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THE INDIAN LAW REPORTS

PATNA SERIES

VOLUME LXVI

INDEX

REPORTED BY

HIGH COURT, PATNA ..... SATYENDRA PRASAD JAMUAR, M.A., B.L. (Reporter)

RAJESHWAR DAYAL, M.A., B.L. (1st Assistant Reporter)

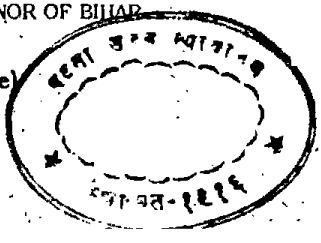
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PATNA

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PATNA HIGH COURT L-III

1987

Chief Justice

1.	The Hon'ble Mr. Justice S.S. Sandhawalia, B.A. (Hons.) L.L.B.	Leave not taken. Relinquished charge of his office on the 27th July, 1987 in the forenoon (on attaining the age of superannuation).

Puisne Judges

1.	The Hon'ble Mr. Justice B.P. Jha, B.A., B.L.	Acting Chief Justice w.e.f. 27.7.1987.
2.	The Hon'ble Mr. Justice L.M. Sharma, B.A. B.L.	Relinquished charge of his office as Judge of Patna High Court in the afternoon of 4.10.1987 to assume charge of the office of Judge, Supreme Court of India.
3.	The Hon'ble Mr. Justice S.K. Jha, M.A. B.L.	(i) Leave on full allowance for three days w.e.f. 29.10.87 to 30.10/87 and for 2.11.87. (ii) Leave on full allowance for four

			days i.e. for 27.11.87, 1.12.87, 10.12.87 and 17.12.87.
4.	The Hon'ble Mr. Justice N.P. Singh, B.A. (Hons.), B.L.		Leave on full allowance for 11 days w.e.f. 11.12.87 to 21.12.87.
5.	The Hon'ble Mr. Justice Uday Sinha, M.A. B.L.		Leave not taken.
6.	The Hon'ble Mr. Justice S.Ali Ahmad, B.Sc., B.L. (Hons.)		Leave not taken.
7.	The Hon'ble Mr. Justice B.P. Sinha, M.A. B.L.		Leave not taken.
8.	The Hon'ble Mr. Justice S.S. Hasan, B.A. B.L.	(i)	Leave on full allowance for one day i.e. for 2.11.87.
		(ii)	Leave on full allowance for six day w.e.f. 9.3.87 to 12.3.87 and 21.7.87 to 22.7.87
9.	The Hon'ble Mr. Justice S. Roy, B.A., B.L.		Leave not taken.
10.	The Hon'ble Mr. Justice M.P. Verma, B.Com., B.L.		Leave not taken. Retired w.e.f. 17.11.87 (forenoon).

11.	The Hon'ble Mr. Justice Binodanand Singh, B.A., B.L.	Leave on full allowance for six days i.e. for 20.11.87 and w.e.f. 30.11.87 to 4.12.87
12.	The Hon'ble Mr. Justice Yadunath Sharan Singh, B.A..B.L.	Leave not taken. Retired w.e.f. 11.10.87 (forenoon)
13.	The Hon'ble Mr. Justice R.C.P. Sinha, M.A. B.L.	Leave not taken.
14.	The Hon'ble Mr. Justice A.K. Sinha, B.A., B.L.	Leave not taken. Retired w.e.f. 11.8.87 (forenoon)
15.	The Hon'ble Mr Justice S.N. Jha, B.A., B.L.	Leave not taken.
16.	The Hon'ble Mr Justice S.B. Sanyal, M.A., B.L.	Leave not taken.
17.	The Hon'ble Mr. Justice K.B. Sinha, B.A. (Hons.), B.L.	Leave not taken.
18.	The Hon'ble Mr. Justice Ram Naresh Thakur, B.A., B.L.	Leave not taken.
19.	The Hon'ble Mr. Justice P.S. Mishra, M.Sc., B.L.	Leave not taken.
20.	The Hon'ble Mr. Justice Abhiram Singh, B.A., B.L.	Leave not taken.
21.	The Hon'ble Mr. Justice R.N. Prasad, M.A., B.L.	Commuted leave for 14 days w.e.f. 21.8.87 to 3.9.87.

22. The Hon'ble Mr. Justice S.H.S. Abidi, M.A., LLB.	
23. The Hon'ble Mr. Justice U.P. Singh, B.A., B.L.	Leave not taken.
24. The Hon'ble Mr. Justice P.B. Prasad, M.A..B.L.	Leave not taken.
25. The Hon'ble Mr. Justice B.N. Agrawal, B.A., B.L.	Leave not taken.
26. The Hon'ble Mr. Justice B.N. Sinha, M.A., B.L.	Leave not taken.
27. The Hon'ble Mr. Justice R.N.Lal, M.A., B.L.	Commuted leave for 5 days w.e.f. 24.8.87 to 28.8.87
28. The Hon'ble Mr. Justice L.P.N. Shahdeo, B.A., B.L. (Hons.)	Leave not taken.
29. The Hon'ble Mr. Justice S.C. Mookherji, B.A., B.L.	Leave not taken.

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1982-XXXVIII See, Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981.

1983-IV See, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982.

Of the State of Bihar and Orissa.

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1860-XLV	See	Penal Code, 1860
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1908-IX	See,	Limitation Act, 1908.
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1923-VIII	See,	Workmen's Compensation Act, 1923
1939-IV	See,	Motor Vehicles Act, 1939.
1940-X	See,	Arbitration Act, 1940.
1947-XIV	See,	Industrial Disputes Act, 1947
1952-XLVI	See,	Criminal Law Amendment Act, 1952.
1956-LXXIV	See,	Central Sales Tax Act, 1956.
1957-XXVII	See	Wealth Tax Act, 1957.
1961-XLIII	See,	Income Tax Act, 1961.
1962-LII	See,	Customs Act, 1962.
1963-XXVI	See,	Limitation Act, 1963.
1963-XLVII	See,	Specific Relief Act, 1963.
1974-II	See,	Code of Criminal Procedure, 1973.
1980-LXV	See,	National Security Act, 1980.
1980-LXIX	See,	Forest (Conservation) Act, 1980.

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Arbitration Act, 1940-|- sections 30, 39 and 41 — — Award. whether justified by the weight of evidence led by the parties —— Court, whether can re-examine the merits— grounds on which an Award can be set aside — Code of Civil procedure — provisions of. whether apply in the proceedings under the Arbitration Act - Code of Civil Procedure, 1908 (Act V of 1908), Order 41, Rule 22.

It is not open to the Court to re-examine the merits for finding out whether the Award is justified by the weight of evidence led by the parties. The jurisdiction of the Court to examine its correctness is limited by the provisions of the Arbitration Act, which are based on the general principle applicable to arbitration proceedings. An arbitrator is a tribunal selected by the parties, and his adjudication is binding on them. If it were permissible for the court to re-examine the correctness of he Award, the entire proceeding would amount to an exercise in futility.The grounds on which an Award can be set aside are limited by statute and section 30 of the Act in mandatory terms declares that an Award shall not be set aside on other grounds. It is also not open to the court to speculate, where no reasons are given by the Arbitrator as to the reasons which led him to his conclusion. The court cannot proceed to determine whether the conclusion is right or wrong on an assumption that the Arbitrator must have proceeded by a certain process of reasoning.

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Section 41 of the Act says that subject to the provisions of, and the rules made under the Act, the Civil Procedure Code shall apply to all proceeding before the court and to all appeals under the Act. There does not appear to be any provision inconsistent with the application of the Civil Procedure Code.

Held, therefore, that in the instant case the decision of the court so far it has gone against the plaintiff respondent is clearly appealable under section 39 and as such the cross-objection is maintainable.

Bihar State Electrricity Board v. M/s Khalsa Brothers (1987) I.L.R., LXVI, Pat. 134

Arms Act, 1878, section 17, sub-section (3), clause (a), revocation of a gun licence under during registration and pendency of a criminal case for major or capital offence—whether justified— subjective satisfaction of the licensing authority, whether to be exercised for adequate reasons.

Held, that the registration and pendency of a criminal case for a major or capital offence may for adequate reasons justify the suspension or revocation of a licence under clause (a) of subsection (3) of section 17 of the Arms Act, 1878.

It is true that sub-section (3) does not in term provide that the pendency of a criminal charge is a grant for the revocation of licence. Clause(a) warrants revocation if the licensing authority is satisfied that the holder of the licence "is for any reason unfit for the

licence under the Act." The employment of such phraseology in the statute by the framers can leave no manner of doubt that a wide residuary discretion has been vested in the licensing authority to revoke privided it is satisfied that the holder is unfit for the licence under the Act. The implication of the holder in serious or horrendos capital crime in a particular case may furnish an adequate ground for the licensing authority for being so satisfied.Sub-section (1) requires the licensing authority to give notice in writing to deliver up the licence to it. That would invariably give an opportunity to the licensee to show some cause against such action. A further safeguard is provided by subsection (5) of section 17. The licensing authority must record in writing reasons therefore and also furnish to the holder of the licence on demand a brief statement of the same unless in exceptional cases he is of the opinion that it will not be in the public interest to furnish such statement. Nevertheless the requirement of recording reasons in writing is inflexibly mandatory. Therefore, it cannot be easily said that the subjective satisfaction of the licensing authority hedged in by the statutory requirements cannot be exercised on the basis of the pendency of the serious or capital criminal charge. If such subject satisfaction has been broadly and reasonably exercised, it would come within the parameters of the statute under clause (a) of subsection (3) of section 17 of the Arms Act.

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Kapildeo Singh v. The State of Bihar and others (1987) - I.L.R. 66, Pat. . . 1166

Assessee—

1—amount representing Sales Tax not paid by assessee — whether to be deemed to be income of the assessee — entire amount of Rs. 3,09,991/- paid by the assessee to its foreign collaborators, whether allowable as revenue expenditure.

Where assessee was following mercantile system of accounting, and the liability to pay had accrued during the assessment year in question but the assessee did not pay Rs. 80,688/- representing the sales tax;

Held, that the amount must be deemed to be income of the assessee.

Where the assessee claimed the entire sum of Rs. 3,09,991/- paid as royalty to its foreign collaborators to be revenue expenditure but the Income Tax Appellate Tribunal directed that one-third of the payment should be disallowed as representing capital expenditure in hands of the assessee and the balance should be allowed as Revenue expenditure.

Held, that the Income Tax Appellate Tribunal was not justified in bifurcating the expenditure of royalties into two-third revenue expenditure and one-third capital expenditure. The entire sum of Rs. 3,09,991/- is allowable as revenue expenditure.

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M/s. Tata Robins Frazer Ltd. Jameshedpur v. The Commissioner of Income Tax, Bihar, Patna (1987) I.L.R. 66. Pat. 716

2—Throwing the house property, which he earlier returned as 'individual', in the general hotchpotch and returning the same as H.U.F. for the purpose of the assessment—income from the house property, whether individual income of the assessee.

Where the assessee return his income with regard to the house at Patna treating the house property in the status of individual till assessment year 1967-68, but in the accounting year 1967-68 he claimed that the house had been thrown in hotchpotch of his Hindu Undivided Family hereinafter referred to as H.U.F. consisting of himself, his wife and his daughter and claimed that the income from the house property should be assessed separately as the property of the H.U.F. and therefore he did not include the income from the house property in his return of individual income;

Held, that the Income Tax Appellate Tribunal was not correct in holding that the disputed property belonged to the 'H.U.F.' consisting of the assessee, his wife and daughter. It could not be treated as H.U.F. Property. The income therefrom had to be treated as individual income of the assessee.

The declaration by the assessee throwing the separate property in the common hotchpot made no

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difference. The right of the members of the 'H.U.F.' did not get enlarged for the reason that the peroperty was thrown into the family hotchpot.

Commissioner of Income Tax. Bihar. Patna v. Rajeshwari Prasad. Advocate (1987) I.L.R. 66 Pat. 329

Award by the All India Industrial Tribunal (Bank Disputes) popularly known as Sastry Award being followed by the Bank — non-application thereof in petitioners case — whether amounts to illegal discrimination —Sastry Award sub-para 3, para 521, — period of one year in the rule whether reasonable and mandatory —two parallel proceedings one by a departmental enquiry and another a criminal prosecution, whether can proceed— departmental proceeding after the period of one year was over and threat of prosecution has disappeared, whether void — consideration of provisions of clause (c) of paragraph 521 (10) of the Sastry Award by the Labour Court, propriety of.

Held, On an objection raised as to the maintainability of the writ petition on the ground that the Sastry Award (Award of the All India Industrial Tribunal (Bank Disputes) Bombay given in connection with certain industrial disputes), has no statutory force, that, if the Sastry Award is being followed by the respondent Bank, and it is not suggested otherwise, it cannot arbitrarily refuse to do so in the petitioner's case for that would amount to illegal discrimination and as such the writ petition cannot be rejected as not maintainable.

Held, further, that the object for mentioning the period of one year in sub-paragraph (3) of paragraph 521 of the Sastry Award after which it is said that the management may deal with an employee departmentally, appears to protect an employee from two parallel proceedings at the same time, one by a departmental enquiry and another a criminal prosecution. In many a case, an employee may in such circumstances be seriously prejudiced in his defence in the criminal case.

The rule, therefore, appears to be reasonable and so while threat of a criminal case is pending, if an employee is called upon to file his show cause in a departmental proceeding, he may justifiably refuse to do so. If the management, in such circumstances, insists to expeditiously close the enquiry, the proceeding may have to be struck down as illegal, but where an employee has no reason to apprehend prejudice or justification for non-co-operating in the departmental proceeding, the position will be different. The relevant portion of paragraph 521 (3) of Sastry Award is not mandatory in nature so as to vitiate the departmental proceeding by itself, even in a case where the servant is not prejudiced by its violation. In the instant case, therefore, after taking part in the enquiry at a point of time when the threat of any criminal prosecution had completely disappeared and the period of one year was over the petitioner is not entitled to challenge the entire proceeding in the departmental enquiry as void.

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Held, also that the Labour Court was entitled to examine the question of proper punishment in view of the provisions of sub-paragraph 10 (c) of paragraph 521 of Sastry Award.

Sachida Nand Tiwary v The Chairman State Bank of India and ors. (1987) I.L.R. 66, Pat. 794

Benami —

Question of — Revenue authority, whether can entertain — absence of real owner — decision, against the ostensible owner, whether binding on the real owner — concurrent finding of fact — High Court, whether can interfere under its writ jurisdiction — Constitution of India Articles 226 and 227.

The Benami question can be entertained by the Revenue authority in the absence of the real owner and the decision against the ostensible owner would be binding upon the real owner.

Held, therefore, that in the instant case it cannot be said that the decision on that score is without jurisdiction.

Where the findings arrived at by the Court are concurrent findings of fact;

Held, that the High Court cannot interfere with such findings of fact while exercising its jurisdiction under Articles 226 and 227 of the Constitution of India.

Ram Narayan Dubey and another v. State of Bihar and ors. (1987), I.L.R. 66, Pat. 1516

Bengal Ferries Act, 1885 -[- Sections 6, 7, 8 and 9 and BiharLand Reforms Act, 1950 Section 4 —

composite settlement of a public ferry declared under section 6 of the Bengal Ferries Act and a sairat ferry vested in th State under section 4 of the Bihar Land Reforms Act, — whether permissible in law — composite settlement, whether governed by the provisions of the Bengal Ferries Act or by the purely administrative instruction for the settlement of sairats — State Government, whether can interfere in the case of composite settlement.

Per S.S. Sandhawalia, C.J. and S. Ali Ahmad, J (Birendra prasad Sinha, J contra) : -

Held, That the law permits a composite settlement of a public ferry declared under section 6 of the Bengal Ferries Act, 1885, and a sairat ferry vested in the State under section 4 of the Bihar Land Reforms, Act.

There is nothing in sections 7 and 9 or any other provisions of the Bengal Ferries Act. 1885, which raises a legal bar against a composite settlement. Nor can or indeed should the State be prevented if it finds it convenient to club together the public ferries which are statutorily controlled. And vested in it under the Bengal Ferries Act and the sairat ferries now vested free from legal encumbrances by virtue of section 4 of the Bihar Land Reforms Act. Therefore, the somewhat doctrinaire and extreme stand that public ferries and sairat ferries cannot in law be compositely settled even by way of a public auction, must necessarily be rejected.

Held, further, that in the event of a composite settlement of public and sairat ferries the same shall be

governed by the provisions of the Bengal Ferries Act, 1885, and the Rules framed thereunder and not by the purely administrative instructions for the settlement of sairats. This flows from the basic proposition that no mere executive instruction or Governmental Circulars can possibly override or erode the mandates of the legislature itself and the subordinate legislation framed thereunder.

The relevant provisions of the Bengal Ferries Act, 1885, and the statutory rules framed thereunder vest the control, leasing and management of the public ferries in the Magistrate of the district subject to the direction of the Commissioner. The State Government as such does not enter into or in any way figure in this statutory scheme. Any frontal interference by the State Government in the control, management and the settlement of public ferries under the Act is not warranted in the eye of law. The same procedure applies to a composite settlement also, and the State Government has no power to interfere therewith.

Held, therefore, that the State Government in varying and extending the period of the lease to three years acted without jurisdiction and its order was liable to be quashed and that of the statutory authority namely, the Commissioner to the effect that the period of lease must be for one year only must be maintained.

Per Birendra Prasad Sinha, J : -

A public ferry governed by the provisions of the Bengal Ferries Act and a Sairat ferry governed by the

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Bihar Land Reforms Act cannot be clubbed together and a composite settlement of a Public ferry and sairat ferry is not permissible in law. Neither the Bengal Ferries Act nor the Bihar Land Reforms Act provide for clubbing together of the two types of ferries. It follows, therefore, that a composite settlement can neither be governed by the Bengal Ferries Act nor by the provisions made under the Bihar Land Reforms Act. The two types of ferries are controlled by two statutes each prescribing different types of procedure for settlement. When a detailed procedure has been prescribed under the Bihar Land Reforms Act, the rules and various circulars and orders issued from time to time for the settlement of the Sairats by the prescribed authorities, it would be difficult to hold that such sairats can also be settled by the Magistrate of the district under the Bengal Ferries Act by merely clubbing such sairat ferries with the Public ferries.

In the instant case, the respondent-District Magistrate, therefore, had no authority to club a Public ferry along with other Sairat ferries and make a composite settlement and the entire procedure was without jurisdiction.

Ranjit Singh v. The State of Bihar and others (1987) I.L.R. 66. Pat. 1101

Bihar Buildings (Lease, Rent and Eviction) Control Act-1947 -[-section 11 (1)(d) - violation of tenant, whether can be evicted by one of the joint Co-owners despite other co-owner wanting the tenant to continue

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by accepting his share of the monthly rent due—tenant, whether a defaulter under section 11 (1) (d).

Per Majority (L.M. Sharma, J. Contra):-

Under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, one of the joint co-owners can evict the tenant from the whole of the premises on the ground of the violation of section 11(1) (d) of the said Act despite the desire and violation of the other co-owner to allow the tenant to continue in occupation. Acceptance by one of the co-owners of his share of monthly rent due will not absolve the tenant from the penalty resulting from arrears and consequent eviction under the provisions of section 11(1) (d) of the Act.

Per L.M. Sharma, J :

One of the joint Co-owners was entitled to demand his share of rent directly from the tenant who by acceding to the request did not act illegally. A portion of rent for two months was thus paid and the default was in respect of the remaining portion only. Consequently, the tenant cannot be treated to be a defaulter wihin the meaning of section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947.

Sharfuddin and others v. Bibi Khatija and another (1987), I.L.R. 66, Pat. 1594

Bihar Buildings (Lease, Rent and Evition) Control Act, 1982 -[- sections 11 (1) (c) and (e) and 14(8), scope and applicability of — suit for eviction of a tenant either on the ground of personal necessity reasonably and in

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good faith or of expiry of the period fixed under the lease — remedy of the landlord when he loses the suit — Civil revision application by him, whether maintainable.

Held, that, the remedy of the landlord in a case lost by him in which he institutes the suit in a civil court of competent jurisdiction for eviction of a tenant either on the ground of personal necessity reasonably and in good faith or in the case of expiry of the period fixed under the lease as per section 11 (1) (c) and (e) respectively is by "way of revision (and revision only)" of the order of the Court by the High Court as laid down in proviso to sub-sec tion (8) of section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, and the civil revision application in the present case is maintainable at the instance of the landlord petitioner.

Uday Banerjee v. P. R. Dutta (1987) I.L.R. LXVI, Pat. 148

Bihar Civil Service (Judicial Branch) (Adhoc Recruitments on Temporary Basis), Rules, 1974, rule 9 and Bihar Civil Service ((Judicial Branch) (Recruitment) rules 1955 — persons appointed in same service in accordance with two statutory Rules and holding identical posts— whether to be treated as different classes — seniority between the two — determination of — two equals treated as unequals — Article 14 of the Constitution, whether attracted—rule 9 of 1974 Rules, whether discriminatory and ultra vires as violative of

Articles 14 and 16(1) of the Contitution— Constitution of India, Articles 14 and 16(1).

It is true that adhoc appointment made under fortuitous circumstances, without following any statutory rule or procedure consistent with Articles 14 and 16 of the Constitution, as a stopgap arrangement, to meet an emergency situation, cannot be held to be an oppointment on temporary basis in its strict sense. But if appointments, have been made after due advertisement and selection by a statutory committee or following a procedure consistent with Articles 14 and 16 of the Constitution i.e. selection in order of merit, after giving opportunity to all eligible persons, then such appointments have to be treated at par with temporary appointments even if they are notified as adhoc appointments. In the instant case the petitioners were appointed in accordance with '1974' Rules after advertisement, screening and interview by a statutory committee consisting of two judges of the High Court and a member of the Commission. In that back ground even if the petitioners were appointed on adhoc basis under the '1974' Rules' their nature of appointment was not inferior to appointment on temporary basis. Rule 9 itself speaks about the period before absorption as "Service as a temporary Munsif" and provides for absorption of such appointees in permanent cadre. The petitioners and those appointed under '1955 Rules' had been appointed in the same service in accordance with two statutory Rules, were holding identical posts and

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an appointee under '1974 Rules' used to be transferred to a post held by appointee under 1955 Rules' and they were never treated separately during the period of their temporary appointment.

Held, therefore, that under such a situation the persons appointed under '1974 Rules' are not inferior as a class so that their period of temporary appointment before absorption in the permanent cadre ought to have been ignored by Rule 9. There being no rational basis to treat the petitioners separate as a class from appointees under '1955' Rules. They have to be treated as equal with the apponlees under '1955 Rules'.

Held, further, that it is well known that when two equals are treated as unequals Article 14 of the Constitution is attracted and any order / rule treating two equals as unequal has to be struck down and as such part of Rule 9 purporting to discriminate the petitioners without any rational basis are ultravires being violative of Articles 14 and 16 (1) of the Constitution and accordingly the seniority of the appointees under '1974 Rules' be re-fixed in accordance with law ignoring the objectionable part of Rules 9.

Rajendra Sinha and ors. v. The State of Bihar and ors (1987) I.L.R. 66. Pat. 404

Bihar Government Notification No. S.O. 1432 dated 28-11-1985 —prescribing a declaration form to be carried on a goods carrier for transporting goods through the State of Bihar during the course of inter-Statetrade.

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whether violative of Articles 301 and 304 of the Constitution — Constitution — Articles 301 and 304.

Where the petitioners challenged the constitutionality of the Government of Bihar Notification no. S.O. 1432 dated 28th November, 1985 prescribing declaration form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of inter State Trade;

Held, that notification no. 1432 dated 28th November, 1985 prescribing the declaration form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of inter State Trade, is violative of Article 301 and 304 of the Constitution. The notification is hereby quashed.

Harihar Prasad Debuka and anr. v. State of Bihar and ors. (1987) I.L.R. 66, Pat. 235

BIHAR LAND REFORMS ACT, 1950

1—Section 4, see Bengal Ferries Act, 1885. 1101

2—Section 26 subsections (1) and (2) and 27, scope and applicability of — mode for computation of compensation determined — order covered by sub-section (1) of section 26 — appeal under section 27 maintainable — provisions prescribing mode for computation of compensation under the Act, whether mandatory— previous order fixing the amount of compensation according to market value of the vested property whether without jurisdiction and void— successor-in-office, whether can ignore it as non-

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existent — appellate court, whether can examine the correctness of any earlier order and set it aside.

Held, that, the impugned order is one covered by sub-section (1) of section 26 of the Bihar Land Reforms Act, 1950, inasmuch as the very mode for computation of the compensation has been determined by it. The scope of sub-section (2) of section 26 is limited to correction of the draft compensation Assessment roll in regard to any entry or any omission therefrom. The appeal is, therefore, maintainable.

Held, further, that the compensation which is payable under the Bihar Land Reforms Act, 1950, is what is mentioned in Chapter V and the jurisdiction of the Compensation Officer in assessing the sums is defined by the provision of the Act. The rule, therefore, that when a statute confers jurisdiction upon a Tribunal of limited authority and statutory origin, the annexed conditions and qualifications must be stricity complied with, fully applies to the present case. The Act clothes the Compensation Officer with the power to fix the compensation in prescribed mode. He has no power in this regard except under the Act, and he must act in the manner directed. The relevant provisions prescribing the mode of assessing the compensation under the Act are mandatory. The earlier order dated 5-10-1982 passed by the Deputy Commissioner holding that the compensation amount had to be fixed according to the market value of the vested property was without jurisdiction and void and his successor-in

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office had the right as well as the duty to ignore the same as non-existent.

Held, also, that assuming that the previous order of the Deputy Commissioner dated 5-10-1982 ignored by the successor-in-Office was not void but merely erroneous, rule 22 of the Bihar Land Reforms Rules, 1951, applies, the procedure laid down under order 41 of the Code of Civil Procedure to appeals under section 27 of the Bihar Land Reforms Act 1950. The Civil Procedure Code permits the appellant to challenge the correctness of any order passed earlier in the proceeding affecting the merits of the case in an appeal from the final decision. This principle is of general application and applies to all regular appeals unless so excluded. The previous order, therefore, is liable to be set aside in the present appeal as being illegal.

Man Mohan Dev. v. State (1987) I. L. R., 66, Pat. 1438

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 1—section 16(3) — scope and applicability of — application for pre-emption — non-mention of "description of the land" as provided in schedule 1 of Form LC 13 under rule 19 of the Rules — effect of.

Where in an application under section 16(3), description of the land whether it was agricultural, horticultural or homestead was not given but the map attached to the application showed that the land was agriculatural in character and further the petitioners

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did not mention the name of the District or Sub-division but the applicant did mention the number of the police station and the name of the village, there could absolutely be no difficulty in finding as to in which district and sub-division the land was located and no prejudice was caused to the purchaser by the non-mention of the classification of the plots in question;

Held, that substantial/sufficient informations were furnished in Form L.C. 13 of Schedule I (Under Rule 19) and hence on the basis of the ratio laid down in the Supreme Court case of Hiralal Agrawal, the application filed under section 16 (3) could not be thrown out.

Khokhari Devi and ors. v. The Addl. Member, Board of Revenue & ors. (1987) I.L.R. 66. Pat. 52

2—Section 16(3) scope and applicability of — claim for pre-emption — whether can be defeated by the adjoining lands before an application under section 16(3) was filed.

On a plain reading of section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, the right for reconveyance of the lands transferred can be exercised by a co-sharer or a holder of adjoining land, when the land has been transferred to any person other than a co-sharer or a raiyat of an adjoining land.

Held, therefore, that in the instant case after the registration of the two sale deeds in respect of two plots

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in his favour the purchaser petitioner became holder of two adjoining plots. When applications for pre-emption were filed in respect of two plots transferred, the petitioner can legitimately resist the claim for pre-emption on the ground that he himself is a holder of the adjoining plot. It is almost settled that before an application under section 16(3) of the Act is filed, the purchaser by purchasing an adjoining plot can himself become the holder of an adjoining plot in order to defeat the pre-emption application which is filed later.

Ram Roop Yadav v. The State of Bihar and ors. (1987) I.L.R. 66, Pat. 159

3— section 45B, interpretation of —power under— when can be exercised.

Per L.M. Sharma and B.P. Jha, JJ (S.S. Sandhawalia, C.J. holding the reference to be infructuous).

Section 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, on its face has vested the authorities with wide jurisdiction to reopen any closed proceeding and the only limitation mentioned is that the power may be exercised "if it thinks fit". It means that the authority concerned is not to act without sufficient cause.The proceeding cannot therefore be reopened for merely making a fishing enquiry to test the correctness of the earlier order.

If fresh material relevant to the question is

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discovered which, if considered along with the existing materials on the record is likely to lead to a different conclusion, the proceeding can certainly be re-opened. Further, if any material or matter on the records of a case has been omitted from consideration which may be so substantial as to lead to a different conclusion, the power under section 45B may be exercised. The observation in *Yamuna Rai and others* v. *The State of Bihar and others* are consistent with this view and that case did not lay down the discovery of some fresh material, which was not on the records, as a necessary condition for exercise of power.

Praveen Shanker Singh and others v. The State of Bihar and others (1987) I.L.R., 66, Pat. 883

Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, Sections 7 and 8, scope of — section 8 empowering the State Government to remove difficulties in the enforcement of the Act, whether can be used as a cloak for subordinate legislation and as a substitute for rule-making power under section 7— notifications issued from time to time under section 8 for the purpose of framing rules, whether liable to be struck down— order for suspension in compliance of valid instructions issued by the State—whether can be challenged.

Held, that, section 8 of the Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, empowering the State Government to remove difficulties in giving effect to its provisions

cannot be used as a cloak for subordinate legislation and as a substitute for the express rule-making power under section 7 thereof.

The very purpose and scope of provision like section 8 is to remove difficulties when encountered in the enforcement of the Act and to obviate the time consuming mandatory process which may become necessary for its actual working. It is certainly not the fountainhead for the framing issuance and enforcement of statutory rules for which the express power has been conferred by an- altogether different section 7 and the procedure for the valid enactment of such rules. It is plain on the language of section 8 itself that it authorises no such power and all the notifications purporting to issue under section 8 are thus devoid of any valid statutory source and are therefore, struck down.

Held, further, that in absence of any statutory rule whatsoever which should have been framed under section 7 of the Act, it would be permissible for the respondent State to issue instructions under annexure 6 which ex facie does not suffer from any patent vice or infirmity and the impugned order of suspension under annexure 1 issued at the behest of the District Magistrate is in substantial compliance with the provisions of annexure 6 and therefore the challenge to the order for suspension must fail.

Krishnadeo Mishra v. The State of Bihar and others (1987), I.L.R. 66, Pat. 1489

Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, sections 3 (3) and 4 (2) — untrained teacher on the date of the report of the Specail Board whether can claim to be considered and absorbed in Government service on subsequent acquisition of the training qualification —Full Bench judgment in *Ram Ballabh Prasad Singh and others* v. *The State of Bihar and others*, whether extends mutatis mutandis to teachers as well under section 3 (3).

Held, that a teacher, who was untrained on the date of the report of the special board under section 3(3) of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, cannot claim to be considered for absorption in government service on the ground of having subsequently acquired the requisite qualifications.

It is evident from the second paragraph of sub-section (3) of section 3 of the Act that the procedure prescribed thereby envisages the consideration of the qualification and the suitability of teachers much earlier than the actual take over by a committee (conveniently labelled as a special board) constituted by the State Government for the said purpose. It is only on the basis of the evaluation and report of the said committee or the special board that the government would later appoint such persons on the date of the take over of the institution. The crucial point of time and indeed the

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outer limit for such consideration is the date of the report of the special board for the consideration of eligibility, qualification and suitability of teachers for absorption. There is no vested right in a teacher to claim that after the question of his qualification and suitability has been duly considered by the special board and reported upon, he has chosen to later qualify himself and his case should be re-examined on the date of the notification. Indeed section 3 (3) does not visualise a second special board for consideration of any such cases on or after the date of notification.

Held, further, that the ratio of the Full Bench judgment in *Ram Ballabh Prasad Singh and others* v. *The State of Bihar and others* is applicable in terms to teachers first and by way of extension brings in Headmasters within the ambit of the said term. Indeed far from the said judgment not being applicable to the case of teachers itself, it stricto sensu first governs the teachers and then by necessary implication the Headmaster, who in the words of the Full Bench, being the head teacher, is brought into the fold. The rationale and ratio of the full Bench judgment aforesaid extends mutatis mutandis to teachers as well under section 3(3) of the Bihar Non Government Secondary Schools (Taking over of Management and Control) Act. 1981

Ram Naresh Prasad Nirala v. State of Bihar and others (1987), I.L.R. 66. Pat. 1152.

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Bihar Service Code, 1952, Rule 84 — provisions of — whether a bar to crossing of efficiency bar if writ-petitioner has been promoted to higher post — Government of Bihar memo no. 3014 dated 31.7.1980 — effect of — writ-petitioner, whether entitled to interest at the rate of 12% on all his dues.

Rule 84 of the Bihar Service Code cannot stand in the way of a person in his crossing efficiency bar if he has been promoted to a higher post bearing higher salary. Such cases will be governed by government of Bihar memo no. 3014 dated 31st July, 1980.

Held, that all actions against the writ-petitioner having failed and the writ-petitioner having obtained a promotion to a higher post while he was stuck at the efficiency bar, such an order of promotion itself will be deemed to be an order impliedly sanctioning the crossing of the Efficiency bar.

Where the writ-petitioner till the date of his retirement took all possible steps to obtain the benefits of crossing the Efficiency Bar but to no effect and even his representations to this effect has not even been replied to;

Held, that the inaction on the part of the respondents in the instant case is most deplorable, illegal and uinjustified. The writ-petitioner shall be entitled to interest on all his dues at the rate of 12% per annum till the payment is made.

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R.C. Kaul, Development Officer, Department of Industries, Govt. of Bihar, Patna v. The State of Bihar and ors. (1987), I.L.R., 66 Pat. 1038

Bihar State Univesities Act, 1976 section 60 sub-section 4—exercise of powers under, by the University in appointing ad-hoc committee of a College administered and established by a minority community —whether without jurisdiction —— Declaration by the State Government of the minority character of the institution — requirement of — action of the University in removing the Governing Body of the College appointed by a religious minority without affording opportunity to show cause— whether against the principles of natural justice.

Where, the writ petitioners and association of people professing faith in Budhism, established Sangmitra College and constituted Governing Body adhering to the regulations and statutes of the Ranchi University which was granted temporary affiliation by the Ranchi University and the Government of Bihar and they also applied to the State Government for declaring the college as one established and administered by a minority community on the ground of religion but the declaration was not yet made by the Government.

Held, that though before the Governing Body is constituted in accordance with the provisions of the Statutes, a declaration by the State Government that the institution was governed and managed by a Minority Community may be required but that in itself cannot mean that until and unless a declaration is

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made by the State Government, the University shall extend its powers under sub-section 4 of section 60 of the Bihar Universities Act, 1976 and remove the Governing Body appointed by the sponsors and appoint an ad-hoc committee.

Held, further that the Vice-Chancellor and the Syndicate of the Ranchi University acted without jurisdiction in appointing ad-hoc Governing Body for the College.

Held, also, that appointment of ad-hoc Committee without disclosing the facts as to why actions were taken by the University to remove the Governing body appointed by the religious minority and without assngning any reason was without complyig with the requirements of natural justice and as such the impugned order appointing an ad-hoc committee is without jurisdiction.

Bishwa Budha Parishad and anr. v. The Ranchi University and others (1987) I.L.R. 66. Pat. 603

Bihar Tenancy Act, 1885, section 48E, subsections (6), (7), (8) and (9) 48F(1). *scope and applicability of —subsection (9). whether mandates the Collector to give reasons and record a judgement as in a civil suit even when he agrees with the Board.*

Per S.S. Sandhawalia. C.J. and Uday Sinha. J (S. Shamsul Hasan. J. Contra):-

Held, that, Sub-section (9) of section 48E of the Bihar Tenancy Act, does not mandate the Collector to

give reasons and record a judgement as in a civil suit in the event of his unreserved agreement with the Board.

Where the legislature required the recordings of reasons, it has said so in express terms and where it did not so intend or require, it has designedly remained silent. There is nothing in the provisions of sub-sections(6) and (7) of section 48E of the Act. which requires the recording of reasons of a judgement. To read the two different situations, namely, where the Collector agrees with the Board and where he disagrees with it, as identical for the purpose of the recording of reasons is wholly unwarranted. Where an authority unreservedly agrees with another then to require it to give reasons for such agreement and to go further and record a judgment in this regard as contentious civil suit is uncalled for on any sound rationate.

Where a statutory appeal is provided, it is necessary for the court or authority below to record a reasoned judgment or order for the apprecation of the appellate court. However, where no statutory appeal is provided, the rationale of recording of reasons disappears. Appeal is provided only from an order made under sub-section (8) of section 48E by virtue of section 48E(1). No appeal is provided from orders under suh-section (6) and (7)of sectin 48E. Sub section (8) expressly and independently provides for the recording of reasons in sharp contrast to sub-sections (6) and (7)

which do not even remotely specify any such requirement.

Whilst in sub-section (8) of section 48E recording of reason is mandated, in sub-section (9) the Collector has merely to state the ground which may be no more, indeed, than the fact that he unreservedly agrees with the Board. To misread a mere statement of ground as requirement of recording of reasons and of judgment as in a civil suit is neither tenable on the language of the statute nor so on principle.

Per S. Shamsual Hasan. J. :-

When a report comes subsequent upon the amicable settlement under sub-section (6) of section 48E of the Bihar Tenency Act or as a result of a contested decision under sub-section (7) and the Collector agrees with the Board, the Collector is required to record his order in writing and give reasons for accepting the same. At that stage when dealing with the matter under sub-sections (6) and (7), the authority has to make up its mind whether it should agree with the Board or disagree. It is for this purpose, therefore, that the legislature in its wisdom has enjoined upon the authority to give reasons for accepting the report in contradistinction to its disagreeing with the same under sub-section (8). Sub-section (9) must be read into the three sub-sections in their respective and proper places to achieve a harmonious effect because sub-section (8) really pervades over sub-sections (6), (7) and (8). In all the three situations, therefore the

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authorities must give their reasons in writing. It was intended by the legislature that the authority would give reasons of its own to justify the decision it has come to.

Sarjug Yadav and others v. The State of Bihar and others (1987) I.L.R., 66 Pat. 1260

Bihar Trade Articles (Licenses Unification) Order, 1984 as amended by notification dated 17th October, 1985 — clauses 2(C), 11 and 27(b) and (c) — Collector alone the licensing authority with regard to wholesale trade in any article specified in Schedule 1 — clause 11 — wholesale license of writ-petitioner cancelled by Special Officer incharge Rationing, validity of.

In view of new definition of Collector given in clause 2(c) read with clause 27(b) and (c) of the Bihar Trade Articles (Licenses Unification) Order, 1984, hereinafter called the Order, as amended by notification dated 17th October, 1985, it has to be held that now the Sub-divisional Officer cannot be deemed to be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 of the order on the basis of any authorisation by the Collector. When the framers of the Order as amended have specifically said that Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 of the order on the basis of any authorisation by the Collector. When the framers of the Order as amended have specificaly said that Collector shall be the liensing authority in respect of the

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wholesale trade of any article specified in Schedule I of the Order, then the Collector cannot delegate that power to any other officer on the basis of definition of "Collector" given in clause 2(c) of the Order.

Held, further, that the Special Officer incharge Rationing had no authority to suspend the licence of the petitioner under clause 11 of the Order.

M/s Patna Kerosene Agency v. The State of Bihar and others. (1987) I.L.R. 66, Pat. 94

Bihar and Orissa Co-operative Societies Act 1935, 1— section 65A — provisions of — whether suffer from the vice of arbitrariness providing no limitation or guideline — whether reasonable and infract Article 14 of the Constitution of India— whether liable to be struck down.

Held, that the wide -ranging, unguided and uncanalised powers conferred by section 65A of the Bihar and Orissa Co-operative Societies Act, 1935 on the State Government to call for any and every proceedings before the Registar or his subordinates or any other person and decide them as it may deem fit, plainly suffer from the vice of arbitrariness and consequently infract Article 14 of the Constitution and section 65A, therefore, is liable to be struck down.

The Registrar or any person exercising his powers under section 48 of the Bihar and Orissa Co-operative Societies Act, 1935, is a court and the proceedings before him are judicial in nature. Section 65A does not

merely confer a power on the State Government to revise matters decided by the Registrar or by officials exercising such power but it extends to any and every matter which may as yet be merely pending before the Registrar or any one of his subordinates or any other person acting under his authority.The State Government is empowered to call for any such record and pass such orders as it may deem fit. In essence the Minister would then be performing not merely the statutory functions of the Registrar but his purely judicial functions as well and constitute himself as a Judge or a Court of Law. Further, section 65A is devoid of any limitation or of any guideline and it confers the power in naked arbitrariness for deciding the matter as the Minister deems fit de hors any law or rule. Therefore, such power under section 65A authorising interference in such purely judicial field would be plainly arbitrary, irrational and unconstitutional.

It is not only over the specific heads covered by section 65A which are otherwise provided in the greatest detail by the statute that a blanket unguided power is sought to be given to the Minister. Apart from the enumerated matters, the State Government is entitled to call for "any other matter concerning the working of the Society". Not only that, the power is yet again vested "to call for any record of inspection or inquiry made under this Act or proceedings of any matter". In essence, section 65A thus creates a Frankenstein monster whose shadow pervades every

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provision of statute and every niche and corner of Co-operative work upon which he may at any time choose to lay his hand and dispose of the same by passing such orders as deemed fit. It is an executive repeal of all earlier statutory provisions and vesting the whole gamut of the powers in the hands of the State Government and its Minister without let or hindrance. Section 65A therefore, cannot withstand the test of reasonableness under Article 14 of the Constitution.

No rationale or reason is indicated in the Objects and Purposes of the amending Act 21 of 1976 for the addition of a provision of the nature of section 65A. The provision is not merely an ultimate repository of a revisional power but a blanket power to decide all matters in the original stage itself by the State Government.

Chandeshwar Prasad and others v. The State of Bihar and others (1987) I.L.R. 66, Pat. 895

2-Section 66-B, scope and applicability of — Special Officer of the Central Co-operative Bank terminating the services in obedience to the direction of the State Government who had no jurisdiction to issue the direction — order terminating the services, whether illegal and liable to be quashed.

Where the Special Officer of the Central Co-operative Bank, who had the authority in law to terminate the services of the petitioners and others in

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accordance with law for some valid reasons, did not do so in exercise of his own discretion or his own judgment but in compliance of the unauthorised direction of the State Government which had been communicated to him through the Additional Secretary of the Co-operative Department as also through the Deputy Commissioner;

Held, therefore, that the impugned order of termination of the services of the petitioners as also the direction of the State Government cannot be sustained in the eye of law and has to be quashed. Section 66-B of the Bihar and Orissa Co-operative Societies Act, on which reliance was placed does not even speak about the termination of services, far from authorising the State Government to issue any direction in this regard.

Sheoshankar Prasad Sinha and others v. The State of Bihar and others (1987) I.L.R., 66, Pat. 367

Cadre of Sub Deputy Collectors amalgamated with that of Deputy Collectors — inter se seniority of the mergees and direct recruits —— direct recruits, whether to be treated as senior — date of joining the service, whether immaterial for the purpose of inter se seniority — Rule contained in Notification dated 26-8-1972, rule 3 (vii) — rule, how far applies to direct recruits — right of promotion to seniormost officers in Sub-Deputy Collectors' cadre, whether denied — decision to appoint some direct recruits taken earlier but appointment letters issued later due to certain formalities to be

completed — this technical objection when can be allowed to prevail.

