Post Graduate Diploma Course in the year 1980. Therefore, respondent Nos. 7 and 8 have gained sufficient experience; whereas the petitioners appear to be freshers and, therefore, by virtue of the experience and the posts held by respondent Nos. 7 and 8, it cannot be said that if they are permitted to appear at the Post Graduate Medical Examination, that in itself will lower down the standard specially when a different type of examination has not been envisaged in case of such teachers and, as a matter of fact, the standard, their qualification and worth of any candidate will purely depend upon the success in the examination and not simply because one had attended a particular type of course and the another a different one. When one fixed standard in the nature of Final Examination is made applicable to the two categories of candidates; one who has undergone the course by virtue of obtaining admission by competitive examination and another by the experience gained both working in the field and serving as teachers; the apprehension of any deterioration in the standard cannot be said to be a valid one. Although, not of much relevancy, but safely it can be said that it is the intrinsic value which matters ultimately and simply a candidate had undergone the study course of two years or four years will not necessarily, by virtue of that fact independent in itself, can be said to be superior in all respects; rather it is the ultimate result in the Examination which matters and

when that examination is uniformly applicable to the two categories of the candidates, the deviation in the standard of a Post Graduate Degree holder will not depend upon any other criteria but purely on the performance at the examination.

10. It is true, by virtue of admission in the Post Graduate course for two years or four years, as the case may be, ordinarily candidates will receive training, deep and higher studies, specialised knowledge and the like and there cannot be denial that it is for the Medical Experts like Medical Council of India to consider and find out as to whether any other candidates, who have not taken up course prior to taking up the examination, can any way lower down the standard or it be desirable that that may not be permitted to appear in the Examination and if so advised, the entire issue may be taken up by the Medical Council of India, but I am afraid, in the instant case, on the basis of the existing facts, if found that the Chancellor is fully competent to lay down the statute under section 5(2) of the Act, the claim of respondent Nos. 7 and 8 cannot be defeated. If the Medical Council comes to an opinion that excepting the mode for taking up the Examination through the process as indicated in Annexure-1, no other criteria can be made available for appearing at the Post Graduate Medical Course Examination, in that case, if so advised, exception will be made regarding the powers conferred upon the Chancellor under section 5(2) of the Act.

11. Now coming to the question of validity of section 5(2) of the Act, it will be relevant to mention herewith section 5(1)(d) and 5(2) of the Act which runs as follows:-

"5(1) The said Board shall advise the Chancellor/State Government on the

following matters:

xxx xxx xxx

(d) Measures for desirable uniformity in the Statutes, Ordinances, Regulations and Rules of different Universities:

xxx xxx xxx

5(2) Notwithstanding anything contained in the Patna University Act, 1976 (Bihar Act XXIV of 1976) and the Bihar State Universities Act, 1976 (Bihar Act XXIII, 1976), the State Government shall consider the advice tendered by the Inter University Board on any of the subjects mentioned in clause (1) and in accordance with the said advice or with such amendments as the State Government may deem fit, shall recommend to the Chancellor for appropriate action in the matter and the Chancellor at his discretion, shall issue such directive on the subject as he deems fit. Such dirctive shall be binding on the University shall execute the orders within such specified period as the Chancellor may determine."

12. It appears that in the Patna University Statute Chapter XVI provides that "a teacher working in any Educational Institution of an University or a department transferred or re-transferred to the control of the State Government atleast for a continuous period of 18 months immediately preceding the date of his application may be permitted by the Academic Council to appear at an examination conducted by the University provided that whether the examination involves a practical work also he shall have fulfilled the prescribed