Where the petitioners were initially appointed as Sub Deputy Collectors and in pursuance of a decision amalgamating the cadre of Sub Deputy Collectors with that of Deputy Collectors with effect from 1-4-1974 they became Deputy Collectors and the respondents were appointed as Deputy Collectors as direct recruits on 12-3-1974 and the petitioners claimed seniority over the direct recruits.

Held, that the petitioners must be treated to have been substantively appointed with effect from 1-4-1974. This however cannot entitle the petitioners to their claim of seniority over the direct appointees, unless the latter are shown to have been appointed subsequently. The services of the direct recruits were found satisfactory and they had fulfilled all the conditions for confirmation and accordingly were actually confirmed later. They were, therefore, substantively appointed on and with effect from the 12th of March, 1974, i.e., even before a decision to amalgamate the two cadres was taken by the government and the direct recruits must be treated as senior.

Held, further, that the actual dates of joining the service are immaterial for the purpose of deciding the inte se seniority of the mergees and direct recruits.

Even Rule 3 (vii) of the 1972 Rules mentions continuous officiation also as the basis for deciding

seniority and does not confine itself to substantive appointment as sole criterion. The direct recruits shall also succeed under the test laid down by the rule with reference to continuous officiation.

Held, also, that it cannot be said that the petitioners who were seniormost officers in the Sub Deputy Collectors cadre were being illegally denied their legal right of promotion retrospectively with effect from 1972 and 1973. The possibility of promotion of some of the mergees before the relevant dates, could not have been ruled out and was rightly taken note of while framing the Resolution amalgamating the two cadres in clause (c) of the said Resolution.

On an objection of the petitioners with regard to some direct recruits that the formal appointment letters could not be issued earlier due to certain formalities which were not completed by the candidates themselves.

Held, that the appointment of these direct recruits and that of the other direct recruits were part of one transaction and these direct recruits were placed higher in merit than others, the technical objection should not be allowed to prevail as that will bring about serious anomaly. Besides, there is no justice to be pleaded by the petitioners against these direct recruits as the decision to appoint them was taken earlier and the appointment letters were awaiting compliance of technical formalities. In fact the appointment letters could have been issued on the 12th March, 1974, itself

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to take effect subject to the fulfilment of the formalities. In substance, that is the position although the appointment letters were issued later. This Court, therefore shall not exercise its discretionary jurisdiction in view of the circumstances of the case.

Anil Kumar Sinha and others v. The State of Bihar and others (1987) I.L.R. 66, Pat. 773

Central Excise Ruels, 1944 — Rule 8 sub rule (1) — Notification No. 66 of 1973 and 152 of 1977 — issued under — exempting steel ingots falling under item No. 26 of first schedule of Central Excise and Salt Act, 1944 — Steel ingots manufactured from scraps answering the description in Notification No. 66 of 1973 and other articles manufactured from Ingots in terms of Notification No. 152 of 1977, whether exempted from Excise duty.

Steel ingots falling under item No. 26 of First Schedule of Central Excise and Salt Act, 1944, answering the description specified in the notification no. 66 of 1973 — C.E. dated 1-3-1973 issued under sub-rule (1) of Rule 8 of Central Excise Rules, 1944, were exempted from excise duty provided that on the scraps the appropriate duty of excise leviable had already been paid and by notification no. 152 of 1977 dated 18-6-1977 the scraps used for producing ingots were also exempted and as such the writ petitioners who have integrated steel plant and manufacture ingots with the aid of electric furnace had got on liability to pay any excise duty on the scraps in veiw of the

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exemption by notification no. 152 of 1977 and on other products from such steel ingots also they have the exemption in view of the notification dated 1.3.-1973 and 18-6-1977.

Held, that the writ petitoners are not lible to pay any excise duty on the ingots which have been manufactured from scraps which answered the description in notification No. 66 of 1973 and on other articles manufactured from the ingots by them in terms of notification No. 152 1977. The writ petitioner, Tata Iron & Steel Company is exempted from any excise duty on the scraps in terms of notification no. 150 of 1977. They have accordingly no liablity to pay the demands.

Tata Yadogawa v. *The Union of India and ors.* (1987) I.L.R. 66, Pat. 341

Central Sales Tax Act, 1956 - 1—section-14 clause (vi) — Oilseed — meaning of —— Copra, whether assessable to sales tax at the rate of 3% only under section 6(3) of the Bihar Sales Tax Act, 1959 —Bihar Sales Tax Act, 1959 section 6 (3).

Reading the definition of oilseeds under section 14 clause (vi) of the Central Sales Tax Act 1956, it is implicit that 'copra' i.e. dry coconut was an oilseed and thus being covered within the purview of that definition, it was assessable at the rate of 3% only under section 6(3) of the Bihar Sales Tax Act, 1959.

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Commissioner of Commercial Taxes, Bihar, Patna V. M/s Ekbal Ram Lakhman Prasad. (1987) I.L.R. 66 Pat. 564

2— Sections 14 (ia) and 15(a) — Scope and applicability of —— manufacturing briquettes by mixing coal dust with soil and molasses — whether a product of coal or coke to be treated as goods specified in section 14(ia).

If the words "coal, including coke in all its forms" have to be given a wide meaning, then any product directly connected with coal or coke, has to be held as a product of coal, or coke, in whatever form it may be. In the instant case when the respondents have admitted that the petitioners are preparing briquettes for domestic consumption by mixing coal dust with soil and molasses, the briquettes so prepared have direct connection with coal or coke, especially when coal dust is the main ingredient of the product. Once the briquettes prepared by the petitioners are held to be a form of coke then they are entitled to the protection of section 15 of the Act.

Held, therefore, that in the instant cases the communication issued by the Deputy Commissioner, Commercial Taxes, on the basis of the decision taken by the State Government that briquettes prepared from the coal dust be treated as unspecified goods must be quashed and the coke briquettes prepared by mixing coal dust soil and molasses should be treated as goods specified in the entry 14(ia), being a form of coke during the assessment proceeding.

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Bajrangbali Coke Briquetting Industries v. The State of Bihar and ors. (1987) I.L.R. 66, Pat. 1007

Code of Civil Procedure, 1908. -|-Section 2(11),and Order XXII Rules 3 and 4 — scope and applicability of — legal guardian of a minor in possession of the property — whether a legal representative on the minor's death — father-guardian being on the record already — other heir or heirs not substituted — question of abatement, whether would arises — requirement in Rules 3 and 4 of order XXII, whether of being a legal representative and not of the heirs or the heirs in Class I or class II under section 8 of the Hindu Successin Act — Hindu Succession Act. 1956 section 8, Per S.S. Sandhawali, C.J. and S. Ali Ahmad, J. (Lalit Mohan Sharma, J. Contra):—

Held, that the legal guardian of a minor in possession of his property who is himself a party to the suit along with such minor, would, on the latter's death, undoubtedly come within the sweep of the phrase any person who intermeddies with the estate of the deceased" and become a legal representative within the inclusive definition of section 2(11) of the Code of Civil procedure. Once that is so, it is plain that if he is already on the record of the case, the mere absence of one or the other heirs would not result in the abatement.

The definition of "legal representative" in section 2(11) of the Code of Civil Procedure is a wide and inclusive one and conceives of two distinct categories.

Firstly, the heirs or persons who in law represent the estate of the deceased person. However, at par with them and in a Class by itself is any person who intermeddles with the estate of the deceased. Such a person is equally a legal representative. An intermeddler (who is on the same footing as an executor de son tort in English law) is one who in any way whatsoever dabbles with or comes in touch with the estate of the deceased. The wide sweep of the phrase intermeddler with the estate, as a term of art, and the intention of the legislature in expressly including an intermeddler in the definition of legal representative under section 2(11) of the Code of Civil Procedure, is thus not in doubt. Once that is so a legal guardian in possession of the estate would, in the event of the death of the minor, come squarely within the ambit of an intermeddler with the estate in the eye of law, even if he himself does not happen to be a class I heir thereto.

In can hardly be disputed that a legal guardian during the life time of the minor is legally and factually in possession of his ward's estate. In the event of the minor dying, the factum of the actual or notional possession of the estate of the legal guardian does not evaporate in the thin air. No such fiction can be exercised. There is a settled general rule that if a person is specifically found in possession of an estate at a prior date there is a presumption of continuity of such possession till the contrary of such possession till the contrary is established. With regard to a legal guardian in possession of the estate of the minor, there

would be a presumption of the continuity of possession after the death of the minor till it has been shown otherwise that he was dispossessed thereof. Once it is so, the former legal guardian would be in possession of the estate either lawfully or unlawfully. to be an intermeddler, the legality of the entitlement is irrelevant.

Held, therefore, that the father of the deceased minor was an intermeddler with his state and consequently his legal representative. Therefore, the father being on the record already, as the legal representative, no question of abatement would arise.

Held, further that the language employed Rules 3 and 4 of Order XXII of the Code Civil Procedure is not that the heirs or the heirs in Class I or class II under section 8 of the Hindu Succession Act must be made party in the event of the death of the original party, but only that the legal representatives of the deceased should be so made.

Per Lalit Mohan Sharma, J : —

A general proposition cannot be laid down for universal application that on the death of minor his guardian must be held to be an intermeddler and therefore his legal representative.

The question whether a person is an intermeddler so as to be the legal representative of a deceased party in a given case is dependent on the relevant facts, which facts have to be alleged by somebody. The

question remains to be dependent on fact to be alleged. If necessary assertion is made by a party, the other side will be entitled to an opportunity to deny the same, and the court will have to decide the issue only after ascertaining the factual aspect. If one of the parties in a particular case so alleges the question whether the guardian is an intermeddler does not arise for decision and he cannot be presumed to be so as a matter of law. . .

Held, further, that, in the present case, the plea which is dependent on facts cannot now in the present letters patent appeal be entertained specially when the consistent stand of the respondents has been otherwise. On the death of the minor. Leaving behind his mother as the sole heir during the pendency of the appeal in the court below, nobody alleged that the guardian was an intermeddler. On the other hand, there was no dispute between the parties that the estate was represented by the mother of the minor and the only question debated by the parties was whether there was sufficient cause for condoning the delay in filing the application for her substitution after setting aside abatement.

Held, also, that as admittedly the minor's mother, who was class I heir under section 8 of the Hindu Succession Act exclusively inherited the estate, the presence of the father and the other relations, who were Class II heirs, on the records is wholly immaterial and wholly irrelevant for deciding the present question.

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Sudama Devi and others v. Jogendra Choudhary and others (1987) I.L.R. 66, Pat. 845

Code of Civil Procedure 1908 —1—section 80, scope and applicability of — identity of the person issuing notice under section 80 being the same as the person filing the suit — provisions of section 80, whether complied, — Limitation Act 1908 -[- Articles 56 and 120 and Limitation Act 1963 -[- section 30, Articles 18 and 113 — suit for realisation of price for work not done in its entirety — Article 56 of the old Limitation Act or Article 18 of the New Limitation Act not applicable — residuary article 120 of the old Limitation Act or Article 113 of the New Limitation Act and section 30 whether applicable — suit, whether barred by limitation.

Where the suit was filed by M/s Bhagat and Company and notice under section 80 of the Code of Civil Procedure was given by Shri D.R. Bhagat a Partner of Bhagat and Company;

Held, that there was due compliance of the provisions of section 80 of the Code of Civil Procedure as the identity of the person who issued the notice was the same as the person who brought the suit.

Where it is not one of such suits where the plaintiff has sued the defendant after completion of the construction work of the defendant but a case where the plaintiff was stopped from doing any further work by the Executive Engineer on 23.8.1961 when the right to sue accrued to the plaintiff and the suit was instituted in the year 1966;

Held, that Article 56 of the limitation Act, 1908, Corresponding to Article 18 of the New Limitation Act will not govern the case and the only other Article applicable will be Article 120 of the old Act which is described as a residuary Article and says that any suit for which no period of limitation is provided elsewhere in the schedule to the Act, the period of limitation would be six years from the date when the right to sue accrues. Under the corresponding Article 113 of the New Limitation Act the period of limitation has been curtailed which provides only three years' period of limitation from the date when the right to sue accrues and as a consequence will attract the provision of section 30 of the New Act. Section 30 provides that any suit for which the period of limitation is shorter than the period of limitation prescribed by the Old Act may be instituted within a period of seven years next after the commencement of the New Act or within the period prescribed for such suit by the Old Act. whichever period expires earlier. Under the old Act, by virtue of Article 120, a period of six years was prescribed as the period of limitation from the date when the right to sue accrued, which is earlier than the period of seven years ex gratia extension under section 30(a) of the New Act. Taking the shorter period as prescribed in the Old Act, therefore, into consideration, the period of limitation would expire on 23.1.1987 or, perhaps, on 22.1.1967 (which is six years from the date when the right to sue acrued). Obviously, therefore, in the year 1966, when the suit was instituted, the suit cannot be said to be barred by limitation.

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M/s Bhagat & Company. Hazaribagh v. The State of Bihar (1987) I.L.R. 66. Pat. 118.

2— section 151 —— ambit of — resort to this section to stay the eviction suit pending disposal of earlier suit for specific performance of contract, whether will frustrate the legislative mandate in the provisions of section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act — Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982.

Where the defendant in an eviction suit filed an application in the suit under section 10 of the Code of Civil Procedure, 1908, hereinafter called the Code, for staying the eviction suit pending the disposal of the suit filed by him earlier for specific performance of contract which was rejected and then in the revision application in the High Court the plea was taken that in case section 10 of the Code was not applicable, relief be given by taking recourse to section 151 of the Code;

Held, that by resorting to the inherent powers under section 151 of the Code the very object and purpose of a bilateral munificent piece of legislation as the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, hereinafter called the Control Act, will be frustrated, setting at naught the legislative mandate and thereby rendering nugatory the provisions of section 14 of the Control Act. To take recourse to such a procedure would not only be not subservient to the ends of justice but would be overriding the Special procedure mandated by a self contained Code as the Control Act. It would indeed

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be an abuse of the process of the Court by trying to induce the Court to render section 14 of the Control Act as otiose and redundant.

Dr. N.P. Tripathi v. Smt. Dayamanti Devi and another, (1987) I.L.R., 66, Pat. 182

Code of Criminal Procedure, 1973 *—1- Sections 5 and 428, scope and applicability of — conviction and sentence by a court Martial under the provisions of the Army Act — provisions of section 428, whether applicable — period of detention before conviction, whether can be allowed to be set off — order of re-arrest — principle of natural justice, whether violated.*

Held that, what has been envisaged by section 5 of the Code of Criminal Procedure, 1973, is to allow any special jurisdiction or power conferred or any special form of procedure prescribed by a special law to take control of the proceedings and exclude the operation of the Criminal Procedure Code. But merely because there is a special law, the operation of the Criminal Procedure Code is not excluded unless the special laws expressly or impliedly provides in that behalf, in which case the special law applies, otherwise the Code applies. Conviction and sentence passed by the Court Martial are not in any way affected by granting set off against the term of imprisonment imposed on the accused as provided by section 428 of the Code of Criminal Procedure, 1973, and they remain the same even after the set off is allowed. Section 428 is absolute in its terms. The object of the enactment of section 428 was to release the anguish of

prolonged detention of undertrials and to avoid overcrowding in jails. The Army Act like the Navy Act or the Air Force may be a special law and special provisions are made for the trial by the court martial, still how the sentence would be carried out and in doing so, set off would be granted or not, is not covered by the special provisions thereof.

Held, therefore, that the petitioner was entitled to the benefit of section 428 of the Code of Criminal Procedure, 1973, and to the issue of a writ in the nature of mandamus directing the respondents for not taking the petitioner in custody pursuant to the orders contained in Annexures 1 and 2 to undergo unexpired portion of his sentence.

Held, further, that the petitioner was not given opportunity of being heard nor the authority of law, under which he has sought to be detained, was disclosed to him and as such the principle of natural justice was violated.

Ex-Major Ganesh Prasad Sinha v. Union of India New Delhi and ors. (1987) I.L.R., 66, Pat. 101

2—section 125 — maintenance — Executive Magistrate, whether can pass order of maintenance — Chapter IX of the Code — Scheme of.

An order of maintenance can be passed only by a competent Judicial Magistrate of the 1st class and not by any Executive magistrate. The scheme as provided in Chapter IX can be enquired into and relief granted only

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by the Judicial Magistrate of the 1st Class and in the instant case respondent no. 3, the Executive Magistrate, Desertion Cell, being not competent, had no lawful and legal power to grant such maintenence.

Held, therefore, that the order passed by the Executive Magistrate, respondent no. 3 granting maintenance is wholly without jurisdiction and void ab initio.

Jagdish Mahto v. The State of Bihar and others (1987) I.L.R. 66. Pat. 812

3— Sections 145, 146(1) 397(2)—Scope and applicability of — order of attachment of immovable property under — section 146(1)—nature of—whether revisable under section 397(2).

The attachment of property under section 146 (1) of the Code of Criminal Procedure, 1973 is nothing but a step-in-aid in the pending proceeding under section 145 of the Code. It is only an enabling provision and the wide discretion is left to the Magistrate to attach property conditioned on the fact that he considers the case to be one of emergency or the other requirement specified under section 146(1). Sections 145 and 146 are intended to prevent a breach of peace and to take measures against its continued likelihood. Attachment of immovable property herein is to be resorted to only as a step-in-aid to the pending proceedings in this regard.

Held, therefore, that both on principle and precedent an order of attachment of an immovable property under section 146(1) of the Code is interlocutory in nature within

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the meaning of section 397 (2) of the Code and consequently no revision against the same is maintainable.

Bechan Mahto and others v. The State of Bihar and another. (1987) I.L.R. 66. Pat. 1474

4—sections. 167, 309(2) and 439 — order of remand of an accused — application or request for such remand, absence of——Magistrate whether has jurisdiction to pass an order of remand — physical production of the accused before the Magistrate, failure of — whether vitiates the order of remand even if circumstances for non-production are beyond control — accused in custody under a valid order of remand on the date of hearing — whether he can claim a writ of habeas corpus on the ground of earlier remand order being defective — judicial orders of a criminal court (stricto sensu) under the Code of Criminal Procedure —whether amenable to quashing by a writ of certiorari.

Held, (i) A Magistrate has jurisdiction to pass an order of remand despite the absence of any formal written application or a request for such remand being made by the Police or the prosecution. (ii) The mandate of the law is that accused person is to be physically produced before the Magistrate and that the submission on behalf of the State that subsequent to the first production the physical presence of the accused person for further remand is unnecessary must be rejected. Though physical production of the accused before the Magistrate is desirable yet the failure to do so would not per se vitiate

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the order of remand if the circumstances for non-production were beyond the control of the prosecution or the Police. (iii) The true test for the legality or otherwise of the detention is on the date of hearing itself.A defect in an earlier order of remand of an accused person is not incurable and he cannot claim a writ of habeas corpus on that score alone if on the date of hearing he is in custody under a valid order of remand.

(iv) The Judicial orders of a criminal court stricto sensu under the Code of Criminal Procedure are not amenable to quashing by a writ of certiorari. The present writ jurisdiction case seeking primarily the quashing of the judicial orders of the Chief Judicial magistrate and the learned Sessions Judge (Annexures 4 and 5) is not maintainable.

Ramesh Kumar Ravi alias Ram Prasad v. The State of Bihar and ors. (1987) I.L.R. 66. (Pat). 1351

5—sections 190, sub-section (1), clauses (a), (b) and (c), 203 and 204, scope of —whether clauses (a), (b) and (c) of sub-section (1) of section 190 pertaining to cognizance of offences by the Magistrate are mutually exclusive—issue of process by the Magistrate are mutually exclusive — issue of process under section 204 after cognizance, whether indentical with and shackled by the specific requirements under section 203 for dismissal of a complaint— Magistrate taking cognizance and issuing process on relevant pieces of evidence before him including statement in writing filed by the complainant before the police—propriety of.

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Held, that clauses (a), (b) and (c) of sub-section (1) of sub-section 190 of the Code of Criminal Procedure, 1973, pertaining to cognizance of offences by the Magistrates under the said section are in no way mutually exclusive. There appears no legal mandate whatsoever that cognizance must be taken either under clause (a) or clause (b) or clause (c) separately and that they do not intermingle or overlap each other. The three clauses are not divided by the word "or" from each other. Therefore, any hermetic sealing or compartmentalisation of clauses (a), (b) and (c) of sub-section (1) of section 190 and holding that these are mutually exclusive is neither justified on principle nor on authority.

Held, further that the issue of process against an accused under section 204 after cognizance by the Magistrate under section 190 is in no way indentical with and consequently is not shackeled by the specific requirements mandated in section 203 of the Code of Criminal procedure for the dismissal of a complaint. The dismissal of cimplaint under section 203 and the issue of process under section 204, are things distinct and apart both on principle and the language of the aforesaid provisions and it is erroneous to label them as identical.

Section 203 is in terms specific with regard to the materials on the basis of which complaint is to be dismissed at the threshold without issue of process to the accused. In sharp contrast thereto section 204 which is inevitably linked with section 190 regarding the cognizance of offences by Magistrate, does not contain

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any such pre-conditions or mandated materials upon which the process is to be issued against the accused. The matter here is at large in the discretion of the Magistrate and if in his opinion there is sufficient ground for proceeding, he must forthwith issue process of the nature warranted by a offence, namely, either a summons or a warrant therefore. Further, section 204 makes no statutory requirement of the recording of any detailed or brief reasons for the issue of process, on the other hand section 203 further mandates that the Magistrate must briefly record his reasons for dismissing the complaint. Section 204 requires no more than the opinion or satisfaction of the Magistrate that there is sufficient ground for proceeding against the accused.

Held, therefore, that the learned Magistrate whilst taking cognizance and issuing process adverted all the relevant pieces of evidence before him including the statement in writing filed by the complainant before the police for arriving at his judicial opinion that there was sufficient ground for proceeding against the petitioners under sections 307 and 500 of the Indian Penal Code and as such that discretion is not to be lightly interfered with.

Gajendra Swaroop Srivastava v. Baleshwar Prasad Kesari (1987) I.L.R. 66, Pat. 1573

6—Section 294(3) — Scope and applicability of — postmortem report — non-examination of the doctor to prove the postmortem report — effect of — and injury report or postmortem report, whether and when covered

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under section 294(3) of the Code — such document, whether to be taken as substantive evidence.

Sub-section (3) of section 294 of the Code of Criminal Procedure, 1973 contemplates only genuineness of the documents to be and not that of the document or contents thereof. An injury report or postmortem report is fully covered under this new provision if the genuineness of the document is not challenged or not disputed.

Held, therefore, that in the instant case the postmortem report (Ext.3) whose genuineness was not denied or challenged by the appellant has to be taken into consideration under sub-section (3) of section 294 of the Code of Criminal procedure, 1973.

Taiyab Gowala v. The State of Bihar (1987), I.L.R. 66. Pat. 1025

7— section 309 — physical production of an accused before the Magistrate, whether necessary for extension of his remand to custody — failure to do so, whether vitiates the order of remand.

Held, that though it is desirable that the accused should be present before the Magistrate but such physical production is not inflexibly mandatory for extending his remand to custody and failure to do so would not vitiate the same.

Mishri Singh v. The State of Bihar and others (1987) I.L.R. 66. Pat. 323

8—Section 389. See Constitution of India. 1182

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9— Section 482 — order of Special Magistrate separating trial of accused for offences under sections 165 A and 165 A read with section 34 of the Penal Code from one under sections 121 - A, 124 - A and 120 - B of the Penal Code — quashing of, whether will prevent the abuse of the process of the court — Criminal Law Amendment Act, 1952, — sections 7(3) and 8(1)— provisions of — Special Judge, whether can try for offences under section 121 - A and 124 - A of the Penal Code without the accused persons having been committed for trial — Penal Code, 1860 — sections 34, 120B, 121 - A, 124-A and 165 - A.

Where the State filed an application under section 482 of the Code of Criminal Procedure, 1973, for quashing the order passed by Special Judge separating the trial of the accused for offences under sections 165 - A and 165 - A read with section 34 of the Penal Code, 1860, from the offences under sections 121 - A, 124 - A and 120 - B of the Penal Code;

Held, that the quashing of the impugned order, in the instant case, will prevent the abuse of the process of the court and shall also secure the ends of justice. On the contrary, if the order of the Special Judge is upheld, it is likely to cause prejudice to the accused persons, in as much they shall have to face two separate trials, although many evidence in the two trials, although many evidence in the two trials may be common.

If the offence under section 165 - A read with section 34 of the Penal Code is tried separately, the prosecution has to lead the same evidence in connection with the

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charge of conspiracy alleged to have been entered into between the accused persons in respect of offences under sections 121 A and 124 - A of the Penal Code because, according to the prosecution, the bribe had been offered to the officials at the checkpost to allow the accused persons to leave the territory of India and to proceed to Nepal.

Held, further, that reading section 7(3) alongwith section 8(1) of the Criminal Law Amendment Act, the Special Judge can try for offences even under sections 121 - A and 124 - A of the Penal Code without the accused persons being committed to him for trial for the said offences.

State of Bihar v. Simranjit Singh Mann and others. *(1987). I.L.R., 66, Pat.* 208

Constitution —

1—*Articles 12, 14, 226 — Article 14 — principle of*— whether violated —dismissal of writ-petitioner without holding domestic enquiry, whether violative of the principles of natural justice — Article 226 — whether justiciable under — Article 12 — M/s instrumentation Ltd, whether an authority within the meaning of Article 12 of the Constitution.

Where the termination of services of the writ-petitioner was for a proved misconduct by rejecting the show cause filed by him, without holding an enquiry into the explanation furnished by him;

Held, that the dismissal of the writ-petitioner from service on alleged misconduct of theft, breach of trust

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and faith without holding any domestic enquiry but treating the explanation given in the show cause an admission of guilt is arbitrary, capricious and in complete breach of the principles of natural justice and thus violative of Article 14 of the Constitution and is justiciable under Article 226 of the Constitution.

After having realised the price of the scrap wood, imposition of penalty by way of deduction Rs. 400/= being the cost of 10 quintals of excess wood and realisation of Rs. 100/= for using the truck from the dues of the writ-petitioner, incorporated in order of dismissal, appear to be unreasonable and vindictive.

Held, further, that disengagement brought about by the order of termination of service of writ-petitioner being ip-so facto void and non est, it would be deemed that the writ-petitioner continued in service.

Held, also, on a proper assessment of facts in the light of relevent Articles of Association of the company, that it is an authority within the meaning of Article 12 of the Constitution and is, therefore, an instrumentality and agency of the Government.

Raj Narayan Singh v. Presiding Officer, Labour Court, Bokaro Steel City and another, (1987), I.L.R. 66, Pat. 827

2— Articles 14 and 16 - provisions of - whether violated in respect of Homeopathic Diploma holder Vis a Vis Ayurvedic and Unani Degree-holder medical officer in regard to pay scale and status — classification based on educational qualification made with a view to achieving

administrative efficiency whether rest on fortuitous circumstances.

The fourth pay revision Committee recommended different pay-scales for two types of Medical Officers namely, the Ayurvedic and Unani Degree holder medical officers on the one hand, and the Homeopathic Diploma-holders, on the other describing the former as gazetted officers and the latter as non-gazetted. The State Government had taken a decision both in regard to the pay scale and with regard to their status in conformity within the recommendation of the Pay Revision Committee.

NO prejudice has been caused to the writ petitioners, the Homeopathic Diploma holders, which may be said to be violative of Articles 14 and 16 of the Constitution.

Classification on the basis of educational qualification made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances. Classification must be truely founded on substantial differences which distinguished persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved, judicial scrutiny can, therefore extend only to the considerantion whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evalution of the basis of classification.

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Dr. Mathura Prasad and others. v. The State of Bihar and others.(1987) I.L.R. 66. Pat. 650

3—Articles 14 and 16 — violation of — fixation of seniority between petitioner and respondents — State fixing seniority on the basis of availability of posts for respondents even before they entered in service, whether violative of Articles 14 and 16.

Where respondent No. 8 to 16, direct recruits, were admittedly appointed as Inspector of Excise after the petitioner was promoted to that post but a fictional seniority was given to the respondents with effect from the dates when admittedly they were not in the service of the State Government;

Held, that the petitioner shall be deemed to have been appointed in the service prior to the respondents aforesaid and they can not claim seniority over the petitioner merely on the ground that the posts which had been reserved for direct recruits were lying vacant from the date prior to the promotion of the petitioner. It is almost settled that the seniority is to be determined normally with effect fromthe date of entry into the service even in cases where recruitment is made from different sources.

Held, further that the action of the state while fixing the seniority between the petitioner and respondents aforesaid on the basis of availability of the posts for the respondents is violative of Articles 14 and 16 of the Constitution.

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Held, also, that part of the gradation list where respondent No. 8 to 16, have been shown as senior to the petitioner is quashed and the respondent State is directed to include the name of the petitioner at proper place in the said gradation list. The petitioner shall also be entitled to any consequential benefits because of the change in the position of petitioner in the gradation list of Inspector of Excise.

Jitendra Prasad Srivastava v. The State of Bihar & others (1987) I.L.R. 66, Pat. 1629

4—Article 21—capital crime punishable with death, whether covered by constitutional right to speedy public trial under Article 21 — a broad time frame for the original trials of offences including capital ones punishable with death, whether can be spelt out — right to speedy trial, whether includes within it the period of police investigation — delay of ten years or more in the investigation and original trials of pending cases for capital offences, — delay of five years or more in the investigation and original trials for capital offences registered hereinafter —whether would violate or attract the constitutional guarantee of a speedy public trial under Article 21 — charges, whether liable to be quashed—rule of presumptive prejudice, whether rebuttable,

Held, (i) that, on principle and consistent precedent capital crime punishable with death is equally well within the majestic sweep of the constitutional right to speedy public trial guaranteed by Article 21 of our Constitution.

(ii) that it can now be authoritatively held that a broad time frame for the original trials of offences

including capital ones punishable with death can well be spelt out by precedent:

(iii) that a callous and inordinately prolonged delay of ten years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extra oridinary or exceptional reasons) in the investigation and original trials of pending cases within our state for capital offences punishable with death would plainly violate the constitutional guarantee of a speedy public trial under Article 21 :

(iv) that in accord with Sheela Barse's case a callous and inordinately prolonged delay of five years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reasons) in the investigation and original trial for capital offences registered hereafter within our State would plainly attract the constituional guarantee of a speedy public trial under Article 21 : and

(v) that the aforesaid rules of presumptive prejudice are rebuttable by the prosecution by showing that the delay was wholly or substantially contributed by the default of the accused or was otherwise justifiable because of extraordinary or exceptional reasons.

Held, therefore, that on the case on which the trial for capital offence extended nearly 14 years without any default on the part of the accused petitioners or any extraordinary or exceptional reasons, the constitutional right of the petitioners to a speedy trial guaranteed under Article 21 of the constitution stands plainly and manifestly

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violated and as such the charges against them must fall on that sole ground and have to be inevitably quashed and that in other cases the prosecution has been able to show that the delay in the trial was substantially or equally contributed to by the default of the accused petitioners themselves and they cannot claim a cosntitutional right of the nature aforesaid.

Surya Narain Singh and ors. v. The State of Bihar (1987) I.L.R. 66. (Pat). 1277

5—Article 21, —Code of Criminal Procedure, 1973, section 389 — scope and aplicability of — constitutional right of speedy trial, whether includes the expeditious disposal of substantive appeals against conviction as well — bail on the ground of inherent limitations or inability of the High Court in hearing and disposing of substantive appeals against convictions on capital charge after one year of the pendency of the appeal, whether and when can be granted — exceptions to the general rule enunciated — section 389, whether envisages grant of bail on the ground of inordinate delay in hearing of substantive appeals.

Per S.S. Sandhawalia, C.J. and N.P. Singh, J (S.H.S. Abidi, J contra).

Held, that, the constitutional right of speedy trial implicit in Article 21 of the Constitution includes within its sweep the expeditious hearing of substantive appeals against conviction as well. Article 21 does not stop short at the end of the trial but continues to extend its protective shield even after the post conviction stage. Expeditious

hearing of substantive appeals against convictions is fairly and squarely within the mandate of the said Article. Equally it has to borne in mind that in the event of later acquittal by the appellate court the long incarceration in jail during the pendency of the appeals is inherently incompensatable in terms of money. In any case it is a virtually legal impossibility to secure monetary damages against the State for wrongful or false imprisonment in such cases Added to this is the fact that both for undertrials, and for convicts, in jails within the state the conditions are admittedly sub-human. There is thus no option but to hold that the issue of delay occasioned by the High Court's own inability to hear the substantive appeals expeditiously de hors the merits is directly and materially relevant for consideration in the grant of bail to the convicts.

Held, further, that unless there are cogent grounds for acting otherwise, an appellant on conviction on a capital charge would become entitled to a favourable consideration for grant of bail when after one year of incarceration and pendency of the appeal the High Court is unable to bring the substantive appeal pending before it to a final hearing. No exhaustive classification of cogent grounds for acting otherwise is either possible or desirable. However, where capital crime may further be peculiarly heinous and horrendously brutal in its nature and shocking to the conscience of the Court and society in general, convicts would not be ordinarily entitled to such concession of bail once they have been held guilty by the

trial court of such grievous crime, for example, multiple and mass murders on caste and triabal considerations, dacoity coupled with murder, rape with murder, bride-burning or bridemurder terrorist crime, day-light bank robbery, abduction for ransom followed by murder, indiscriminate use of firearms and bombs in murders disturbing public order and so on.

Even under section 389 of the Code of Criminal procedure inordinate delays in the hearing of substantive appeals because of the Court's own inability to do so would be an extremely relevant factor for the grant of bail. The said section mentions the recording of reasons for suspending the sentence and undoubtedly it would be a good reason to state that there is no practicable possibility of expeditious hearing of the appeal.

Per S.H.S. Abidi, J : —

Considering the positon of the system of working in our courts, it appears that there are some reasonable causes for the delay in disposal of cases and in spite of best efforts of the courts delay have become inevitable. As a matter of fact the delays are not to be looked but its causes should be removed by providing speedy justice. Orders for bail or orders for abatement of appeals on the ground of delays may create paradise for criminals and expose the law abiding and peaceful citizens to horrors and dangers.

After conviction one cannot be and is not deprived of his liberty and he files appeal. The appellate courts are to exercise their powers and they do exercise their

powers. For that provision has been made in the code and section 389 is there. After appeal the court can suspend the execution of the sentence and order for the release of the appellant on bail till the disposal of the appeal on any such condition as the court thinks fit and proper to impose. For this the court is to record the reasons.

There is no reason to fix the reasonable period of time at one year with a despotic formula or to adopt different standands in respect of offences both, for the shocking as well as non-shocking. If the ground of delay is the consideration without keeping in view the merits of the case in the case of non-shocking cases then why there should be no consideration of delay in the case of those persons in respect of whom conscience is shocked. In both the cases delay in the disposal of the case may entitle the appellants for consideration of the bail when the court is not able to hear the case early. The legislature in its wisdom did not think proper to fix any period, otherwise it would have been possible for the legislature to have fixed a period.

In view of Chapter XII, Rule 17 sub-rule (c) of the Patna High Court Rules, the cases in which bail has been refused to the appellant after conviction can be given priority and precedence in hearing and they can be heard earlier than those cases in which bail has been granted by the court and if this rule is strictly followed then the appeals in which the convicts are in jail can be heard within a very reasonable period of time which may in

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cases come down to less than year. It appears that this rule has been observed more in breach resulting in inability of the courts to hear the appeals. When a provision exists in the Patna High Court Rules about the early listing as "expedition" it could be resorted to and if it is resorted to then no such situation can arise for fixing a period. The time lag between the prosecution from the stage of the court below till the disposal of the appeal will not come in way and the law will have its own course. The law has made a provision for early disposal in its Rule. Without following that rule, if the accused are enlarged on bail simply because the period of one year has elapsed, it will be something to deviate from the provision of law as well as the judicial pronouncement of the highest court of law.

Anurag Baitha v. The State of Bihar (1987) I.L.R. 66, Pat. 1182

6—Article 311 (1), applicability of — petitioner appointed by the Director — Acting Director, whether had jurisdiction to terminte the service of the petitioner —— appointment made on ad hoc basis till further orders — whether attracts Article 311 or the principles of natural justice.

Where the senior Joint Director terminated the services of the petitioner and it was conterded that he had no jurisdiction to do so because he cannot be equated with the Director, who had appointed him and he was only to perform the current duties of the Director in addition to his own duties:

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Held, that his power to act as Director ceased to be confined to the discharge of current duties only and was enlarged so as to authorise him to discharge all the duties of the Director including appointment and termination of service and he did it for a number of years directly affecting a large number of persons and thus the impugned order did not suffer from illegality on the ground that the Acting Director had no power.

Held, further, that it was petitioner's ad hoc appointment made till further orders which was being terminated with immediate effect by the order and the order, therefore is one of termination simpliciter which does not attract either Article 311 of the Constitution or the principles of natural justice.

Krishna Ranjan Thakur v. The State of Bihar and another (1987) I.L.R. 66. Pat. 1416

7—Article 342 (1) —Tamarias of Singbhum, whether are Patar-Mundas — whether they are included in the notification issued by President of India under Article 342 (1) — inclusion of Tamarias in item no 52 under the heading "backward class" and in item no. 34 under the heading very backward class" in Annexure-1, — validity of.

Held, that the Tamarias of Singbhum are Patar-Mundas and they are included in the notification issued by the President of India under Article 342 (1) of the Constitution. Consequently their inclusion in item no. 52 under the heading" backward class" and item no. 34

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under the heading" very backward class in the decision of State Government contained in Annexure-1 must be struck down.

Shyam Sunder Nag and ors v. State of Bihar and ors. (1987) I.L.R. 66. Pat. 764

Court Fees Act, 1870 -[- section 7, Clause (iv) — suits falling under section 7 (iv) — estimation of the relief by the plaintiff, whether to be ordinarily accepted — palintiff, whether given absolute right or option to place any valuation whatever on such relief — court, whether has jurisdiction to interfere where plaintiff manifestly and delibrately undervalues and understimates the same — objection regarding insufficiency or otherwise of the valuation whether can be raised — mandate at the end of clause (iv) of section 7 that the plaintiff shall value the relief sought — whether governs each of the proceeding sub-clauses (a) to (f) equally.

Held, that, in suits falling under clause (iv) of section 7 of the Court Fees Act, irrespective of the various sub clauses thereof, the estimation of the relief by the plaintiff has to be ordinarily accepted. Nevertheless, (i) the palintiff has not been given any absolute right or option to place any valuation whatever on such relief and (ii) where he manifestly and deliberately undervalues and undrestimates the same, the court is not a silent and impotent spectator thereof and has clear jurisdictioin to interfere. (iii) the sufficiency or otherwise of the relief estimated by the plaintiff is now no longer in question and finical objections about the insufficiency of such

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estimation should not any longer be permitted to be raised by the trial courts. (iv) no difference or line of distinction can be drawn qua the individual sub-clauses (a) to (f) of clause (iv) of Section 7 of the Court Fees Act. The mandate at the end of clause (iv) of section 7 applies equally and evenly to each of the sub-clauses (a) to (f).

Md. Alam v. Gopal Singh and others (1987). I.L.R. 66 Pat. 926

CRIMINAL LAW AMENDMENT ACT, 1952- sections 7 (3) and 8(1). See Code of Criminal Procedure, 1973, no. 9. 208

Criminal Trial

1-dying declaration — recording and mode of — a few omissions in the statement here and there — effect of.

Held, that there is no prescribed form to record a dying-declaration and no rigid rule can be for the same. It can only be said that the man who records the dying declaration must satisfy himself that the deponent is in a fit state of mind and quite alert in making statement relating to the injuries sustained by him. A few omissions in the statement here and there, if the statement is otherwise found to be honest and acceptable, cannot be said to be a reasonable cause to reject it, and more so, if other facts reflect the same to be as a correct statement.

Ramji Singh v. The State of Bihar (1987) I.L.R. LXVI. Pat. 195

2- -exculpatory Statement —effect of -- Suspicion —— whether to take the place of proof — conviction, when to be maintained.

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Held, that an exculpatory statement made by an accused cannot be used as confession in legal sense and therefore, it cannot be used against the accused as his confession.

Held, further, that a suspicion, howsoever, strong cannot take the place of proof. One has to travel up to the point of proof for conclusion in a Criminal trial. Untill and unless, the guilt is proved beyond all doubts, conviction cannot be maintained.

Yogendra Rajbhar v. The State of Bihar (1987),I.L.R. 66 Pat. 981

Customs Act. 1962 -[- section 104 read with sections 4(2), 436 and 437 of the Code of Criminal Procedure, 1973 — person suspected of commision of non-bailable offence under the Act —Magistrate-power of, to remand to custody if produced before him by customs officer — Code of Criminal Procedure, 1973, sections 4(2), 436 and 437.

Held, that section 104 of the Customs Act read with sections 4(2), 436 and 437 of the Code of Criminal Procedure clearly empowers a Magistrate to remand to custody a person suspected of the commission of a non-bailable offence under the said Act and produced before him by the customs officer.

Nagendra Prasad and another v. The State (1987) I.L.R., LXVI, Pat. 61

Direction of State Government dated 21.7.1978 — whether directory in nature — transfer of teachers of El-

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ementary Schools who were office bearers of Primary Teachers Association in contravention of communication of State Government letter dated 21.7.1978 — validity of.

The Communication dated 21.7.1978 issued by the Department, of Education, Government of Bihar to the different District Education Officers and District Superintendents of Education intimating that the office bearers of the recognized Primary Teachers Association should not be transferred from one place to another during the period they hold the said offices unless it is against the public interest cannot be held to be mandatory in nature so as to nullify the orders of transfer issued in respect of the writ-petitioners. It is only a directive by the State Government to its officials in respect of transfer of teacher of the Elementary Schools.

It is well settled rule of construction that statutes creating public duty are directory where as those in conflict with private rights are imperative. It will be all the more difficult to hold an administrative decision in respect of public policy to be mandatory in nature.

Raghav Singh and others v.The State of Bihar and others (1987) I.L.R., LXVI, Pat. 167

Evidence Act. 1872

Section 114, See Penal Code, 1860, See (1987) I.L.R. 66 (Pat).

Forest (Conservation) Act, 1980 section 2 — scope and applicability of — bar placed on the power of

the State Government to make order to dereseve a reserved forest or to order the use of forest land for any non-forest purpose, without prior approval of the Central Government — nature of — bar imposed under section 2, whether applicable to cases of renewal of lease.

From the language of section 2 it appears that the bar placed on the power of the State Government to make order to dereserve a reserved forest or to order the use of forest land for any non-forest purpose without prior approval of the Central Government is imperative and mandatory in nature and as such before granting a lease convering any reserved forest or any forest land for use of non-forest purpose which will include mining operation, prior approval of the Central Government is a must. The bar imposed under section 2 shall apply even to cases of renewal of leases. If any part of reserved forest or forest land was part of any lease hold and such reserved forest had been broken or forest had been cleared on the basis of that lease granted prior to coming into force of the Act no renewal of that lease or fresh grant in respect of that area can be given by the State Govenment without prior approval of the Central Government, because any such renewal or a fresh grant of such area is bound to further deforestation and cannot help reclaiming back the areas where deforestations have taken place.

Held, therefore, that in instant case the lease hold of the petitioner shall be deemed to be valid only in respect of such area which is out side the reserved forest. The grant covering the reserved forest and forest without prior

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approval of the Central Government shall be deemed to be void and inoperative.

Upendra Jha v. The State of Bihar and others (1987) I.L.R. 66 Pat. 817

Income-Tax—

1— expenses incurred by the assessee for securing advantage of an enduring nature — whether capital expenditure.

Where the assessee claimed that the work done in its Mica Mines were in the nature of concreting the walls and roof underground and were carried out under the orders of the Chief Inspector of Mines, Government of India and were in the nature of revenue expenditure.

Held, that the expenses were incurred once for all for securing the advanatage of an enduring nature and were in the nature of capital expenditure and not revenue expenditure.

Commissioner of Income-tax Bihar II, Patna v. M/s Karuna Mica Co., Giridih (1987), I.L.R. 66, Pat. 957

2— gross profit, computation of — amount of Central and State sales-tax debited in the profit and loss account, whether has to be deducted.

Where the gross profits in the trading account were artificially inflated by the assessee by debiting the Central and State sales-tax in the profit and loss account;

Held, that to find out the real gross profit, the actual amount of Central and State sales-tax debited in the profit and loss account both from the turnover as well as gross profit shown has to be deducted. The application of gross

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profit on the amount of sales-tax collections or the sales-tax paid, in law, is not correct and the same should be taken as income or expenditure.

Held, further, that, in law, the rate of net sales should be after excluding the amount of sales-tax and there is no justification, in law, for exclusion of the sales-tax amount as part of the profits of the business. The gros profit, in law, is not cost plus profit plus sales-tax but cost plus profit alone.

Commissioner of Income tax Bihar II, Patna, v. M/s Pareck Brothers, Main Road, Ranchi, (1987) I.L.R. 66, Pat. 990

Income-tax Act, 1961—

1—individual assessee governed by Hindu Law — status, whether would change to that a Hindu Undivided Family merely on his marriage.

Where, after a partial partition in the earlier Hindu joint family, the assessee helde his share as his separate individual property and filed the returns for nearly decade in the status of an individual and was assessed as such and after his marriage filed return in the status of a Hindu undivided family;

Held, that the status of an individual assessee governed by Hindu Law would not change to that a Hindu undivided family under the Income-tax Act automatically on his marriage. The Tribunal, therefore, was not correct in law in holding that the status of the assessee after marriage was that of an HUF and not that of an individual.

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Commissioner of Income tax, Bihar Patna v. Sri Shankarlal Budhia, Ranchi (1987), I.L.R. 66, Pat. 873

2— section 28(i) and 56, applicability of — proprietor of the colliery abdicating all control of its business in favour of a managing contractor by a renewable fixed term lease — proprietor to get annual minimum guaranteed amount and royalty on the quantum of coal raised and manufactured— proprietor, whether can be said to be carrying on the business of the colliery within the meaning of section 28(i) — income of the proprietor, whether falls with the ambit of section 56 as income from other sources — decision for the previous year, whether operates as res judicata for subsequent years.

Held, in the context of the proprietor vis-a-vis the managing contractor of the colliery of the fixed terms lease or its renewal thereafter, the terms of the agreement leave no manner of doubt that it is the managing contractor which carries on the real, substantial, systematic and organised activity of working the colliery with the object of making gain or profit therefrom and it is only the managing contractor which would come within the label of carrying on the business of the colliery within the meaning of section 28(i) of the Income-tax Act, 1961, and the properietor having only a fixed term guaranteed rent per year and royalty on the quantum of coal raised and manufactured irrespective of the profits or gains of the colliery business cannot possibly be said to be carrying on the said business. When there is no direct nexus between the income of the lessor and the production of the leased

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factory, colliery or any other business the income that he receives cannot bear the character of profits of business.

Held, therefore that the income of the assessee proprietor must fall within the ambit of section 56 as income from other sources.

Held, further, that the decision for the previous year that the income of the assessee-lessor fell within section 28(i) of the Income-tax Act, 1961, cannot operate as res judicata between the parties for subsequent years, every year's assessment being based on a separate cause of action.

Commissioner of Income-tax, v M/s. H.D. Agrawala and Sons (1987) I.L.R. 66, Pat. 1536

3— section 37 — Expenditure in defending employees of the company from Criminal prosecution, whether allowable deduction — expenses incurred in defending the Directors from prosecution under the Mines Act — relevant materials to show that the expenditure was in the interest of the business of the company not produced — whether allowable deduction.

Where the assessee-company claimed expenditures incurred during assessment years 1965-66 and 1966-67 in defending the watchman and other employees of the company in connection with criminal cases as allowable expenses;

Held, that the sum spent by the assessee-company in defending its watchman and other employees against criminal prosecution was expenditure expended wholly

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and exclusively for the purpose of the business in terms of section 37 of the Income Tax Act, 1961 and was allowable deduction.

Where the assessee-company claimed expenses incurred in defending the Directors of the company from prosecution under the Mines Act but did not produce the relevant materials to show that the expenditure was wholly and exclusively in the interest of the business of the assessee;

Held, that the expenses over defending the Directors of the company from prosecution under the Mines Act were not allowable deduction.

Commissioner of Income-tax. Bihar II, Patna v. M/s Indian Copper Corporation Ltd., Ghatshila (1987) I.L.R. 66, Pat. 1

4—Section 60, Scope and applicability of —transfer of income — no transfer of assets from which the income arises — income, whether of the transfer or and can be assessed in his hands, though applied in a particular manner under a legal obligation.

Held, that, on a fair and comprehensive reading of the stipulations in the deed of agreement, that, there was no transfer of assets from which the income arose and it was only the application of income going to the ultimate purpose i.e., to the Trust, after it had accrued and not a case of diversions of any sum of money before it had become the income of the assessee. What was transferred was only the income to the Trust and the provisions of

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section 60 of the income Tax Act, 1961, were applicable and the entire commission income will be regarded as the income of the assessee (transferor) and will be included in the assessee's total income, even though it was applied in a particular manner under the legal obligation.

Commissioner of Income Tax, Bihar II, Patna v. Late Banwari Lal Agarwala through legal representative P.K. Agarwal (1987) I.L.R. 66, Pat. 1386

5— section 143 (1) and 263 (1) — section 263 (1) — order passed by the Commissioner Income-tax under the provision — legality of —Income-tax Officer not taking note of provisions of section 143 (1) and not making enquiry — order passed by income-tax Officer, whether erroneous and prejudicial.

Income-tax Appellate Tribunal was not right in canceling the order passed by the Commissioner of Income-tax under section 263(1) of the Income-tax Act, 1961 hereinafter called, the Act. The order of the Income-tax Officer was erroneous and prejudical by not having taken note of the provisions of section 143 (1) of the Act. It was prejudicial to the Income tax Department, as the necessary enquiry had not been made by the Income-tax officer.

Commissionere of Income-tax Bihar-II. Patna v. Smt. Rambha Devi (1987) I.L.R. 66, Pat. 575

6—sections 143 (3) and 263 — Mass Communication Scheme envisaged by the Central Board of Direct Taxes, whether applicable to ladies and minors

— section 143 (3) — assessment with regard to the assessee, a lady, whether to be made under section 143 (3) — section 263 — order of the Commissioner cancelling the assessment made under section 143 (1) and remanding the case to the Income Tax Officer for fresh assessment under section 143 (3) legality of.

Where in terms of the scheme of Mass Communication envisaged by the Cnetral Board of Direct Taxes the assessee, a married lady filed her return of income for assessment years 1968-69 to 1973-74 on 14.12.72 and the Income Tax Officer, on the report of the Inspector, Income Tax submitted on the same day, made assessment on the same day, at the spot for all the assessment years except 1973-74, and the Commissioner of Income Tax considering the assessments to be erroneous issued notice on the assessee in terms of section 263(1) of the Income Tax, 1961, hereinafter called the Act, to show cause as to why the order of assessment be not modified or cancelled and the Commissioner of Income Tax being of the view that the assessment was prejudicial to the Revenue set aside the assessments holding them to be ereoneous and remanded the case to the Income Tax Officer with direction to frame assessment after making close scrutiny as to the extent of the initial capital and the actual income earned by the assessee for the years in question;

Held, that the law in regarded to assessment was not modified by the Mass Communication scheme so far as ladies and minors were concerned. In the course of

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Mass Communication whenever a return was filed by a lady or minor, it could have been accepted but could not have been disposed of in terms of the scheme. It should have been treated as original assessment proceeding with all the rigours with regard to initial capital investment. No connection or amelioration of the procedure in the case of ladies and minors was envisaged. These assessments had to be completed in terms of section 143(3) of the Act and where it was prejudicial to the Revenue, the Commissioner would be fully justified in setting aside such assessment. In the course of Mass Communication Scheme if a return was filed on behalf of a lady or a minor, the Income Tax Office could have been fully justified in not accepting them at the spot and calling upon to the file the return in the Department as if the Scheme did not exist.

Held, further, that the enquiry into the source of initial capital was crucial for the Income Tax Officer. If that was not done the assessment is bound to be erroneous and hence prejudicial to the Revenue.

Held, also, that the Commissioner of Income Tax did not exceed his jurisdiction in exercising his power under section 263 of the Act and cancelling the assessment.

Commissioner of Income Tax, Bihar-II, Patna v. Pushpa Devi (1987) I.L.R. 66, Pat. 292

7— sections 147(a), 147(b), 153(3) (ii) and 154 — section 147 ( ) — ambit of reassessment of 'deemed dividend', whether falls within the ambit of section 147(b) —

section 153(3) (ii) — applicability of — section 153(1) and (2) — provisions regarding limitation, whether applicable — section 154 — order of rectification under, legality of.

Where Jhari Ram Bhadani was the Karta of the Hindu Undivided Family and in his presence, the Appellate Assistant Commissioner, Income Tax issued direction of reassessment of Jhari Ram Bhadani in respect of the deemed divident' as individual.

Held, that Jhari Ram Bhadani, the 'individual' was intimately connected with Jhari Ram Bhadani, the Karta of the Hindu Undivided Family and the instant assessee Surendra Kumar Bhadani has been proceeded against as the legal heir of Jhari Ram Bhadani since the latter was dead at the time of initiation of the proceeding under section 34 (1) (b) of the Income Tax Act, 1961, hereinafter called the Act.

Held, further, that the instant case comes within the periphery of section 153(3) (ii) of the Act. It is obvious that no question of limitation would arise. The direction of the appellate Assistant Commissioner, Income-tax had to be given effect to and, therefore, the provision in regard to limitation set down by sub-sections (1) and (2) of section 153 of the Act had to be put on the self. The Income-tax Appellate Tribunal was thus justified in holing that the initation of the proceeding was not barred by time.

Held, further, that through the case of reassessment of 'deemed dividend' fell within the ambit of section 147(b) of the Act. Yet the initiation of the reassessment

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proceeding was valid. The Income-Tax Appellate Tribunal was not justified in cancelling the proceeding on the ground that the proceeding had been initiated under Section 147(a) and not section 147(b) of the Act.

Held, also that the order for rectification under section 154 of the Act is upheld.

Commissioner of Income-Tax, Bihar, Patna v. Surendra Kumar Bhadani (1987) I.L.R. 66, Pat. 23

8—Section 212 (3A) and 221 — section 212. (3A) — assessee filing estimate under, but not paying advance tax — section 221 — Income-tax Officer, after issuance of notice and show cause by assessee, imposing penalty for not payment of advance tax — validity of — circular no 18-D (XLV-14) of 1963 issued by Central Board of Direct Taxes in regard to levy of penalty under section 221 — effect of.

The assessee filed estimate in terms of section 212 (3A) of the Income Tax Act, 1961, hereinafter called the Act, and in accordance with the estimate, advance Tax of Rs. 12100/- become payable on 15.3.1971 but the advance tax was not paid and on 16.2.72 the asessee filed regular return and on the basis thereof paid tax Rs. 18417/-. The Income Tax Officer on 16.12.1972 called upon the assessee to show cause in terms of section 221 of the Act as to why penalty be not imposed for non-payment of advance tax and on cause being shown, by order dated 3.2.1973 the Income-tax Officer imposed penalty of Rs. 1500/- for non-payment of Advance tax.

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Held, that in terms of circular no. 18-D (XLV-14) of 1963 dated 15.7.1963 in regard to levy of penalty under section 221 of the Act, issued by Central Board of Direct Taxes, no penalty could have been levied. The assessee was certainly in default, but the circular of Central Board of Direct Taxes being binding on the Officer employed in execution of the Act under section 5 (8) of the Act, were bound to give effect to the circular. Hence the Income Tax Appellate tribunal was justified in cancelling the penalty imposed under section 221 of the Act for failure to pay advance tax on the basis of the estimate filed under section 212 (3A) of the Act after the tax had been paid on the basis of regular return.

Commissioner of Income-tax, Bihar, Patna v. Sriram Agrawal, (1987) I.L.R. 66, Pat. 591

9— Section 251(2) — notice under issued on the assessee for showing cause fixing 31.3.1975 by the Appellate Assistant Commissioner Income Tax — Appeal heard on 26.3.1975 and enhancement made on concession of the counsel of the assessee — validity of.

Where notice under section 251 (2) of the Income Tax Act, 1961 was issued in appeal to the assesse, the Individual', fixing 31.3.1975 to show cause as to why his income be not enhanced by making suitable addition in respect of household expenses incurred by him during the year under review but the Appeal was taken up for hearing on 26.3.75 and the counsel for the asessee conceded that the addition was called for and the

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Appellate Assistant Commissioner Income Tax enhanced the assessment for the assessment year 1973-74:

Held, that the Income Tax Appellate Tribunal was right in holding that the concession made by the counsel for the assessee on 26.3.1975 in absence of the assessee when the notice under section 251 (2) fixed 31.3.1975 for hearing was not a valid concession.

Commissioner of Income-tax, Bihar-1, Patna v. M/s Jyoti Tube-well Co., Patna (1987) I.L.R. 66, Pat. 569

10—section 253 and Section 256 (2)— application by Revenue against restoration of appeal by income tax Appellate Tribunal before High Court under section 256 (2) — whether competent —section 253 - ambit of.

Where the assesee filed an application before Income tax Appellate Tribunal hereinafter called the Tribunal, for restoration of her Appeals as she had not been given reasonable opportunity to place her case and the Tribunal restored the appeal for rehearing whereupon the Revenue being aggrieved by the order of Tribunal moved the High Court under section 256 (2) of the Income tax Act, 1961 hereinafter called the Act:

Held, that the order passed on such a petition does not come within the periphery of section 253 of the Act and therefore no reference could be made to the High Court. The reference is thus obviously in competent.

On reading sections 253 (1), 254(1) and 256 of the Act, it is obvious that an application for reference can be

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filed only against the order which comes within the ambit of section 254 of the Act.

Commissioner of Income-tax. Bihar-I. Patna v. Dr. (Mrs.) Krishna Rana. Deputy Superintendent. Civil Assistant Surgeon. Arrah (1987) I.L.R. 66. Pat. 631

Industrial Disputes Act. 1947-[- section 10 (1) scope and applicability of — refusal to make reference under section 10 (1) dispute whether stands resolved if it at all existed — reference on a subsequent representation — validity of — allegation of misconduct against several workmen — action taken against one only, whether discriminatory.

Any refusal to make a reference does not mean that the dispute, if it at all existed, stands resolved. If the dispute in the opinion of the authority concerned existed, any reference on a subsequent representation must be valid. The second reference could be made even in the absence of fresh materials. In the instant case the reference was made on the basis of a report submitted by the agency of the government itself which had not been earlier considered. That report was not available earlier and was sent later that is after the Government had refused to make the reference.

Held, That, in the instant case it was neither necessary nor obligtory on the part of the Government to give a notice to the management and hear them before making the reference and accordingly the findings arrived by the Labour Court are perfectly justified.

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Held, further, that where more than one workmen misconducted but only one of them was proceeded against by the management the Labour Court was completely justified that the proceeding against the workman proceeded against was an action of discrimination.

M/S Champaran Sugar Company Ltd. v. The State of Bihar & others (1987) I.L.R. 66, Pat. 749

Jalkar, settlement of— registered contract between the parties to the settlement fulfilling the requirements of Article 299 of the Constitution of India — whether can be cancelled by the revenue authority by an administrative order—revenue authority, whether could cancel the settlement without giving the petitioner an opportunity of being heard — principle of natural justice, whether violated.

Where the settlement of Jalkar in favour of the petitioner has taken the shape of a concluded contract by execution of registered instrument as contemplated under Article 299 of the Constitution of India;

Held, that no administrative authority could cancel, bypass or upset the concluded contract evidenced by a registered instrument merely by an administrative order. Such contract could be cancelled, bypassed or upset only in a legal forum and that also only on one of the grounds on which such a contract can be cancelled or bypassed, otherwise there would be no sanctity at all to a concluded contract. The order passed by the revenue authority namely, the Additional Collector cancelling the

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settlement with the petitioner was therefore without any legal authority and has to be declared as invalid.

Held, further, that the Additional Collector could not cancel the settlement of jalkar made with the petitioner or pass any order adverse to the interest of the petitioner without giving him an opportunity of being heard and as such the order cancelling the said settlement must be held to be violative of the principle of natural justice and has to be struck down as invalid on this ground alone.

Rustam Ali v. The State of Bihar and others. (1987) I.L.R. 66, Pat. 1506

Limitation Act, 1963-[- Article 136, scope of — execution of decree-period of limitation of twelve years, computation of — time, whether to run from the date of the appellate decree in the event of an appeal or the date of the original decree.

Held, that, the terminus a quo for computing the limitation of twelve years under Article 136 of the Indian Limitation Act, 1963, is the date of the appellate decree in the event of an appeal and not that of the original decree.

The language of Article 136 talks of a decree and its enforceability. It does not limit or constrict itself to the original decree alone. The words employed are any decree' and 'when the order becomes enforceable".

An appeal under the Code of Civil Procedure is a continuation of the suit and the appeal must be taken as

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part and parcel of the continuing trial. In essence where an appeal has been preferred, the suit is disposed of truly and finally by the appellate decree and not by the original one.

Equally well established it is that in the event of an appeal the decree of the trial court merges with that of the appellate court. The original decree by virtue of merger loses its very existence and it is the appellate decree which subsists. The decree which is enforceable is only that of the appellate court and not of the original court and time must necessarily run from the date of the decree which is enforceable one.

Jokhan Rai v. Baikunth Singh (1987). I.L.R. 66, Pat. 1138

Motor Vehicles Act, 1939—

1— Sections 2(18), 93, 94(3) proviso, 110 and 110 A(i) (C)—ambit of— uninsured vehicles, exempted by section 94 (3), whether come within the scope of section 110— sections under chapter VIII of the Act clearly indicating that all vehicles covered by definition of motor vehicles under section 2(18) whether insured or not come within its scope — Heading' of Chapter VIII whether can negative it —— claim application by father of the injured by before claims Tribunal, whether maintainable — section 110A (i) (C) — Expression 'duly authorised 'agent'— construction of.

Father of the injured minor boy who was run over by truck belonging to respondent, a welfare organisation which was exempted by sub-section (3) of Section 94 of

the Motor Vehicles Act, 1939, hereinafter called the Act, from the requirement of getting the vehicle insured, filed claim case before claims Tribunal.

Held, than an examination of the language of section 110 read with sections 2 (18), and 93 and that of the proviso to section 94 (3) of the Act lead to the irresistible conclusion that uninsured vehicles are also within the scope of section 110 of the Act.

Held, further, that as the sections of chapter VIII of the Act clearly lead to the conclusion that all the vehicles covered by the definition of "Motor Vehicle" in section 2(18) of the Act, whether insured, or not, are within its scope, the 'Heading' of the chapter can not be relied upon for negativing it.

It is well settled that the 'Heading ' of a chapter cannot control the plain words of the statute. The court is entitled to look at the Heading" of a chapter for resolving any doubt that it may have as to the ambiguous words but, if the meaning of the section is clear, it cannot be used for giving a different effect.

The object of establishment of claims Tribunals by the amendment in the Act was to ensure speedy relief to victims of road accidents by a less expensive process and there is no reason to place the victims of accidents involving unisured vehicles at a disadvantage.

Held, that the claim petition of the appellant filed before the claims Tribunal cannot be held to be not maintainable.

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Held, further, that the expression 'duly authorised' Agent' referred to in clause (c) of subsection (1) of section 110 A of the Act should not be construed narrowly so as to mean a person expressly authorised or having the authority in writing. It must be given a wide and liberal meaning as including a person having implied authority to claim compensation.

The father-applicant besides suffering severe mental strain on account of the injury to his son injured in the accident, had to spend considerable amount of money over the treatment of the boy for which he was rightly compensated by the Claims Tribunal.

Parmanand Thakur v. The Commissioner, Coal Mines Welfare Organisation, (1987) I.L.R. 66, Pat. 639

2— section 95 (4) — scope and applicability of — vehicle not a motor cab — Legislature making provision for payment of compensation with specific reference to carrying capacity of vehicle — amount of compensation to be awarded — recourse to clause (4) whether to be taken.

When the Legislature made provision for payment of compensation to passengers with specific reference to carrying capacity of vehicle, recourse cannot be taken to clause (4), if it is not a motor cab or vehicles other than those specified in clauses (1), (2) and (3). In the instant case since it was vehicle registgered to carry not more than 30 passengers, the maximum limit of compensation which could have been paid was Rs. 50,000/-.

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Held, therefore, that, being the position the maximum compensation that could have been paid because of the accident was Rs. 50,000/-.

National Insurance Co. v. Shanim Ahmad and ors. (1987) I.L.R. 66, Pat. 696

National Security Act, 1980 as amended by Act 60 of 1984, sections 3 (2) and 14 (2) proviso —scope and applicability of —detention order — expiry or revocation of —second detention order on the same ground —total period of detention under both the detention orders, whether to exceed total period of 12 months —quashing of earlier order of detention, whether amounts to revocation or expiry within the meaning of proviso to section 14 (2).

According to proviso to section 14(2) if after the expiry or revoction of the earlier detention order the second detention order is passed on the same ground, in that event the total period of detention under both the detention orders will not exceed the total period of 12 months.

The quashing of the earlier order of detention by the Supreme Court would mean expiry of the earlier detention order within the meaning of proviso to section 14(2) of the Act.

Held, therefore, that in the instant case the bar of 12 months total period of detention under the two detention orders as mentioned in the proviso would clearly apply.

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Mosst. Rajkali Devi v. The State of Bihar and others (1987) I.L.R. 66, Pat. 1427

Nomination paper — Scrutiny of — candidates or their proposers not explaining to the Returning-Officer the correct part and serial number of proposer in the electoral roll —nomination paper rejected by Returning Officer — validity of.

Where neither the candidates nor their proposers explained to the Returning Officer the correct part and serial number in the electoral roll with respect to the proposers resulting in the Returning Officer getting no assistance in locating the correct part, number and serial number of the proposers and hence the nomination papers of the candidates were rejected by the Returning Officer;

Held that the election petitioner has failed to prove that the nomination paper of the two candidates were illegally rejected.

Held, further that it is not a statutory obligation of the returning officer to scrutinise the electoral roll for finding out the identity of the proposer when the Serial number given in the nomination paper turns out to be wrong.

The enquiry made by the Returning Officer or Assistant Returning Officer at the time of the presentation of the nomination papers is only peripheral enquiry and it is on the date of the scrutiny of nomination paper that the nomination papers come up for detailed consideration

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at the hands of Returning Officer against whom there is no estoppel in regard to the statutory duty of scruniny.

Sidh Nath Rai v. Sri Sonadhari (1987) I.L.R. 66, Pat. 663

Patna University Act, 1976, section-5(2) and 30 **(1)**— section-30 (1) — interpretation of —if University fails to perform its stautory duty under section 5(2), the State Government to fix dates of examinations.

Where the writ-petitioners prayed for quashing the order issued by the Controller of Examinations, Patna University fixing the date of the commencement of the L.L.M. Examination of 1984 on the plea that the date of examination cannot be fixed by rthe Controller of Examination as that power is vested in the State Government under sub-section (1) of section 30 of the Patna University Act, 1976, hereinafter called the Act.

Held that the proper interpretation of sub-section (1) of section 30 of the Act shall be, that the overriding power has been vested in the State Government to fix dates of different examination including in cases where the University fails to hold examinations in different branches for the purpose of grant and conferment of degrees, diplomas and certificates. If the University fails to perform its statutory duty under section 5(2) of the Act, then the State Government has right to fix dates in respect of different examinations, which shall be notified in the Official Gazette, otherwise the University can as well fix dates for different examinations.

Om Deo Singh and others v. The State of Bihar and others (1987) I.L.R. 66, Pat. 1648

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Penal Code, 1860.

1—sections 109, 114 and 149 — Scope and applicability of — Sessions Judge taking up hearing of the case and framing wrong charge — Subsequently case transferred to the court of Additional Sessions Judge and concluded on a wrong charge — Second Judge, whether could have amended and corrected the charge — Section 109, 114 and 149 when attracted.

Where the hearing of the case was earlier taken up by the Sessions Judge who framed wrong charges and subsequently the case was transferred to the court of Additional Session Judge in whose court the proceeding was finally concluded on the basis of wrong charge.

Held, that the Second Judge in whose court the case was transferred for disposal was not absolved of the responsibility of looking to the charge and he should have made amendment and correction in the charge instead of finally delivering judgment on a wrong charge.

Held, further, that a charge under section 149 postulates assemblage of five or more.

Held, also that in case if an accuseed abets the commission of the Crime at the spot and also remains present or participates, the proper charge against him would be under section 109 and not under section 114.

In other words the active abetment of commission of a crime is covered by section 109 and section 114 is intended to cover a case in which there is element of abetment previous to the commission of the crime, who

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happens to be present when the crime is committed. So when a person is present and abets in order to commit the offence, section 109 of the Code and not section 114 of the Code is attracted.

Ramji Singh and another v. The State of Bihar (1987) I.L.R. 66, Pat. 387

2— sections 302 and 304 part I - offence under section 302 — punishment for — culpable homicide not amounting to murder — court, whether has discretion in passing order of sentence.

For an offence of murder punishment under section 302 of the Penal Code only one of two alternative punishment can be awarded. it is either death or imprisonment for life. But in a case of culpable homicide not amounting to murder, the court certainly has a discretion in passing the order of sentence and that is to be done considering the circumstances of each case. There is no unifirmity in any case in imparting sentence either of imprisonment or of fine; and every judge does so in his own wisdom looking to the circumstances in every case before him. Ordinarily, punishment to be imposed should be sufficiently severe to deter the accused to repeat commission of such offence and act as examplary to others. In the instant case there was nothing to show what was the quarrel between the accused and the deceased and what led the accused to embark upon such an act of giving dagger blow to the deceased. It cannot be ruled out that circumstances might be such, which prompted the accused to commit the offence on the spur

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of the moment without any premeditation and might not have intended to cause the death.

Held, therefore, that under such circumstances sentence of eight years of imprisonment will meet the ends of justice.

Chalu Bin v. State of Bihar (1987) I.L.R. 66, Pat. 174

3—, sections 395 and 412 and Evidence Act, 1872, Section 114 —scope and applicability of — property recovered from the possession of a person proved to be stolen in course of dacoity — person in possession of such property, whether guilty under section 395 — presumption under section 114 of Evidence Act, whether to be drawn.

Held, that when it is proved that the property had been stolen in a dacoity presumption that the person in possession thereof was one of the dacoits can be drawn, but on the facts of the instant case, although it has been proved by the prosecution that the property recovered from the possession of the appellant had been stolen in the course of the dacoity, the case is not one for holding the appellant guilty under section 396 of the Indian Penal Code, on the basis of the presumption under section 114 of the Evidence Act, but his guilt under section 412 of the Penal Code is proved beyond reasonable doubt and, therefore, the conviction of the appellant should be altered into one under section 412 from section 395 of the Penal Code.

Chhedi Mandal v. The State of Bihar (1987) I.L.R. 66, Pat. 1408

Private Educational Institutions (Taking over) Ordinance, 1986 section 6 and Constitution of India. Articles 14, 16, 19, 163(3) and 213 and Entry 42 of the Concurrent List III and entry 66 of List I — Promulgation of Ordinance No. 15 of 1986 — Satisfaction of the Governor under Article 213 pertaining to the immediacy, whether justiceable — exercise of legislative power by whether justiceable — exercise of legislative power by promulgation of Ordinance by the Governor, whether can be impeached on ground of malafides — malafides of the Chief Minister, whether tantamount to the malafides of the Council of Ministers as a whole and vitiate the exercise of legislative power of promulgation of an Ordinance — sanction of the President under proviso to clause (1) of Article 213, whether required — whether void for lack of legislative competence, discriminatory, infract Article 14 and violative of Article 19 (1) (c) — section 6 of the Ordinance validity of — power conferred on the State Government to terminate the service of the staff of the institute — nature of — whether attracts the principles of natural justice — services of non-teaching staff, whether, can be terminated under section 6 (4).

The advice tendered by the Council of Ministers to the Governor is constitutionally privileged beyond any probe. Therefore, the result is that not only one cannot probe the mind and satisfaction of a body of persons, but, further, the materials on which such satisfaction is to be arrived at are again expressly barred from the scrutiny of the court. Under Article 213, the Governor is

not obliged to record any reasons for his satisfaction with regard to immediacy. Equally the council of Ministers, whilst arriving at a decision, are equally not obliged to record any reasons, and, as a matter of practice they never do. Therefore, in the absence of knowledge about the materials placed or considered by the Council of Minsiters the nature of discussions in the cabinet meeting, the secrcy of the proceedings and the lack of requirement of recording any reasons, renders it not only undersirable but almost impossible to judicially test the consequential satisfaction of the Governor under Article 213, which is only an auphemism for the satisfaction of a large council of Ministers. The cabinet of Ministers are under an oath of secrecy and the details of the proceedings of the Council of Ministers are confidential and sacrosanct. Here in perhaps what is pre-eminent if not conclusinve, is the fact that the power under Article 213 though exercised by the executive head, is in essence a pristinely ligislatvie function. The Constitution, in chapter IV, leaves this aspect in no manner of doubt, when in the very heading it proclaims it to be the "Legislative power of the Governor", and clause (2) of Article 213 declares that an Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor. Now once Article 213 envisages a legislative function, then it deserves highlighting that considerations pertaining to the exercise of executive or administrative actions are altogether alien thereto.

These fall in an altogether different field than the one of the exercise of the soverign function of legislation. Therefore, to draw any analogy from the field of subjective satisfaction of an individual acting administatively of executively, with the satisfaction of a legislative body is not only inapt but wholly misleading. Indeed, it is axiomatic that the propriety, expediency and the necessity of a legislative act are for the determination of the legislative authority and not for adjudication by the Courts.

Held, therefore, that both on principle and precedent the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is not justiceable.

In the field of constitutionality of legislation colurable exercise of the power is a thing distinct and apart from the ordinary concept of malice in law against executive or administrative action. The concept of colourable exercise of legislative power is not the concept of malice in law but in pith and substance is only a matter with regard to the issue of legislative competence; where an enactment is made by a legislature not competent to legislate on the subject but is merely dressed up in a manner so as to bring it within the field, it is only then that the courts have labelled such an attempt as a colourable exercise of legislative power. It has no relavance at all to any oblique motive therefor. The test in such a situation only is to see the nature of the enactment and whether in pith and substance it comes within the ambit of the legislative entries for which a particular legislature

may be entitled to legislate. If such an enactment does not come within the competence of the legislature in true essence but is merely clothed in such a garb to bring it within the legislative competence, it is only than that the theory of colourable exercise of legislative power can be invoked. No evil motive or any personal malafides of the legislature as a whole or of the individuals composing the same can be attributed. The theory of colurable exercise of legislative power is consequently a thing distinct and apart from the rule of attributions of any malice — be it one of fact or in law —to the legislature.

The colourable exercise of legislative power is in essence nothing more than the absence of legislative competence, it cannot even remotely buttress the stand that an Ordinance can be impeached on the ground of personal malafides.

Held, that the exercise of legislative power of promulgation of an Ordinance by the Governor cannot be impeached on the ground of malafides.

It is true that in the Parliamentary form of Government the position of the Prime Minister or the Chief Minister is pre-éminent, in so far as the Council of Ministers is appointed on his recomendation and, he acts as a hyphen betwixt the Executive and the Legislature. But from this fact it is a wrong and unwarranted step to go to the extreme that the Chief Minister is himself the council of Ministers. In a democratic system, therer is no other principle to determine the decision of a constitutional body of persons except the settled rule of

majority. The only mode for arriving at an answer as to what is the decision of a body of persons co-equal in status, is as to what was the majority opinion of such a body, unless the statute prescribes other-wise or a different mode therefor. The principle of joint responsibility of the cabinet, which is the fundamental base of the Parliamentary form of Government is itself a pointer to the fact that the ministers are not there as cyphers attached to the figure of the chief Minsiter, but are jointly responsible to the legislature and through it ot the people for the conduct of the Government. The well know process of decision-making by the Council of Ministers would itself refute the stand tha the Chief Minster's earlier predilections would necessarily be the decison of his Council of Minsters. The cabinet is a constitutional and responsible consultative body. Democratic process works by expressions and exchange of opinions and even a Chief Minister in a cabinet meeting may well be first persuaded against any pre-conceived view or decision arrived at by him earlier. He may even be out voted in the cabinet, if the matter comes to such a head to presume that the Chief Minister's prior decision or opinion alone, against the views of his council of Ministers and dehors their concurrence, has an overriding finality as such, would be running against the very concept of the principle of Joint cabinet responsibility and the democratic form of Government. Any such stand attributing such dictatorial and arbitrary power to the Chief Minister alone is not to be easily presumed or accepted in a democratic form of Parliamentary Government.

Held, further, that the malafides of the Chief Minister even if established is not tentamount to the mala fides of the Council of ministers as a whole and cannot, therefore, vitiate the exercise of the legislative power of the promuglation of an Ordinance.

A take over or an acquisition or nationalisation of an institution establishment, or a company does not involve any concept of repugnancy and the consequential requirement of the prior concurrence by the President and as such in the instant case the impugned Ordinance did not require the sanction of the President under the proviso to clause (1) of Article 213 of the Constitution.

Entry 66 is confined to the determination of standards for higher education or research and scientific and technical institutions, and Co-ordanating them at the national level. Prescription of standards and co-ordination thereof is something entirely distinct and different from setting up institutions for higher education. Entry 66 of List I cannot possibly be a bar to the establisment of scientific and technical institutions for higher education by the states, which is now clearly a concurrent subject. Education generally including higher education and technical education and universities, would come within the sweep of Entry 25 of List III and consequently by virtue of this Entry the State Government is clearly entitled to legislate for setting up and establishing institutions of this nature, and, if it can do so, it can equally take over and acquire them under its

basic power of acquisition for the purpose of nationalisation. The earlier power of acqustion in List I and II have now been substituted by a single comprehensive Entry no. 42 in the Concurrent List III, conferring both on the Centre and the State, the power of acquisitioning and requisitioning of properties. Therefore the State has the basic legislative competetence to pass the legislation for the acquisitioning of the properties of the Institute in the instant case.

Held, also, that the impugned Ordinance in the instant case is not governed by Entry 66 of List I. It is well will within the parameters of Entry 42 of the Concurrent List III and as such it is not void for lack of legislative competence.

Discrimination under article 14 in a question of fact which has to be pleaded and the burden is always on the petitioner to prove that persons in equal or in identical circumstances have been treated unequalluy. In the instant case barring a bold assertion that the II institutions named are similar, there has been placed no factual data or proof on the record to show that the other alleged II institutions are in an identical situation, far from the same having been actualy established. Some similarity is not identity and as such the impugned Ordinance is in no way discriminatory, nor does it infract Article 14 of the Constitution in its choice of the petitioner Institute alone for nationalisation in its first phase.

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The mere divesting of one of the societies properties, when validly done by the State in its exercise of eminent domain and the power of acquisitioning and requisitioning therefor does not in any way infract or attract the provisions of Article 19 (1) (c) of the Constitution and as such in the instant case the impugned Ordinance does not violate the fundamental right to form associations under Article 19 (1) (c) of the Constitution.

Section 6 of Ordinance No. 15 of 1986 is not violative of Article 14, 16 or 19 of the Constitution and is perfectly valid.

The power conferred on the State Government to terminate the services of the staff of the Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna is not quasi Judicial in Nature and consequently does not attract the principles of natural justice.

Section 6 (4) of Ordinance No. 15 of 1986 squarely warrants the termination of the services of the non-teaching staff as well.

Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna, and another v. The State of Bihar and others (1987) I.L.R. 66, Pat. 432

Santhal Parganas Regulation, 1872, section 27 — provisions of — original transfer against the provisions of the section — plaintiffs not perfecting their title by adverse possession before coming into force of Santhal Praganas Tenancy (Supplementary Provisions) Act, 1949

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— section 20— Revenue Court whether had jurisdiction to order eviction against the plaintiff under this section — Revenue Court disregarding the collusive compromise decree, legality of.

Held, that the original transfer being against the provisions of section 27 of the Santhal Praganas Regulations, 1872 and the poaintiffs having not perfected their title by adverse possession before coming into force of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, the Revenue Court was well within its jurisdiction to pass order of eviction against the plaintiffs under section 20 of Santhal Parganas Tenancy (Supplementary Provision) Act, 1949 and thus the Revenue Court committed no illegality in disregarding the collusive compromise decree passed in the title suit in which the contesting intervenor - defendents were not parties.

Rajo Mian and others v. Puran Mian and others (1987) I.L.R. 66, Pat. 280

SANTHAL PARGANAS TENANCY (SUPPLEMENTARY PROVISIONS) ACT, 1949

Section 20,See Santhal Praganas Regulation, 1872. 280

Seniority— Officers of the Junior Branch of the Bihar Finance Service merged with the Senior Branch of the Bihar Finance Service with effect from 1-4-1974, 1-4-75 and 1-4-1976 — direct recruits appointed in 1976 in the Bihar Finance Service after the last batch of the Junior Branch had already merged — whether the Officers so

merged would rank senior to the direct recruits — Government of Bihar department of Personnal Circular No. 3.r 1-106/72-P-15784 dated 26.-8-1972 paragraph 3 subparagraph (vii) — ambit of — date of merger, whether to be deemed to be the date of appointment in senior branch of Bihar Finance Service.

The State Government by a resolution dated 1-4-1975 decided to merge the Junior branch of the Bihar Finance Service with the Senior branch into one unified cadre and all the Officers were designated as Commercial Taxes Officers and as a consequence of the merger one third officers of the Junior Branch were to merge with effect from 1-4-1974, the other one third with effect from 1-4-1975 and the rest with effect from 1976.

Held, that the Officers of the Junior Branch of the Bihar Finance Service who merged in the Senior Branch of the Bihar Finance Service, having joined the rank of Senior Branch Officers at a point of time when the direct recruits were not a existence, the former must reckon their seniority from the time they become members of the cadre of the Senior Branch. The direct recuits were no where till December, 1976, when they were appointed. Till the entire batch of the Officers of the Junior Branch had filled the rank of Senior Branch the direct recuits had not found their berth in the Senior Branch. It is therefore, obvious that the they, must be held senior to the direct recruits.

Held, further, that in terms of paragraph 3 of the subparagraph (vii) of the Circular issued by Government

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of Bihar in the Department of Personnel being 3/RL-106/72-P-15784 dated 26th August, 1972, the date of merger must be held to be the date of appointment in the Senior Branch of the Bihar Finance Service. In conjunction with this rule, the merger must be deemed to be a mode of appointment for the purpose of fixing the seniority of the officers in the cadre of Senior Branch.

Kartik Charan Jha and Six others v. The State of Bihar and 18 others (1987) I.L.R. 66, Pat. 261

Service —

1—Company, whether could transfer its workman from one of its units to another in exigencies and for administrative reasons — nothing on record to show that appointment of the workman was to a particular post in one unit and was not transferable —conduct of the workman whether lends support to the stand, of employer company that the workman's job was transferable.

Where neither the letter of appointment nor the terms and condition of service were brought on record nor there was any thing in the standing order of the employer-company or its different units showing that the appointment of the workman to a particular post in one unit was not transferable and the workman challenged his transfer to another unit of the same company.

Held, that employer-company was at liberty to transfer its workman to different units in the exigencies and for administrative reasons.

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Held, further, that the conduct of the workman itself shows and lends support to the stand taken by the employer-company that the workman's job was transferable since, as for back as 1971 when the workman had been transferred to the company's head office he had requested for his retransfer and he was re-transferred to Barachaki a branch of the company.

Champaran Sugar Company Limited, Barrah Factory Branch, Barrah, Barachakia District East Champaran v. The State of Bihar and ors. (1987) I. L. R. 66 Pat. 581

2— writ-petitioners designeated as Associate Professors of Medical Colleges, management of which had been taken over by State under Bihar Private Medical College (TAking over of Management) Ordinance, 1977 for obtaining recognition by Medical Council of India-conduct of State Government, whether would amount to implied approval to the appointment and promotion — Estoppel principles of — action of State Government, whether would amount ot acquiescence and waiver of requirement of prior approval in the matter of appointment and promotion.

When the writ-petitioners were designated as Associate Professors they were appointed to that particular post in order to obtain recognition of ther Medical College by the Medical Council of India and Consequent recognition of the University by the Central Government.

The conduct of the State Government in the facts

and circumstances of the case, would amount to implied approval of the petitioner's appointment and/or promotion made by tghe Board of Control constituted under Bihar Private Medical College (Taking over of Management) Ordinance, 1977, hereinafter called the Ordinance as Associate Professors. It is well established that under certain conditions silence or inaction constitute a representation as much as positive language or conduct for the purpose of Estoppel. It was the legal duty of the State to take steps or to disclose to the Medical Council of India or to the petitioners that these promotions have not their approval and, therefore, invalid. On the other hand, the State by their conduct by reaping the benifit of such promotions, led everbody to believe that no shch fact, exists or that there is nothing so abnormal or peculier in the nature of the transaction or in the circumstances of the case as to give rise to any duty of disclosure and to shape Medical Council's course of action on that assumption.

Held, that in any event, it will amount acquiescence and waiver of the requirement of prior approval in the matter of appointment and promotion and/or implied approval of the State to the appointment and promotion.

Held, further, that the appointments as Assistant Professors had the prior approval of the Medical Council of India of which the State had full knowledge. It was, therefore, that the State did not take any action under section 16 of the Ordinance which can safely be assumed to be State's tacit approval of the action taken by the

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Board of Control in the best intetest of the Medical Colleges.

Held, further that the plea of the Government raised on the basis of the letter of the Joint Director of the Health Department that the temporary designation of the writ-petitioners as Associate Professors was accorded without prior approval of the State Government is rejected and overruled.

Held, also, that writ-petitioners appointment as Associate Professor was validly made and the Government was directed to treat the writ-petitioners, to have been validly appointed as Associate Professors from the date they have been so designated and give all consequential benefit flowing therefrom. Any teaching experience gained as being temporarily designated on a particular post should also enure to the benefit of the writ-petitioners. The State was directed to consider the cases of the writ-petitioners along with other eligible candidates if they have the requisite experience and qualification for being appointed as Professors as laid down by Medical Council guidelines for promotion as Professors.