requirement regarding the same". There is assertion on behalf of the respondents and not re-butted by the petitioners, that for the last 30 years a number of teachers had appeared at the Post Graduate Examination meaning thereby that the scheme has worked successfully. Naturally, the teachers posted in medical colleges did not get the aforesaid benefit and thus if by the impugned Statute uniformity is aimed, that will be said to be consistent with a desire to avoid discrimination. Accordingly, the State Government had recommended to the Inter University Board that the provisions laid down in the Patna University Statute be adopted in other Universities where the Post Graduate courses are conducted. Consequently, a meeting of the Inter University Board was held in which the Vice-Chancellors of all the nine Universities of Bihar and the Educational Commissioner and the Medical experts were also present. On 2.5.1983 the meeting had resolved that the State Government be advised to send its recommendation to the Chancellor for implementations of the Statute in the concerned University under section 5(2) of the Act. The aforesaid resolution was sent to the Joint Secretary, Health Department, Government of Bihar which appears from Annexure-A attached to the counter affidavit. Consequently, it was sent to the Chancellor by the State Government by letter dated 6.7.1983 which is Annexure-B to the counter affidavit. Thereafter, the Chancellor on the recommendation of the State Government had been pleased to approve the Statute (Annexure-2) and the same was sent to all the Vice-Chancellors of the different Universities including Ranchi University. Consequently, that was sent to the Principal of different Medical Colleges including Rajendra Medical College, Ranchi for information and necessary action. The Principal of

Rajendra Medical College on receipt of the aforesaid letter had sent the same to all the Heads of the Departments for implementation.

13. Under the circumstances, annexure-2 containing Statute is an outcome of the powers conferred upon the Chancellor through the process of law based upon the existing law and it has got all the force of statute binding upon all the Universities and the aforesaid Statute had brought uniformity and has avoided the element of discrimination.

14. The contention raised on behalf of the petitioners that the Statute as contained in Annexure-2 could not have over riding effect either upon the criteria fixed by the Medical Council of India or the prospectus (Annexure-1) cannot be accepted. Firstly, it would appear that the prospectus or the criteria is primarily for those candidates who are freshers and for taking up the competitive examinations. The power of the Chancellor as provided in section 5(2) of the Act is not in any way affected either by the prospectus (Annexure-1) or by the criteria indicated in accordance with the regulation 33 of the Medical Council of India.

15. Mr. Debi Prasad, learned counsel appearing on behalf of the petitioner, has relied upon a decision of the Supreme Court in the case of *State of M.P. and another vs. Kumari Nivedita Jain and others (1)*. I am afraid, the decision more help the respondents. It has been clearly laid down that Regulation II, which is the Regulation relied upon by the petitioners for showing criteria for taking up the admission in the Post Graduate courses, is merely in the nature of a recommendation. It has been laid down as follows:-

(1) (1981) AIR (SC) 2045.

"We are of the opinion that the use of the words "should be" in Regulation II is deliberate and is intended to indicate the intention of the Council that it is only in the nature of a recommendation. Regulation I which lays down the conditions or qualifications for admission into Medical Course comes within the competence of the Council under S. 33 of the Act and is mandatory and the Council has used language to manifest the mandatory character clearly, whereas Regulation II which deals with the process or procedure for selection from amongst eligible candidates for admission is merely in the nature of a recommendation and directory in nature, as laying down the process or procedure for selection for admission of candidates out of the candidates eligible or qualified for such admission under Regulation I. Regulation II recommending the process of selection is outside the authority of the Council under S. 33 of the Act and the Council has advisedly and deliberately used such lanaguage in Regulation II as makes the position clear and places the matter beyond any doubt. There is another aspect of the matter which also goes to suggest that Regulation II is merely director and does not have any mandatory force."

16. It has been rightly argued by Mr. Ram Balak Mahto, learned Additional Advocate General, that the impugned Annexure-2 has got such legal validity that it neither violates any Article of the Constitution of India as claimed by the petitioners nor is limited to the criteria laid down in the Regulation of the Medical Council of India. That being so, the statutory effect of Annexure-2 cannot be disputed.

17. The law laid down in Annexure-2 ensures a fair balance between the conflicting demand of the petitioners and the respondents, as it safeguards for the right which so far could not be made available to the teachers of other Universities excepting that of the Patna University. In a progressive society it is the dictum that discrimination be eliminated. The law making power of the Chancellor, as envisaged in section 5(2) of the Act leaves no scope to measure good 'against bad law' and thus no other view can be taken excepting the Annexure-2 as legal and constitutional making of general validity and thus the individual claims of the petitioners cannot ignore the vast expansions of government functions which has been cropped up on the postulates of social justice. In any view of the matter, annexure-2 has got statutory force. There is no conflict in between Annexure-1 and the criteria laid down by the Medical Council of India and the Statute (Annexure-2) and thus it operates as a law giving full protections to respondent Nos. 7 and 8 and defeating the claim of the petitioners so long it exists and thus no case is made out for granting the prayer of the petitioners and for issuance of any writ, order or direction.