Mahendra Narain v. The State of Bihar and ors. *(1987) I.LR. 66, Pat.* 1046

Specific Relief Act, 1963 (Section 12 equivalent to section 15 of the old Act of 1877), scope and applicability of — suit for specific performance of contract — Mahadanama showing the executants to be not the exclusive owners of the property rather their mother and sisters, who had not joined the mahadanama, also had interest in the property — contract, whether enforceable

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— section 12, whether applies — decree for specific performance of a part of contract, whether could be granted — one of the conditions for the applicability of section 12 being readiness to pay entire agreed consideration for the whole property not fulfilled — plaintiff, whether entitled to a decree for specific performance of a part of contract.

Where in a suit for specific performance of contract, the Mahadanama clearly showed that the defendants were not claiming the property to be their exclusive, rather besides the defendants, their mother and sisters had also got interest in the property, and thus, the agreement to execute the sale deed with respect to the shares of mother and sisters of the defendants was ipso facto invalid because they did not join the Mahadanama;

Held, that the defendants never represented that the entire property belonged to them and that the contract was not enforceable so far as mother and sisters of the defendants were concerned and therefore, the provisions of section 12 of the specific Relief Act, 1963 which is equivalent to section 15 of the old Act of 1877, has got no application and this being the only provision under which a decree for performance of a part of contract can be granted, no decree, in the instant case, for specific performance of a part of the contract to the extent of the share of the defendants in the suit property could have been granted to the plaintiffs.

Held, further, that the plaintiffs being not ready to purchase share of the defendants on payment of the entire agreed consideration for the whole of the property, which

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is one of the conditions for the application of section 12 of the Specific Relief Act, 1963, as required by sub section (3) thereof, they were not entitled to a decree for specific performance of a contract with regard to the share of the defendants.

Sheikh Abdul Bari and another v. Shree Ram Gupta and another (1987) I.L.R. 66, Pat. 1523

Statute — lacuna in framing procedural form or a rule mandated by statute — whether renders statute itself in a state of suspended animation till such rules are framed.

Held, that a mere lacuna in framing a procedural form or a rule mandated by statute would not render the statute itself in a state of suspended animation till such rules are framed.

Delhi Cloth and General Mills Company Limited (now known as D.C.M. Ltd.) v. Suraj Kuer and another (1987) I.L.R. 66, Pat. 80

University—Teachers' Training College — unrecognised and unaffiliated educational institution — declaration of examination result contrary to statutory provisions or University Regulations —whether warrants issue of a writ of mandamus— securing of admit cards on fraudulent representation —legal or equitable estoppel, whether arises — no estoppel against the statute, principle of — whether applies.

Per S. S. Sandhawalia, C. J. and S. Shamsul Hassan, J (Lalit Mohan Sharma, J. contra) : —

Held, that, no amount of compassion for an

unfortunate student of an unrecognised and unaffiliated educational institution warrants a mandamus for the declaration of his examination result contrary to the statutory provisions and University regulations.

There cannot possibly be any legal or equitable estoppel resting on fraudulent representation or sharp practice. It has been rightly said as a hallowed rule that fraud vitiates everything. For the petitioners to contend that by virtue of a fraudulent collusion with the Principal of the Government Teachers, Training college, Saharsa, and the dubious and under-hand securing of the admit cards they have laid foundation of a legal or equitable estoppel in their favour appears as an argument utterly unwarranted. Further there can be no estoppel against the statute because both the law and the University Regulations having the force of law create frontal bar against the petitioners of the instant case being permitted to take the examination. Therefore, no writ of mandamus to declare the results of students in the examination of the Bachelor of Education who were plainly ineligible to take the examination can issue.

Per Lalit Mohan Sharma, J. — The cancellation of a candidature under Regulation 18 of Chapter II of the Regulations of the respondent University is not an unimportant matter; if affects the candidate seriously and, therefore, cannot be ordered in a casual manner. The question of cancellation, therefore, has to be considered by bestowing thought to the situation, considering the facts and circumstances closely and carefully arriving at unambiguous relevant finding by proper order. Such an

order has not been passed in the present case. Further, in view of the serious consequences which follow an order of cancellation, the affected candidate must be given an opportunity to place his case which admittedly has not been done here.

Held, that since the candidature of the petitioners has not been cancelled, the plea of the University that it could withhold the result of an examinee has to be rejected on this ground alone. It is too late in the day to suggest that the petitioners can be condemned as a perpetrator of fraud and a co-conspirator without being heard. It cannot, therefore, be held that the petitoners were party to a conspiracy, with the two Principals. Besides, it is not possible to come to any conclusion on the allegation even against the Principals who are not parties to this writ petition.

Held, further, that section 2 of Act 21 of 1982 does not deal with private candidates at all and the University has not placed the entire Regulations or the other relevant provisons if any and as such it is not possible to accept the case of University that it has been deprived of the power to admit private candidates at the examination on any condition or in any circumstances even if they fulfilled the necessary conditions.

Amarendra Partap Singh and ors. v.Lalit Narain Mithila University and ors. (1987) I.L.R. 66, Pat. 1319

Wealth Tax Act, 1957, Sections 18 and 35, scope and applicability of—date of the decision of authority to initiate proceeding for levying penalty whether would

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govern the relevant law applicable for the computation of the amount of penalty — no appeal filed by the assessee against the penalty order — order becoming final — assessee, whether can challenge the validity of the order imposing penalty in an appeal against the rectification order regarding quantum of penalty.

Held, that, the date of the decision of authority to initiate proceedings for levying penalty would govern the relevant law applicable for the quantification of the amount of such penalty under section 18 of the Wealth-Tax Act, 1957.

When the original penalty under section 18 of the Wealth Tax Act, 1957 was imposed, the assesses had right of appeal but the assessee did not prefer any appeal against the penalty levied under sections of the Act and thus the penalty order become final;

Held, that the assessee in the appeal against the rectification order regarding the quantum of penalty will not be entitled to contend that the Wealth-Tax Officer had no jurisdiction to impose penalty under section 18 of the Wealth Tax Act, 1957.

Commissioner of Wealth-Tax, Bihar-II, Patna v. Dalip Kumar Worah, Dhanbad (1987) I.L.R. 66, Pat. 1457

Wilkinson's Rules

1—Rules 14 and 31 — Rule 31 — application under, having been entertained and considered on merits, whether could be defeated on the ground that appeal under Rule 14 was not filed — grant of ad-interim

injunction by Additional Deputy Commissioner without assigning any reason — Validity of —— principles and spirit of Code of Civil Procedure 1908, whether will apply in cases under the Wilkinson's Rules.

The Commissioner having entertained the application of the defendent under Rule 31 of the Wilkinson's Rules and considered the case on merits, the same can not be defeated on the ground that an appeal under Rule 14 should have been filed.

Where the plaintiff filed Kolhan Money suit before Additional Deputy Commissioner for recovery of Rupees thirteen lacs and odd on account of the balance of the amount of advance made to the defendent from time to time for the price of manganese supplied by the defendent to the plaintiff together with interest and prayed for temporary injunction which was allowed without assigning any reason and the application by the defendent therefrom before the Commisioner under Rule 31 of the Wilkinson's Rules was rejected;

Held, that the orders of Additional Deputy Commissioner and the Commissioner did not assign any reason which was mandatory in accordance with the principles and spirit of the provisions of the proviso to Rule 3 of order 39 of the Code of Civil Procedure, 1908, for the Code of Civil Procedure, 1908, for the Courts to record and therefore, the orders, are void. Although the Code of Civil Procedure has no application and under Wilkinsons Rules there is no provision for grant of injunction, the Principle and spirit of Code of Civil

Procedure will apply. The quasi judicial order must be supported by reasons. Recording of reason in support of the decision by a quasi Judicial authority is obligatory as it ensures that the decision is reached according to law and is not a result of caprice, whim or fancy or reached on the ground of policy of expediency.

M/s.Orissa Magnese and Minerals Pvt. Ltd. v. The Commissioner of South Chotanagpur Division, Ranchi and ors. (1987), I.L.R. 66, Pat. 378

2— Rule 20 — Provisions — all the Panches not nominated by the Agent, i.e. the Deputy Commissioner — award given by Panches and the decree passed in pursuant thereto, whether without jurisdiction.

Where in a suit was instituted in Kolhan area to which wilkinson's Rules are applicable and Deputy Commissioner i.e., the, Agent proceeded to dispose of the matter in terms of Rule 20 of the Wilkinson's Rules by appointing Panches but actually Panches were got nominated by the two parties to the suit and the third panch was nominated by the Deputy Commissioner himself where upon the panches made award :

Held, that in view of the fact that all the three Panches were not nominated by the agent, i.e., the Deputy Commissioner in accordance with Rule 20 of Wilkinsons Rules, entire proceeding became vitiated in law and award made by the panches was wholly without jurisdiction and as such the decree passed pursuant thereto was set aside.

Kushnu Sinku v. The State of Bihar & 42 others (1987) I.L.R. 66. Pat 690

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Workmen compensation Act, 1923, section 3 subsection (1) — ambit of — workman not meeting with any accident during the course of his employment — workman, whether entitled to compensation from the employer.

Where the Presiding officer, Labour Court had found that the workman did not meet with any accident during the course of his employment and that the medical evidence showed that the body of the workman did not have any external or internal injury;

Held, that sub-section (1) of section 3 of the Workmen's Compensation Act, 1923, envisages the payment of compensation to a workman by the employer only upon the occurrence of an actual physical accident and consequential injury resulting therefrom.

Superintendent of Mines v. Smt Lalo Devi (1987) I.L.R. 66, Pat. 545

Writ Jurisdiction — exercise of — rights and obligation of the parties being statutory and not purely contractual — writ petition, is maintainable — reasons for rejecting the representation of the petitioner whether must be assigned — Indian Electricity Act 1910.

Held, that, the supply of energy by the Bihar State Electricity Board to the petitioner is in discharge of its statutory duty and the parties have their respective rights and obligation as provided in the statutes. It, therefore, cannot be said that the petitioner wanted to enforce a contract qua-contract and in view of the provision of

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clause VI of the schedule to the Indian Electricity Act, it must be held that the duties and obligation of the parties being statutory, the petitioner is entitled to seek relief in writ jurisdiction.

Held, further, that it was incumbent on respondent no. 2 to give reasons in his order rejecting the representation of the petitioner so that the court can see whether respondent no. 2 acted within the limits of law. Once the reasons are assigned, the court may see whether any extraneous or irrelevant matters were taken into consideration and whether relevant matters were left out. Administrative agencies while disposing of dispute is required to give reasons to see whether there is arbitrary exercise of the power.

M/s Carbon and Graphite Products, Ranchi v. Bihar State Electricity Board, Vidyut Bhawan, Patna and ors. *(1987) I.L.R. 66, Pat.* 702

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1260	—	last line	or	(delete)
1261	—	11	ralinale	rationale
1261	—	20	i	is
1261	—	20	section	sections
1263	—	5	Tenency	Tenancy
1268	—	2	inequiry	inquiry
1269	—	13	ratiooiation	ratiocination
1274	20	3rd from bottom	sub-section	subsections
1277	—	10	trails	trials
1278	—	3	form	from
1278	(iv)	5	trail	trial (may be read as trial or trials wherever it occurs as trail or trails)
1290	—	18	perse	per se
1290	—	6th from bottom	do	also
1293	16	9	fir	fit
1294	—	18	under	(delete)

Page nos.	para no.	Line no.	For	Read.
1296	—	last line	Democles	Damocles
1299	23	1	form	from
1299	23	6	issue acquitals	issue of acquittals
1299	23	3rd from bottom	context	context of
1300	24	2	cricumspect	circumspect
1303	28	3rd from bottom	drew ... betwext	...drew the line betwext
1304	—	1	form	from
1305	—	2	no	(delete)
1306	—	16	form	from
1311	20	10	expect	except
1311	21	8	recorde	recorded
1315	41	10	perseuation	persecution
1317	45	9	final from	final form
1323	—	12th from bottom	by	of
1327	9	last but one line	recommendation	Recommendation
1350	—	last but one	Shamsnal Hasan	Sahmsul Hasan
1391	9	4	changeable	chargeable
1393	13	16	transferred	transferred/
1395	15	5	settler	settlor
1412	—	last line	of otherwise	or otherwise
1413	—	6	also	else

Page nos.	para no.	Line no.	For	Read.
1514	5	10	occurrance	occurrence
1417	—	7	in	is
1433	9	6th from bottom	**an safeguard**	**a safeguard**
1433	9	3rd from bottom	if it is	It is
1434	—	2nd from bottom	is	(delete)
1435	—	12	and	an
1437	—	14	challenges	challenge
1438	—	10	weather	whether
1441	2	4	issued	(Delete)
1450	—	5	**interoductive**	**introductive**
1464	—	8th from bottom	imposible	imposable
1478	8	1	revolve	revolves
1484	—	last but one	Reference	reference
1485	—	1	as/well	as well
1486	17	5	followed	to follow
1490	—	10	devoide	devoid
1501	15	last but one	pretende	pretend
1514	9	9	herd	heard
1522	9	1	find	I find.
1572	29	14	**Gagendragadkar C.J.**	**Gajendragadkar C.J.**
1536	—	11	resjudicate	res judicata
1543	3	last line	Proprietor	the Proprietor
1545	10	6	bussiness	business

Page nos.	para no.	Line no.	For	Read.
1550	12	4	parimateria	pari materia
1554	—	4th from bottom	litmas	litmus
1568	34	2	colleriry	colliery
1575	—	12	interferred	interfered
1643	14	16	per see	per se

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FULL BENCH CASES

1. I.L.R. 66 Pat. 235 overruled the unreported decision of this court passed in (1986) C.W.J.C.No. 165 of 1986 disposed of on 14.5.1986.
2. I.L.R. 66 Pat. 845 overruled the case reported in (1974) A.I.R (Pat.) 338
3. I.LR. 66 Pat. 845 overruled the case reported in (1982) A.I.R. (Pat) 177.
4. I.L.R. 66 Pat. 883 held the case reported in 1984 P.L.J.R. 480 to be correctly decided.
5. I.L.R. 66 Pat. 895 overruled the case reported in 1979 B.B.C.J. 109.
6. I.L.R. Pat. 926 overruled the case reported in (1983) A.I.R. (Pat.) 67.
7. I.L.R. 66 Pat. 926 overruled the case reported in (1982) A.I.R., (Pat.) 47.
8. I.L.R. 66 Pat 926 approved the case reported in (1983) A.I.R. (Pat.) 272.
9. I.L.R. 66 Pat 926 modified the observation in the case reported in (1944) A.I.R. (Pat.) 17
10. I.L.R. 66 Pat. 1101 overruled the case decided in (1967) C.W.J.C. no. 277 of 1967 decided on 18.8.1967 to that extent.
11. I.L.R. 66, Pat. 1138 overruled the case reported in (1980) A.I.R. (Pat.) 280.
12. I.L.R. 66, Pat. 1260 overruled the case reported in 1980 B.B.C.J. 57.

13. I.L.R. 66 Pat. 1260 overruled the case reported in (1973) A.I.R. (Pat.) 275 to that extent.
14. I.L.R. 66 Pat. 1260 affirm the case reported in 1980 B.B.C.J. 423.
15. I.L.R. 66 Pat.1319 overruled the case reported in 1982 B.B.C.J. 32 to that extent.
16. I.L.R. 66 Pat. 1319 overruled the case decided in (1983) C.W.J.C. No. 2147 of 1982 disposed of on 25.8. 1983
17. I.L.R. 66, Pat. 1351 overruled the case reported in 1981 B.B.C.J. 171.
18. I.L.R. 66 Pat 1351 overruled the observation in the case reported in 1978 B.B.C.J. 84 as being nebulous.
19. I.L.R. 66 Pat 1457 overruled the case reported in (1986) 162 I.T.R. 884.
20. I.L.R. 66 Pat. 1536 overruled the case reported in (1976) 102 I.T.R. 437.
21. I.L.R. 66 Pat. 1536 overruled the case reported in (1974) 96 I.T.R. 499.
22. I.L.R. 66 Pat. 1536 overruled the case reported in (1985)1 Taxation Law Reports 336.
23. I.L.R. 66 Pat. 1573 approved the case reported in (1929) A.I.R. (Pat.) 473 F.B.
24. I.L.R. 66 Pat. 1573 approved the case reported in (1978) B.B.C.J. 400 (F.B.).
25. I.L.R. 66 Pat. 1573 overruled the case reported in (1979) B.B.C.J. 293.

LETTERS PATENT APPEAL

1. I.L.R. 66 Pat. 52 held 1969 P.L.J.R. 248 to be deemed to be impliedly overruled by Supreme Court by the case reported in (1968) P.L.J.R. 634.

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Of the Union of India.

1860-XLV- See, Penal Code, 1860.

1908- V- *See,* Code of Civil Procedure,1908.

1908- IX- *See,* Limitation Act 1908.

1940- X- *See,* Arbitration Act, 1940.

1952-XLVI- *See,* Criminal Law Amendment Act, 1952.

1961-XLIII- *See,* Income Tax, 1961.

1962- LII- *See,* Customs Act, 1962.

1963-XXXVI-*See,* Limitation Act, 1963.

1974- II- *See,* Code of Criminal Procedure, 1973.

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Arbitration Act, 1940 - [- sections 30, 39 and 41 --- Award, whether justified by the weight of evidence led by the parties --- Court, whether can re-examine the merits --- grounds on which an Award can be set aside - -- Code of Civil Procedure --- provisions of, whether apply in the proceedings under the Arbitration Act - Code of Civil Procedure, 1908 (Act V of 1908) order 41, Rule 22.

It is not open to the Court to re-examine the merits for finding out whether the Award is justified by the weight of evidence led by the parties. The jurisdiction of the Court to examine its correctness is limited by the provisions of the Arbitration Act, which are based on the general principle applicable to arbitration proceedings. An arbitrator is a tribunal selected by the parties, and his adjudication is binding on them. If it were permissible for the court to re-examine the correctness of the Award, the entire proceeding would amount to an exercise in futility. The grounds on which an Award can be set aside are limited by statute and section 30 of the Act in mandatory terms declares that an Award shall not be set aside on other grounds. It is also not open to the court to speculate, where no reasons are given by the Arbitrator as to the reasons which led him to his conclusion. The court cannot proceed to determine whether the conclusion is right or wrong on an assumption that the Arbitrator

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must have proceeded by a certain process of reasoning.

Section 41 of the Act says that subject to the provisions of, and the rules made under the Act, the Civil Procedure Code shall apply to all procedings before the court and to all appeals under the Act. There does not appear to be any provision inconsistent with the application of the Civil Procedure Code.

Held, therefore, that in the instant case the decision of the court so far it has gone against the plaintiff respondent is clearly appealable under section 39 and as such the cross-objection is maintainable.

Bihar State Electricity Board v. *M/s Khalsa Brothers* (1987) I.L.R., LXVI, Pat. 134

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 - [- sections 11 (1) (c) and (e) and 14 (8), scope and applicability of --- suit for eviction of a tenant either on the ground of personal necessity reasonably and in good faith or of expiry of the period fixed under the lease --- remedy of the landlord when he loses the suit --- Civil revision application by him, whether maintainable.

Held, that, the remedy of the landlord in a case lost by him in which he institutes the suit in a civil court of competent jurisdiction for eviction of a tenant either on the ground

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of personal necessity reasonably and in good faith or in the case of expiry of the period fixed under the lease as per section 11 (1) (c) and (e) respectively is by "way of revision (and revision only)" of the order of the Court by the High Court as laid down in proviso to sub-section (8) of section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, and the civil revision application in the present case is maintainable at the instance of the landlord petitioner.

Uday Banerjee v. *P.R.Dutta* (1987) I.L.R. LXVI, Pat. 148

Bihar Government Notification No. S.O.1432 dated 28-11- 1985 --- prescribing a declaration form to be carried on a goods carrier for transporting goods through the State of Bihar during the course of inter-state, whether violative of Articles 301 and 304 of the Constitution --- Constitution --- Articles 301 and 304.

Where the petitioners challenged the constitutionality of the Government of Bihar Notification no. S.O.1432 dated 28th November, 1985 prescribing declaration form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of inter State Trade;

Held; that notification no.1432 dated 28th November, 1985, prescribing the declaration

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form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of Inter State Trade, is violative of Article 301 and 304 of the Constitution. The notification is hereby quashed.

Harihar Prasad Debuka and anr. v. *State of Bihar and ors.* (1987) I.L.R. LXVI, Pat. 235

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 - [- section 16 (3) --- scope and applicability of --- application for pre-emption --- non-mention of "description of the land" as provided in schedule I of Form LC13 under rule 19 of the Rules --- effect of.

Where in an application under section 16 (3), description of the land whether it was agricultural, horticultural or homestead was not given but the map attached to the application showed that the land was agricultural in character and further the petitioners did not mention the name of the District or Sub- division but the applicant did mention the number of the police station and the name of the village, there could absolutely be no difficulty in finding as to in which district and sub-division the land was located and no prejudice was caused to the purchaser by the non-mention of the classification of the plots in question;

Held, that substantial/sufficient

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informations were furnished in For L.C.13 of Schedule I (under Rule 19) and hence on the basis of the ratio laid down in the Supreme Court case of Hiralal Agrawal, the application filed under section 16 (3) could not be thrown out.

Khokhari Devi and ors. v. *The Addl. Member, Board of Revenue & ors.* (1987) I.L.R. LXVI, Pat. 52

Section 16 (3) scope and applicability of --- claim for pre-emption --- whether can be defeated by the adjoining lands before an application under section 16 (3) was filed.

On a plain reading of section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, the right for reconveyance of the lands transferred can be exercised by a co-sharer or a holder of adjoining land, when the land has been transferred to any person other than a co-sharer or a raiyat of an adjoining land.

Held, therefore, that in the instant case after the registration of the two sale deeds in respect of two plots in his favour the purchaser petitioner became holder of two adjoining plots. When applications for pre-emption were filed in respect of two plots transferred, the petitioner can legitimately resist the claim for pre-emption on the ground that he himself is a holder of the adjoining plot.

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It is almost settled that before an application under section 16(3) of the Act is filed, the purchaser by purchasing an adjoining plot can himself become the holder of an adjoining plot in order to defeat the pre-emption application which is filed later:

Ram Roop Yadav v. *The State of Bihar and ors,* (1987) I.L.R., LXVI, Pat. 159

Bihar Trade Articles (Licenses Unification) Order, 1984 as amended by notification dated 17th October, 1985 --- clauses 2(c), 11 and 27(b) and (c) --- clauses 2(c) and 27(b) and (c) --- Collector alone the licensing authority with regard to wholesale trade in any article specified in Schedule 1 --- clause 11 --- wholesale license of writ-petitioner cancelled by Special Officer Incharge Rationing, validity of.

In view of new definition of Collector given in clause 2(c) read with clause 27(b) and (c) of the Bihar Trade Articles (Licenses Unification) Order, 1984, hereinafter called the Order, as amended by notification dated 17th October, 1985, it has to be held that now the Sub-divisional Officer on any officer of the rank of Sub-divisional Officer can not be deemed to be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 of the order on the basis of any authorisation by the Collector. When the framers of the Order as amended have

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specifically said that Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 of the Order, then the Collector cannot delegate that power to any other officer on the basis of defination of "Collector" given in clause 2(c) of the Order.

Held, further, that the Special Officer Incharge Rationing had no authority to suspend the licence of the petitioner under claue 11 of the Order.

M/s Patna Kerosene Agency v. *The State of Bihar and others.* (1987) I.L.R. LXVI, Pat. 94

Code of Civil Procedure 1908 - [- 1 section 80, scope and applicability of --- identity of the person issuing notice under section 80 being the same as the person filing the suit --- provisions of section 80, whether complied, --- Limitation Act 1908 - [- Articles 56 and 120 and Limitation Act, 1963 - [- section 30, Articles 18 and 113 --- suit for realisation of price for work not done in its entirety Article 56 of the old Limitation Act or Article 18 of the New Limitation Act not applicable --- residuary Article 120 of the old Limitation Act or Article 113 of the New Limitation Act and section 30 whether ap licable --- suit, whether barred by limitation.

Where the suit was filed by M/s Bhagat and Company and notice under section 80 of

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the Code of Civil Procedure was given by Shri D.R.Bhagat a Partner of Bhagat and Company;

Held, that there was due compliance of the provisions of section 80 of the Code of Civil Procedure as the identity of the person who issued the notice was the same as the person who brought the suit.

Where it is not one of such suits where the plaintiff has sued the defendant after completion of the construction work of the defendant but a case where the plaintiff was stopped from doing any further work by the Executive Engineer on 23.8.1961 when the right to sue accrued to the plaintiff and the suit was instituted in the year 1966;

Held, that Article 56 of the Limitation Act, 1908, corresponding to Article 18 of the New Limitation Act will not govern the case and the only other Article applicable will be Article 120 of the old Act which is described as a residuary Article and says that any suit for which no period of limitation is provided elsewhere in the schedule to the Act, the period of limitation would be six years from the date when the right to sue accrues. Under the corresponding Article 113 of the New Limitation Act the period of limitation has been curtailed which provides only three years' period of limitation from the date when the right to sue accrues and as a consequence will attract the provision of section 30 of the New Act. Section

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30 provides that any suit for which the period of limitation is shorter than the period of limitation prescribed by the Old Act may be instituted within a period of seven years next after the Commencement of the New Act or within the period prescribed for such suit by the old Act, whichever period expires earlier. Under the old Act, by virtue of Article 120, a period of six years was prescribed, as the period of limitation from the date when the right to sue accrued, which is earlier than the period of seven years ex gratia extension under section 30(a) of the New Act. Taking the shorter period as prescribed in the Old Act, therefore, into consideration, the period of limitation would expire on 23.1.1987 or, perhaps, on 22.1.1967 (which is six years from the date when the right to sue accrued). Obviously, therefore, in the year 1966, when the suit was instituted, the suit cannot be said to be barred by limitation.

M/s Bhagat & Company, Hazaribagh v. *The State of Bihar* (1987) I.L.R.LXVI, Pat. 118

2 section 151 --- ambit of --- resort to this section to stay the eviction suit pending disposal of earlier suit for specific performance of contract, whether will frustrate the legislative mandate in the provisions of section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act --- Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982.

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Where the defendant in an eviction suit filed an application in the suit under section 10 of the Code of Civil Procedure, 1908, hereinafter called the Code, for staying the eviction suit pending the disposal of the suit filed by him earlier for specific performance of contract which was rejected and then in the revision application in the High Court the plea was taken that in case section 10 of the Code was not applicable, relief be given by taking recourse to section 151 of the Code;

Held, that by resorting to the inherent powers under section 151 of the Code the very object and purpose of a bilateral munificient piece of legislation as the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, hereinafter called the Control Act, will be frustrated, setting at naught the legislative mandate and thereby rendering nugatory the provisions of section 14 of the Control Act. To take recourse to such a procedure would not only be not subservient to the ends of justice but would be overriding the Special procedure mandated by a self contained Code as the Control Act. It would indeed be an abuse of the process of the Court by trying to induce the Court to render section 14 of the Control Act as otiose and redundant.

Dr.N.P.Tripathi v. *Smt.Dayamanti Devi and another.* (1987). I.L.R., LXVI,Pat. 182

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Code of Criminal Procedure, 1973 - sections 5 and 428, scope and applicability of --- conviction and sentence by a court Martial under the provisions of the Army Act --- provisions of section 428, whether applicable --- period of detention before conviction, whether can be allowed to be set off--- order of re-arrest --- principle of natural justice, whether violated. 1

Held, that, what has been envisaged by section 5 of the Code of Criminal Procedure, 1973, is to allow any special jurisdiction or power conferred or any special form of procedure prescribed by a special law to take control of the proceedings and exclude the operation of the Criminal Procedure Code. But merely because there is a special law, the operation of the Criminal Procedure Code is not excluded unless the special law expressly or impliedly provides in that behalf, in which case the special law applies, otherwise the Code applies. Conviction and sentence passed by the court Martial are not in any way affected by granting set off against the term of imprisonment imposed on the accused as provided by section 428 of the Code of Criminal Procedure, 1973, and they remain the same even after the set off is allowed. Section 428 is absolute in its terms. The object of the enactment of section 428 was to release the anguish of prolonged detention of undertrials and to avoid overcrowding in jails. The Army

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Act like the Navy Act or the Air force may be a special law and special provisions are made for the trial by the court martial, still how the sentence would be carried out and in doing so, set off would be granted or not is not covered by the special provisions thereof.

Held, therefore, that the petitioner was entitled to the benefit of section 428 of the Code of Criminal Procedure, 1973, and to the issue of a writ in the nature of mandamus directing the respondents for not taking the petitioner in custody pursuant to the orders contained in Annexures 1 and 2 to undergo unexpired portion of his sentence.

Held, further, that the petitioner was not given opportunity of being heard nor the authority of law, under which he was sought to be detained, was disclosed to him and as such the principle of natural justice was violated.

Ex-Major Ganesh Prasad Sinha v. *Union of India New Delhi and ors.* (1987) I.L.R., LXVI, Pat. 101

2 - section 482 --- order of Special Magistrate separating trial of accused for offences under 165 A and 165 A read with section 34 of the Penal Code from one under section 121 - A, 124 - A and 120 - B of the Penal Code --- quashing of, whether will prevent the abuse of the process of the court --- Criminal

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Law Amendment Act, 1952, - [- sections 7(3) and 8(1) --- provisions of --- Special Judge, whether can try for offences under section 121 - A and 124 - A of the Penal Code without the accused persons having been committed for trial --- Penal Code, 1860 - [- section 34, 120B, 121 - A, 124 - A, and 165 - A.

Where the State filed an application under section 482 of the Code of Criminal Procedure, 1973, for quashing the order passed by Special Judge separating the trial of the accused for offences under section 165 - A and 165 - A read with section 34 of the Penal Code, 1860, from the offences under sections 121 - A, 124 - A and 120 - B of the Penal Code;

Held, that the quashing of the impugned order, in the instant case, will prevent the abuse of the process of the court and shall also secure the ends of justice. On the contrary, if the order of the Special Judge is upheld, it is likely to cause prejudice to the accused persons, in as much they shall have to face two separate trials, although many evidence in the two trials may be common.

If the offence under section 165 - A read with section 34 of the Penal Code is tried separately, the prosecution has to lead the same evidence in connection with the charge of conspiracy alleged to have been entered into between the accused persons in respect of offences under sections 121 A and 124 -

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A of the Penal Code because, according to the prosecution, the bribe had been offened to the officials at the checkpost to allow the accused persons to leave the territory of India and to proceed to Nepal.

Held, further, that reading section 7(3) alongwith section 8(1) of the Criminal Law Amendment Act, the Special Judge can try for offences even under sections 121 - A and 124 - A of the Penal Code without the accused persons being committed to him for trial for the said offences.

State of Bihar v. *Simranjit Singh Mann and others*.(1987). I.L.R., LXVI,Pat.

CRIMINAL LAW AMENDMENT ACT, 1952 - sections 7(3) and 8(1). See Code of Criminal procedure, 1973, no.2 208

Criminal trial --- dying declaration --- recording and mode of --- a few omissions in the statement here and there --- effect of:

Held, that there is no prescribed form to record a dying-declaration and no rigid rule can be for the same. It can only be said that the man who records the dying declaration must satisfy himself that the deponent is in a fit state of mind and quite alert in making statement relating to the injuries sustained by him. A few omissions in the statement here and there, if the statement is otherwise found

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to be honest and acceptable, cannot be said to be a reasonable cause to reject it, and more so, if other facts reflect the same to be as a correct statement.

Ramji Singh v. *The State of Bihar.* (1987) I.L.R., LXVI, Pat. 195

Customs Act, 1962 - [- section 104 read with sections 4(2), 436 and 437 of the Code of Criminal Procedure, 1973 --- person suspected of commission of non-bailable offence under the Act --- Magistrate-power of to remand to custody if produced before him by customs officer --- Code of Criminal procedure, 1973, sections 4(2), 436 and 437.

Held, that section 104 of the Customs Act read with sections 4(2), 436 and 437 of the Code of Criminal Procedure clearly empowers a Magistrate to remand to custody a person suspected of the commission of a non- bailable offence under the said Act and produced before him by the customs officer.

Nagendra Prasad and another v. *The State* (1987) I.L.R., LXVI, Pat. 61

Direction of State Government dated 21.7.1978 --- whether directory in nature --- transfer of teachers of Elementary Schools who were office bearers of Primary Teachers Association in contravention of communication of State Government letter dated 21.7.1978 ---

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validity of.

The Communication dated 21.7.1978 issued by the Department, of Education, Government of Bihar to the different District Education Officers and District Superintendents of Education intimating that the office bearers of the recognised Primary Teachers Association should not be transferred from one place to another during the period they hold the said offices unless it is against the public interest cannnot be held to be mandatory in nature so as to nullify the orders of transfer issued in respect of the writ- petitioners. It is only a directive by the State Government to its officials in respect of transfer of teacher of the Elementary Schools.

It is well settled rule of construction that statutes creating public duty are directory where as those in conflict with private rights are imperative. It will be all the more difficult to hold an administrative decision in respect of public policy to be mandatory in nature.

Raghav Singh and others v. *The State of Bihar and others.* (1987) I.L.R., LXVI, Pat. 167

Income Tax Act, 1961, 1- section 37 --- Expenditure in defending employees of the company from Criminal prosecution; whether allowable deduction --- expenses incurred in defending the Directors from prosecution under the Mines Act --- relevant materials to

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show that the expenditure was in the interest of the business of the company not produced --- whether allowable deduction.

Where the assessee-company claimed expenditures incurred during assessement years 1965-66 and 1966-67 in defending the watchman and other employees of the company in connection with criminal cases as allowable expenses;

Held, that the sum spent by the assessee-company in defending its watchman and other employees against criminal prosecution was expenditure expended wholly and exclusively for the purpose of the business in terms of section 37 of the Income Tax Act, 1961 and was allowable deduction.

Where the assessee-company claimed expenses incurred in defending the Directors of the company from prosecution under the Mines Act but did not produce the relevant materials to show that the expenditure was wholly and exclusively in the interest of the business of the assessee;

Held, that the expenses over defending the Directors of the company from prosecution under the Mines Act were not allowable deduction.

Commissioner of Income-tax, Bihar II, Patna v. *M/s Indian Copper Corporation Ltd.*,

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Ghatshila (1987) I.L.R. 66, Pat. 1

2 - sections 147(a), 147(b), 153(3) (ii) and 154 -- - section 147( ) --- ambit of reassessment of 'deemed dividend', whether falls within the ambit of section 147(b) --- section 153(3) (ii) --- applicability of --- section 153(1) and (2) --- provisions regarding limitation, whether applicable --- section 154 --- order of rectification under, legality of.

Where Jhari Ram Bhadani was the Karta of the Hindu Undivided Family and in his presence, the Appellate Assistant Commissioner, Income Tax issued direction of reassessment of Jhari Ram Bhadani in respect of the 'deemed divident' as individual;

Held, that Jhari Ram Bhadani, the 'Individual' was intimately connected with Jhari Ram Bhadani, the Karta of the Hindu Undivided Family and the instant assessee Surendra Kumar Bhadani has been proceeded against as the legal heir of Jhari Ram Bhadani since the latter was dead at the time of initiation of the proceeding under section 34 (1) (b) of the Income Tax Act, 1961, hereinafter called the Act.

Held, further, that the instant case comes within the periphery of section 153(3) (ii) of the Act. It is obvious that no question of limitation would arise. The direction of the Appellate Assistant Commissioner, Income-tax

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had to be given effect to and, the refore, the provision in regard to limitation set down by sub- sections (1) and (2) of section 153 of the Act had to be put on the self. The Income-tax Appellate Tribunal was thus justified in holing that the initiation of the proceeding was not barred by time.

Held, further, that though the case of reassessment of 'deemed dividend'fell within the ambit of section 147(b) of the Act. Yet the initiation of the reassessment proceeding was valid. The Income-Tax Appellate Tribunal was not justified in cancelling the proceeding on the ground that the proceeding had been initiated under Section 147(a)and not section 147(b) of the Act.

Held, also that the order for rectification under section 154 of the Act is upheld.

Commissioner of Income-Tax, Bihar,Patna. v. *Surendra Kumar Bhadani* (1987)I.L.R. LXVI,Pat. 23

Penal Code, 1860 -[- sections 302 and 304 part I - offence under section 302 --punishment for --- culpable homicide not amounting to murder --- court, wether has discretion in passing order of sentence.

For an offence of murder punishment under section 302 of the Penel Code only one of two alternative punishment can be awarded.

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it is either death or imprisonment for life.But in a case of culpable homicide not amounting to murder, the court certainly has a discretion in passing the order of sentence and that is to be done considering the circumstances of each case. There is no uniformity in any case in imparting sentence either of imprisonment or of fine; and every judge does so in his own wisdom looking to the circumstances in every case before him. Ordinarily, punishment to be imposed should be sufficiently severe to deter the accused to repeat commission of such offence and act as examplary to others.In the instant case there was nothing to show what was the quarrel between the accused and the deceased and what led the accused to embark upon such an act of giving dagger blow to the deceased. It cannot be ruled out that circumstances might be such, which prompted the accused to commit the offence on the spur of the moment without any premeditation and might not have intended to cause the death.

Held, therefore,that under such circumstances sentence of eight years of imprisonment will meet the ends of justice.

Chalu Bin v. *State of Bihar* (1987) I.L.R. LXVI, pat. 174

Statute --- lacuna in framing procédural form or a rule mandated by statute --- whether

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renders statute itself in a State of suspended animation till such rules are framed.

Held, that a mere lacuna in framing a procedural form or a rule mandated by statute would not render the statute itself in a state of suspended animation till such rules are framed.

Delhi Cloth and General Mills Company Limited (now known as D.C.M. Ltd. v. *Suraj Kuer and another* (1987) I.L.R., LXVI, Pat. 80

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1986

April,8.

*Commissioner of Income-Tax, Bihar II, Patna.**

v.

M/s Indian Copper Corporation Ltd. Ghatshila.

Income Tax Act, 1961 (Central Act No. XLIII of 1961) - [- 1 section 37 --- Expenditure in defending employees of the company from Criminal prosecution, whether allowable deduction --- expenses incurred in defending the Directors from prosecution under the Mines Act --- relevant materials to show that the expenditure was in the interest of the business of the company not produced --- whether allowable deduction.

Where the assessee-company claimed expenditures incurred during assessement years 1965-66 and 1966-67 in defending the watchman and other employees of the company in connection with criminal cases as allowable expenses;

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*Taxation Case Nos. 216 to 219 of 1976. Statement of case under section 256(1) of the Inocme-tax Act by the Income-tax Appellate Tribunal, Bench Calcutta in the matter of assessment of Income-tax on M/s Indian Copper Corporation Ltd., Ghatshila, for assessment years 1965-66 and 1966-67.

Held, that the sum spent by the assessee-company in defending its watchman and other employees against criminal prosecution was expenditure expended wholly and exclusively for the purpose of the business in terms of section 37 of the Income Tax Act, 1961 and was allowable deduction.

Where the assessee-company claimed expenses incurred in defending the Directors of the company from prosecution under the Mines Act but did not produce the relevant materials to show that the expenditure was wholly and exclusively in the interest of the business of the assessee;

Held, that the expenses over defending the Directors of the company from prosecution under the Mines Act were not allowable deduction.

Case laws discussed.

Statement of case under section 256(1) of the Income- Tax Act.,1961.

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

Messrs B.P.Rajgarhia (Sr. S.C., ITD). and S.K.Sharan (Jr. S.C., ITD). for the petitioner

Messrs G.C.Bharuka and Namite.Pd. Singh. for the opposite party

UDAY SINHA, J. -- *These are four references under section 256(1) of the Income-tax Act, 1961 and relate to assessment years 1965-66 and 1966-67. The questions referred to as for our opinion are the following:*

(1) Whether, on the facts and in the circumstances of the case, the claim of the assesses company amounting to Rs.19,39,205/- for the assessment year 1965-66 and Rs.2,99,039/- for the assessment year 1966-67 in respect of the Internal Development Expenditure could be allowed as revenue expenditure?

(2) Whether, on the facts and in the circumstances of the case, the expenses of Rs.2,000/=, and Rs.7,319/= for the assessment year 1965-66 and Rs.5,017/= and Rs.2,195/= for the assessment years 1966-67 incurred in defending the employees in connection with the criminal cases are admissible expenses?

(3) Whether, on the facts and in the circumstances of the case, the assessee was entitled to the export profit rebate in respect of the kyanits business in the assessment year 1965-66 and 1966-67 ?

(4) Whether, on the facts and in the circumstances of the case, the losses of Rs.80,933/= in the assessment year 1965-66 and Rs.25,500/= in the assessment year 1966-67 claimed by the assessee on the purchase and sale of securities and bonds could be allowed as business loss ?"

2 The assessee is a public limited Company. The first and third questions, quoted above, fall for consideration before this very Bench in Taxation Case Nos. 185, 186, 205 and 206 of 1971 and 57 and 56 of 1972. These cases related to this very assessee Company and were disposed of on the 23rd January, 1986. One of the questions referred to us in Taxation Case Nos.205 and 206 of 1971 was whether on the facts and in the circumstances of the case, the claim

of Rs.14,43,524/= in respect of the Internal Development expenses was revenue expenditure. Those cases related to assessment year 1962-63. The first question raferred to us in these references is the very same matter, viz, whether Internal Development Expenditure could be allowed as revenue expenditure. The question of allowance of Internal Development expenses was considered at paragraphs 54 to 68 of the judgment. In paragraph 67 it was held that the Tribunal had rightly held that the Internal Development expenses was Revenue Expenditure and rightly allowed deductions accordingly. Since the question has already been answered by this Court in regard to the assessee before us and since nothing has been brought to our notice to doubt the correctness of the view taken by us earlier, it has to be held that any Internal Development Expenditure to the tune of Rs.19,39,205/= during assessment year 1965-66 and Rs.2,99,089/= during assessment year 1966-67 is allowable expenditure. Question No.1 is thus answered in favour of the assessee and against the Revenue.

3. The third question referred to us in regard to entitlement to export profit rebate in respect of the kyanite business during the assessment years 1965-66 and 1966-67 has also beed decided by us in the aforasaid taxation cases of this very assessee. The precise question referred to us in this behalf had been referred by the Tribunal in Taxation Case Nos. 205 and 206 of 1971. This question was answered in the earlier taxation cases in paragraph 72 where Nazir Ahmed,J held as follows:

"From the aforesaid facts it is evident that it is not in dispute that the assessee is entitled to export profit rebate in respect of the kyanite business for

the assessment year in question, i.e., 1962-63. The actual dispute between the parties was with respect to the method of computation of export profit rebate."

Since the real point at issue was the method of computation of the export profit rebate, the question referred to us was reframed as follows:

"Whether on the facts and in the circumstances of the case, the assessee is entitled to export profit rebate in respect of the kyanite business for the assessment year 1962-63 in the manner as computed by the I.T.O. or in the manner as computed by the Tribunal ?"

In that connection, it was laid down by this Court that the total sales of kyanite business and the profit relating to the total sales of kyanite business, total export sales and the total profit on export sales of kyanite business have only to be considered for application of rule 2(3) of the Income-tax Rules. On that basis the Tribunal had directed the I.T.O. to compute the rebate. We upheld the mode of computation adopted by the Tribunal.And we do so now once again. Question No.3 is answered accordingly in favour of the assessee. These conclude our opinion on question Nos.1 and 3, referred to us. Both of them are decided in favour of the assessee and against the Revenue.

4. The second question referred to us relates to claim of expenditure over defending the directors and the employees against criminal prosecutions. The assessee spent Rs.2,000/= and Rs.5,017/= during the assessment year 1965-66 and 1966-67, respectively in defending the directors in a criminal prosecution

under the Mines Act. The prosecution had been initiated by the State on account of an accident that had occurred in North Badala Section of its mines at Mosahani on 17-8-1953. Another category of expenditure was Rs.7,319/= and Rs.2,195/= spent in 1965-66 and 1966-67, respectively. These expenditures were incurred for defending the watchment and other employees of the assessee, who had been posted to guard its premises against *hooligans* and thieves. The question relating to legal expenses, therefore, had to be tackled from two different angles. The first category is of defending the directors. The other is on account of defending the employees of the assessee. The deductions were claimed as expenditure expended wholly and exclusively for the purposes of the business. Section 37 of the Income-tax Act, 1961 enjoins that any expenditure expended wholly and exclusively for the purposes of the business shall be allowed in computing the income for the purposes of the business. The expenditure has to be wholly and exclusively for the purposes of the business. Judged by these standards, I have not the least doubt that the sums spent by the assessee in defending its watchmen and other employees was allowable deduction. Those were cases where night watchman had fired on hooligans. Those incidents led to prosecution of the employees of the Company. The Company was under obligation to defend the employees. The watchmen had been engaged to watch the properties of the assessee. Their duty forced them to such a situation that they had to face criminal prosecution. It cannot, therefore, be doubted for a moment that the expenditure over defending the employees was expenditure expended wholly and exclusively for the purposes of the business. The matter is so well settled that it is not necessary to refer authorities on this point. I would, *therefore*,

refer only to the case of *Rohtas Industries Ltd.* Versus *Commissioner of Income-tax, Bihar and Orissa(1)* . which is a decision of this Court. That was a case where the directors and the principal officers were prosecuted under the Essential Supplies Temporary Powers Act, on the allegation that the vegetable oil produced by the Company did not contain 5% til oil as required by the order made under clause (9) of the Act. The Company incurred expanditure in defending the case, and the officers were acquitted. In the assessment proceeding the Rohtas Industries claimed deduction of expenses spent over that litigation in defending its officers under section 10(2) (xv) of the Income-tax Act, 1922. This Court observed that the nature and purpose of legal proceeding in relation to the quality and standard of the manufactured goods of the Company. The prosecution was on the ground that those goods were below standard and the Company had to defend the quality of their products by defending themselves and their officers in that criminal case. In those circumstances, the goodwill and the quality of the goods was at stake. It had to be defended and protected. Their Lordships, therfore, held that the expenditure was deductible under section 10(2)(xv) of the Act. The present case also must be decided on the ratio of the said case. It cannot be doubted for a moment that the expenses had been incurred wholly and exclusively for the porposes of the business of the assessee. Later the Supreme Court laid down in *Commissioner of Income-tax, Andhra Pradesh* versus *Dhanrajgirji Raja Narasingirji.* (2) that the crucial

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(1) (1968) 67 I.T.R 361

(2) (1973) 91 I.T.R. 544.

question to be seen is whether the expenditure was bonafide incurred wholly and exclusively for the purpose of the business. For the academic legal question their Lordships relied upon an earlier decision of the Supreme Court in *Commissioner of Income-tax* versus *Birla Cotton Spinning and Mills Ltd.*(1) The above should have concluded matters, but I cannot resist my temptation of referring to another case of the Calcutta High Court in *Parshva Properties Ltd.* versus *Commissioner of Income-tax, Central, Calcutta.* (2) That was a case of accident in a quarrel A labour engaged in it had died in the accident. The director, the agent and manager of the Company were prosecuted and sentenced. It had been found in the criminal case that the working of the mine was defective and the accident took place because of the failure to comply with regulations 38 and 40 of the Indian Mettalliferous Mines Regulations, 1926. A sum of Rs.17,057/= was alleged to have been incurred in defending the original proceeding. That amout included Rs.3,000/= paid as fine. The Tribunal rejected the claim to deduction of the said sum as spent wholly and exclusively for the purpose of the business of the Company. On referance Sabyasachi Mukharji,J laid down some principles which emerged from the decided cases. His Lordship laid down that the question of deductibility of expenditure of that nature must depend on the purpose and nature of the expenditure incurred. Secondly, it had to be found out in what capacity the expenditure was incurred. and lastly, the ultimate result or decision in which

(1) (1971) 82 I.T.R. 166.

(2) (1976) 104 I.T.R. 631.

the expenses were incurred would not in any way affect the question of allowability of the expenditure. In regard to sums spent in defending the directors, their Lordships of the Calcutta High Court observed that in so far as expenses were incurred in defending the accused persons in respect of the acts alleged to have been committed in course of employment of the assessee while carrying on the business of the assessee, unless it could be said that the expenditure was not incurred bonafide, which was not the case there, the expenditure should be allowed in computing the total income of the assessee. Their Lordships, however, laid down that the sum of Rs.3,000/= paid as fine could not be allowed as deduction. I am in respectful agreement with the views of Mukharji,J. I am, therefore, of the view that sums spent over defending the employees from criminal prosecution, i.e. the sums of Rs.7,319/= and Rs.2,195/= incurred in assessment years 1965-66 and 1966-67 were allowable deductions.

5. Learned Senior Standing Counsel for the Income-tax Department relies upon *Commissioner of Income-tax, West Bengal* versus *H.Hirjee* (1) in which the Supreme Court rejected the claim for deductions on account of legal expenses. That was a case where the directors of the assessee were prosecuted under Hoarding and Profiteering Ordinance, 1953 on the charge of selling goods at higher prices that were reasonable in contravention of the provisions of section 6 thereof. The respondent defended the cases. The

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(1) (1953) 23 I.T.R. 427.

expenditure spent in defending the prosecution which had ended in acquittal was claimed as allowable deductions. The legal expenses as allowable deductions was rejected by the Supreme Court. In my view, the case of *H.Hirjee* (supra) was decided on a different footing. That decision proceeded on the footing that the directors were charged with contravention of section 6 of the Hoarding and *Profiteering Ordinance*, 1953 which prohibited the sale by a dealer or producer of an article for consideration which was unreasonable. Their Lordships repelled the reasoning of the High Court that since the prosecution had ended in acquittal, the expenses were legally deductible. Their Lordships held that there was chance of conviction as well and, therefore, the question of acquittal or conviction was entirely foreign to the matter in *controversy*. In this behalf. I can do no better than state that the present case must be decided on the ratio of the Supreme Court decision in *Haji Aziz and Abdul Shaukor Bros vrs. C.I.T., Bombay City-II (S.C.), (1) Learned Counsel for the Revenue placed reliance upon commissioner of Income-tax, Delhi and Rajasthan* versus *Chaman lal and Bros* (2) *Lakshmi Narayan Gouri Shankar* versus *Commissioner of income-tax, Bihar* (3) *Raghubir Prasad Supra vs. C.I.T. West Bengal (4) and Commissioner*

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(1) (1961) 41 I.T.R. 350.

(2) (1970) 77 I.T.R. 383. (Delhi)

(3) (1975) 100 I.T.R. 143. (Patna)

(4) (1979) 120 I.T.R. 789. (Calcutta)

of Income-tax MP-I vs. Malwas Vanaspati and Chemical Co.Ltd. MP, (1) to impress upon us that expenses over criminal prosecution are Ex-facie not deductible expenditure. Those cases stand on a different footing. Those were cases of penalty or fine under special enactment. These were not cases of prosecution. The real question which must decide the issue is whether expenses were incurred in defending prosecutions which were wholly and exclusively for the business of the assessee. In the present case, I am clearly of the view that the sums spent over defending the employees were allowable deductions in terms of section 37 of the Act.

6. I must now come to the question whether the sum spent for defending the director from presecotion under the Mines Act was allowable deduction. In this behalf it was submited by learned Senior Standing Counsel that the assessee had failed to produce necessary relevant materials to show that the expenditure was wholly and exclusively in the interest of the busines of the assessee. He submitted that there was nothing to show that in what circumstances the accident had occurred and what was the infraction of the law by the assessee. The law is that sums spent wholly and exclusively in the interest of the business must be allowed as a deduction. The finding of fact recorded by the Tribunal is that there had been an accident in a mine of the assessee. The Tribunal, however, has not recorded the circumstances in which the accident had taken place and what were the part played by the assessee or

(1) (1982) 135 I.T.R. 221. (M.P.)

to put it in other words what were alleged to be the failings of, the defactors. In the absence of those materials, it would be difficnet to hold that the sums were spent wholly and exclusively for the business of the assessee. The assessee failed to produce the necessary materials in this behalf. Merely saying that some amounts were spent over defending the directors from criminal prosection under the Mines Act is not enough. The law does not have any bias or favour for person infringing law to endanger life of the citizens. In that view of the matter, the assessee was required to show the circumstances in which the accident occurred and that the directors had interest in defending the good name of the Company. In the absence of necessary materials, the sums allowed over defending the directors were not allowable deductions order section 6(c). However, it was contended on behalf of the assessee that the Tribunal had found that those expenses were in proceedings arising out of and were incidental to the assessee's business, this was a finding of fact and, therefore, this Court in reference under section 256(1) of the Act had no jurisdiction to take another view of the matter and hold that the expenses were not wholly and exclusively for the pupose of the business. I regret, I have some difficulty in holding that this was a finding of fact. The Tribunal appears to proceed upon the assumption that the moment the assessee asserts that expenditure was incurred for defending the directors in a criminal prosecution, the deduction must be allowed. I do not think that is the law. It will have to be seen on the facts of each case whether the expenditure was in the interest of the business or whether it was in the interest of an individual. In that view of the matter, I am of the view that Rs. 2,000/- and Rs. 5,017/- spent in 1965-66 and 1966-67, respectively were not allowable

deductions. The answers to question No.2 must be that the expenses over defending the watchmen and other employees were allowable deductions, but the expenses over defending the directors from prosecution under the Mines Act were not allowable deductions. Question No.2 must, therefoe, be answered accordingly.

7. Question No.4 relates to certain losses incurred by the asseesee as capital losses. The position in this regard is that the assessee purchased the Bihar State Development Bond and sold them the very same day. In both the assessment years these purchases and sales caused loss to the assessee. In this behalf it would be relevant to quote the findings of the Appellate Assistant Commissioner which is Annexure B-1 to the statement of the case :

"At the instance of the Government of Bihar the appellant was made to purchase the following development loans.

a). On 24.08.64 43/4 % Bihar State Development Rs.1086540 Loans 1976.

b). On 19.11.68 43/4% Bihar State Electricity Rs.460187 Board Bond, 1975.

c). On 16.11.64 5% Bihar State Electricity Rs. 497500 Board Bond 1976.

Soon after the purchase the appellant sold No.(a) on 24.08.64 (same date on which it was purchased) for Rs.1053780. It was sold at a loss of Rs.32760.

The appellant sold No.(b) on 16.11.64 for Rs.433594. There was a loss of Rs.26593.

> Appellant sold No.(c) on 16.11.64 (same date on which it was purchased) for Rs.475750. It incurred a loss of Rs. 21750. All these sales were to outsiders. Low price was fetched because the quotation was low in the market. The appellant had not purchased these securities with a view to investments. On the other hand, it was made to purchase them by the Government of Bihar. That the appellant did not think of investment is evident from the fact that from all 3 securities two have been sold away on the same date on which were purchased on the date. It appears to me that the purchase and sale was not in connection with the appellant's business."

From the above findings, it will be seen that the parchases and sales were anything but commercial ventures. These bonds were available in the market for much lower sums. It was known that the price which the bonds would fetch on sales was much lower than the investment and yet knowing all these the Company went into that venture. It is difficult to appreciate how such an expenditure can be held to be wholly and exclusively in the interest of business. The Tribunal in a very glibly and in accryptic manner accepted the stand of the assessee observing that the very fact that they were sold shortly after they were purchased in a way indicate that the purchases were made only to oblige others. It is difficult to comprehend whether it was meant to oblige others or it was meant to oblige the powers that may be under the assessee Company. It may be convenient way out for cornering the profits of the Company. The Trisbunal has not gone into the question to whom these assets were sold. The A.A.C. did hold that these sales were to outsiders, But outsider is too vague an expression. These outsiders may well be sons,

nephews and other relations. Merely saying that the sales were to outsiders is insufficient materials to hold that they were genuine sales and purchases.

8. The Tribunal allowed the deduction on the finding that the purchases were only to oblige others. Even upon this finding, it can hardly justify allowance of such an expenditure. The assessee did not disclose who had applied pressure nor did he disclose what was the kind of pressure applied. There is nothing to show what would have happened, if the Companiy had not succumbed to the pressure. Supposing these sales were must as bribe to any high ranking officer of the Government, would that be deemed to be envestment in the interest of the business. in my view, the law cannot be twisted or interpreted to give incouragement to corruption and mal-practices in the garb of pressure from Government. By succumbing to such pressure, the assessee became participent criminal. I am unable to hold that from the mere assertion of the assessee that these losses were known before the transaction and yet they were gone through to oblige some body in the Government was adequate ground for allowing the deductions. A Court of law cannot take note of illegal pressure. Every citizen is supposed to resist the demand for bribe. If this view of the law is accepted, it would open the case for bribing officers and political dignitaries. it is this sort of interpretation by Court which encourages political dignitaries to demand bribe. When the persons subjected to the bribe express their inability saying what will they show in the accounts they are met with the rebuff "that is your concern not mine. It would be putting a premium on corruption by powerful elements.

9. Learned counsel for the assessee placed reliance in support of his stand on *Commissioner of Income-tax, Tamil Nadu v. Dhamdayuthapani Foundry (private) Ltd.* (1). That was a case where the assessee was obliged to subscribe to cartain Government security. This was done on the persuasion of the Sales Tax Authorities over making assessments on the assessee and had control over Form No.XX which was delivery note to be issued at the time of despatch of goods by the Sales Tax Authorities. The assessee instead of directly purchasing the securities and then selling them later paid certain margin amounts to the brokers which represented the difference between the issue price and the market price for the securities. The brokers purchased on behalf of the assessee and sold them immediately. The result was a loss of Rs.1900/-. The assessee claimed as revenue loss. The Tribunal upheld that stand on the footing that the assessee purchased and sold for retention of the goodwill of the Sales Tax Department. On that footing the loss was allowed as a loss incidental to the business of the assessee. That was a case where it was obvious that submission to the pressure was necessary in order to obtain Form XX without which goods could not have been despatched. That decision should be read carefully to follow the ratio. From the facts it was obvious that there nexus was established between the act of the assessee and the pressure or persuasion applied by the Department. If the nexus can be established between the two, it is obvious that the expenses would be in the interest of business. That

(1) (1980) 123 I.T.R. 709.

is not the situation before us. The real problem in accepting the submission urged on behalf of the assessee is that nothing has been spelt out about the nature of the pressure or the source of the pressure.

10. In this connection, it would be useful to advert to a Full Bench decision of the Madhya Pradesh High Court in Addl. *Commissioner of Income-tax versus Kuber Singh Bhagwandas* (1) Since this case has been relied upon heavily by learned counsel for the assessee, it would be apt to deal with this case at some length in order to show that it does not really help the assessee. The facts of that case are that there was a drought in the relevant assessment year in the Madhya Pradesh. Twelve districts of Madhya Pradesh were badly hit by famine. The export of foodgrains there had, therefore, been banned by Madhya Pradesh Gram (Export Control) order,1967,under the Essential Commodities Act.

The Bhopal Vyapari Maha Sangh addressed a representation to the Food Minister to the effect that the production of pulses and gulabi Chana was maximum in the State of Madhya Pradesh as compared to other States and that their stock was steadily deteriorating in quality because of want of market. The hardships of the mercantile community attracted the attention of the Chief Minister. He addressed a letter to the President of the Maha Sangh which stated that in view of the representation, the Government had decided to allow liberally permits for export of Gulabi Chana and pulses outside the State. In the

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(1) (1979) 118 I.T.R. 379.

same letter the Chief Minister brought to the notice of the trading community that the kisans and labourers were undergoing untold hardship on account of drought conditions and as the merchants were bound to earn profits, the Chief Minister appealed to the trading community that they should contribute to the Chief Minister's Drought Relief Fund which would be utilised for the purposes of relieving the distress of the famine stricken people, for production of foodgrains and for small scale irrigation schemes. The Chief Minister, however, made it clear that there was no question whatsoever of exerting pressure on any one in the matter, and that he hoped that as the foodgrain marchants of the State never lagged behind in generosity, his appeal would receive generous response. The Joint Secretary of the Maha Sangh wrote to the constituents asking the merchants to deposit Rs.30 per quintal for the export of gulabi chana and Rs.5 per quintal for the export of pulses into the State Bank of India or the State Bank of Indore to the credit of the 'Chief Minister's Drought Relief Fund' and obtain duplicate receipts from the Bank. It was also directed that the original of such receipts were to be sent along with the duly filled in application forms for permits to the Maha Sangh at Bhopal and in case any Bank refused to issue duplicate receipts, a bank draft for the amount should be obtained in the name of the Chief Minister's Drought Relief Fund and the application for the permit with the draft should be sent to the Maha Sangh at Bhopal. The assessee also contributed to the Drought Relief Fund and obtained permit. In the assessment the assessee claimed deduction of the amount contributed to the Chief Minister's Drought Relief Fund. Tribunal upheld the stand of the assessee that the expenditure had been incurred for the purposes of the business. On reference

at the instance of the Commissioner, the High Court upheld the stand of the assessee and rejected that of the Commissioner. The High Court held that the contribution was as allowable deduction. On the face of it, the decision seems to support learned counsel for the asseessee. A proper appreciation is, however, required. The Madhya pradesh High Court notices four aspects in upholding the claim for deduction. They are rather important. The first aspect was that the Government was Prepared to grant the permits only when the Maha Sangh speaking for the trading community offered its services for the benefit of the public. The procedure which was followed in obtaining a permit had direct relationship with the quantity of foodgrains for which permit was applied for and granted. There was thus clear nexus between the expenditure and the object. Legally the traders were not bound to make the contribution, but the traders realised that there was greater prospect of getting of permit for carrying of the export business in case he made the donations as requested by the Chief Minister. The donations were thus made as a matter of fact for commercial necessity which facilitated the permit for carrying the export trade. To quote the words of C.J,G.P.Singh "the expenditure had a direct connection with the permit, as the receipts of donations were attached with the applications for permits and permits were granted is proportion to the donations." The second aspect noted therein is that the object behind the donations was to obtain permits for business to enable the assessee to earn profits by exporting and selling gram in the neighbouring States where the price of the commodity was double than what it was in the State. The expenditure was thus incurred wholly and exclusively for purposes of business. The third noteworthy aspect is that decision is that the traders

did not contravene any law. The donations were not made as penalty for infraction of any law. The fourth aspect was that the donations were made to obtain permits as also to earn profits. They were made not subject to any condition that they would be refunded if the merchants did not make any profit. They were made before making the application for permit. They were, therefore not made out of the profits. The last noteworthy aspect was that the mere fact that the donations were voluntary and that some members got permits even without making donations was not crucial for determining whether the donations constituted the business expenditure allowable under section 37(1) of the Act.

11. Let us test the case before us in the light of the decision of the Madhya Pradesh High Court. The first aspect to which I would like to advert is that on the facts as found, do we know why the pressure was applied? The second aspect was, is there any material to show that the Company benefited or was likely to benefit? The third aspect is, there is no material to indicate whether the investments were made to violate any law. Purchases and sales of the bonds themselves were not against law, but if they were meant to be bribe, would it not be against law? Would the donations not be said to have been made for infraction of any law? Is there anything to show that the assessee benefited by the purchase and sale of the bonds. The answer to all must be "we do not know", since there is no material in this behalf. For all these reasons, the Full Bench decision of the Madhya Pradesh High Court can be of no help to the assessee. If the assessee intended to take the advantage of section 37(1) of the Act, some more materials were required. The ratio of that case really goes against

the assessee.

12. Learned counsel of the assessee relied upon Additional *Commissioner of Income-tax, Madras-II versus B.M.S.(P) Ltd.* (1). This was also a case of purchase and sale of Government bonds which brought about loss to the assessee. The losses were allowed as deductible expenditure. This case is again distinguishable because the nexus between the investment was obvious. The trouble in our case is that the nexus has not been established. The nexus has not even been alleged much less established. In that view of the matter, I am of the view that the losses incurred by the assessee were not business losses. The expenditure cannot be held to have been incurred wholly and exclusively for the purposes of the business. In my view, therefore, the Tribunal was not right in allowing the sum of Rs.80,933/- in 1965-66 (A.Y.) and Rs.25,500/- in 1966-67 (A.Y.) as business losses. Question No.4 must, therefore, be answered in favour of the Revenue and against the assessee.

13. In fine, question Nos.1 and 3 are answered in favour of the assessee and against the Revenue in terms of our decision in Taxation Case Nos.185, 186, 205 and 206 of 1971 disposed of on 23.01.1986. Question No.2 is answered in favour of the assessee so far as expenses over defending the employees of the assessee were concerned, but it is answered in favour of the Revenue and against the assessee so far as the expenditure over defending the directors

(1) (1979) 119 I.T.R. 321.

in the prosecution under the Mines Act is concerned. Question No.4 is answered against the assessee and in favour of the Revenue. In special facts and circumstances of the case, there shall be no order as to costs.

14. Let a copy of this judgment be transmitted to the Income-tax Appellate Tribunal in terms of section 260 of the Income-tax Act. 1961.

Nazir Ahmad, J: I agree

R.D. *Questions answered.*

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1986.

April,23

*Commissioner of Income-tax, Bihar, Patna.**

V.

Surendra Kumar Bhadani.

Income Tax Act, 1961 (Central Act No.XLIII of 1961), sections 147(a), 147(b), 153(3)(ii) and 154 --- section 147(b) --- ambit of reassessment of 'deemed dividend, whether falls within the ambit of section 147(b) --- section 153 (3)(ii) --- applicability of --- section 153(1) and (2) --- provisions regarding limitation whether applicable --- section 154 --- order of rectification under, legality of.

Where Jhari Ram Bhadani was the karta of the

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*Taxation Case Nos.252 to 254 of 1976. Statement of case under section 256(1) of the Income-tax Act, 1961 by the Income Tax Appellate Tribunal, Patna Bench, 'B' in the matter of assessment of Income-tax on Surendra Kumar Bhadani for the assessment year 1953-54.

In Tax Case No.254 of 1976: Surendra Kumar Bhadani v. The Commissioner of Income-tax, Bihar.

Hindu Undivided Family and in his presence, the Appellate Assistant Commissioner, Income Tax issued direction of reassessment of Jhari Ram Bhadani in respect of the 'deemed divident' as individual;

Held, that Jhari Ram Bhadani, the 'Individual' was intimately connected with Jhari Ram Bhadani, the Karta of the Hindu Undivided Family and the instant assessee Surendra Kumar Bhadani has been proceeded against as the legal heir of Jhari Ram Bhadani since the latter was dead at the time of initiation of the proceeding under section 34(1)(b) of the Income Tax Act, 1961, hereinafter called the Act.

Held, further, that the instant case comes within the periphery of section 153(3)(ii) of the Act. It is obvious that no question of limitation would arise. The direction of the Appellate Assistant Commissioner, Income-tax had to be given effect to and, therefore, the provision in regard to limitation set down by subsections (1) and (2) of section 153 of the Act had to be put on the self. The Income-tax Appellate Tribunal was thus justified in holding that the initiation of the proceeding was not barred by time.

Held, further, that although the case of reassessment of 'deemed dividend fell within the ambit of section 147(b) of the Act, yet the initiation of the reassessment proceeding was valid. The Income-tax Appellate Tribunal was not justified in cancelling the proceeding on the ground that the proceeding had been initiated under section 147(a) and not section 147(b) of the Act.

Held, also, that the order for rectification under section 154 of the Act is upheld.

Case laws discussed.

Statement of case under section 256 (1) of the Income- tax Act, 1961.

The facts of the cases material to this report are set out in the judgment of Uday Sinha, J.

Messrs B.P.Rajgarhia, Sr. S.C., I.T.D. and S.K.Sharan, Jr.S.C., I.T.D. for the petitioner in T.C.No.252 & 253 OF 1976.

Messrs K.N.Jain, Rameshwar Prasad No.II and Amrendra Kumar Sinha for the opposite party in T.C. No.252 & 253 of 1976.

Messrs K.N.Jain; Rameshwar prasad No.II and Amrendra Kumar Sinha. for the petitioners in T.C.No.254 OF 1976.

Messrs B.P.Rajgarhia, Sr.S.C.I.T.D. and S.K.Sharan, Jr. S.C., I.T.D. for the opposite party in T.C.No.254 of 1976.

Uday Sinha, J. -- These are consolidated references under section 258 (1) of the Income-tax Act, 1961. Some question have been referred to us at the instance of the Revenue and others at the instance of the Assessee. The following questions have been referred at the instance of the Revenue:

"(1) Whether on the facts and in the circumstances of the case, the Tribunal is correct in holding that the proceedings under section 147(a) were not valid?

(2) Whether on the facts and in the circumstances of the case the Tribunal was justified in cancelling

the proceeding on the ground that the proceedings have been initiated under section 147(a) and not under section 147(b)?

(3) Whether on the facts and in the circumstances, the Tribunal is justified in cancelling the order under section 154 of the Income-tax Act?"

The questions referred to us at the instance of the assessee are the following:

"(1) Whether on an appeal by the H.U.F., the A.A.C. is competent to give a finding and direction to assess the individual so as to lift the bar of limitation under section 34(1) and proviso?

(2) Whether the Tribunal is right in holding that action under section 147(b) had not become barred at the point of time when the A.A.C. gave directions?

(3) Whether the Tribunal was right in holding that action under section 34(1) (a) of the Income-tax Act 1922 had been taken in the name of the deceased and no such proceeding initiated under section 34 against the assessee was pending at the commencement of the new Act?"

The assessee is an individual being legal heir of late Jhari Ram Bhadani. The concerned assessment year is 1953-54.

2. For the aforesaid assesment year M/s Jhari Ram Bhadani and Sons was originally assessed in the status of Hindu Undivided Family (hereinafter called 'the H.U.F.') on a total income of Rs.8217/- on 27.10.1953. The assessment was later rectified under section 154 to Rs. 8893/-. That was again rectified

under section 154 and assessment was completed on a total income of Rs.12705/- on 16.9.1958. In the asssement procedding Jhari Ram Bhadani as karta of the H.U.F. contended that the dividends of Hirjee Mills ltd., Bombay were the assets of Jhari Ram Bhadani as 'individual' since the share stood in his individual name and, therefore, the H.U.F. was not liable to that extent. The Income-tax officer (hereinafter referred to as 'the I.T.O.') rejected the stand of the H.U.F. that the aforesaid income was not the income of the H.U.F. On appeal the Appellate Assistant Commissioner (hereinafter called 'the A.A.C.'), deleted the 'deemed dividend' from the assessment of the H.U.F. holding that since the H.U.F. was not the registered share holder of the Company, it could not be saddled with the liability of tax for the 'deemed dividend' Having deleted the 'deemed dividend' from the income of the H.U.F., the A.A.C. directed the I.T.O. by order dated 22.2.1961 to take action under section 34 read with section 31 of the Income-tax Act, 1922 for assessing that deemed dividend income in the hands of the registered share-holder. That direction having been given, the I.T.O. initiated proceeding under section 34(3) of the 1922 Act against Late Jhari Ram Bhadani, who was by then dead. No return was filed in answer to the notice. That proceeding never came to a close. While it was pending the I.T.O. with the approval of the Central Board of Direct Taxes (to be called 'C.B.D.T.) initiated proceeding under section 147 of the Act and issued notices on 15.10.1965 to Surendra Kumar Bhadani, legal heir of late Jhari Ram Bhadani 'Individual'. A return of Rs.187038/- was filed.

2A. Various objections were raised on behalf of the assessee. The main objection of the assessee

was that the initiation of proceeding under section 147 of the Act was barred by time. Suffice it to say, that the assessee's objections made no impact on the I.T.O. He, therefore, reassessed the income of the assessee in terms of section 147 of the Act adding Rs. 178865/- as dividend income of the assessee desed to have been declared under section 23A in the case of M/s Hirjee Mills Ltd., Bombay. The I.T.O. also initiated a proceeding under section 271(1) (a) for late filing of the return of income.

3. The matter was then taken in appeal. The A.A.C.upheld the contention urged on behalf of the assessee holding that the re-assessment proceedings were Abinitio void. In his view, the A.A.C. having pronounced that the registered share-holder should be taxed in respect of the deemed dividend, the I.T.O. should have proceeded only under section 34(1)(b) and not under section 34(1)(a). The view of the A.A.C., in appeal against re-assessment order was that there had been no omission or failure on the part of the assessee and, therefore, the case would not fall within the ambit of section 34(1)(a) and so the shorter period of limitation in terms of section 34(1)(b) would be applicable.

4. The matter was then taken on appeal by the Revenue to the Tribunal. The Tribunal posed the following questions:

(i) Whether the findings and direction given by the Appellate Assistant Commissioner were valid in law?

(ii) Whether the re-assessment proceedings for assessing the deemed dividend was to be taken under

section 147(a) or under section 147(b) of 1961 Act. corresponding to section 34(1)(a) and section 34(1)(b) of the Income-tax Act, 1922 ?

(iii) Whether the limitation for taking any such action had become barred at the point of time when the Appellate Assistant Commissioner had given the direction?

(iv) Whether any valid proceeding under section 34 of the old Act was pending against the present assessee at the time of commencement of the new Act?

(v) Whether the action for re-opening for assessment could be validly taken under section 147 read with section 153 of the Income-tax Act?

(vi) Whether the assessment made was valid in law?

The first issue was decided in favour of the Revenue. It was held that the individual member alone could be assessed in respect of the deemed dividend declared under section 23A In regard to the second issue the Tribunal held that the re-assessment proceeding could be taken, but only under section 34(1)(b) of the Income-tax Act corresponding to section 147(b) of the 1961 Act. In regard to the third issue, the Tribunal held that the limits placed in section 34 for initiating the action were removed by the proviso. Thus the time for taking action had not become barred at that time. In the view of the Tribunal, the law did not provide any time limit for taking any action under section 34. In regard to the fourth issue the Tribunal held that no valid proceeding was pending under section

34 against the assessee. In regard to the fifth issue, the Tribunal held that the direction of the A.A.C. was legal and valid and the action taken in pursuance of thereof was also valid. In its view, the Explanation to sub-section (3) of section 153 would have applied, if such direction had not been given. In regard to the sixth and the last issue whether the assessment was valid in law, the Tribunal held that the assessment was saved by the 2nd proviso to section 34(3) though it had been made more than four years after the end of the assessment year. The Tribunal thereafter considered the question whether the re-opening of the assessment under section 147(a) could be upheld on the ground that action could have been taken under section 147(b). The Tribunal held that it could not substitute the order of the I.T.O. passed under section 147(a) as an order under section 147(b). In fine, the Tribunal held that the order of the I.T.O. was invalid, as action was taken under section 147(a) and not under section 147(b). The order of the Tribunal gave umbrage to both the parties. Questions have, therefore, been referred to us, as stated earlier, at the instance of both the parties.

5. I shall first consider whether the Tribunal was right in holding that the action not having been initiated in terms of section 147(b), the proceeding was invalid. In my view, the Tribunal was not right in the view that it took in the matter for reasons which I shall set out hereinafter. Section 147 of the Act empowers the Revenue to initiate and take steps to assess income which has escaped assessment. The *escapement* has been divided into two categories - where the assessee is in default and where the Revenue is in default. Section 147(a) covers cases where the escapement

has been occasioned on account of omission or failure on the part of an assessee to disclose fully and truly all materials necessary for his assessment. Section 147(b) covers cases where there has been no omission or failure on the part of the assessee but the I.T.O. has reason to believe that income chargeable to tax has escaped assessment. In either situation, the I.T.O. has the jurisdiction to initiate re-assessment proceeding. The power to re-assess, however, is limited by the provisions of section 158(2) which sets a time limit for initiation of a re-assessment proceeding. Section 153(2) lays down that no order of re-assessment, or re-computation shall be made, if it has to be made under clause (a) of section 147, after the expiry of four years from the end of the assessment year in respect of which notice under section 148 was served. Section 158(2)(b) provides that no re-assessment or re-computation shall be done whare action is taken in terms of clause (b) of section 147 after the expiry of four years from the end of the assessment year in which the income was first assessed or after the expiry of one year from the date of service of the notice under section 148 whichever is later. The conjoint effect of sections 147 and 153(2), therefore, is that where income has escaped assessment, a limitation period is fixed for initiating proceeding for re-assessment. The crucial aspect is limitation of time. If the limitation placed by section 153(2) disappears and there is a case for re-opening of assessment no holds are barred. Such a situation is taken care of by sub-section (3) of section 153 which leaving aside irrelevant matter reads as follows:

(3) The provisions of sub-sections (1) and (2) shall

not apply to the following classes of assessments, reassessments, and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time -

(i) Where a fresh assessment is made under section 146;

(ii) Where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or *to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263, or 264* or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;

(iii) Where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147."

6. Let us apply the law to the facts of the instant case. In this case the H.U.F. was assessed which included deemed income from Hirjee Mills. The H.U.F. of which the present assessee (the Individual) was the Karta asserted that the income in question was income of the Individual and not of the H.U.F. and, therefore, it was not liable to be assessed as the income of the H.U.F. The H.U.F. failed before the I.T.O. The stand of Jhari Ram Bhadani, Karta of the H.U.F. however, succeeded before the A.A.C. The A.A.C. in exercise of his appellate powers directed that Jhari Ram Bhadani the 'Individual', i.e. the present assessee should be assessed in regard to the deemed income from the H.U.F. In accordance with the directions, the reassessment proceeding in regard to Jhari Ram Bhadani, the Individual was taken. It will

thus be seen that proceeding for reassessment under section 147 was initiated to give effect to the finding and the direction of the A.A.C. The instant case, therefore, comes within the periphery of section 153(3)(ii). It is thus obvious that no question of limitation would arise. The direction of the A.A.C. had to be given effect to and, therefore, the provision in regard to limitation set down by sub-sections (1) and (2) of section 153 had to be put on the shelf. The Tribunal was thus justified in holding that the initiation of the proceeding was not barred by time. To that extent, the finding of the Tribunal must be endorsed. Thus there was no question of limitation involved.

7. The next question is whether having initiated a proceeding under section 147(a) whether action could be taken in terms of section 147(b). The Tribunal, in my view, fell into serious error in holding that since sanction had been obtained to act in terms of section 147(a) and since the case fell within the ambit of section 147(b), the order of the I.T.O. was invalid. The bar of limitation having been lifted, the distinction between sub-sections (a) and (b) of section 147 becomes *irrelevant.* If it is conceded that there was an escapement, whosoever be at fault, - the assessee or the Department action for reassessment could be taken. The C.B.D.T. would be bound to accord approval for initiation of the reassessment proceeding. In my confirmed view, therefore, there was no sanctity left in the difference between (a) and (b) of section 147. The Tribunal was, therefore, not right in rejecting the stand of the Revenue that the order of reassessment was invalid. The conclusion of the Tribunal is that the instant case fell within the category of section 147(b) and not section 147(a). The facts in relation

to a deemed dividend had been disclosed. It was known to the Revenue that the shares stood in the name of Jhari Ram Bhadani, the Individual. There was thus no omission or failure on the part of the assessee. The case would, therefore, not fall within the ambit of section 147(a). It is incontrovertile however, that the said dividend was liable to be taxed and had not been taxed. The escapement was, therefore, for reasons other than those contemplated by section 147(a).

8. The initiation of the proceeding under sub-section (a) or (b), however, could not be conclusive of the matter. Even if, proceeding had been initiated in terms of section 147(a), but if the facts fell within the ambit of section 147(b), it would be quite in order to resort to that provision, if the conditions necessary for initiation of proceeding under section 147(b) were available. The view that I have taken receives ample support from a Full Bench decision of the Calcutta High Court in Smt.Nirmala Birla and others versus Wealth-tax Officer, 'M' Ward, Dist. V(1), Calcutta and others: [1976] 106 I.T.R. 483. C.J. Sankar Prasad Mitra in an unanimous judgment held that where a reassessment under section 34(a) (since the case related to Indian Income- tax Act 1922) is set aside by the appellate Tribunal, it would be open to the Tribunal to treat reassessment as one properly made under section 34(1)(b) provided that, on the materials on record all the necessary conditions under section 34(1)(b) were satisfied. To quote the words of Mitra, C.J.:

"It is, therefore, clear that there is no bar to a notice under clause (a) being treated as notice under

clause (b)."

The Full Bench in that behalf endorsed the view taken in *Mirganka Mohan Sur versus Commissioner of Income-tax.* (1)In this connection, it would also be useful to refer to a decision of the Punjab and Haryana High Court in *Commissioner of Income-tax, Amritsar-II* versus *Ess Ess Kay Engineering Co. Pvt.Ltd.* (2) where Goyal, J held that clause (a) or (b) of section 147 do not deal with two separate jurisdictions. His Lordship observed that it was not necessary to specify in the notice the particular clause of section 147 under which it was being issued. The following words of Goyal, J are significant:

"If the notice is issued within the period of four years, resort can be had to either of the two clauses by the ITO and if it is issued beyond that period, clause (b) cannot be invoked under any circumstance and proceedings can be taken only under clause (a)"

It will thus be seen that, limitation permitting, the clause under which proceeding has been initiated is of not much significance. That would have significance if the limitation questions were germane. In the instant case, there is no question of limitation. The proceeding was initiated on the direction of the A.A.C. The case would, therefore, fall within the category of section 153(3).

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(1) (1974) 95 I.T.R. 503.

(2) (1982) 137 I.T.R. 448.

9. Lastly, the authoritative pronouncement of the Supreme Court in *Commissioner of Income-tax, Bombay versus Onkarmal Meghraj (H.U.F.)* (1) cannot be ignored. That was a case where assessment had been done on 'individual' partners pursuant to the direction of the A.A.C. The I.T.O. issued notice of reassessment under section 34 of the Income-tax Act, 1922 to the Individual partner N.M. and H. and their sons. The question was whether the assessment proceeding made pursuant to the direction of the A.A.C. was barred by limitation. Their Lordships of the Supreme Court held that the second proviso to section 34(3) could be availed of at any time in the case of N.M. and H. and the reassessments made on them were not barred by limitation.

In regard to the sons of the partners N.M. and H. the position was held to be different. They were not assessess before the A.A.C. and they were not intimately connected with the assessee, i.e. the H.U.F. and, therefore, the second proviso to section 34(3) was not applicable in their case. It follows that where the assessment is in pursuance of a direction of the A.A.C. or the Tribunal, there would be no question of limitation. That question would be relevant, if the persons sought to be proceeded against would not be intimately connected with the assessee before the A.A.C. when the direction was issued. On the facts of the case before the Supreme Court, it was held that the sons of the three partners were not intimately connected with the assessee i.e., the Hindu undivided

(1) (1974) 93 I.T.R. 233 = 1973 A.I.R. S.C. 2585

families, as there was no Hindu undivided family. In the instant case, Jhari Ram Bhadani was the Karta of the H.U.F. and in his presence, the A.A.C. had issued the direction of reassessment of Jhari Ram Bhadani in respect of the 'deemed income.' It cannot, therefore, be denied that Jhari Ram Bhadani, the 'Individual' was intimately connected with Jhari Ram Bhadani, the Karta of the H.U.F. The instant assessee Surendra Kumar Bhadani has been proceeded against as the legal hair of Jhari Ram Bhadani. He has not been proceeded against in his personal capacity as one of the co-sharers of the H.U.F., but as heir of Jhari Ram Bhadani since the latter was dead at the time of initiation of the proceeding.

10. Learned counsel for the assessee strongly relied upon the decision of the Supreme Court in *Johri Lal (H.U.F.)* versus *Commissioner of Income-tax, U.P.*(1) in support of his proposition that where action had been taken under section 34(1)(a), it was not open to the Revenue to treat it as a proceeding under section 34(1)(b). In my view the reliance placed upon the Supreme Court decision is entirely misplaced. There were sevaral assumptions in that case which do not exist in the case before us. Further that was not a case where there was a direction by the appellate authority. The reassessment has not been undertaken because of any direction. That makes a world of difference. I am, therefore, unable to hold that having initiated a proceeding under section 147(a), it was not open for the I.T.O. to take resort to an order

(1) (1973) 88 I.T.R. 439.

in terms of section 147(b).

11. Mr. K.N.Jain, learned counsel for the assessee contended that the direction of the A.A.C. to assess the deemed income as income of the assessee and to reassess Jhari Ram Bhadani, the Individual was illegal and without jurisdiction. The submission is entirely fallacious. The validity of the direction was challanged by the assessee before the Tribunal, but without any success. The Correctness and validity of the direction, therefore, cannot be challenged now. It must be held to be barred by the principle of Res judicate. The direction to reassess Jhari Ram Bhadani the Individual was ordered in presence of Jhari Ram Bhadani and on his invitation. The direction having become final, the challenge to reassessment has no substance and must be rejected.

11A. Mr.Jain also submitted that the direction of the A.A.C. was to assess the deemed income in the hands of the registered shareholders. It did not mean a direction to assess the deemed income in the hands of Jhari Ram Bhadani, the Individual and, therefore, the bar of limitation could not be lifted. Mr.Jain was candid enough to concede that if the direction had been to assess Jhari Ram Bhadani the Individual, the bar of limitation would have become ineffective. I regret, I find no substance in this submission. It is not disputed that the shares were registered in the name of Jhari Ram Bhadani the Individual. The direction of the A.A.C., therefore, to assess the income only mean a direction to assess the income in the hands of Jhari Ram Bhadani. The registered share-holders could only mean a direction to assess the income in the house of Jhari Ram Bhadani.

The registred share holders could not mean any body else. The meaning and intention was thus obvious.

12. My conclusions, therefore, in this behalf are that although the case fell within the ambit of section 147(b) and not 147(a), yet the initiation of reassessment proceeding was valid. The Tribunal was not justified in cancelling the proceeding on the ground that the proceeding had been initiated under section 147(a) and not 147(b).

13. The last question referred to at the instance of the Commissioner is whether the Tribunal was justified in cancelling the order under section 154 of the Income-tax Act. I regret, the Tribunal was not correct in setting aside the order under section 154 of the Act. The position is that the A.A.C. had directed that the deemed income had to be assessed in the hands of Jhari Ram Bhadani, the 'Individual'. That direction had to be given effect to. The assessment of the assessee had, therefore, to be consequently rectified. Now that I have held that the Tribunal was not correct in cancelling the order of assessment, the order for rectification under section 154 must be upheld. In that view of the matter, the third question at the instance of the Revenue must be decided in favour of the Revenue and against the assessee.

14. We now come to the questions referred to at the instance of the assessee. The first question is whether the A.A.C, was competent to give the direction to assess the Individual, so as to lift the bar of Sec. 34(1), 2nd proviso? In my view, the validity

of the direction of the A.A.C. was subject matter of challenge before the Tribunal. The challenge failed. The matter has thus become final. The assessee could not be allowed to challenge it collaterally. I am unable to appreciate the submissons vigorously urged at the Bar. It cannot be disputed that the A.A.C. had ordered that the "deemed income was not the income of the H.U.F., but it had to be assessed as income of the assessee, the 'Individual'. Learned counsel for the assessee did not dispute that the A.A.C. had that jurisdiction, apart from the fact that order had been complied with. That direction having been made the second proviso to section 34(3) would come into effect. The terms of this proviso reads as follows:

> "Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a re-assessment made under section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."