18. In the result, I do not find any merit in this writ application which fails and is dismissed, but there will be no order as to costs.

Madan Mohan Prasad, J. I agree.

R.D. Application dismissed.

MISCELLANEOUS CRIMINAL

1985/March 16

Before S.S.Sandhawalia, C.J. and Prem Shanker Sahay, J.

*Lakshmi Sah and another.**

v.

The State of Bihar.

Bihar Food grains Dealer's Licensing Order, 1967, *Clause 7—licence—nature of—person granting licence, whether and when can demand the same—demand of licence in absence of the licensee—effect of-production of licence on demand, whether obligatory on the licensee.*

The licence is a document by which authority is conferred to do business as per terms and conditions mentioned therein. Persons granting that authority has, therefore, always the power to demand the licence whenever so required. Simply because the licence is not present and in his absence the licence is demanded and is not produced then it is difficult to accept that prosecution can be lodged only against that person who was present in the shop and not against the licensee. Clause 7 of the Order makes it obligatory

* Criminal Miscellaneous Nos. 7539 and 7562 of 1982. In the matter of applications under section 482 of the Code of Criminal Procedure.
Cr. Misc. 7562 of 1982 ... Anil Kumar ... Petitioner.

on a licensee to produce the licence if so required by the authorities.

Held, therefore, that if licence is not produced before the authorities, in the absence of the licensee, then it will amount to giving a big rope to the dealers to conduct their business in a clandestine manner which will frustrate the very object of granting the licence.

Held, further, that according to clause 7 the licensee has to abide by the terms and conditions of the licence. It is also not necessary to mention in the licence specifically that licence has to be produced on demand because it is a privilege given to some persons to carry on a business with certain terms and conditions and the authority granting that privilege has every right to demand the licence. Moreover, the grant of licence in Form C is a ministerial act and if some clerk deliberately, in league with the licensee, deletes the clause even then the licensee will be bound by the terms and conditions of the licence for which declaration is given in Form A.

Mangal Singh and ors. v. State of Bihar (1)-relied on.

Radhey Shyam Kalwalia v. State of Bihar (2)-overruled.

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 P.S.Sahay, J.

Mr. N.K.Agrawal for the petitioners in both the case.

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(1) (1968) AIR (Pat.) 37

(2) (1968) BLJR 890.

Mr. G.P.Jaiswal for the opposite party in both the cases.

P.S.Sahay, J. - The points involve in both the applications are identical and, therefore, they have been heard together and will be governed by this common judgment. The petitioners want to invoke the inherent power of this Court to quash the criminal prosecutions pending against them in which cognizance has been taken under section 7 of the Essential Commodities Act for the violation of the Bihar Food grains Dealers' Licensing Order, 1967 (hereinafter to be referred as the Licensing Order) and also the Bihar Essential Articles (Display of Prices and Stocks) Order, 1977 (hereinafter to be referred as the Display Order).

2. In order to appreciate the points it will be necessary to state some necessary facts. The petitioners, in both the cases, deal in foodgrains and are retail licensees under the Licensing Order. In Cr. Misc. 7539 of 1982 the shop was inspected on 18.9.1982 by the Supply Inspector and admittedly the petitioner was not present and his son was at the shop. Licence was not produced and on verification of the stock certain irregularities were detected and there was no 'Board, in which stock and price had to be displayed. On these allegations a complaint was filed and a copy of the same has been filed and marked Annexure-1. On receipt of the complaint the learned Chief Judicial Magistrate, by his order dated 23.9.1982, has taken cognizance against the petitioner. Being aggrieved by the aforesaid order the petitioner has moved this Court which was listed before me for admission on 21.10.1982. A point was raised that the petitioner, who is the licensee, was admittedly not present at the time of inspection and even if licence was not produced on demand, he shall not be liable for

prosecution. In support of the contention reliance was placed in the case of *Radhey Shyam Kalwalia vs. State of Bihar (1).* After going through the decision I doubted the correctness of the same and, therefore, the application was admitted and directed to be placed before a Division Bench at the time of final hearing. In Cr. Misc. 7562 of 1982 the shop of the petitioner was inspected in his absence on 6.3.1981 and his grand father, Agnu Sao, was conducting the business. Certain irregularities were detected and the licence was not produced and the stocks were not displayed. Sanction was granted and a copy whereof has been filed as Annexure-3. The learned Chief Judicial Magistrate, by his order dated 31.3.1982, has taken cognizance against the petitioner and Agnu Sao. Being aggrieved by the aforesaid order the petitioner alone has moved this Court and a similar point was raised at the time of admission and, therefore, it was ordered to be listed for final hearing with Cr. Misc. 7539 of 1982. This is how both the applications have been placed before us.

3. Mr. N.K.Agrawal appears on behalf of the petitioners, in both the applications, and a common point has been raised that the petitioners, who are licensee, were admittedly not present at the time of inspection and, therefore, even if licence was not produced on demand no offence had been committed. Reliance has been placed in the case of *Radhey Shyam Kalwalia (supra).* Before dealing with the submissions it will be necessary to refer to some of the provisions of the Licensing Order. These who want to deal with foodgrains as a retailer has to file an application in Form A according to Clause 4 of the Order and licence is granted to a wholesale

(1) (1968) BLJR 890.

dealer in Form B and to a retail dealer in Form C. Clause 7 of the Order deals with the contravention of the condition of the licence which is as follows:

"7. Contravention of conditions of licence:-

No holder of a licence issued under this Order or his agent or servant or any other person acting on his behalf shall contravene any of the terms and conditions of the licence and if any such holder or his agent or servant or any other person acting on his behalf contravenes any of the said terms or conditions, then without prejudice to any other action that may be taken against him, his licence may be cancelled or suspended by order in writing of his licensing authority."

In Form A an applicant has to give a declaration that he shall abide by the terms and conditions of the Licensing Order. Clause 3 of Form B may be usefully quoted.

"3. (i) The licensee shall, except when specially exempted by the State Government or by the licensing authority in this behalf maintain separate register of daily accounts for each godown for each of the foodgrains mentioned in paragraph I showing correctly -

(a) the opening stock on each day:

(b) the quantities received on each day as and when received showing the place from where and the source from which received:

(c) the quantities delivered or otherwise removed on each day as and when delivered or otherwise removed, showing the places of destination; and

(d) the closing stock on each day.

(ii) The licensee shall complete his accounts for each day on the day to which they relate, unless prevented by reasonable cause, the burden of proving which shall be upon him.

(iii) A licensee who is a producer himself shall separately show the stocks of his own produce in the daily account, if such stocks are stored in his business premises."

Clause 5 states that the licensee shall not contravene the provisions of the Licensing Order. In the case of Radhey Shyam Kalwalia (supra) prosecution was lodged for not producing the licence at the time of inspection and in paragraph 6 it was observed by the learned single Judge that nowhere in the body of the Licensing Order or any of the terms and conditions of the licence in Form B it is obligatory upon a licensee to produce the licence before the inspecting officer if called upon to do so. Further, it has been held that if the staff had contravened the provisions of the Licensing Order or the terms and conditions then the prosecution of the licensee cannot be justified. The learned single Judge also considered the question of menarea and held that unless it is shown that the act complained was done with some criminal intention the prosecution is misconceived. With utmost respect, in my opinion, the observation of his lordship is not correct. The licence is a document by which authority is confirmed to do business as per terms and conditions mentioned therein. Persons granting that authority has, therefore, always the power to demand the licence where-ever so required. Simply because the