The direction to reassess being invulnerable, the challenge to the jursidiction lacks substance. The lifting of the bar of limitation is natural consequence of making a direction under section 31. The submission would have substance, if the power of the A.A.C. to issue directions to the I.T.O. in terms of section 31(3)(b) had been questioned. That is not the position here. The A.A.C. had directed as follows in his order dated

22-2-61.

> "The Income-tax officer is, however, directed to take action under section 34 read with section 31 for assessing this income in the hands of the registered share-holders for the relevant year. He is entitled to do so under the second proviso to sub-section (3) of section 34."

The above direction was upheld by the Tribunal in its order dated 10-1-1962 in I.T.A. No. 1942 of 1961-62. The objection of the assessee seems to be to the last sentence in the order of the A.A.C., quoted above where it was said that the I.T.O. would be entitled to assess *interms* of the second proviso to sub-section (3) of section 34. There would have been no difference in the legal position, if that sentence had not been there. The A.A.C. was only setting down the law in terms of the Act. Even if, that sentence had not been there, the I.T.O. in terms of section 34(3) second proviso would be entitled to initiate proceedings under section 147 for reassessment of the assessee. The direction was as a *sequel* to the stand of Jhari Ram Bhadani the Karta that the sum in question was not the income of the H.U.F. The stand of the Karta of the H.U.F. having been accepted by the A.A.C., the rest would be natural concomitant of the acceptance of the stand of the assessee as Karta. The position in law is absolutely clear and, therefore it would be *futile* to encumber this judgment by reference to authorities on this point. In my view, there can be no doubt that the A.A.C. was competent to give a finding and a direction to assess the Individual

which would lift the bar of limitation under the second proviso to section 34(1).

15. The next question is whether the Tribunal was right in holding that the action under section 147(b) had not become barred at the point of time when the A.A.C. gave directions? This question again balls down to the power of the A.A.C. to issue necessary directions. Section 147 is exactly the same as section 34 in its content. Whatever could be done in terms of section 34 of the old Act, could be done under section 147 of the new Act. It is true that the direction of the A.A.C. was made four years after the order of assessment of the Individual. But here was a case where while hearing appeal of the H.U.F. a direction had been made. It cannot be disputed that the A.A.C. could give such a direction. If he had the jurisdiction to make such a direction, the question of bar of time is meaningless. The direction had been made on 22-2-1961 under the 1922 Act and had been made in terms of section 31. The new Act come into force on 1st April, 1962. As a sequel to the direction if the 1961 Act had had not come into being' action could have been taken under section 34. Question thus is whether action could have been taken under the new Act or not. The provision equivalent to section 34 is section 147 and the provision equivalent to 2nd proviso to section 34(3) is section 153(3) of the new Act. Sub-section (3) of section 153 covers the same ground as the second proviso to section 34(3). Question is whether the action under section 147(b) had become barred, when the direction had been made. The direction

had been made on 22-2-1961 in terms of the old Act under section 34 and not section 147(b). The I.T.O. took action under section 143 on 15-10-1965. Return was filed in answer to the notice, on protest, on 16-3-1970 showing income of Rs.1,87,038/=. In terms of section 153(2) the reassessment could not be done after the expiry of four years from the end of the assessment in which notice under section 148 was served. Apparently in terms of section 153(2) steps for reassessment ought to have been taken on 31-3-1965. It was in fact taken on 15-10-1965. In terms of section 153(2) it was certainly beyond time, but precisely for such a situation, 153(3) was enacted which reads as under:

> "(3) The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time -
>
> (i) xx xx xx
>
> (ii) Where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise then by way of appeal or reference under this Act;
>
> (iii) xx xx xx xx"

Thus the bar of limitation for initiating proceedings under section 147 was lifted. In that view of the matter,

there can be no question of the matter having become barred by time when the A.A.C. gave the direction.

16. The last question reaferred at the instance of the assessee is whether the Tribunal was right in holding that action under section 34(1) (a) of the 1922 Act had been taken in the name of the deceased and no such proceeding initiated under section 34 against the assessee was pending at the commencement of the new Act ? It was submitted that a proceeding having been initiated against jhari Ram Bhadani, another proceeding under section 147 of the Act could not be initiated, In substance two parallel proceedings are not permitted by law, This conteded Mr.K.Jain for the assessee. The submis on on behalf of the assessee is that a proceeding under the old Act having been initiated under section 34 which was pending when the new Act came into force, That was the proceding which should have been taken to its logical conclusion and, There fore, the present proceding under section 147 was illegal and without jurisdiction, The submission is untenable,The fact of initiation of a proceding under section 34 of the 1922 Act has not been mentioned by the I.T.O. The A.A.C.did state that the proceeding under section 34 had been initiated, According to the A.A.C., the proceeding under section 34(1)(a) had been initiated on 11-8-1961. No return was filed by late Jhari Ram Bhadani, Who had died long before that date. No return having been filed, the I.T.O. issued notice under section 22 (4) on 7-1-1985 , but did not complete the proceeding for assessment, Before the proceding under section 34(1) was closed or completed, the I.T.O. took parallel action under section 148 by is saing notice to Surendra Kumar Bhadani as legal heir of

Jhari Ram Bhadani under section 147(a) on 15-10-1965 From these facts,it will be seen that the proceeding under section 34(1)(a) was initiated against Jhari Ram Bhadani, who was dead long before the initiation of the proceeding. The proceeding was thus against a dead person. Itt does not require much argument to appreciate that a proceeding against a dead person is nullity. It must be deeme to be Non Est in the eye of law. That is why, the Tribunal in its order at paragraph 15 held that although as a fact a proceeding under section 34(1)(a) had been initiated against deceased Jhari Ram Bhadani, that was no proceeding in the eye of law. I am in complete agreement with the view of the Tribunal. That proaeding must be deemed to be Non est. The conclusion inescapably must be that no proceeding under section 34 was pending on 1-4 -1962 when the new Act came into force. I am unable to find any error in the conclusion of the Tribunal in this behalf. A proceeding may be bad or barred by limitation, but it is valid; A proceeding against a dead person is no proceeding. It has no existance in the eye of law.

17. Lastly, learned counsel for the assessee submitted that the proceeding under section 34 of the 1922 Act was initiated and notice was issued to Surendra Kumar Bhadani, legal heir of late Jhari Ram Bhadani. In support of this fact Mr, K. N. Jain showed to us a photo - state copy of a notice purporting to be of some notice issued to Surendra Kumar Bhadani. I regret, I am unable to take any notice of the document shown to us. This Court is not permitted to take additional evidence. The orders of the A.A.C. and the Tribunal do not show that any notice was

issued to Surendra Kumar Bhadani in any proceeding under section 34 of the 1922 Act on 11-8- 1961. The order of the A.A.C. shows that the proceeding was initiated against Jhari Ram Bhadani. The notice must, therefore, have been issued in that very name. In that view of the matter, there in no scope for holding that a proceeding under section 54 of the 1922 Act was pending on 1-4-1962, as also in 1965 when the present proceeding was initiated.

18. There is yet anothere aspect of the matter. *In Atma Ram Bindraban* Versus *Commissioner of Income-tax, Delhi, Ajmer, Rajasthan and Madhya Bharat(1)* a Division Bench of the punjab High Court (Delhi Bench) held that section 34 (1) places no limit on the number of notices of reassessment that may be issued so long as they are within the time limit specified in that section.To quote the words of chopra,J:

"there can be no restriction as to the number f proceedings that can be taken to re-open an assessment where it is found that any income of the assessee has for one reason or another escaped assessment. Similarly, there is no bar to a fresh notice of reassessmement being given even though proceedings on a previous notice which are still pending have not been finally disposed of "

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(1) (1960) 39 I.T.R. 418.

Further, the decision of the supreme Court in *Commissioner of Income-tax, Andhra Pradesh* versus *K. Adinarayana Murty* (1) supports the proposition that a notice under section 34 may be issued while another proceeding under section 34 for reassessment may be pending. In this case the facts were that the assessee had been assessed as 'Individual' for the assessment year 1949-50. For the assessment year 1954-55 the I.T.O. took the status of the respondent to be that of an 'Individual.' He issued notice under section 34 to re-open the assesment for the assessment year 1940-50 in the status of an 'Individual'. The respondent, however, filed a return in the status of a Hindu undivided family. while the re-assesament proceeding was pending,the A.A.C. in an appeal against the assessment for the year 1954-55 held that the status of the respondent was that of a Hindu undivided family. Thereafter, the I.T.O. issued a fresh notice under section 34 to reassess the income of the respondent for the year 1949-50 as a Hindu undivided family. A second return was duly filed in pursuant to the second notice and the I.T.O. made an assessment aocordingly. Both the notices were in identical terms. The question was whether the assessment made parsuant to the second notice and the second return, ignoring the first return filed pursuant to the first notice, was valid. The Supreme Court laid down the law by stating that since the correct status of the respondent was that of a Hindu

(1) (1967) 65 I.T.R. 607

undivided family the first notice issued in the status of Individual was illegal and without jurisdiction, and, therefore, the I.T.O. was entitled to ispore the return filed by the asaessee as non est in law. The second notice was held to be valid and the return filed in response to that notice and the assessment thereon were valid. Applying the law laid down by the Supreme Court in the instant case, the position which emerges is, assuming that a proceeding under section 34 had been initiated and during its pendency a proceeding under section 147 was initiated on the basis of the law laid down by the supreme Court in *Commissioner of Inocome-tax, Andhra Pradesh* versus *K. Adinarayana Murty* (Supra), it must follow that the I.T.O. and the Tribunal were within their rights in ignoring the first proceeding and proceeding to reassess on the basis of the proceeding initiated under section 147. They were entitled to treat the first proceeding as Non -est. For these reasons, I am of the view that the Tribunal was right in holding that no proceeding under section 34(1)(a) was pending at the commencement of the new Act.

19. The issues involved in these references are simple. The assessee claimed that an item of income was income of Jhari Ram Bhadani, the individual and not of Jhari Ram Bhadani and Sons H.U.F. The stand of Jhari Ram Bhadani was accepted by the A.A.C. The A.A.C. directed reassessment of Jhari Ram Bhadani, the individual and so for as the 'deemed income' had escaped assesment. The assesse agitated the jurisdiction of the A.A.C. to issue the direction

to reopen the assessment of Jhari Ram Bhadani the Individual. Action was taken in terms of the direction. The A.A.C. had ample jurisdiction to direct re-opening of the assessment. The Tribunal rejected the stand of the assessee in record to the jurisdiction to issue direction for reassessment of the assessee. The power to issue direction thus become barred by the principles of Res Judicata. Independent of the principles of Res Judicata, the power of the A.A.C. to issue the direction cannot be doubted. The direction having been made, the bar of limitation contained in the second proviso to section 34 (3) and section 153(3) is lifted. There is no time limit for inititating reassessment proceeding. The time taken in initiating the reassessement proceeding under section 147 after the direction had to be excluded. The lifting of the bar of limitation was not an arbitrary act of the A.A.C. It had legal sanction. Even if, the A.A.C. had not observed that the I.T.O. would be entitled to do so under the second proviso to sub-section (3) of section 34, even than the I.T.O. would be within his rights to initiate reassessment proceedingx either under section 34 or under section 147. The bar got lifted not by the enunciation of the law in the direction, but because of the force of the Statute. The proceeding initiated against Jhari Ram Bhadani decease in Februbry , 1961 under section 34(3) was Non-est, as it was against a dead person. Being Non-est, it is obvious that there was no proceeding pending when the instant proceeding was initiated in October, 1964. These in substance cover the entire gamut of the controvercy. The action

initiated under section 147(a) was no bar to treating as proceeding under section 147(b). Once the bar of limitation was lifted, there was no other har to it. The assessee, in short, has no case to agitated

20. To sum up, my conclusions in regard to question No. 1, referred to at the instrance of Revenue is that the Tribunal was correct in holding that the proceeding should have been under section 147(b) and not under section 147 (a). My answer in regard to question No.2, referred to at the instance of Revenue, however, is that the initiation of the proceeding under section 147(a) not under section 147(b) did not make any difference in passing the order of reassessment. The Tribunal was thus not justified in cancelling the proceeding on that ground. In regard to question no. 3 at the instance of Revenue, it must be held that the Tribunal was not justified in cancelling the order under Section 154 of the Act.

21. In regard to the questions referred to at the instance of the assessee, my view on the first question is that the A.A.C. was competant to give a finding and direction to the I.T.O. to assess the 'Individual'so as to lift the bar of limitation under section 34(a) second proviso. The Tribunal was right in that behalf. In regard to question No.2 at the instance of the assessee, my view is that the Tribuna l was right in holding that action under section 147(b) had not become barred at the point of time when the A.A.C. gave direction. In regard to question No.3,

the Tribunal was Right that since the proceeding was against a dead person, there was no proceeding at the commencement of the new Act.

22. For the rasons, stated above, all the questions referred to at the instances of the Revenue and the assessee are decided in favour of the Revenue and against the assessee. The referenoces are thus disposed of with costs. Hearing fee Rs.500/= (Rupees five hundred) payable by the assessee to the Revenue.

23. Let a copy of this judgment be transmitted to the Income-tax Appellate Tribunal in terms of section 260 of the Income-tax Act, 1961.

Nazir Ahmad, J: I agree

R.D. *Questions answered*

LETTERS PATENT

Before S.S. Sandhawalia, C.J and Ashwini Kumar Sinha,J.

1986

July,3

*Khokhari Devi and ors.**

v.

The Addl. Member, Board of Revenue & ors.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act , 1961 (Act XII of 1962), section 16 (3)--- scope and applicability of--- application for pre-emption --- non - mention of " description of the land" as provided in schedule I of Form LC13 under rule 19 of the Rules--- effect of .

Where in an application under section 16 (3), description of the land whether it was agricultural, horticultural or homestead was not given but the map attached to the application showed that the land was agricultural in character and further the petitioners did not mention the name of the District or Sub- division but the applicant did mention the number of the police station and the name of the village, there could

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*Letters patent Appeal No. 41 of 1984.An appeal from the decision of the Hon' ble Mr. Justice S.Ali Ahmad, passed in C.W.J.C.No.897 of 1975 on 9.3.84

absolutely be no difficulty in finding as to in which destrict and sub-division the land was located and no prejudice was caused to the purchaser by the non -mention of the classification of the plots in question;

Held, that substantial /sufficient informations were furnished in Form L.C..13 of schedule I (under Rule 19) and hence on the basis of the ratio laid down in the Supreme Court case of Hiraall Agrawal,the application filed under section 16(3) could not be thrown out.

Hiralal Agrawal v. *Ram Padarath Singh and ors,* (1)relied on.

Ganesh Prasad. v. *Yugeshwar Tiwary and ors.* (2) deemed to be impliedly overruled by the S.C.

Appeal by the purchasers.

The facts of the case material to this report are set out in the judgement of Ashwini Kumar Sinha,J.

Ashwini Kumar Sinha, J. This Letters Patent Appeal is by the purchasers and is directed against the judgement and order dated 9-3-1984, passed by the learned Single judge of this Court in C.W.J.C.No. 897 of 1975.

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(1) (1968) P.L.J.R. 634.

(2) (1969) P.L.J.R.284.

2. To be more exact appellants no I to 3 are the heirs and legal representatives of one purhchaser Khusi Lal Mahto (who was respondent no. 4. in the writ case) and appellant no.4 is the other purchaser (who was respondent no.5 in the writ case).

3. The sole significant question involved in this appeal is as to what is the effect of non-mention of "description of the land"whether held for agricultural, horticultural or homestead as provided in schedudle-I of Form LC 13 Under rule 19 of the Bihar Land Reforms(Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963 (for brevity sake known as the Bihar Land Ceiling Rules, 1963) (hereinafter referred to as "the Rules).

4. Admittedly, the description of land as to whether it was agricultural, horticultural or homestead was not given in the application filed under section 16(3) of the Bihar Land Reforms (Fixation of ceiling area and Acquisition of surplus Land) Act, 1961 (Bihar Act XII of 1962) (herein-after referred to as "the Act"). Admittedly also the district or the subdivision where the land in question was located was not mentioned in the application. Also admittedly, the classification of each plot was not mentioned in the application. This application had to be in Form L.C.13.This Form L.C.13 contains two Schedules and Schedule-I refers to "description of land transferred" and Schedule - II refers to "description of adjoining land or the land held by the co-sharer".

5. The write petitioner (Abdul Gafoor) filed an application under section 16(3) of the Act before the Deputy collector , Land Reforms, Begusarai, on the ground that he held land adjacent to the land sold in favour of the aforesaid two purchasers (who were respondents no .4 and 5 of the writ case). This application was contested by the purchasers. The Deputy Collector, Land Reforms, Begusarai, by his order dated 18th january, 1968, allowed the prayer for pre-emption. The purchasers then went in appeal and the appellate court set aside the order and remanded the case back to the D.C,L.R. for fresh decision in accordance with law. On remand, the D.C.L.R., by his order dated 27-12-71, upheld the claim of pre-emption made by the writ petitioner (Abdul Gafoor). There after the vendees went in appeal before the Collector but the appeal was dismissed and then the vendees preferred a revision before the Member, Board of Revenue. The learned Addl. Member, Board of Revenue, by his order dated 21-11-74,allowed the revisional application and held that the claim for pre-emption could not be allowed on the ground that the application under section 16(3) of the Act had to be in Form L.C. 13 but the petitioner (Abdul Gafooor) did not furnish information required under that Form and also on the ground that the pre-emptor, throughout held land adjacent to three of the plots (plot nos.424, 425 and 239), he did not hold any land adjacent to plot no ,436. on these two grounds the learned Additional Member, Board of Revenue, allowed the revisional application and the claim for pre-emption by the petitioner (Abdul Gafoor) under scction 16(3) of the Act was disallowed.

6. Thereafter, the petitioner (Abdul Gafoor) claiming pre-emption filed the writ case (No.897/75) praying to quas the order of the Addl. Member, Board of Revenue, dated 21st November, 1974.

The learned Single Judge held (i) that the non-mentioning of the description of the land , as provided in Schedule, I of form L.C.13 of the Rules, was not fatal, as the informations furnished in Schedule-I of form L.C.13 were substantial and (ii) no prejudice was caused to the purchasers (vendees) by non-mentioning of classification of the plots in question. Having held as such the learned single Judge held that the application under section 16(3) could not be thrown out and thus the writ case was allowed and the order of the learned Additional Member, Board of Revenue *held that the application dated under section 16(3) could not be thrown out and thus the writ case was allowed and the order of the learned Additional Member* , Board of Revenue dated 21-11-1974 (Annexure-4 to the writ case) was quashed,

Thus the present L.P.A.

7. the learned counsel for the appellants contended that the conditions laid down in Rule 19 were mandatory and unless they were complied with the application under section 16(3) of the Act for enforcing the right must fail.

8. The learned counsel for the appellants relied upon the case of *Ganesh Prasad* v. *yugeshwer Tiwari and ors.* It is true that a Bench of this Court had occasion to consider the effect of non- mention of "description of the land"as proided in Schedule-I of form L.C.13 and the Bench took the view that this was fatal to the maintainability of the application.

9. However, the significant queation involved in this appeal is already answered in the Supreme Court case of *Hiralal Agrawal* v. *Ram padarath Singh and*

*ors.*This case of Hiralal Agrawal (supra), though decided on 15th July, 1968 was, it seems obvious, not brought to the notice of this Court in the case of *Ganesh Prasad* v. *Yugeshwar Tiwary & ors.* (supra), which was decided later on 26th March, 1969. To me, it appears, that if the case of Hiralal Agrawal (supra) would have been brought to the notice of this Court while deciding the case of *Ganesh Prasad* v. *yugeshwar Tiwary & ors.* (supra) the view taken by this Court in Ganesh Prasad's case (supra) would have been otherwise on the point involved in this appeal. The supreme Court in the aforesaid case held that the object of Rule 19 in prescribing that the application under section 16(3) (in Form L.C. 13 of Schedule-I) of the Act must be accompanied by a copy of the registered deed, was to enable the collector, before he exercises his power, to ascertain the purchase price, the terms and conditions of the sale, the readiness of the applicant to have the land in question reconveyed to him on the same terms and conditions in the sale-deed and the fact of the applicant having deposited the relevent amount in the treasury...

In that case of the Supreme Court, a copy of the registered deed was not furnished along with the application and the Supreme Court, on a consideration of the object of Rule 19, read with section 16(3) of the Act, held that *so long as the application furnishes information necessary for the Collector to proceed with the application, it was a sufficient compliance of the directory prescriptions* and the Supreme Court held, in the fact of that case (i.e.non-furnishing of the copy of registered-deed), that it was not fatal to the application nor did such an omission deprived the Collector of his Jurisdiction to entertain the same nor

did it vitiate the proceedings before him or the order thereon made by him. Thus, the argument to the contrary that the conditions laid down in Rule 19 was mandatory was rejected by the Supreme Court. The Supreme Court further held that to hold that if the formality prescribed by Rule 19 was not satisfied, the application would be bad, would be to nullify the object of the statute and it further held that it could not be the intention of the draftsman who framed Rule 19 and Form L.C.13. The Supreme Court further held that *the omission (as was done in the Supreme Court case) to comply with the requirement was not fatal to the application as the instructions in Form L.C.13 under Rule 19 read with section 16(3) of the Act were only directory and if there was sufficient compliance thereof, the application could be validly entertained by the Collector.*

10. A perusal of the Judgment in the case of *Ganesh Prasad* v. *Yugeshwar Tiwary* (Supra) shows that the attention of the learned judges in that case was not drawn to the decision in the case of *Hiralal Agrawal* (Supra).

11. In the present case then what has to be seen is whether, in the application under section 16(3) of the Act in Form L.C.13 of Schedule-I (under Rule 19), substantial/sufficient informations were furnished by the applicant or not? It is true that the description of the land whether it was agricultural, horticultural or homestead was not given but the map attached to the application under section 16(3) showed that the land was agricultural in character. it is also true that the petitioners did not mention the name of the District or subdivision but the applicant did mention the number of the police station and the name of

the village. I hold that on the basis of these informations, there could absolutely be no difficulty in finding as to in which district and in which subdivision the land was located.

12. I further hold that no prejudice has been caused to the purchaser by the non-mention of the classification of the plots in question. For these reasons I hold that substantial/sufficient informations were furnished in Form L.C.13 of Schedule-I (under Rule 19) and hence, on the basis of the ratio laid down in the Supreme Court case of Hiralal Agrawal (supra), the application filed under section 16(3) could not be thrown out.

13. As I have already stated above that this Court in a Bench decision in the case of *Ganesh Prasad* (supra) took a contrary view, yet in the light of the decision of the Supreme Court in the case of *Hiralal Agrawal* (Supra) the ratio decided by the Supreme Court has to be followed. And, in my opinion, the ratio decided in the case of Ganesh Prasad (Supra) with regard to the effect of non-mention of "description of the land" as provided in Schedule-I of Form L.C.13, must be deemed to be impliedly overruled by the Supreme Court in the case of *Hiralal Agrawal* (Supra).

The learned counsel for the appellants tried to distinguish the decision in the Supreme Court case of *Hiralal Agrawal* (Supra) in the sense that though in that case it was held to be sufficient compliance yet in the present case it could not be held to be as such. The distsinction sought to be made is unwarranted and proceeds upon an inherent fallacy. I have already held above that the informations already supplied by the applicant in the application under section 16(3) of the Act in Form L.C.13 of Schedule-I

(under Rule 19) were in sufficient/substantial compliance of Form L.C.13 of Schedule-I under Rule 19.

14. The learned counsel for the appellants also sought to contend that the pre-emptor had got lands more than the ceiling area prescribed under the Act and hence the pre-emptor was debarred from pre-empting the lands in question.

To this objection, the pre-emptor had, at the earliest occasion, filed a rejoinder, affidavit and had also adduced evidence in support of his case that he did not have lands in excess of the ceiling area.

On a perusal of the order passed by the learned Additional Member, Board of Revenue, it appears that unfortunately neither party carried this issue to its logical conclusion and there does not seem to have been any finding on this issue either way by the lower courts. Thus, this question is a disputed question of fact and cannot be gone into at this stage of Letters Patent Appeal.

Thus, I hold that there is no substance in this Submission also advanced by the learned counsel for the appellants.

15. In the result, this appeal fails and is dismissed. However, there will be no order as to costs.

(The Lines have been underlined by me for emphasis).

S.S.SANDHAWALIA, C.J. I agree.

M.K.C. *Appeal dismissed.*

MISCELLANEOUS CRIMINAL

Before S.S.Sandhawalia, C.J. and Ram Nandan Prasad, J.

1986.

August, 1.

*Nagendra Prasad and another.**

v.

The State.

Customs Act, 1962 (Act L 11 of 1962), section 104 read with sections 4(2), 436 and 437 of the Code of Criminal Procedure, 1973 --- person suspected of commission of non-bailable offence under the Act --- Magistrate-power of to remand to custody if produced before him by customs officer --- Code of Criminal Procedure, 1973 (Act 2 of 1974), sections 4(2), 436 and 437.

Held, that section 104 of the Customs Act read with sections 4(2), 436 and 437 of the Code of Criminal Procedure clearly empowers a Magistrate to remand to custody a person suspected of the commission of a non- bailable offence under the said Act and produced before him by the customs officer.

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*Criminal Miscellaneous Case No.2856 of 1986. In the matter of an application under section 482 of the Code of Criminal Procedure.

Case laws reviewed.

Application under section 482 of the Code of Criminal Procedure, 1973.

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

Messrs Braj Kishore Prasad and Gopal Shankar for the petitioners

Messrs Mahendra Prasad Pandey and Ganpati Trivedi. for the State.

S.S.SANDHAWALIA, C.J., Does section 104 of the Customs Act, 1962 read with sections 4(2), 436 and 437 of the Code of Criminal Procedure, 1973, empower a Magistrate to remand to custody a person suspected of the commission of any non-bailable offence under the aforesaid Act - is the question in this criminal miscellaneous case admitted to hearing by the Division Bench in view of the significance of the issues involved.

2. The facts are not in dispute and lie in a narrow compass. On 24th of November, 1985 the two petitioners were arrested by a Customs Officer for allegedly having in their possession foreign goods, namely, Chinese primary gold weighing 1122 grams valued at Rs.4,42,352, which had apparently been smuggled into India from Nepal. The prosecution under section 135 of Customs Act (hereinafter to be referred to as the 'Act') having thus been initiated, the two petitioners were thereafter produced in person before

the court of the Chief Judicial Magistrate, Patna. By his order (annexure 2) the learned Chief Judicial Magistrate noticed that the petitioners had been produced in connection with the case under section 435 of the Act and section 8 of the Gold Control Act read with section 13 of the Foreign Exchange Regulation Act and directed their remand to the Central Jail, Patna, till the 6th of December, 1985 awaiting prosecution report. The remand of the two petitioners was thereafter extended and on the 9th of December, 1985 an application for bail on their behalf was moved. On 23rd of December, 1985 the learned Chief Judicial Magistrate recorded a detailed order rejecting the said application. The case of the petitioners was later transferred to the court of Mr. N.K.N.Sinha, presiding Officer of the Special Court (Economic Offences) at Muzaffarpur for disposal. Before him another bail application was preferred which also met the same fate of rejection (vide order dated the 7th of February, 1986). The matter was thereafter carried before the Sessions Judge, Muzaffarpur who, on the 3rd of March, 1986, declined the prayer for bail as well.

3. In this criminal miscellaneous petition at the motion stage itself it was sought to be urged that the Magistrate had no power to remand the petitioners to custody for offences under the Customs Act and further that the provisions of section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the 'Code') would also be attracted to criminal prosecutions thereunder. Noticing the significance of the issues involved, the matter was

directed to be heard by a Division Bench.

4. As stands noticed at the outset, the issue herein would turn on the language of section 104 of the Act and sections 4(2) and 437 of the Code, the relevant parts whereof may be read in the beginning:-

Customs Act

> "104. Power to arrest. - (1) If an officer of customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under sec.135, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.
>
> (3) Where an officer of customs has arrested any person under section (1), he shall. for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).
>
> (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable."

Code of Criminal Procedure

"4(1).....

4(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise "dealing with such offences."

"437 (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions, of an non-bailable and cognizable offence;

Provided that.....

Provided further that.....

Provided also that.....

(2).....

(3).....

(4) An officer or a Court releasing any "person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2) may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6).....

(7).....

5. To clear the decks for the true appraisal of the issue, one may first notice and dispose of certain aspects on which there is no controversy and, indeed, with regard to which learned counsel for both the parties were themselves agreed. A reference to section 135 of the Act would show that apart from other penalties the evasion of duty or prohibitions are also made serious criminal offences. By virtue of section 135(1)(b)(i) and sub-section (2) thereof the punishment for such offences may extend to seven years and fine in grave offences whilst in other cases the imprisonment may extend to three years or with fine or with both.

5A. Admittedly the Act itself does not provide for the procedure of criminal trials or the grant of bail and consequently the issue whether offences under section 135 of the Act would be non-bailable is governed by Schedule I of the Code. Part II thereof relating to classification of offences against laws other than

the Indian Penal Code makes it manifest that all these offences punishable with three years' imprisonment and upwards would be non-bailable and triable by a Magistrate of the first class. However, by virtue of sub-section (4) of section 104 of the Act all offences under the said Act shall not be cognizable.

6. Again it was not now in dispute at all that a Customs Officer, though he has the power of arrest and other analogous powers, is yet not a Police Officer *stricto sensu*. Earlier this question was not entirely free from doubt but all controversies on this aspect have been set at rest by the Constitution Bench judgment in *Ramesh Chandra Mehta* v. *The State of West* Bengal (1) (see paragraphs 24 and 25 of the report) which, in turn, has been unhesitatingly followed thereafter in *Illias* v. *The Collector of Customs, Madras (2)* Now, once it is held that a Customs Officer is not a Police Officer, it would necessarily follow that section 167 of the Code which clearly and imperatively refers to an investigation by the Officer- in-charge of a police station or other Police Officers would not be attracted. All argument on this score is thus obviated, and both Mr.Braj Kishore Prasad, learned counsel for the petitioners, and Mr.Pandey for the State were unanimous that the provisions of the said section cannot be invoked herein.

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(1) (1970) A.I.R. (S.C.) 940.

(2) (1970) A.I.R. (S.C.) 1065.

7. The sheet-anchor of Mr.Braj Kishore Prasad's contention on behalf of the petitioners is that herein there exists a serious lacuna in the law and the same is of a nature which cannot be bridged by any interpretative exercise. Taking his cue from the observation in *Intabar Parida and others* v. *State of Orissa* (1) that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law, learned counsel submitted that herein both the Act and the Code were silent on the particular situation of the protection of the petitioners by the Customs Officer before a Magistrate. It was the stand that under the present Code under section 309(2) (unlike the corresponding provisions of the earlier section 344 of the old Code) the power to remand an accused by warrant to custody is conferred only after taking cognizance. Since in the present case as yet no complaint had been and, indeed, even now has been filed, no cognizance has been or could possibly be taken and, therefore, it was submitted that the Magistrate was denuded of any power to remand the petitioners to custody even after rejecting the application for bail. As a matter of fact, learned counsel had to go to the logical extreme of contending that even though the Magistrate under section 437 may expressly reject the prayer for bail on behalf of the accused persons, yet he must set the persons accused at liberty forthwith thereafter because of the want of any provision authorising such detention at the pre-cognizance stage. Whilst conceding that this would be utterly illogical, counsel submitted

(1) (1975) A.I.R. (S.C.) 1465.

that the Courts have no choice but to fold their hands in face of what was termed as a legislative.

Basic reliance for this somewhat curious stand is on the Division Bench judgment of the Delhi High Court in *Dalam Chand Baid* v. *Union of India and others(1).*

8. Ere one turns to precedent, it is inevitably refreshing to first examine the issue on principle and then on the language of the statute. The larger purpose of the Customs Act is to protect the fiscal and the commercial interests of the nation. The sanction provided therefore is two-fold, namely, confiscation and imposition of penalties provided in the Act and also to make serious violation thereof as criminal offences, which the statute views with great disfavour and makes them punishable with heavy hand. Undoubtedly, these offences sometimes go to the root of the very material sources of revenue derived by the State from customs. As already noticed, certain offences under section 135 are of a gravity which are now prescribed to be punishable with imprisonment up to seven years. Not only that, both sub-sections (1) and (2) in the particular cases lay down that in the event of a confiction the imprisonment shall not be for less than one year except for special and adequate reasons. Even the discretion of the Court with regard to the special and adequate reasons is then severely fettered by sub-section (3) which lays down that the ordinary considerations of imposing a

(1) (1982) Cr. L.J.747.

lenient sentence shall not in such a case be considered as special and adequate reasons for awarding sentence of imprisonment for a term of less than one year. It is thus patent that the law views the offences under the Act with great seriousness and it is equally necessary that the State must be able to find out the ramifications of such smuggling or other activities which eat into the coffers of the State. There can thus be no doubt that the instant release of persons involved in serious revenue crimes would hamper the investigation and act as a damper to further attempt to collect information and evidence. The basic interpretative approach to the penal provisions of the Act, therefore, has to be governed by the aforesaid background.

9. Now, to give teeth to forces protective of revenue of the State, section 104 confers a wide-ranging power on an Officer of Customs to arrest any person whom he has reason to believe to have been guilty of an offence punishable under section 135. Once that is done, sub- section (2) mandates that every such person shall, without unnecessary delay, be produced before a Magistrate. Apart from the Act, this is even otherwise imperatively provided by the Code and Article 22(2) of the Constitution itself. The core of the issue, therefore, is whether the Magistrate before whom such a person is produced has power to refuse bail to the suspected offender and in that event remand him to custody? or, whether it is a pointless and purposeless exercise wherein a Magistrate has no choice but to forthwith set such person at liberty even after holding that there is no adequate reason to grant bail and rejecting the application?

10. The Customs Act does not itself prescribe any procedure whatsoever for the grant or refusal of bail to persons accused of offences under section 135 thereof or for their subsequent custody or trial thereafter. Undoubtedly in that situation sub-section (2) of section 4 of the Code would be attracted and all the procedural provisions of the Code would be applicable. Section 4(2) of the Code provides that all offences under any law other than the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code. This, however, is subject to the limitation that in case there is some enactment regulating the manner or place of investigating, inquiring into or trying or otherwise dealing with such offences, the provision contained in the special enactment would prevail as against the general corresponding provisions of the Code. In the matter of the provisions of bails and bonds, Chapter XXXIII of the Code would, therefore, be attracted straightaway in regard to offences under the Act by virtue of sub-section (2) of section 4 of the Code. This is necessarily so because the provisions regarding bails and bonds have no place in the Act at all and the provisions of the Code cannot possibly be subject to any such corresponding provision. It could not be seriously contested before us that with regard to the subject of bails and bonds the provisions contained in Chapter XXXIII of the Code would automatically be attracted even with regard to offences under the Customs Act.

11. Once it is held as above, *a fortiorari* the provisions of sections 436 and 437 in Chapter XXXIII would become plainly applicable. As already noticed, so far as offences under section 135 are concerned,

they are non-bailable in nature and consequently what come directly into play are the provisions of the latter section 437 itself. The narrower question, therefore, is whether the provisions of this section authorise the detention in custody of a person accused of an offence under section 135 before the Magistrate in the event of the latter rejecting the prayer for bail.

12. Now it is true that sub-section (1) of section 437 does not in terms employe the words "remand to custody". This was sought to be made the kingpin of the argument on behalf of the petitioners by their learned counsel, Mr.Braj Kishore Prasad. It was sought to be contended that in the absence of these words, the power to direct custody is necessarily denuded. Rather ingeniously it was sought to be contended that the legislature where so minded has employed the words "commit him to custody" in the subsequent sub-section (5) thereof and it is only if such phraseology is employed that such a power can be read into the provision.

13. The aforesaid contention, despite the ingenuity with which it is sought to be advanced, has only to be noticed and rejected. Plainly enough the words "custody" and "liberty" are stark antonyms. A Magistrate cannot possibly first reject the prayer for bail of the person produced and also at the same time forthwith set him at liberty without restraint. That, in my humble opinion, would be a logical absurdity. It needs no great erudition to hold that the refusal to grant bail is the imposition or continuance of custody. If there is an express power to refuse bail, there is necessarily a power to retain or place a person in custody as a consequence of that refusal. To hold that a Magistrate

has the discretion to decline bail but has no power to remand to custody would thus be a contradiction in terms.

14. It deserves highlighting that section 437 visualises the situation where the suspected person has been arrested and is brought before the Magistrate in custody. The language of sub-section (1) of section 437 is, therefore, necessarily modulated to that situation. Consequently in the opening part of sub-section (1) it provides that such a person may be released on bail and in clauses (i) and (ii) it lays down the conditions where such person shall not be so released. It is thus obvious that the person produced being already in custody, the language would not direct a double custody by re-employing the said word. All that is required in such a situation is the continuance of such an arrest and custody thereafter or a release therefrom. That is why sub-section (1) of section 437 repeatedly employs the word 'release' in contradiction to custody in which the person already is. What, however, is further significant is that clauses (i) and (ii) of sub-section (1) provide in specific terms in which such a person produced in custody shall not be so released. What is the true connotation of the phrase "shall not be so released" in such a context? To my mind, it is nothing more than an express mandate that in the event of refusal of bail such a person shall be kept or continued in custody. The mandate of the law that he shall not be so released is only a negative form of couching the command that he shall be kept in custody. That being so, it is virtually explicit and in any case it is necessarily implicit in the statute that there inheres a power to remand to custody. Reading it otherwise, to my mind, would be

doing plain violence to the language of the statute and equally to the purposes and the objects behind the same. It bears repetition that in the context of sub-section (1) the positive command or mandate to keep in custody has necessarily been couched and modulated in the reverse by the direction that he shall not be so released.

15. Yet again reference must be made to sub-section (4) of section 437 mandating the recording of reasons or special reasons. Now it must be realised that since section 437 empowers the Magistrate concerned to release a person on bail and also obliges him to record reasons in writing whenever sub-section (4) is attracted and to impose conditions envisaged by sub- section (3) it would follow as a logical necessity that the court has the power to remand the person suspected of the offence under section 135 of the Act who has been arrested and produced before the court to custody in a case where it does not consider it proper to release him on bail or where the person fails to furnish the bond or refuses to be released on bail. If the power to release on bail, as of necessity, excludes the power to deny bail then by necessary implication it confers on the Magistrate a power to remand him to judicial custody. This position is made abundantly clear by sub-section (5) of section 437. This confers on the Court a power to direct that any person earlier released on bail by it under sub-section (1) or sub- section (2) be arrested and committed forthwith to custody if it considers it necessary to do so. This power would be equally in respect of a person suspected of an offence under the Act who has been arrested by the Officer of Customs produced before the Court. Thus, sub-section (5) of section 437

in terms contemplates that the Court has power to commit such a person to custody. The mere fact that such language in terms has not been employed in sub-section (1) of section 437 appears to be of little significance. It is a settled canon of construction that all the sub-sections of a section are to be construed harmoniously and not in isolation from each other. Sub-section (1) therefore is not to be narrowly construed as hermetically sealed in its self but along with other sub-sections including sub-section (5), all of which have been read together. When so done, indeed the hypertechnical reliance of the learned counsel for the petitioners on sub-section (5) would vanish and its provisions in fact boomerang on his stand.

16. Lastly one must hearken back to the golden rule that where two constructions are possible, one must necessarily avoid the one which leads to anomalous or mischievous results. Learned counsel for the petitioners was himself fair enough to concede that the stand which he was taking would lead to illogical results patently in so far as the Magistrate may refuse bail and yet be obliged to release such a person unconditionally. One must, therefore, obviously tilt against such an interpretation of section 437 which in the context of the Customs Act would render it pointless and purposeless. This apart, to my mind, the construction advocated on behalf of the petitioners would lead to mischievous results. If persons accused or serious crimes against the revenue and indulging in smuggling and subverting the commercial interest of the nation have to be necessarily set at liberty by a Magistrate after they are produced before him by the Customs officer. The dangers ensequential from such an interpretation can be well imagined. For

these additional reasons as well, the stand on behalf of the petitioners has necessarily to be rejected,

17. It remains to advert to the Division Bench judgment in *Dalam Chand Baid* v , *Union of India and others* (supra) which, as already noticed, is the corner stone of the learned counsel for the petitioners. Undoubtedly it lends firm support to their contentions, However, a very close analysis of the judgment would indicate that the larger approach to the problem was somewhat warped by not noticing the crucial provisions of section 4(2) of the Code and brushing away somewhat brusquely the counsel's reliance on section 437 of the Code which, in my view, substantially covers the issue, It is unnecessary to advert in detail to the individual reasoning of *Dalam chand Baid's case. This judgment was later considerd by a Division Bench judgment of Gujarat High Court in N.H. Dave, Inspector of Customs v, Mohmed Akhtar Hussain Ibrahim Iqbal Kadar Amad wagher (Bhatti) and others* (1) and expressly dissented from. Chief Justice M.P. Thakkar (as his Lordship then was) in taking a contrary view was somewhat categoric in these terms;-

"There is therefore no escape from the conclusion that the Magistrate before whom the person suspected by the officer of customs, upon the officer concerned entertaining a reasonable belief that he has committed an offence under Section 135, is produced, has the power to commit such a person to judicial custody. Unless the provision contained in Section 104 of the

(1)(1984) 15 E.L.T.353

Customs Act to arrest the person and to produce him before the Magistrate is to be considered to be meaningless, purposeless and a futile exercise undertaken for no purpose and unless we shut our eyes to Section 4(2) and Section 437, no other view is possible,"

Yet again with regard to the broad approach to the issue, he opened his Judgment with the following colourful observation:-

" 'Purposeless and pointless' is a phrase the existentialist philosophers may unhesitatingly employ in connection with their views on 'life.' But a Court of Law would be extremely reluctant to employ such a phrase in the context of a provision of law enacted by the Parliament in its wisdom. Considerations regarding respect for the law-makers apart, the Court itself would be understandably anxious to interpret a provision in a manner which renders it "meaningless'. And if this approach is made it is impossible to assent to the proposition that the whole purpose of empowering a customs officer to arrest a person reasonably believed to have committed an offence under the Customs Act is to enable the Magistrate (before whom he is required to be produced within twenty -four hours)to see his face and permit him to go without anything more."

18. Yet again the Kerala High Court in *the Superintendent of Customs, C.I.U., Cochin* v, *P.K.Umberkutty and others* (1) after expressly noticing

(1) (1983)Cr.L.J. 1860

Dalam Chand Baid's case (Supra), dissented there from and preferred to follow the Gajarat view in N.A. Dave's case (Supra) and concluded as follows:-

"Thus, it is clear that the Magistrate dealing with the person arrested by virtue of the power under sec. 104(1) of the Act and produced before a competent Magistrate under Section 104(2) of the Act has power to commit him to custody ."