licensee is not present and in his absence the licence is demanded and is not produced then it is difficult to accept the contention of the learned counsel that prosecution can be lodged only against that person who was present in the shop and not against the licensee. Clause 7 of the Order, which has been referred to above, makes it obligatory on a licensee to produce the licence if so required by the authorities. If it is held that if licence is not produced before the authorities, in the absence of the licensee, then it will amount to giving a big rope to the dealers to conduct their business in a clandestine manner. That, in my opinion, will frustrate the very object of granting the licence. In Cr. Misc. 7562 of 1982 it has further been submitted that Clause 3 of the terms and conditions of the licence which is granted in Form C has been deleted and in support of that a copy of the licence has been filed which is Annexure-4. True that clause 3 has been deleted but according to Clause 7, quoted above, the licensee has to abide by the terms and conditions of the licence. It is also not necessary to mention in the licence specifically that licence has to be produced on demand because it is a privilege given to some persons to carry on a business with certain terms and conditions and the authority granting that privilege has every right to demand the licence. Moreover, the grant of licence in Form C is a ministerial act and if some clerk deliberately, in league with the licensee, deletes the clause even then the licensee will be bound by the terms and conditions of the licence for which declaration is given in Form A. Learned counsel for the petitioner has not been able to produce any notification or order of the State Government deleting Clause 3 from Form C. If clause 3 of licence of Form C is

deleted and is construed in the manner the learned counsel for the petitioner want us to construe then there will be no purpose of granting licence to any person. Mr. Jaiswal, learned counsel appearing on behalf of the State, has placed reliance in the case of *Mangal Singh and others vs. State of Bihar (1)* where it has been held that a licensee is liable for prosecution for the descrepancy found in the books of accounts maintained by him which amounts to the violation of the terms and conditions of the licence and it is for the licensee to show that there has been no violation at all in course of trial. Thus, I find that there is no substance in the contention of learned counsel for the petitioner.

4. Learned counsel then submitted that the shop of the petitioner was not working at that time it was inspected and, therefore, there was no question of display of the Board. On the face of the allegations made in the complaint it is difficult to accept the contention at this stage. That will be a rule of evidence and it will be for the petitioner to satisfy the Court in course of trial. Another point has been argued in Cr. Misc. 7539 of 1982 that there is no allegation that the petitioner of that case was conducting the business at the time of inspection and, therefore, he cannot be prosecuted and reliance has been placed on section 10 of the Essential Commodities Act, which reads as follows:

"10. Offences by companies -

(1) If the person contravening an order made under section 3 is a company, every person who, at the time the contravention was committed, was incharge of, and was responsible to, the company for the conduct of the business of the company as well as the

(1) (1968) AIR (Pat.) 37.

company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due dilligence to prevent such contravention."

This submission is wholly without any substance because this section deals with a company and firms carrying on business. But petitioner of this case is the individual licensee and, therefore, section 10 will have no application at all.

5. For the reasons, mentioned above, the points raised on behalf of the petitioners in both the cases are devoid of any substance. The case of *Radhey Shyam Kalwalia (supra)* has been wrongly decided. I over rule the same and it is, accordingly, overruled. Both the applications are dismissed and the trial pending in the court below should be disposed of expeditiously.

S.S. Sandhawalia, C.J. I agree.

M.K.C. Application dismissed.

LETTERS PATENT

1985/March, 13.

Before S.S.Sandhawalia, C.J. & Prem Shanker Sahay, J.

*Union of India through the General Manager, Eastern Railway & Others.**

v.

Nityanand Jha & Another.

Service—*transfer from one School to another—person so transferred, whether can go back to that School—transfer—Scope of—courts, whether and when can interfere in transfer matter—persons being transferred belonging to same cadre, whether discriminatory—fact neither pleaded nor argued, whether beyond the scope of writ application—Constitution of India, Articles 226 and 227.*

A person, for some reason or other, may seek transfer from one school to another but it does not mean that he can never go back to that school from where he was transferred. Moreover, transfer from one place to another is made on administrative grounds and also according to exigencies of the situation and courts normally do not interfere in such transfers except in few exceptional cases if

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Letter Paten Appeal No. 100 of 1983. Against the judgment of Shri Justice B.P.Jha, Patna High Court, dated 7.11.1983 passed in CWJC 4585 of 1982.

there has been no violation of any statutory rules or procedure. In the instant case both the persons transferred were of the same cadre.

Held, therefore, that in that view of the matter, no question of discrimination arises and the order of the learned Single Judge cancelling the transfer is bad.