19. I am in respectful agreement with the view expressed by the Gujarat and the Kerala High Courts and with the deepest deference must record my dissent from the observations in *Dalam Chand Baid's case.*

20. Lastly it may be noticed that the stand taken on behalf of the petitioners again envisages a stage of compulsory bail in the case of offences under the Customs Act till cognizance of crime is taken upon the complaint. Such a notion of compulsory bail has also been authoritatively ruled out by their Lordships of the Supreme Court in a somewhat analogous context of commitment proceedings and the power of the Magsitrate to remand to custody thereunder. Reversing the Allahabad High Court's view their Lordships observed as follows in *State of U.P.v. Lakshmi Brahman and another.*(1)

"The view taken by the High court introduces a stage of compulsory bail not envisaged by the Code and , therefore, also the view of the High Court cannot

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(1) (1983) ALL.L.J. 419.(S.C)

be upheld. According to the High Court after the accused is brought before the Court along with the police report, the Magistrate must forthwith commit the accused to the Court of Session because the Magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case to Court of Session is made. The view with respect is wholly untenable and must be set aside."

It is plain that the aforesaid observation by way of analogy lends the strongest assurance to the stand taken on behalf of the respondent.

21.To finally conclude, the answer to the question posed at the outset is rendered in the affirmative and it is held that section 104 of the Customs Act read with sections 4(2) 436 and 437 of the Code of Criminal Procedure clearly empowers a Magistrate to remand to custody a person suspected of the commission of a non - bailable offence under the said Act and produced before him by the Customs officer,

22. Once it is held as above, the major and indeed the sole plank of the petitioners' stand disappears.The criminal miscellaneous case is thus without merit and is hereby dismissed.

RAM NANDAN PRASAD,J., *I agree.*

M.K.C. *Application dismissed.*

REVISIONAL CIVIL

Before S.S. Sandhawalia, C.J. and Prabha Shanker Mishra,J.

1986

August, 12

*Delhi Cloth and General Mills Company Limited.**

Now Known as D.C.M. Ltd.

v.

Suraj kuer and another.

Statute--- lacuna in framing procedural form or a rule mandated by statute --- whether renders statute itself in a State of suspended animation till such rules are framed.

-*Held*, that a mere lacuna in framing a procedural form or a rule mandated by statute would not render the statute itself in a state of suspended animation till such rules are framed.

Case laws reviewed.

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*Civil Revision Nos, 386 and 388 of 1984 . In the matter of applications arising out of orders dated the 8th February, 1984, and the 12th December, 1983, respectivley, passed by Shree Suresh Prasad, Execution Munsif, Gaya.

Applications by the defendant.

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

Mr. S.S. Asghar Hussain, and, Mr S.S. Nayer Hussain, for petitioners.

Mr. Shrinath Singh, and Mr. Ramjee Sharan for the opposite party

S.S.SANDHAWALIA, C.J.: whether a lacuna in framing a procedural form or a rule mandated by a statute would render the statute itself in a state of suspended animation till such rules are framed, is the solitary though significant question in these two connected civil revisions, referred for an authoritative decision by the Division Bench.

2. The facts deserve notice with the strictest brevity and in so far as they are relevant to the pristinely legal issue aforesaid. The title suit, giving rise to the proceedings, was filed by the plaintiff (opposite party) for the eviction of the defendants (petitioners)on the ground that the fixed term tenancy under the lease deed dated the 10th October, 1975, had expired on the 30th of June, 1982

3. Section 14 of the new Bihar Buildings (Lease, rent and eviction) control Act, 1982, puts a fetter on the defendant- tenant's right to resist such a suit, if it has been filed for eviction on the ground of expiry of the tenancy by offlux of time or for his bonafide reasonable requirement. The section prescribes that the defendant-tenant, in such a case, has to file an

affidavit,stating the grounds on which he seeks to make contest and obtain leave of the court to contest the suit. Under the said provision, the defendant, on the 9th February, 1983, filed a petition, supported by an affidavit, purporting to state the grounds on which he sought leave to contest the suit. On the 20th April, 1983, the plaintiff(land-lord) filed her rejoinder, stating therin that the affidavit filed by the defendant-tenant was vague and did not disclose any fact disentitling the plaintiff-land-lord from obtaining an order for recovery of possession.The learned trial court, in an elaborate order dated the 12th December, 1983, which is sought to be impugned, came to the conclusion that the defendant's affidavit did not pass the test laid down in law and it discloses no fact, which would entitle the defendant to contest the suit. Consequently, leave to contest the suit was declined and the case was directed to be put up for further hearing

4. Later, on the 12th January, 1984, the defendant-petitioner filed a petition, praying for acceptance of the written statement, filed along with the said petition, to which a rejoinder dated the 31st January, 1984, was filed by the plaintiff, objecting to the prayer of the defendant, aforesaid.Learned trial court by a detailed order rejected the defendant's petition, holding that the same was nothing but mala fide and mere abuse of the process of the court. It further recalled the earlier order dated the 8th January, 1983.

5. Aggrieved by the aforesaid orders, Civil Revision Nos.386 and 388 of 1984 have been preferred to assail them.

6. These petitions originally came up before my learned Brother Prabha Shanker Mishra, J., sitting singly. Before him, the basic issue pointedly raised was, whether Section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, and the procedure prescribed therein can operate in the absence of the rules prescribed, as provided under Section 33 of the said Act, read with Sections 13 and 14 (i) thereof. Noticing the significance of the issues involved, the matter was directed to be placed before a Division Bench for an authoritative decision.

7. Inevitably herein the whole controversy revolves around the relevant statutory provisions. It is, therefore, first apt to notice these in extenso for ease of reference.

> "1. Short title, extent and commencement.
>
> (1) This Act may be called the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982.
>
> (2) It applies to the whole of the State of Bihar.
>
> (3) Section 28 shall come in force immediately and the remaining provisions of this Act shall be deemed to have come into force on the 1st of April, 1981 and shall continue to remain in force:
>
> Provided that the period between expiration of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 (Bihar Act XVI of 1977) and the commencement of this Act shall not -
>
> (a) render recoverable any sum which during the continuation thereof was irrecoverable or affect the right of a tenant to recover any sum of which during the continuation of the Act was recoverable

by him thereunder; or

(b) affect any liability incurred under that Act or any punishment incurred in respect of any contravention of that Act or any order made thereunder; or

"(c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid;

and any such investigation or legal proceeding may be instituted, continued, or enforced and any such punishment may be imposed as if that Act has not expired."

"Section"11. Eviction of tenants.-(1) Notwithstanding anything contained in any contract or law to the contrary but subject to the provisions of the Industrial Disputes Act, 1947 (Act XIV of 1947), and to those of section 18, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution of a decree passed by the Court on one or more of the following grounds:-

X X X

(c) where the building is reasonably and in good faith required by the landlord of his own occupation or for the occupation of any person for whose benefit the building is held by the landlord;

X X X

(e) in case of a tenant holding on a lease for a specified period, on the expiry of the period of the tenancy; and

X X X

"13. The provisions of section 14 to have overriding effect.- The provisions of section 14 or any rule made thereunder shall have effect notwithstanding anything inconsistent "therewith contained elsewhere in this or in any other law for the time being in force."

"14. Special procedure for disposal of cases for eviction on ground of bona fide requirement.-

(1) Every suit by a landlord for the recovery of possession of any premises on the ground specified in clause (c) or (e) of sub-section (1) of section 11 shall be dealt with in accordance with the procedure specified in this section.

(2) The Court shall issue *summons in the prescribed form* in every suit referred to sub-section (1) without delay.

X X X.

(4) The tenant on whom summons is duly served (whether by ordinary mail or by registered post) shall not contest the prayer for eviction from the premises unless he files an affidavit stating the ground on which he seeks to make such contest and obtains leave from the Court as hereinafter provided; and in default of the appearance in pursuance of the summons or his obtaining such leave the statement made by the landlord in the suit for eviction shall be deemed to be admitted by the tenant and the landlord shall be entitled to an order for eviction on the ground aforesaid.

(5) The Court shall give to the tenant leave to

contest the suit if the affidavit filed by the tenant discloses such facts as would "disentitle the landlord from obtaining an order for eviction on the ground specified in clauses (c) and (e) of sub-section (1) of section 11.

6. When leave is granted to the tenant to contest the suit, the latter may, within fifteen days from the date of the order, pray after filing the requisite Court- fee, required for a written statement that the affidavit may be treated as the written statement or if he chooses to file a separate written statement he may do so within fifteen days of the grant of leave to contest the suit and if he does not file the written statement within the period he shall not be allowed to do so later. The Court shall thereafter commence the hearing of the suit as early as practicable.

X X X "

8. Learned counsel for the petitioners *himered* himself with technical *literality* of sub-section (2) of section 14 and, in particular, the words "the Court shall issue summons in the prescribed form". It was contended that admittedly till now under the Rules the form of the summons mandated by the statute has not been prescribed. On that premise the forcible submission was that sections 13 and 14 of the Act have not come into force at all and, indeed, cannot in the absence of the prescribed form of summons. Alternatively, it was contended that section 13 and 14 of the Act should be deemed to be in a state of suspended animation and can possibly come into force if and when such a form of summons to be issued has been duly prescribed by the State Government, as directed by the statute.

9. Before adverting to the aforesaid contention, it must be noticed that the issues raised herein are substantially covered by an illuminating judgment of the learned single Judge in *Sardar Rajendra Singh and another* v. *Sardar Bahadur Singh* (1) Learned counsel for the petitioners had fairly conceded that there was no authority on the specific point to the contrary but he strenuously, though - perhaps - vainly, assailed the correctness of the view therein.

10. In *Sardar Rajendra Singh's case* the identical issue had come up before S.J.Hyder, J., and four distinct submissions were raised on behalf of the petitioners therein (para 9 of the report). Adverting seriatim to each one of them, the learned Judge convincingly repelled them. Somewhat picturesquely he concluded as under:-

"As already stated, the said provisions provide for a special procedure governing suits of a particular nature. May be that the State Government has not prescribed the form of summons to be issued to a defendant in a suit falling under the said provisions of law. This omission on the part of the Bihar State can not be legitimately construed as if repealing or holding in abeyance the operation of the said provisions of law as if by a side wind...

The courts are under a duty to give effect to the legislative intent which is clear from the provision of the Act. To insist that the new procedure prescribed by section 14 of the Act can come into force only

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(1) (1984) P.L.J.R. 525.

when a summons as required by sub-section (2) of section 14 of the Act has been prescribed by the State Government is to insist on a futile rigidity. It is not possible to subscribe to the view that section 14 of the Act has either not come into force or stands protanto repealed on account of inaction of the State Government. The Rules framed by the State Government under Section 33 of the Act are only ancillary to the purpose of the Act. They strangely depart from the course earmarked for them when they govern instead of subserving the purpose of the Act. In case the submission "of the learned counsel is accepted, it will be an instance of the tail wagging the dog."

11. In assailing the ratio in *Sardar Rajendra Singh's* case, the learned counsel for the petitioners primarily projected the alleged ground of prejudice or likely prejudice to a tenant unless he was served with the summons in the form prescribed. It was sought to be argued that by virtue of section 13 and 14, the Act now prescribed a general and special procedure for the trial of suits thereunder. According to the counsel, unless the tenant was served with clear notice by way of the statutory pre-prescribed summons, he was bound, or in any case, likely to be prejudiced and would remain in dark as to the procedure applicable to his case.

12. Though the aforesaid submissions might bring some credit to the ingenuity of the learned counsel, the same is pointedly fallacious on a closer examination. The matter has to be viewed against the legislative history of the Act and its preceding provisions. These have been delineated in some detail in paragraph 3

of the report in *Sardar Rajendra singh and another v. Sardar Bahadur Singh* (1) and it is unnecessary to traverse the same ground again. It suffices to supplement it by noticing that sections 13 and 14 of the Act appear to have been borrowed from the Delhi Rent Control Act, 1958, and are in *pari materia* with sections 25A and 25B thereof. Now, even a plain reading of sections 13 and 14 of the Act would make it manifest that so far as eviction on the ground of bona fide personal requirement and expiry of the specified period of lease is concerned, the only procedure now provided is under section 14. In no uncertain terms it has been declared in section 13 that the provisions of section 14 have overriding effect notwithstanding anything inconsistent therewith either in the Act or in any other law for the time being in force. It has consequently to be pointedly highlighted that section 14 of the Act now provides a special and exclusive procedure for trial of suits for eviction on the grounds of clauses (c) and (e) of section 11(i). This procedure is materially and substantially different from the trial of suits on the ground specified in the other clauses of the said section 11. Consequently, the moment a notice or a summon is served on a tenant for eviction on the ground of clauses (c) and (e) of section 11(i), it is the clearest notice to him that the proceeding would be contested only within the parameters of the specified procedure spelt out in section 14. There is no question of any written statement or a full-dress trial as such at the threshold stage and under sub-section (4) of section 14, a tenant cannot contest the eviction unless he first files an

(1) (1984) P.L.J.R. 525.

affidavit stating the ground on which he seeks to make such a contest and obtains the pre- requisite leave from the Court as provided in sub- section (6) thereof. Consequently, any element of prejudice or its likelihood in this context is thus eliminated. The apprehension that in the absence of the prescribed form of summons, there would inevitably be some prejudice is thus wholly unfounded.

13. That the legislature itself never intended to give any mandatory sanction to the prescription of the form of the notice under section 14(2) is manifest from the fact that apart from section 28, all the remaining provisions of the Act were given retrospective effect from the Ist of April, 1981, the Act being Bihar Act 4 of 1983 which was published in the Bihar Gazette (Extraordinary) No.252 on the 21st of February, 1983. So, plainly enough, the Act and sections 13 and 14 were accorded retrospectivity for a period of two years. By the very nature of things, there could not possibly be a prescribed form under the rules for the purpose of section 14 during this interregnum. Therefore, the legislature could not have intended the absurdity of first making the statute retrospective with effect from the Ist of April, 1981, and then rendering it nugatory or as has been put picturesquely in a state of suspended animation *ad interim* till a rule and the form were duly prescribed. It is significant to notice that the state in its sublime indifference has not framed any rule or prescribed the form of summons under sub-section (2) of section 14 till now even after the judgment in *Sardar Rajendra Singh's case* (supra). It seems somewhat plain that the legislature itself never intended section 14(2) to be inflexibly mandatory and viewed it as a directory procedural provision.

14. Yet again it has to be noticed that herein we are called upon to construe a primarily procedural provision. It is well to remind oneself that procedure is the hand-maid of justice and not a road block thereto. To say and to hold that the non-prescription of a mere procedural form occasioned by the failure of the State to frame the rule would virtually destroy or render nugatory the basic provisions or section 14 incorporated by the legislature, is, to my mind, carrying a hyper-technical argument to untenable lengths.

15. Learned counsel for the petitioner was unable to lay any meaningful challenge to the considered and reasoned view of the learned single Judge in *Sardar Rajendra Singh and another* v. *Sardar Bahadur Singh* (supra). Therefore it is unnecessary to traverse the same ground again. The learned Judge took the view that section 13 and 14 of the Act and the other general provisions are independent of each other and deal with different topics and distinct subjects. He further held that sub-section (2) of section 14 is directory and not mandatory and further that the doctrine of *casus omission* was not attracted to the case. It suffices to say that we are entirely in agreement with the aforesaid view and the ratio in *Sardar Rajendra Singh and another* v. *Sardar Bahadur Singh* (supra) is hereby affirmed. Equally it calls for notice that in *Ajit Kumar sinha* v. *Anil Kumar Yadav and others*. (1) it was again reiterated that special procedure has been laid down in section 14 of the Act and that section 13 directs that the provisions of section 14 will have overriding effect.

16. To conclude on the legal aspect, the answer to the question posed at the outset is rendered in

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(1) (1984) P.L.J.R. 940.

the negative and it is held that a mere lacuna in framing a procedural form or a rule mandated by statute would not render the statute itself in a state of suspended animation till such rules are framed.

17. Though the matter stands concluded against the petitioner on the issue of law, it is equally more so on facts as well. It is significant to note that when the petitioner put in appearance in court in pursuance to the summons, it made an application dated the 8th of January, 1983. The contents of the said application would leave no manner of doubt that the petitioner was more than amply aware of the nature of proceedings against it and in express terms sought time to file an affidavit in contest in terms of sub-section (4) of section 14. Not only that, it did in fact file such an affidavit. Annexure 2 at page 23 expressly affirmed the grounds of this affidavit in contest with the clear distinction as to what was based on deponent's personal knowledge and what was based on his personal belief. Thereafter the issue was not only contested and debated before the court but after full consideration thereof it came to the conclusion that no fact at all was disclosed in the said affidavit which would merit the allowance of the contest of the proceedings for eviction on merits. It is only after such rejection that pretence was made that the petitioner wanted to file a written statement. It would appear that it was catching at a straw and trying to hang on the words "written statement" used by the court in its order granting the application for filing an affidavit in contest. This quittle on the inadvertent phraseology employed by the court has to be read in the context of the application of the petitioner praying to file an affidavit in contest alone and is thus of no great relevance whatsoever. The court below was thus perfectly justified in rejecting it out of hand.

18. Both the revision petitions are thus without merit and are hereby dismissed with costs.

19. Before parting with this judgment, we feel compelled to notice somewhat regretfully that the State, in its sublime indifference, has still not framed the necessary rule or the prescribed form for the summons under section 14(2) of the Act despite the categoric observation in Sardar *Rajendra Singh and another* v. *Sardar Bahadur Singh* (supra). We accordingly direct that a copy of this judgment be forwarded to the State Government and we hope that it will expeditiously proceed to frame the requisite rule and prescribe the form of the summons under section 33 of the Act in conformity with the mandate of section 14 thereof.

PRABHA SHANKER MISHRA, J., I agree

M.K.C. *Application dismissed.*

CIVIL WRIT JURISDICTION

Before N.P.Singh and Yadunath Sharan Singh, JJ.

1986.

August, 13.

*M/s Patna Kerosene Agency.**

v.

The State of Bihar and others.

Bihar Trade Articles (Licenses Unification) Order, 1984 as amended by notification dated 17th October, 1985 --- clauses 2(c), 11 and 27(b) and (c) --- clauses 2(c) and 27(b) and (c) --- Collector alone the licensing authority with regard to wholesale trade in any article specified in Schedule 1 --- clause 11 --- wholesale licence of writ-petitioner cancelled by Special Officer Incharge Rationing, validity of.

In view of new definition of Collector given in clause 2(c) read with clause 27(b) and (c) of the Bihar Trade Articles (Licenses Unification) Order, 1984, hereinafter called the Order, as amended by notification dated 17th October, 1985, it has to be held that now

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*Civil Writ Jurisdiction Case No.2735 of 1986. In the matter of an application under Articles 226 and 227 of the Constitution of India.

the Sub-divisional Officer or any officer of the rank of Sub-divisional Officer can not be deemed to be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 of the order on the basis of any authorisation by the Collector. When the framers of the Order as amended have specifically said that Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 of the Order, then the Collector cannot delegate that power to any other officer on the basis of definition of "Collector" given in clause 92(c) of the Order.

Held, further, that the Special Officer Incharge Rationing had no authority to suspend the licence of the petitioner under clause 11 of the Order.

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 the Court.

For the petitioner: *Messrs B.P.Rajgarhia, Pawan Kumar and Lakshmi Kant Tewary.* for vs

For the State : *Mr. Ishwari Singh, J.C.to G.P.5. for* the State.

N.P.SINGH & YADUNATH SHARAN SINGH, JJ :- This writ application has been filed on behalf of the petitioner for quashing an order dated 5.6.1986 passed by the Special Officer Incharge Rationing,Patna.

2. From the statements made in the writ application and the documents annexed thereto it appears that, by order dated 8.5.1986, the Special

Officer Incharge Rationing suspended the wholesale Kerosene dealers licence of the petitioner (Licence No. 4 of 1985). Against that order, a writ application (C.W.J.C. No.2337 of 1986) was filed on behalf of the petitioner making a grievance that after the amendment in the Bihar Trade Articles (Licenses Unification) order,1984 (hereinafter referred to as 'the order'),the wholesale dealers' licence of the petitioner could not have been suspended by the Special officer Incharge Rationing; it could have been suspended by the District Magistrate, Patna, who will be deemed to be the licensing authority.

3. This Court, by order dated 26.5.86, directed the Special Officer Incharge Rationing to examine the aforessid grievance of the petitioner and to recall the order of suspension if he is not the licensing authority under the order aforesaid.

4. The Special Officer Incharge Rationing, by the impugned order dated 5.6.86, has come to the conclusion that he is the licensing authority even in respect of wholesale kerosene dealers' licensee on basis of an order of delegation dated 11.3.1985 issued in his favour by the Collector under clause 2(c) of the Order.

5. Clause 2(c) as it originally stood was as follows:

> "2(c) "Collector" means the Collector of a district and includes Deputy Commissioner, Additional collector and such other officer, as may be authorised by the Collector to perform the functions and exercise the powers of the Collector under this Order."

On plain reading, the expression "Collector" was to include Deputy Commissioner, Additional Collector

and "such other officer, as may be authorised by the Collector to perform the functions and exercise the powers of the Collector under this order." Clause 2(i) defines licensing authority as follows :-

> "2(i) "Licensing Authority" means an officer not below the rank of S.D.O. appointed by the State Government to exercise the powers and perform the duties of the Licensing Authority for different areas and under the different provisions of this order."

Clause 3 prescribes that "no dealer shall, after the commencement of this order carry on business of purchase sale or storage for sale of any of the trade articles mentioned in Schedule I except under and in accordance with the terms and conditions of a licence issued in this behalf by the Licensing Authority under the provisions of this order". Under clause 11 the licensing authority has been vested with the power to cancel or suspend the licence. Clause 27 in its original form was as follows:

> "27. Inherent powers of Commissioner and collector. - In addition to the power specified in this Order-
>
> (a) The Commissioner shall have all the powers of a collector, and
>
> (b) The Collector shall have all the powers of the Licensing Authority.
>
> (c) The Sub-divisional Officer will be the Licensing Officer."

Kerosene oil has been mentioned in Schedule I under Part 'E' of the Order.

6. Amendments have been introduced in the Order by a notification dated 17.10.1985. The definition of collector has been sustituted as follows:-

> "1(c) 'Collector' includes Deputy Commissioner, Additional Collector and such other officers, not below the rank of Subdivisional officer, as may be authorised by the Collector to perform the functions and exercise the powers of the Collector."

Now the collector cannot authorize an officer below the rank of subdivisional Officer to act as Collector. By the aforesaid notification dated 17.10.1985 clause 27 has also been substituted as follows :-

> "27. Inherent powers of Commissioner and collector.-
>
> In addition to the power specified in this order:-
>
> (a) for Oil Companies, Coal Dump holder, Coal Agents and L.P.Gas dealers, the Collector shall be the Licensing Authority within limits of his jurisdiction.
>
> (b) Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule I including the agents or oil companies within limits of his jurisdiction.
>
> (c) Sub-divisional Officer and Special officer Incharge Rationing shall be the licensing authority in respect of retail trade of any article specified in Schedule I within limits of their jurisdiction."

In view of clause (b) and (c) of new clause 27, the Collector shall be deemed to be the licensing authority in respect of the wholesale trade of any article specified in Schedule I; Sub-divisional Officer

and Special officer Incharge Rationing shall be the licensing authority in respect of retail trade of any article specified in Schedule I.

7. In view of specific provision introduced on 17.10.1985 saying that only Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule I and Subdivisional Officer and Special officer Incharge Rationing shall be the licensing authority in respect of the retail trade of any article specified in Schedule 'I, there is no question of Special officer incharge Rationing exercising power of the Collector on the basis of any authorisation or delegation issued on 11.3.1986 in favour of such Special officer Incharge Rationing.

8. In our opinion, if the new definition of collector given in clause 2(c) is read with clause 27(b) and (c) it has to be held that now the Subdivisional officer or any other officer of the rank of Subdivisional officer cannot be' deemed to be the licensing authority in respect of the wholesale trade of any article specified in Schedule I on the basis of any authorisation by the Collector: if a contrary view is taken, as has been taken by the Special officer Incharge Rationing, then new clauses 27(b) and (c) shall become redundant. When the framers of the order have specifically said that Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule 1 then the Collector cannot now delegate that power to any other officer on the basis of the definition of "Collector" given in clause 2(c) of the order. Once it is held that Collector shall now be the licensing authority in respect of the wholesale trade

of any article specified in Schedule I, then while reading clause 11 which vests power in the licensing authority to cancel or suspend the licence has to be exercised by the Colletor in respect of the wholesale dealers of articles specified in Schedule I of the Order. The Special officer Incharge Rationing had no authority to suspend the licence of the petitioner.

9. Accordingly, we allow this writ application at the stage of admission itself after hearing the counsel for the petitioner and the State and quash the Order dated 5.6.1986 as well as order dated 8.5.1986 suspending the wholesale dealer licence of the petitioner. However, it is made clear that it will be open to the Collector, who shall be deemed to be the licensing authority of the wholesale dealers licence of the petitioner, to issue any fresh order of suspension in accordance with law. In the Circumstances of the case, there will be no order as to costs.

RD. *Application allowed*

CRIMINAL WRIT JURISDICTION

Before Prabha Shanker Mishra, J.

1986.

August, 22.

*Ex-Major Ganesh Prasad Sinha.**

v.

Union of India, New Delhi and others.

Code of Criminal procedure, 1973 (Central Act II of 1974), sections 5 and 428, scope and applicablity of -- - conviction and sentence by a court Martial under the provisions of the Army Act --- provisions of section 428, whether applicable --- period of detention before conviction, whether can be allowed to be set off --- order of re-arrest --- principle of natural justice, whether violated.

Held, that, what has been envisaged by section 5 of the Code of Criminal Procedure, 1973, is to allow any special jurisdiction or power conferred or any special form of procedure prescribed by a special law to take control of the proceedings and exclude the operation of the Criminal Procedure Code. But merely because there is a special law, the operation of the Criminal Prodedure Code is not excluded unless

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*Criminal Writ Jurisdiction Case No.137 of 1984. In the matter of an application under article 226 of the Constitution of India.

the special law expressly or impliedly provides in that behalf, in which case the special law applies, otherwise the Code applies. Conviction and sentence passed by the court Martial are not in any way affected by granting set off against the term of imprisonment imposed on the accused as provided by section 428 of the Code of Criminal Procedure, 1973, and they remain the same even after the set off is allowed. Section 428 is absolute in its terms. The object of the enactment of section 428 was to release the anguish of prolonged detention of undertrials and to avoid overcrowding in jails. The Army Act like the Navy Act or the Air Force Act may be a special law and special provisions are made for the trial by the court Martial, still how the sentence would be carried out and in doing so, set off would be granted or not is not covered by the special provisions thereof.

Held, therefore, that the petitioner was entitled to the benefit of section 428 of the Code of Criminal Procedure, 1973, and to the issue of a Writ in the nature of mandamus directing the respondents for not taking the petitioner in custody pursuant to the orders contained in Annexures 1 and 2 to undergo unexpired portion of his sentence.

Subramanian v. *Officer Commanding Armoured Static Workshop.* (1) -- relied on.

F.R.Jesuratnam v. *Chief of Air Staff* (2) -- not followed.

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(1) (1979) Cr. L.J.617.

(2) (1976) Cr. L.J.65.

B.P.Andre v. *Superintendent Central Jail. Tihar.*

New Delhi (1) and *Suraj Bhan* v. *Om Prakash and another* (2) ----- referred to.

Held, further, that the petitioner was not given opportunity of being heard nor the authority of law, under which he was sought to be detained, was disclosed to him and as such the principle of natural justice was violated.

Application by the petitioner.

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

M/s Ashok Kumar Keshri and Rakesh Ranjan Prasad for the Petitioner

Mr. K.K.Prasad, S.C.C.G. for the Respondent.

P.S.MISHRA,J. An Ex-Major in the Indian Army has moved this Court for an appropriate Writ to quash the order dated 30.1.1984 issued by the second respondent (Annexure-I) and the order dated 9.1.1984 by the 4th respondent (Annexure-2).

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(1) (1975) A.I.R. (S.C.) 164 = (1975) Cr. L.J.182.

(2) (1976) 1 S.C.C. 886.

2. The petitioner was found guilty in a General Court Martial held at Jalandhar Cantonment and convicted on 29.10.1982 for acts prejudicial to good order and military discipline etc. On the said conviction, the General Court Martial ordered for the petitioner's dismissal from the military service, vide order dated 8.3.1983. There was a review suo moto and on 11.6.1983 the punishment was enhanced by the following:-

(i) The petitioner to be cashiered, and

(2) To suffer rigorous imprisonment for one year.

The enhancement was confirmed by the Chief of the Army Staff on 27.10.1983. Accordingly, the sentence was promulgated on 8.11.1983 and the petitioner was handed over to the Civil Police, Jalandhar and lodged in the custody of the Superintendent, Central Jail, Jalandhar with the order that the sentence would take effect from 8.3.1983. It appears that before the promulgation of the sentence, the petitioner had been taken in custody by the army with his arrest on 21.10.1982 and at no time he was released until, according to him, he served out his sentence and released on 16.11.1986. According to the petitioner, he was so released pursuant to remission of 11 days for blood donation and benefits of trial period of 130 days vide order of the 4th respondent dated 15.11.1983. The second respondent, however, addressed a communication to the Superintendent of Police, Muzaffarpur dated 30.1.1984 stating therein that the petitioner was required to undergo unexpired portion of his sentence in view of the warrant of commitment issued by the 4th respondent on 9.1.1984. The communication of the second respondent has made a reference of the order of the 4th respondent dated

9.1.1984 which was issued cancelling the warrant of commitment dated 8.11.1983. Apprehending arrest, the petitioner has moved this Court.

3. There in no substantial controversy as to the conviction and sentence awarded to the petitioner by the competent authority. The main controversy, however, is whether the release of the petitioner on 8.1.1984 by the second respondent from his custody was invalid, as the petitioner was yet to serve out the sentence of imprisonment imposed upon him. In the counter-affidavit on behalf of the respondents 1 to 4, it is said that since the sentence was to commence from 8th march, 1983 as per Army Rules, 1968, the petitioner should have been released from the said prison of 8th march, 1984; erroneously, the Superintendent of the said jail prematurely released him from the prison on 16th November, 1983. He did so presuming that the provisions of section 428 of the Code of Criminal Procedure of 1973 were applicable to the petitioner; but the provisions of Code of Criminal Procedure 1973 are not applicable to the trials conducted by a Court Martial under the Army Act and the Army Rules made thereunder, since the Army Act is a special law as defined in the Indian Penal Code and section 5 of the Code of Criminal Procedure bars the application of such provision to the trials under the military law. According to the respondents, this bona fide mistake was detected by the Superintendent of Central Jail, Jalandhar and accordingly, the communication (Annexure 1) has been issued.

4. Learned counsel for the petitioner has attacked

the comunication to re-arrest the petitioner to undergo further imprisonment after his release from custody mainly on two grounds:-

(1) There is no error in releasing the petitioner from custody who has served out his sentence of one year rigorous imprisonment, and (2) the respondents by taking unilateral decision to revoke remissions granted to the petitioner in the sentence have violated the principles of natural justice.

5. Before I deal with the contention, I may refer to the provision in section 5 of the Code of Criminal Procedure. It says:

> "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

What has been envisaged by this provision in the Code is to allow any special jurisdiction or power conferred or any special form of procedure prescribed by a special law to take control of the proceedings and exclude the operation of the Criminal Procedure Code. But merely because there is a special law, the operation of the Criminal Procedure Code is not excluded unless the special law expressly or impliedly provides in that behalf, in which case the special law applies, otherwise the Code applies. Section 5 of the Code is a reenactment of a portion of sub-section 2 of section 1 of the Code of Criminal Procedure 1898. Since, section 5 is in the nature of a saving clause, it can only save what is acquired or already provided.

It cannot debar legislature from creating or conferring new rights by a special enactment. At the same time, in order that one provision can be said to be a specific provision to the contrary, it must completely cover the field of operation of the other and must lay down a contrary rule for the entire field so as altogether to nullify the other. These principles can alone guide to test whether period of detention undergone by the accused during the investigation, enquiry or trial before conviction may be allowed to be set off against the term of imprisonment on conviction as provided under section 428 of the Cr.P.C. In the instant case, the petitioner has been convicted by the General Court Martial and sentenced to imprisonment in accordance with the provisions in the Army Act.

6. Chapter 10 of the Army Act contains provisions as to the powers of the Court Martial. Section 125 thereof says:-

> "When a Criminal Court and a Court Martial have each jurisdiction in respect of an offence it shall be in the discretion of the officer commanding the army, army corps, detention or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which Court the proceedings shall be instituted, and if that officer decided that they should be instituted before a Court Martial, to direct that the accused person shall be detained in military custody."

It has given a discretion to the officer commanding or such other officer as may be prescribed to decide whether the case would be tried by a military court or a court otherwise competent to try the offender. This jurisdiction, although exclusive does not appear to affect the jurisdiction of the ordinary Criminal Court. Sections 126 and 127 of the Army Act provide that

a Criminal Court having jurisdiction, may by written notice require the officer, referred to in section 125, at his option either to deliver the offender over to the nearest Magistrate for being proceeded against according to law, or to postpon proceedings pending reference to the Central Government and on such notice the officer concerned to either deliver the offender over to the magistrate in compliance of the requisition or forthwith refer the question to the Central Government whose order upon such reference is final; and even after conviction or acquittal by a Court Martial for trial of the offender by a Criminal Court for the same offence or on the same facts, of course, with the previous sanction of the Central Government. Sub-section 2 of section 127, however, says:

> "If a person sentenced by a Court-martial under this act or punished under any of the sections 80, 83, 84 or 85 is afterwords tried and convicted by a Criminal Court for the same offence, or on the same facts, that Court shall in awarding punishment, have regard to the punishment he may already have undergone for the said offence."

Chapter 11 of the Army Act which contains provisions as to procedure of Court martial, says in section 152 :-

> "Any trial by a Court martial under the provisions of this Act shall be deemed to be a judicial proceeding within the meaning of section 193 and 228 of the Indian Penal Code and the Court martial shall be deemed to be a Court within the meaning of section 480 and 482 of the Code of Criminal Procedure, 1898."

The other relevant provisions are in Chapter 13

of the Army Act. Section 167 provides for reckoning commencement of sentence of imprisonment and says

> "Whenever any person is sentenced by a Court Martial to transportation or imprisonment, the term of his sentence shall whether it has been revised or not be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer or in the case of a summary Court martial by the Court."

7. The controversy herein, however, is based on the interpretation given to the provisions in sections 169, 171, 172, 173 and 176 of the Army Act. Before, however, I advert to these provisions and test whether the reckoning date of commencement of sentence will vary in a case where sentence is directed to be undergone in a civil prison or not, I may state that there are provisions in Chapter 14 of the Army Act which deal with the pardons, remissions and suspension of sentence but they do not appear to have any effect on what I am called upon to decide.

8. The respondents have apparently pleaded that there was some error in the warrant which was later corrected and the second respondent realised his mistake in treating, after granting remissions etc., the petitioner to have undergone the sentence of imprisonment and recalled his order. He accordingly directed for petitioner's arrest to undergo imprisonment for the period remaining unserved in the civil prison.

9. Section 171 of the Army Act says :-

> "Whenever in the opinion of an officer commanding an army, army corps, detention or independent

> brigade any sentence or portion of a sectence of imprisonment cannot for special reasons conveniently be carried out in a military prison or any military custody in accordance with the provisions of section 169, such officer may direct that such sentence or portion of sentence shall be carried out by confinement in any civil prison or other fixed place."

The petitioner who was arrested on 21-10-1982 and admittedly punished to undergo imprisonment by an order made on 8-3-1983 was directed to imprisonment in a civil prison. The order in Annexure '1' received under the warrant of commitment issued by the 4th respondent dated 9-1-1984 the petitioner was sentenced to undergo one year rigorous imprisonment; he was released by giving the benefit of 130 days undergone during investigation, enquiry and trial; the release was unauthorised and the petitioner was still required to undergo imprisonment to complete the sentence awarded to him. True, the petitioner was sent to civil prison on 8-11-1983 after confirmation of the punishment awarded and revision thereof but he was kept in confinement with effect from his arrest on 21-10-1982. In accordance with the provision in section 428 of the Code of Criminal Procedure, 1973, the petitioner is entitled to set off against the term of imprisonment imposed on him, the period of detention undergone by him during the investigation, enquiry or trial, if the said provision is applicable. In the instant case, the investigation, enquiry or trial of the case against the petitioner was conducted by the competent authority under the Army Act and the General Court Martial. The procedure in that behalf prescribed in the Army Act, therefore, has been applied. There was no provision similar to one in section 428 of the Code of Criminal Procedure, 1973 in the Code

of Criminal Procedure, 1898. The Army Act has spelt out some characters of a Criminal Court in a Court Martial by providing in section 152 of the Army Act that any trial by a Court Martial under the provisions of the Act shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and the Court Martial shall be deemed to be a court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898. Since the Act has referred to the Code of Criminal Procedure, 1898 and the provisions contained therein one can legitimately suggest that for treating a Court Martial, a court subject to the Code of Criminal Procedure, one has always to refer to the Code of 1898 and not to the Code of 1973. On this basis, it can be suggested that in the matter of imposition of sentence by a Court Martial set off as provided under section 428 of the Code shall not be granted to the convict sentenced to undergo imprisonment by a Court Martial, Before this argument is sustained, however, it will be necessary to hold that a conviction by a Court Martial will be one granted by a special law which has prescribed a special procedure for community the sentence and has made no provision for set off. In other words it has to be held that the trial and conviction by a Court Martial is saved by section 5 of the Code of Criminal procedure, 1973.

10. In the case of *F.R. Jesuratnam* (1) before a Division Bench in the Delhi High Court, the petitioner who was a Squadron leader in the Air Force and was tried by a General Court Martial after his arrest

(1) (1976) Cr. L.J. 65.

under the Air Force Act, 1950 and sentenced to rigorous imprisonment had raised a similar question. The Court has observed:-

> "So far as section 428 of the Code is concerned it has been held in B.P. Andre v. Supdt., Central Jail, Tihar, New Delhi (AIR 1975 SC 164) = (1975 Cri IJ 182) that the said section is absolute in its term and that it provides for set off of the pre-conviction detention of an accused person against the term of imprisonment imposed on him on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into account by the court while imposing the term of imprisonment. The Legislature having introduced no such exception, the court cannot read it into the section, by a process of judicial construction, that no set off of such pre- conviction detention would be permitted if the same had been already taken into account by the court while imposing the term of imprisonment on conviction."

But the Court having said that the Army Act is a special law and a conviction and sentence to undergo imprisonment by the Court Martial shall not attract section 428 of the Code, it has said:-

"The most formidable difficulty in the way of the petitioner, as we see it, is that the petitioner, on whom the burden lies heavily, has not been able to show how now giving him the benefit of pre-trial detention set off is discriminatory merely because civilians are now getting such a benefit under section 428 of the Code. The petitioner cannot say in such a context, that all that he is asking for is that the jail authorities must commute the period of imprisonment imposed by the Court Martial under section 428; obviously the

Code does not apply to him by reason of section 5 thereof. The Act is seen to be more lenient in some respects to persons subject to it even as in some areas they may be more disadvantageously placed. When this is so and this was not and could not be denied - we fail to see how the petitioner could seek to compare himself with civilians in any area where he complains of being more disadvantageously placed. In no view of the matter does the argument of discrimination seem to have any force."

11. A Division Bench of the Madras High Court in the case of *P.P.Chandrasekaran* v. *Government of India and others* (1) has said that the Navy Act is a special law as contemplated by section 5 of the Criminal Procedure Code; it prescribes an elaborate procedure for conducting a trial and for execution of sentences; and the accused who is sentenced to imprisonment by the Court Martial under the Navy Act is not entitled to claim the benefit of section 428 of the Code.

12. It appears to me, however, that the Supreme Court in the case of B.P. Andre (supra) has said with no ambiguity that the conviction and sentence by the Court are not in any way effected by granting set off and that they remain the same even after the set off is allowed. Thrust of the judgment of the Supreme Court although apparently confined to the question whether a person convicted after the coming into force of the new Code of Criminal Procedure would alone claim the benefit of section 428 also embraces cases

(1) (1977) Cr.L.J. 677.

where a person had been convicted before but his sentence was still running at the day when the new code came into force, is also that section 428 is absolute in its terms. The object of the enactment of section 428 of the Code was to release the anguish of prolonged detention of undertrials and to avoid over- crowding in jails. The Army Act like the Navy Act or the Air Force Act may be a special law and special provisions are made for the trial by the Court Martial, still how the sentence would be carried out and in doing so, set off would be granted or not is not covered by the special provisions thereof.

13. I find support to my view in a judgment of the Kerala High Court in the case of *Subramanian* v. *Officer Commanding Armoured static workshop*(1) which has chosen to record its disagreement with the Delhi view. In the words of P.Narayana Pillai,J. in the said judgment:-

"The object of the enactment of section 428 of the Code was to relieve the anguish of prolonged detention of undertrials and to avoid overcrowding in jails. Sentence is the pith and substance of the whole criminal process. When that and the conviction remain intact and untouched inspite of the grant of set off, the grant of set off, cannot be considred as in any manner affecting the provisions of the Army Act."

I entirely agree with the above and also record my disagreement with the decision in *F.R. Jesuratnam* v. *Chief of Air Staff* (supra).

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(1) (1979) Cr.L.J. 617.

14. The Supreme Court in the case of Lt. *Colonel Prithi Pal Singh Bedi* v. *Union of India & Others (1) has considered the constitutional validity of some of the provisions as to enquiry and trial by a Court Martial. Although, it has not found any infirmity in the law as such, yet it has lost no opportunity to remind that persons subject to the Army Act and Rules are also citizens of India and governed by the liberty oriented Constitution and made several recommendations for removing anomolies in the trials by the Courts Martials and the ordinary Criminal Courts.*

15. In a judgment previous to it in the case of *Suraj Bhan* v/s. *Om Prakash and another*(2) also some words have been used by the Supreme Court which say the following:

"Indeed section 428 does not contemplate any challenge to a conviction or a sentence. It confers a benefit on a convict reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as undertrial prisoner."

16. My attention, however, has been drawn to a judgment by a Division Bench of the Madras High Court in the case of *T.S.Ramani v. Superintendent of Prisons, Central Jail, Madras* (3). The Madras High Court has chosen to dissent from the Kerala view

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(1) (1982) A.I.R. (S.C.) 1413.

(2) (1976) I.S.C.C. 886.

(3) (1984) Cr.L.J. 892.

and adopted the reasonings in the Delhi Courts' judgment. It has gone further to say that the same person if tried by Court Martial and sentenced to undergo imprisonment shall not be entitled to the benefit of section 428 Cr.P.C., but on his trial by the ordinary Criminal Court, if so ordered by the competent authority, he shall be entitled to the benefit thereof. I have already indicated my preference and noticed the legal position. The Madras Court has not taken notice of the fact that conviction or sentence imposed by the Court Martial has got nothing to do with the set off, which set off is granted by section 428 of the Code of Criminal Procedure irrespective of the Conviction and sentence on whatever considerations.

17. The next question is also of some importance. The petitioner who was entrusted to the custody of the second respondent was released from custody and it appears his re-arrest has been designed at the initiative of the fourth respondent. No provision of law has been brought to my notice under which they can take initiative and direct for the arrest of the petitioner to undergo sentence once, according to the petitioner rightly and according to the respondents wrongly set off has been granted. The common law principle of natural justice, apart from giving to the petitioner opportunity of being heard will also require disclosure of the authority of law under which he is sought to be detained. Is he a fusitive of law? The answer is, "not". Even if he is a fusitive of law, his detention can be authorised only by a competent authority. Judicial review of administrative action is a rule which is answered on facts which show the authority of law and the procedures prescribed in this behalf. It is obvious that no such opportunity has been afforded to the petitioner. There

is thus, a violation of natural justice in so far as the petitioner's right to know the legal authority and opportunity of being heard is concerned.