Held, further that where the creation of a separate cadre for teachers of High School and Middle School was neither pleaded nor argued, the order passed by the learned Single Judge for creating a separate cadre was equally bad and was beyond the scope of the writ application.

Appeal under clause 10 of the Letters Patent.

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

Mr. A.B. Ojha for the appellants.

M/s Tara Kant Jha & Sadanand Jha for the respondents

P.S.Sahay, J. This appeal under Clause 10 of the Letters Patent is directed against the judgment of a learned single Judge passed in CWJC 4585 of 1982 on 7.11.1983.

2. Respondent no. 1, Nityanand Jha, was appointed as a teacher in the Eastern Railway High School in Grade II on 26.11.1964 and respondent no. 2, Ramadhar Singh, was appointed some times in the same grade in 1977 and was working in Jhajha High School. On 25.9.1979 he was transferred to H.E. School Jhajha and respondent no. 1 was sent in his place. On 25.9.1979 respondent no. 2 was reposted in the High English School. Being aggrieved by the aforesaid order respondent no. 1 moved this Court under Articles 226 and 227 of the Constitution of India which gave

rise to CWJC 4585 of 1982.

3. A point was taken in that writ application that he was senior to respondent no. 2, Ramadhar Singh, having been appointed earlier and has been transferred from High English School to Middle English School and the transfer was was discriminatory in nature. The learned single Judge, after hearing the case of the parties, held that respondent no. 1 being senior to respondent no. 2 was being transferred to a Middle School from a High School, the transfer was discriminatory, against the well known principle that person having the same status should be transferred from one School to another and he, therefore, quashed the order of transfer. The learned Judge further gave the following direction:

> "I further direct the Railway authorities to keep a separate cadre of the teachers of primary and middle Schools. They should also keep a separate cadre for the teachers of the High Schools."

Being aggrieved by the aforesaid judgment the appellants have preferred this appeal.

4. Mr. A.B.Ojha, learned counsel appearing on behalf of the Railway Administration, has submitted that the order of the learned single Judge cancelling the order of transfer is wholly illegal and unjustified and is fit to be set aside. He has further argued that it was neither pleaded nor argued before the learned Judge that a separate cadre should be created for the High English School and Middle English School and, therefore, the direction given by the learned single Judge was beyond the scope of the writ application. He has submitted that creation of cadre is within the domain of the Railway administration who are the employers and these involve policy

matters, and the direction given by the learned single Judge will prejudice the Railway administration and is bound to create complications. He has, further, submitted that the two respondents were working in the same cadre as teacher and even if respondent no. 1 was working in the High School and was transferred to Middle School the action cannot be said to be discriminatory. In my opinion, the contention raised on behalf of the learned counsel has to be accepted. Mr. Tara Kant Jha, learned counsel appearing for respondent no. 1, frankly conceded that the second part of the order was not even urged by him and could not be supported. Regarding the order of transfer he has half heartedly contended that respondent no. 2 was working in the High School and had himself asked for his transfer to the Middle School and, therefore, now he could not resist the transfer. This submission has absolutely no force. A person, for some reason or other, may seek transfer from one School to the other but it does not mean that he can never go back to the School from where he was transferred. Moreover, transfer from one place to another is made on administrative grounds and also according to exigencies of the situation and Courts normally do not interfere in such transfers except in few exceptional cases. It was not shown to the learned single Judge and it has also not been shown to us that there has been a violation of any statutory rules or procedure. Both the respondents were of the same cadre and the second part of the direction given by the learned single Judge to create a separate cadre clearly indicate that there was no separate cadre till then. In that view of the matter, no question of discrimination arises. Thus, in my considered opinion the order of the learned single Judge cancelling the transfer must be held to be

bad. The second part of the order to create separate cadres for teachers of High School and Middle School is equally bad and was neither pleaded nor argued by the parties and, thus, was beyond the scope of the writ application.

5. The appeal is, accordingly, allowed and the order of the learned single Judge is, hereby, set aside. But, there shall be no order as to costs.

S.S.Sandhawalia, C.J. I agree.

M.K.C. Appeal allowed.

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