18. In the result, this application is allowed. Let, a writ in the nature of certiorari be issued quashing the orders contained in Annexures 1 and 2 and consequentially, a writ in the nature of mandamus be issued directing the respondents for not taking the petitioner in custody pursuant to the orders contained in Annexures 1 and 2. There shall be no order as to costs.

S.P.J. *Application allowed.*

APPELLATE CIVIL

Before S.K.Jha and Binodanand Singh, JJ.

1986

August, 28.

*M/s Bhagat & Company, Hazaribagh.**

v.

The State of Bihar.

Code of Civil Procedure, 1908 (Act V of 1908), section 80, scope and applicability of --- identity of the person issuing notice under section 80 being the same as the person filing the suit ---, provisions of section 80, whether complied --- Limitation Act 1908 (Act IX of 1908), Articles 56 and 120 and Limitation Act, 1963 (Act XXXVI of 1963), Articles 18, 30 and 113 --- suit for realisation of price for work not done in its entirety- Article 56 of the old Limitation Act or Article 18 of the New Limitation Act not applicable, --- residuary Article 120 of the old Limitation Act or Article 113 of the New Limitation Act and section 30 whether applicable --- suit, whether barred by limitation.

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*Appeal from Appellate Decree No.706 of 1971. Against the decision of Shri N.N.Chakravarty, Ist Additional District Judge, Hazaribagh, dated the 31st August, 1971, arising out of that of Shri Ajit Nath Sarkar, Additional Subordinate Judge, Hazaribagh dated the 10th May, 1969.

Where the suit was filed by M/s Bhagat and Company and notice under section 80 of the Code of Civil Procedure was given by Shri D.R.Bhagat a Partner of Bhagat and Company;

Held, that there was due compliance of the provisions of section 80 of the Code of Civil Procedure as the identity of the person who issued the notice was the same as the person who brought the suit.

S.N.Dutt v. *Union of India* (1) --- distinguished.

Where it is not one of such suits where the plaintiff has sued the defendant after completion of the construction work of the defendant but a case where the plaintiff was stopped from doing any further work by the excecutive Engineer on 23.8.1961 when the right to sue accrued to the plaintiff and the suit was instituted in the year 1966;

Held, that Article 56 of the Limitation Act, 1908, corresponding to Article 18 of the New Limitation Act will not govern the case and the only other Article applicable will be Article 120 of the old Act which is described as a residuary Article and says that any suit for which no period of limitation is provided elsewhere in the schedule to the Act, the period of limitation would be six years from the date when the right to sue accrues. Under the corresponding Article 113 of the New Limitation Act the period of limitation has been curtailed which provides only three years' period of limitation from the date when the right to

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(1) (1961) A.I.R. (S.C.) 1449.

sue accrues and as a consequence will attract, the provision of section 30 of the New Act. Section 30 provides that any suit for which the period of limitation is shorter than the period of limitation prescribed by the Old Act may be instituted within a period of seven years next after the commencement of the New Act or within the period prescribed for such suit by the old Act, whichever period expires earlier. Under the old Act, by virtue of Article 120, a period of six years was prescribed, as the period of limitation from the date when the right to sue accrued, which is earlier than the period of seven years *ex gratia* extension under section 30(a) of the New Act. Taking the shorter period as prescribed in the Old Act, therefore, into consideration, the period of limitation would expire on 23.1.1967 or, perhaps, on 22.1.1967 (which is six years from the date when the right to sue accrued). Obviously, therefore, in the year 1966, when the suit was instituted, the suit cannot be said to be barred by limitation.

Appeal by the plaintiff.

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

The case in the first instance was placed for hearing before a Single Judge, who referred it to a Division Bench.

On this reference.

Mr.Braj Kishore Prasad No.2 for the appellant

M/s Rameshwar Prasad, G.P.6 and Vijay Chandra, (J.C. to G.P.6). for the respondent

Binodanand Singh,J. This is a plaintiff's appeal against a judgment of reversal. The learned Additional Subordinate Judge had decreed the suit, which has

been reversed by the learned 1st Additional District Judge, Hazaribagh, in Money Appeal No.15 of 1969/19 of 1971; whereas the Money Suit had been registered as No.2525 of 1966/4 of 1966

2. The appellant had filed the suit for realisation of Rs.5,208.76 Paise as the balance due for the works done by the plaintiff-appellant as contractor togethar with Rs.1,588.24 Paise interest totalling Rs.6,797/- with interest pendente lite and future interest. The case of the plaintiff was that it was a registered partnership firm doing contract business for transport of materials in the district of Hazaribagh. In June, 1961, the Superintending Engineer, Hazaribagh, had issued notices inviting tenders for transport of Public Works Department's materials in the Hazaribagh Division for the period ending 30.6.62. The plaintiff submitted its tender as also deposited an earnest money of Rs.3,000/- as required. On 3.7.61, the Executive Engineer, Hazaribagh, asked the plaintiff to meet him in connection with the settlement of the contract and when the plaintiff met the Executive Engineer, it was decided that the plaintiff would accept the work at the second lowest tender rate if it was found that the appellant's rate exceeded that rate and ultimately, the Executive Engineer informed the appellant on 4.7.1961 that he had recommended the plaintiff's rate and terms to the Superintending Engineer, Hazaribagh, for his approval and also asked the appellant to start the work in anticipation of the approval of the Superintending Engineer. In pursuance thereof, the appellant carried on the work of transportation of the Public Works Department as per tender to the entire satisfaction of the Department. The Superintending Engineer, Hazaribagh, subsequently decided to ask for fresh tenders for the work and the Executive

Engineer informed the plaintiff on 23.8.61 about this matter and also asked the appellant to take delivery of such materials only which the appellant had already received on the basis of the railway receipt from the defendant-respondent and not to do any further work. The appellant accordingly stopped further work and requested the Executive Engineer to pay the bills for the work already done as agreed to between them.. According to appellant's case, on demand, the Superintending Engineering and the Executive Engineer refused to make payment and hence, the suit was filed. A notice under section 80 of the Code of Civil Procedure was sent on 17.2.1966, which was duly served on the respondent.

3. The defendant-respondent filed a written statement contesting the suit. According to the case of the respondent, the Executive Engineer, by his letter, dated 4.7.1961 had authorised the plaintiff-appellant to start the work in anticipation of the approval of the Superintending Engineer, but it was not implied in that authorisation that the rate would be subject to the approval of the Superintending Engineer meaning thereby that the rate approved by him will be agreeable to the appellant and the plaintiff started the work on the said condition. The plaintiff's allegation that he would get the payment at the rate of second lowest tender was denied and, according to the respondent, the plaintiff being an old contractor very *well know* that he would be paid at the rate approved by the Superintending Engineer. According to the defendant-respondent, no decision was taken by the Superintending Engineer to ask for fresh tenders for the work, but the Superintending Engineer only decided to allow the work to the lowest tenderer, who was one Shri B.L.Choudhary and he was given the work

and the plaintiff was accordingly informed. It was also contended that the plaintiff had been paid as per the rate approved by the Superintending Engineer and nothing was due.

4. The only two main points, which were canvassed before the courts below were whether the suit was barred by the law of limitation and, secondly, had the provisions of sections 79 and 80 of the Code of Civil Procedure been followed and if not, was the suitliable to be dismissed.

5. The trial court decided both the issues in favour of the appellant and decreed the suit on contest with costs, interest pendent lite and future interest at the rate of 6 per cent. per annum. On appeal by the defendant, the lower appellate court has reversed both the findings of the trial court and has dismissed the suit.

6. The appeal was taken up for hearing before a learned single Judge of this Court and the only two questions raised were the same as were raised in the courts below. Having regard to these questions of law, the learned single Judge referred this case to a Division Bench. Hence, this appeal before us.

7. First, I propose to deal with the question whether the appellant can be nonsuited on the ground of contravention of the provisions of section 80 read with section 79 of the Code of Civil Procedure or not. Admittedly, the suit was instituted by M/s Bhagat and Company as the plaintiff. According to the finding in the trial court judgment, which has not been reversed nor even considered by the lower appellate court, there is no dispute over the fact that the plaintiff was asked to begin works at the rate agreed on between the plaintiff's agent D.R.Bhagat and the Executive Engineer and that there is no dispute regarding the fact that the plaintiff's claim is confined to this amount

only. The plaint as originally filed was signed by D.R.Bhagat as plaintiff, followed by the verification portion wherein, it has been stated that -

"I, D.R.Bhagat, a Partner of M/s Bhagat & Co. the plff., do hereby declare that the statement made above, are true to the best of my knowledge and belief. Verified at Hazaribagh. this the 1st day of October, 1966."

Thereafter, it is again signed followed by an endorsement bearing the name D.R.Bhagat,.. Plaintiff. It would bear repetion to say that the suit was instituted by M/s Bhagat and Company as the plaintiff as described hereinbelow. Therefore, the suit was instituted by the appellant M/s Bhagat and Company. The plaintiff had filed an amendment petition in the trial court in which in paragraph 1, it had been added that D.R.Bhagat is one of the partners of the plaintiff firm In course of the trial, the plaintiff-appellant had filed an amendment petition, in which it prayed that in paragraph 1 of the plaint, it be added -

"D.R.Bhagat is one of the partners of the plaintiff firm."

The plaintiff's lawyer submitted that nothing new had been stated in the amendment matter, because in the original plaint at the place of verification, it had been clearly stated as quoted above. The attention of the trial court was also drawn to a letter (Ext.A) filed by the defendant, which was written by M/s Bhagat and Company to the Superintending Engineer on 19.8.61 in which D.R.Bhagat (P.W.2) had signed as a partner of Bhagat and Company and this letter had also stated that the partnership deed and the power of attorney had already been submitted to the Executive Engineer, Hazaribagh. On these facts, the petition for amendment of the plaint was allowed by the trial court. In this background, it has to be considered as to whether

the lower appellate court was justified in holding that the suit was hit by the provisions of section 80, Code of Civil Procedure as the lower appellate court has held. In the draft plaint attached to the notice, the plaintiff had been described as-

"Shri D.R.Bhagat, Partner, Bhagat and Company, Contractors and Builders, Mohalla Nawabganj, P.O., P.S. and district Hazaribagh.... Plaintiff" and in the plaint, the plaintiff has been described as

"M/s Bhagat and Company, registered firm under the Indian Partnership Act, carrying on works of contract Mohalla Nawabganj, P.S. and district Hazaribagh- Plaintiff."

The lower appellate court has taken the view that the suit was filed by M/s Bhagat and Company and in the notice, the plaintiff was described as Shri D.R.Bhagat of Bhagat and Company. It appeared that the notice was given by Shri D.R.Bhagat, a Partner of Bhagat and Company and, therefore, on a comparison of the notice with the plaint in the court, the identity of the person, who issued the notice, was not found to be the same by the lower appellate court as the person who brought the suit. The plaintiff had been nonsuited on this ground and for this purpose, the lower appellate court has relied on a decision of the Supreme Court in the case of *S.N.Dutt* v. *Union of India*(1). Before, however, adverting to this decision, I am not oblivious of the well settled principle of law

(1) (1961) A.I.R. (S.C.) 1449

that section 80 applied to all forms of suit and whatever the relief sought. The Act, albeit a Procedure Code, must be read in accordance with natural meaning of its words and section 80 is express, explicit and mandatory and it admits of no implication or exceptions. Corning now to the case of *S.N.Dutt* (supra), it was held therein that section 80, according to its plain meaning, requires that there should be identity of a person, who issues the notice with the person who brings the suit. Where an individual carries on business in some name and style, the notice has to be given by the individual in his own name for the suit can only be filed in the name of an individual. In that case, notice under section 80 was given by Messrs S.N.Dutt and Company and the suit was filed by S.N.Dutt, sole proprietor of a business carried on in the name and style of M/s S.N.Dutt and Company. In these circumstances, it was held by the Supreme Court that the person giving the notice was not the same as the person suing and that, therefore, section 80 was not complied with. It will bear repetition to say that notice under section 80 was given by Messrs S.N.Dutt and Company and the suit was filed by S.N.Dutt. In the instant case, the suit was filed by M/s Bhagat and Company and a notice was also given in the name of Shri D.R.Bhagat of Bhagat and Company, Contractors and Builders. On the facts and in the circumstances mentioned above, I see no analogy between cases of *S.N.Dutt* (supra) and the instant case. I, therefore, over-rule the decision of the lower appellate court on this point, namely, non-compliance with the provisions of section 80 of the Code of Civil Procedure and, in my view, the learned Additional Subordinate (the trial court) was right in holding that the provisions of section 80 of the Code of Civil

Procedure were duly complied with. To take the view as taken by the lower appellate court would be merely piling unreason upon technicality.

8. This then brings us to the only other question involved in this appeal, namely, the question of limitation which I shall be considering hereinafter. The conflict, if any, which has to be resolved is whether Article 56 of the Old Limitation Act (hereinafter referred to as' the old Act') corresponding to Article 18 of the New Limitation Act (hereinafter referred to as 'the New Act' for the sake of convenience) will apply or Article 120 of the Old Act corresponding to Article 113 of the New Act will apply. Article 56 of the Old Act provides three years' period of limitation from the date when the work was done for the price of work done by the plaintiff for the defendant at his request where no time has been fixed for payment. The corresponding section 18 of the New Act provides the same period of limitation for such claim. The only slight difference is that Article 120 of the Old Act provides six years' period of limitation from the date when the right to sue accrues in a suit for which no period of limitation is provided elsewhere for the suit; whereas the corresponding Article 113 of the New Act provides only three years' period of limitation from the date when the right to sue accrues. Manifestly, therefore, under Article 113 of the New Act, the period of limitation has been curtailed and as a consequence will attract the provisions of section 30 of the New Act, which provides that notwithstanding anything contained in the New Act in a suit for which the period of limitation is shorter than the period of limitation prescribed by the Old Act may be instituted within a period of seven years next after the commencement of the New Act

or within a period prescribed for such suit by the Old Act whichever period expires earlier. Therefore, it has to be determined from the facts of the case, and the nature of plaint as to whether Article 120 of the Old Act corresponding to Article 113 of the New Act will be applicable or it will be governed by Article 56 of the Old Act corresponding to Article 18 of the New Act. So far as the trial court is concerned, it has stated that the suit was filed by the appellant within three years from the date of refusal by the respondent of the payment of demand of the bill by the appellant and it was not barred by limitation. However, no date of such refusal has been stated. It goes without saying that the refusal must be after the damand is made. Therefore, no express finding with regard to the date of refusal need be gone into. In the trial court, the respondent contended that the period of limitation was to be reckoned from 23-8-1961, the date on which the defendant- respondent informed the plaintiff to do no further work.

9. As has been earlier stated, Article 56 of the Old Act = Article 18 of the New Act provides three years' period of limitation from the date when the work was done for the price of the work done by the plaintiff for the defendant at his request where no time has been fixed for payment. It is well settled that a suit is governed by this Article if it arises out of a contract to pay the price of work done at the request of the defendant. A claim for payment of an additional rate over the stipulated period in view of the changed circumstances and not for the price of the work not done as agreed under the contract does not fall within the ambit of this Article. It was laid down by the Supreme Court long way back in the case of *Gannon Dunkerley and Co.Ltd.* v. *The Union*

of India(1) and also a Division Bench decision of this Court in the case of *The State of Bihar* v. *Binod Behari Lall* (2) In the case at hand, the claim is for payment of the price of the work done at the request of the defendant arising out of a contract and not for any claim for the payment of an additional rate over the stipulated period. Here, the work had been done by the plaintiff at the request of the Executive Engineer acting as an agent of the defendant-respondent. But, then the controversy arises as to whether this Article will apply to a case where the work is not done in its entirety. Evidently, in this case, the work was not done in its entirety although admittedly no time had been fixed for the payment, but the plaintiff was stopped from doing any further work by the Executive Engineer on 23.8.1961. It is for the party to assert that its case is governed by Article 56 of the Old Act or Article 18 of the New Act to establish the requirements of the Article. Therefore, it is not one of such suits where the plaintiff-appellant has sued the defendant-respondent after completition of the construction work of the respondent. Therefore, it can safely be inferred that Article 56 of the Old Act = Article 18 of the New Act will not govern this case. The only other Article which, then, is to be considered is Article 120 of the Old Act which is described as a residuary Article and says that any such for which no period of limitation is provided elsewhere in the schedule to the Act, the period of limitation would be six years from the date

(1) (1970) A.I.R. (S.C.) 1433 at 1435

(2) (1974) B.B.C.J. 780 at 787

when the right to sue accrues. Article 113 of the New Act, more or less corresponding to Article 120 of the Old Act prescribes a period of three years' as the period of limitation from the date when the right to sue acrues; whereas Article 120 prescribes six years' period of limitation from the date when the right to sue had accrued. In the instant case, from the facts notices earlier, it will be seen that the right to sue accrued to the plaintiff on 23.8.1961 when the Executive Engineer informed the plaintiff's agent,who is none else but D.R.Bhagat, a partner of the plaintiff firm holding power of attorney, not to do any further work. If Article 120 of the Old Act applies, the period of limitation would extinguish any such right in 1967, i.e. after a period of six years from the date when the right to sue accrued; whereas under the New Act, it would be three years from that date. The suit was instituted in the year 1966, i.e. within the period of six years from the date when the right to suit accrued reckoning from 23.8.1961, but according to the New Act, under Article 113, the period of three years' would culminate on 22.8.64 or 23.8.64. That brings into play the provisions of section 30 of the New Act. Section 30 provides that any suit for which the period of limitation is shorter than the period of limitation prescribed by the Old Act may be instituted within a period of seven years next after the commencement of the New Act or within the period prescribed for such suit by the Old Act, whichever period expires earlier. It is well settled that the law of limitation being a law of procedure is retrospective, which is applicable to any particular suit or proceeding, law in force on the date on which the suit or the proceeding is instituted notwithstanding the cause of action may have arisen before the Act came into force. Judicial precedents are numerous on this point, but

I may refer to a Division Bench decision of this Court in this connection in the case of *Mani Devi and others* v. *Ram Prasad and others*(1). Similar view has been taken by the Assam High Court, the Madhya Pradesh High Court and the Calcutta High Court. Therefore, in all fairness, presumably, on equitable grounds, provisions like section 30 of the New Act have been made to resolve the anomaly. The New Act being retrospective in operation would govern this suit of 1966 which, as already stated, prescribes a period of three years' limitation only from the date when the right to sue accrued. It goes without saying that but for section 30 of the New Act, the period of limitation would have expired on 22.8.1964 or 23.8.1964 thereby barring the suit, but section 30(a) of the New Act having provided a non obstene clause saying that notwithstanding anything contained in this Act, any suit for which the period of limitation is shorter than the period of limitation prescribed by the New Act may be the period of seven years next after commencement of this Act or within the period prescribed for such suit by the Old Act whichever period expires earlier. As has already been noticed, under the Old Act, by virtue of Article 120, a period of six years was prescribed, as the period of limitation from the date when the right to sue accrued, which is earlier than the period of seven years ex *gratia* extension under section 30(a) of the New Act. It may be pertinent to take note of the fact, it is not of very great significance, that previously the period of seven years' in section 30(a) of the New Act was prescribed as five years' only, but by virtue of section

(1) A.I.R. 1968 PATNA 70 = 1967 B.L.J.R. 566

2 of the Limitation (Amendment) Act, 1969 (10 of 1969), the period of seven years' was substituted for five years' and it was laid down that it shall be deemed always to have been so done. Taking the shorter period as prescribed in the Old Act, therefore, into consideration, the period of limitation would expire on 23.1.1967 or, perhaps, on 22.1.1967 (which is six years from the date when the right to sue accrued). Obviously, therefore, in the year 1966, when the suit was instituted, the suit cannot be said to be barred by limitation by any stretch of imagination. On this ground also, therefore, I am constrained to hold that the lower appellate court has taken an erroneous view of the law and the finding in that regard also has, therefore, to be reversed.

As a matter of fact, the trial court has recorded a categorical finding that the amount as claimed by the plaintiff-appellant has been mentioned in Schedule A to the plaint and in the written statement nothing has been stated about this claim in the schedule. Paragraphs 18 and 19 of the plaint wherein the claim is set-forth by the appellant has not been controverted in the written statement of the respondent. It, thus, stands admitted by non traverse of the pleadings. The amount in dispute as claimed by the plaintiff-appellant, therefore, more or less admitted. This finding of the trial court has not been reversed by the lower appellate court as the appeal there was confined only to the two questions of law which were canvassed before this Court.

10. No other point was canvassed in either of the courts below or even before this Court. It is, therefore, not necessary for us to go into any question relating to any other matter arising in the suit exercising the second appellate jurisdiction.

11. This appeal is, accordingly, allowed, but in the peculiar circumstances of the case, I shall direct the parties to bear their own costs of this appeal.

S.K.JHA,J. I agree.

S.P.J. *Appeal allowed*

APPELLATE CIVIL

Before Lalit Mohan Sharma and S. Shamsul Hasan, JJ.

1986.

August, 29.

*Bihar State Electricity Board.**

v.

M/s Khalsa Brothers.

Arbitration Act, 1940 (Act X of 1940), sections 30, 39 and 41 --- Award, whether justified by the weight of evidence led by the parties --- Court, whether can re- examine the merits --- grounds on which an Award can be set aside --- Code of Civil Procedure --- provisions of, whether apply in the proceedings under the Arbitration Act.- Code of Civil Procedure, 1908 (Act V of 1908), Order 41, Rule 22.

It is not open to the Court to re-examine the merits for finding out whether the Award is justified by the weight of evidence led by the parties. The jurisdiction of the Court to examine its correctness is limited by the provisions of the Arbitration Act, which are based on the general principle applicable to arbitration proceedings. An arbitrator is a tribunal

*Appeal from Original Order no.19 of 1979. Against the judgment of Sri Naresh Kumar Sinha, Additional Subordinate Judge VII, Patna, dated 30.9.1978.

selected by the parties, and his adjudication is binding on them. If it were permissible for the court to re-examine the correctness of the Award, the entire proceeding would amount to an exercise in futility. The grounds on which an Award can be set aside are limited by statute and section 30 of the Act in mandatory terms declares that an Award shall not be set aside on other grounds. It is also not open to the court to speculate, where no reasons are given by the Arbitrator as to the reasons which led him to his conclusion. The court cannot proceed to determine whether the conclusion is right or wrong on an assumption that the Arbitrator must have proceeded by a certain process of reasoning.

Section 41 of the Act says that subject to the provisions of, and the rules made under the Act, the Civil Procedure Code shall apply to all proceedings before the court and to all appeals under the Act. There does not appear to be any provision inconsistent with the application of the Civil Procedure Code.

Held, therefore, that in the instant case the decision of the court so far it has gone against the plaintiff respondent is clearly appealable under section 39 and as such the cross-objection is maintainable.

Case laws discussed.

Appeal by the defendant under section 39 of the Indian Arbitration Act.

The facts of the case material to this report are set out in the judgment of Lalit Mohan Sharma,J.

M/s R.P.Katriar and S.K.Katriar for the appellant

M/s K.D.Chatterjee, Chunni Lall, Santosh Kumar Sinha and N.U.Bhat for the respondent.

Lalit Mohan Sharma,J. This appeal under section 39 of the Indian Arbitration Act, 1940 is directed against the decision of the Additional Subordinate Judge, Patna, making the Award of an Arbitrator a rule of the Court after certain modifications.

2. The parties to the appeal entered into a contract for making certain constructions. The respondent-firm undertook to execute the work as per the agreement dated 12.9.1969. The work commenced in September, 1969 but could not proceed after a few months. Certain differences arose between the respondent and the appellant Electricity Board, the other contracting party, and the dispute was, as per the agreement, referred to the arbitration of Sri P.R.Guha, Chief Engineer (Retired), River Valley Project Department, Bihar. The parties filed their written statements and fully participated in the proceeding before the Arbitrator. Ultimately, an Award was made and was filed in court in August, 1972. The appellant raised several objections against the Award, and a suit was, therefore, registered in the court below in which the contractor-respondent was described as the plaintiff and the appellant-State Electricity Board as the defendant.

3. The plaintiff made a total claims of about Rs.34 lacs and the Board, a counter claim of over Rs.1 crore 23 lacs. The Arbitrator accepted the claim of the plaintiff to the tune of Rs.12,67,057.00 and the counter claim of the defendant for a sum of Rs.66,054.00 and directed the Board therefore to pay a sum of Rs.12,01,003.00. The court below modified the amount by reducing the sum of Rs.12,67,057.00 to Rs.10,38,087.00 and substituting the sum of Rs.66,054.00 by Rs.81,386.00. It held that the items

of claim and counter claim were severable and the modifications were thus legally permissible without setting aside the entire Award.

4. The defendant-Board has appealed and the plaintiff has filed a cross-objection.

5. In view of the points urged by Mr.R.P.Katriar in support of the appeal it is not necessary to give in detail all the objections mentioned in the petition of the appellant filed in the court below. The Arbitrator has not given any reason in support of his Award but has dealt with the claims of the parties itemwise. The break up of the claim and counter claim as also the Arbitrator's decision thereon are mentioned itemwise in the Award. For appreciating the points taken on behalf of the parties before us, reference may be made to the impugned judgment and certain papers included in the paperbook prepared by the appellant. The documents do not appear to have been formally marked as exhibits but the learned counsel have not taken any objection to their being treated as evidence in the case; rather, both sides have referred to the same before us. I am, therefore, proceeding to deal with the arguments of the learned advocates accordingly.

6. Mr. Katriar contended that the contract remained only partially executed not on account of any fault on the part of the defendant-appellant, and the plaintiff, therefore, is not entitled to any compensation by way of loss of profits. He also argued that although the Arbitrator has not given a speaking Award, the same should be set aside on account of inconsistent conclusions impliedly but necessarily

arising out of the decision in the Award on the different items of claim and counter claim. The learned counsel placed great reliance on the observations in paragraph 6 of the judgment in K.P.Poulose vs. State of Kerala: A.I.R. 1975 Supreme Court, 1259 in support of his points that the Court is under a duty to examine the controversy on the merits of the dispute, and pass proper orders in accordance with its conclusion. It is claimed that since on account of the default on the part of the plaintiff the work remained unexecuted which had to be given to another contractor for completion, the plaintiff was liable to re-compensate the defendant with respect to the extra expenditure the Board had to incur.

7. The plaintiff claimed a sum of Rs.12,15,900.00 for loss of profits and the Arbitrator has granted a sum of Rs.4,50,000.00. The argument which was pressed in the court below and reiterated here is that the agreement between the parties did not empower the Arbitrator to allow such a claim. I do not find any substance in this argument. The relevant clause of the Arbitration agreement including the arbitration clause have been mentioned in the judgment under appeal, and there does not appear to be any scope for holding that in case of a breach of contract the guilty party shall not be liable for the loss necessarily arising out of such a breach. I accept the finding of the court below on this point as well-founded. Mr.Katriar strenuously argued that the defendant is entitled to invite the Court to examine the materials produced before the Arbitrator and come to a decision that the defendant was not responsible for the breach of the contract. He relied on *K.P.Poulose* vs. *State*

of Kerala: (1) and Ardeshar Irani vs. *The State of Madhya Pradesh(2).* I do not agree with the learned counsel that it is open to the court to re-examine the merits for finding out whether the Award is justified by the weight of evidence led by the parties. I have already stated that the Arbitrator has not given any reason in support of his decision, and the jurisdiction of the Court to examine its correctness is limited by the provisions of the Arbitration Act, which are based on the general principle applicable to arbitration proceedings. An arbitrator is a tribunal selected by the parties, and his adjudication is binding on them. If it were permissible for the court to re-examine the correctness of the Award, the entire proceeding would amount to an exercise in futility. The grounds on which an Award can be set aside are limited by statute and section 30 of the Act in mandatory terms declares that an Award shall not be set aside on other grounds. It is also not open to the court to speculate, where no reasons are given by the Arbitrator as to the reasons which led him to his conclusion. The court cannot proceed to determine whether the conclusion is right or wrong on an assumption that the Arbitrator must have proceeded by a certain process of reasoning. It has been observed by the Supreme Court in *Jivarajbhai Ujamshi Sheth & ors.* vs. *Chintamanrao Balaji. & ors.(3)* that it is not open to the court to attempt to approach the mental process by which the

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(1) (1975) A.I.R. (S.C.) 1259.

(2) (1974) A.I.R. (M.P.) 199.

(3) (1965) A.I.R. (S.C.) 214.

Arbitrator has reached his conclusion, where it is not disclosed by the terms of his Award. The court cannot sit in judgment on the Arbitrator and a reappraisal of the evidence is not permissible. The decision in Poulose's case (supra) does not help the appellant as in that case the Award was speaking one and reasons were given for the decision against the contractor (see-paragraph 3 of the judgment). The Supreme Court by examining the reasons of the Arbitrator held that the Award suffered from a manifest error apparent ex facie. The Madhya Pradesh case also does not support Mr.Katriar. There the Arbitrator, who was a Government servant, demanded exorbitant fee (four times what the court ultimately fixed) and the matter was referred to the court under section 38 of the Act at the instance of one party. The other party offered to pay the entire amount, which was accepted by the Arbitrator without waiting for the court's decision. The Arbitrator gave his Award in his favour and included the amount in the Award to be realised from the losing party. In that background the High Court held that it was a case where the Arbitrator was guilty of misconduct within the meaning of clause (e) of section 30. The main argument addressed on behalf of the apellant must therefore be rejected.

8. The next argument of Mr. Katriar is that since the claim of the plaintiff for a sum of Rs.1,77,538.00 for earth work as per item (i) at page 89 of the paperbook was not allowed, it must be inferred that the Arbitrator rejected the plaintiff's case about the alleged failure of the defendant in providing water as per stipulation. The entry reads as follows:-

"CLAIMS AMOUNT AWARD

(i) For earth work in placing the soil in embankment which was available from item no.

2(a) but could not be utilised due to failure of the department in providing water as per stipulation. Therefore, less in this account for 12,68,129 cft. @ 200/ less Rs.60/- for Rolling, watering extra lead Rs.140/- per % cft. Rs.1,77,538/- Nil."

On that basis the claims as per items 2(a) to 5(a) at page 88 of the paperbook should also nave been rejected. Mr.K.D.Chatterjee, the learned counsel for the plaintiff-respondent, replied that the decision of the Arbitrator in not allowing the claim as per item (i) aforementioned does not necessarily lead to the conclusion that the plaintiff's case about the failure on the part of the defendant to provide water has been rejected. In view of the facts and circumstances of the case, it is just possible that the Arbitrator did not allow the claim as according to the case there was only a partial default in supply of water as is demonstrated by the fact that the plaintiff was able to execute the work in part. The fact that the plaintiff has been given a lump sum for the breach of contract has been suggested as another possible ground for the Arbitrator to reject the claim in item (i). The counsel said that the rejected item referred to an additional compensation claimed separately and the inference sought to be drawn by Mr.Katriar is not permissible. The argument of Mr. Chatterjee appears to be correct.

9. Mr.Katriar also challenged the Arbitrator's decision in rejecting the defendant's counter claim as per item 7 at page 92 of the paperbook. The defendant demanded compensation for the extra cost incurred for getting the unfinished work completed through

another contractor. He placed before us the evidence of Sri Guha, the Arbitrator, who was examined in the court below as a witness. His statements in paragraphs 5 and 7 of the recorded deposition relied on by Mr.Katriar do not give any support to the defendant's case. Besides, I do not think the oral evidence can be admissible for interpreting the written Award. The oral statement of the Arbitrator indicates that he had accepted the plaintiff's case of non-supply of water, but I am not relying upon the same for my view about the Award. In support of the counter claim Mr.Katriar relied on clause 3(o) of the arbitration agreement, which has been quoted in page 13 of the judgment of the court below. The court has rejected the argument, and, in my view rightly, on the ground that the decision of the Arbitrator on the merits of the claim was not subject to the court's scrutiny. It cannot be legitimately suggested that the defendant could be entitled for any compensation on this count in absence of failure on the part of the contractor to execute the work, and it was for the Arbitrator to decide as to where the responsibility lay for non-completion of the work.

10. Mr. Katriar next challenged the Award with reference to certain other items. He said that the amount at the rate of 2 per cent, as mentioned at the bottom of page 88 of the paperbook, has been wrongly calculated and this amounts to an error apparent on the face of the Award. The rate 2 per cent is an obvious mistake for 2 per thousand, as has been discussed in para 13 of the judgment placed before us by Mr. Chatterjee and in his final reply Mr. Katriar did not further pursue the matter. The learned counsel also said that although the contractor claimed Rs.15/-

per cent by way of loss of profit only on unexecuted work the Arbitrator awarded compensation on the total work executed or unexecuted. He was, however, not able to substantiate his interpretation of the Award, as mentioned above. The judgment of the court below, which was placed by the learned Advocate for both sides specially paragraph 10 (page 46 of the paperbook) does not suggest such an interpretation of the Award and no other material has been relied upon before us. Lastly, Mr.Katriar faintly argued that the Arbitrator must be held to have been partial in favour of the contractor. No such ground was urged in the court below nor taken in the memorandum of appeal in this Court and it cannot be entertained now.

11. For the reasons mentioned above, I do not find any merit in the appeal which is accordingly dismissed.

12. The plaintiff-respondent has filed a cross-objection contending that the court below has illegally reduced the amount allowed under the Award by a total sum of more than 2,44,000.00. The claim in the cross- objection has been split up itemwise, as detailed in the memorandum.

13. So far maintainability of the cross-objection is concerned, Mr.Chatterjee contended that since the Arbitration Act has provided for the remedy arising out of an arbitration proceeding before the court of ordinary civil jurisdiction, the provisions of the Civil procedure Code included Rule 22 of Order 41 must

be held to apply, unless any particular provision thereof appears to be inconsistent with the Act. He relied on the following observation of Vaiscount Haldana L.C. in *National Telephone Company* vs. *Postmaster General(1).*

"When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court, are to attach, and also that any general right of appeal from its decisions likewise attaches"

He has also referred to the decisions in *Ramanbhai Ashabhai Patel* vs. *Dabhi Ajit Kumar Fulsinji & ors.*(2) *Bhanu Kumar Shastri* vs. *Mohanlal Sukhadia & ors.(3)* and *Ramasray Singh* vs. *Bibhisan Sinha(4):* The Supreme Court cases arose under the Reprasentation of the Peoples Act, 1951 and the Calcutta case under the Bengal Money Lendars Act. The observations made in these cases support the principle on which Mr.Chatterjee is relying. So far the Arbitration Act is concerned, the view in favour of the maintainability of a cross-objection appears to be stronger in as much as section 41 of the Act says that subject to the provisions of, and the rules made under the Act, the Civil Procedurs Code shall apply

(1) (1913) App.Cas. 546, 552

(2) (1965) A.I.R.(S.C.) 669

(3) (1971) A.I.R.(S.C.) 2025

(4) (1950) A.I.R.(Cal.) 372

to all proceedings before the court and to all appeals under the Act. There does not appear to be any provision inconsistent with the application of the Civil Procedure Code. The decision of the Court so far it has gone against the plaintiff-respondent is clearly appealable under section 39, and I, therefore, hold that the cross-objection is maintainable.

14. With reference to the merit of the cross-objection, Mr.K.D.Chattarjee placed his argument with reference to a typed chart, which was placed before us during the hearing of the appeal, dealing with the claims, as mentioned under items 2(a) to 4(a) at page 88 of the paperbook; item III at page 89 and item no. 9 at page 92 of the paperbook. The figures mentioned in the chart were challenged by Mr.Katriar as not correct. The statement of claims of the petitioner allowed by the Arbitrator and included in his Award indicates that the claim of the plaintiff under item 2(a) was only Rs.88769.00, but the plaintiff was awarded Rs.1,47,994.00 under the Award. The court below has reduced the figure to the amount claimed and I do not find any error in the judgment.

15. So far item no.3(a) is concerned, the Arbitrator allowed Rs.4,95,898.00 against the claim of the contractor to Rs.7,12,885.00 and under item no.4(a) a sum of Rs.2,09,161.00 was allowed against the claim of Rs.2,76,161.00. In paragraph 6 of the judgment of the court below, it has been pointed out as to how on the admitted facts the amount of Rs.4,95,898.00 was wrongly mentioned in place of Rs.4,86,174.00 due to an arithmetical error. Similarly, a sum of Rs.209161.00 has been entered in the Award due to a clerical mistake in place of Rs.1,49,140.00. These amounts allowed

under the Award when scrutinised with reference to the admitted position, clearly show that the Award was excessive and that the error is apparent on the face of the Award and has been rightly corrected.

16. The Arbitrator allowed the claim of Rs.1,00,000.00 under item (iii) at page 89, which has been struck down by the court below on the ground that it amounted to double payment.

The said sum was recovered by the Board from the running bill and it was certainly included in the compensation claimed for breach of contract. The court has elaborated this point in paragraph 9 of the judgment and I agree with the reasoning. The remaining claim under the cross-objection refers to item no.9 at page 92 of the paperbook whereby the Arbitrator rejected the counter claim of the defendant to a sum of Rs.15332.00; and has been dealt with in the judgment under appeal in paragraph 14. The court has allowed the amount for reasons discussed therein and which appear to be correct. Mr. Chatterjee contended that the decision of the court below is erroneous inasmuch as this amount was never claimed by the defendant at all. I do not find any merit in this contention as the statement of counter-claims clearly includes this amount as the 9th item.

17. On a consideration of the entire materials on which the parties have relied on in this case, I agree with the court below that the Arbitrator had made such errors on the face of the record, which were fit to be corrected by the court, as has been done. Since the amounts covered under these heads are severable from the remaining part of the Award,

which has been confirmed by the court below, there is no difficulty in making the modification without setting aside the entire Award.

18. In the result, although the cross-objection has been held to be maintainable, the same is dismissed on merits. The parties shall bear their own costs.

S.SHAMSUL HASAN,J. I agree.

M.K.C. *Order accordingly.*

REVISIONAL CIVIL

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

1986.

August, 30.

*Uday Banerjee.**

v.

P.R.Dutta.

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (Bihar Act IV of 1983) sections 11 (1)(c) and (e) and 14 (8), scope and applicability of --- suit for eviction of a tenant either on the ground of personal necessity reasonably and in good faith or of expiry of the period fixed under the lease --- remedy of the landlord when he loses the suit --- Civil revision application by him, whether maintainable.

Held, that, the remedy of the landlord in a case lost by him in which he institutes the suit in a Civil court of competent jurisdiction for eviction of a tenant either on the ground of personal necessity reasonably

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*Civil Revision No.1735 of 1985. Against the judgment and decree dated 28.8.85 passed by Sri A.R.Ansari, Munsif Ist, Patna.

and in good faith or in the case of expiry of the period fixed under the lease as per section 11 (1)(c) and (e) respectively is by "way of revision (and revision only)" of the order of the Court by the High Court as laid down in proviso to sub-section (8) of section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, and the civil revision application in the present case in maintainable at the instance of the landlord petitioner.

Vinod Kumar Chowdhary v. *Smt.Narain Devi Taneja* (1) -- relied on.

Application by the landlord.

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

The case in the first instance was placed for admission before a Single Judge, who referred it to a Division Bench for decision on the question of maintainability of the civil revision application.

On this reference.

Messrs S.K.Mazumdar, S.K.Ghose and *Laxmi Narain Das.* for the petitioner.

Messrs Krishna Murari, Udai Chand Prasad and *Suraj Narain Yadav.* for the opposite party.

S.K.Jha. A reference of this Civil Revision application to the Division Bench with regard to the

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(1) (1980) 2 S.C.C. 120.

true interpretation of section 14(8) of the Bihar Buildings (Lease, Rent and Eviction) Control Act. 1982 (Bihar Act No.4 of 1983) (hereinafter referred to as the Act for the sake of brevity and convenience) has been necessitated by and is reminiscent of an old saying *id perferctumest quod ex omnibus suis partious constat; et nihil perfectum est dum aliquid restal agendum;* that is perfect which is complete in all its parts, and nothing is perfect whilst anything remains to be done. In this case the difficulty has arisen not from anything inherent in the subject itself which might be quite simply treated but by the loose draftmanship which, of late, has become more frequent in view of the vast increase in the number of new legislative enactments from time to time. When this case came up before a learned single judge of this Court at the admission stage itself a preliminary objection was raised by learned counsel for the opposite party that no civil revision application could be entertained under section 14(8) of the Act. This at once impels me to quote in extenso section 14(8) of the Act running thus:-

> "14(8). No appeal or second appeal shall lie against an order for the recovery of possession of any premises made in accordance with procedure specified in this section.
>
> provided that on an application being made within sixty days of the date of the order of eviction the High Court may for the purpose of satisfying itself that an order under the section is according to law, call for the records of the case and pass such order in respect there to as it thinks fit".

On a plain prima facie reading of this section it would appear that a petition in revision may be

filed before the High Court against an order for the recovery of possession of any premises made in accordance with the procedure provided in the section. But ultimately the point which falls for decision will depend upon whether the well-settled canon of construction of statutes, namely *ul res magis valeat quam pereat* is attracted or not. This section, namely, section 14 of the Act lays down a special summary procedure for disposal of cases for eviction on the ground of bonafide requirement and in sub-section (1) thereof it has been specifically stated that every suit by a landlord for the recovery of possession of any premises on the ground specified in clauses (c) or (e) of Sub-section (1) of Section 11 of the Act shall be dealt with in accordance with the procedure specified in this section. Clause (c) of section 11(1) of the Act lays down one of the grounds for eviction of a tenant by the landlord" where the building is reasonably and in good faith required by the landlord for his own occupation or for the occupation of any person for whose benefit the building is held by the landlord; provided that where the court thinks that the reasonable requirement of such occupation may be substantially satisfied by evicting the tenant from a party only of the building and allowing the tenant to continue occupation of the rest and the tenant agrees to such occupation, the Court shall pass a decree accordingly, and fix proportionately fair rent for the portion in occupation of the tenant, which portion shall henceforth constitute the building within the meaning of clause (b) of section 2 and the rent so fixed shall be deemed to be the fair rent fixed under section. 5....." We are not concerned with the remaining portion of this clause. Clause {e} of section 11(1) of the Act applies to the case for eviction of a tenant holding a building on a lease for a specified period on the expiry of the period of tenancy. In nut shell section 11(1) (c) applies to the case of personal necessity of the landlord and section 11(1) (e) applies to the case of eviction on the expiration of the period prescribed under a contract of lease which means

by efflux of time. The special summary procedure for disposal of cases for eviction is confined to only two grounds, namely, personal necessity of the landlord reasonably and in good faith of either the whole or a substantial portion of the same which can satisfy his personal necessity and the other by efflux of time fixed by the contract of lease for the specified period itself. On no other ground can the summary procedure as prescribed in section 14 of the Act be invoked. Reverting now to the language of section 14(8) of the Act, although it bears repetition, it speaks that no appeal or second appeal shall lie against an order for the recovery of possession of any premises made in accordance with the procedure specified in this section. Only a civil revision has been provided for in the proviso to section 14(8) in case an application is made within 60 days of the date of the order of eviction (underlining is mine for the sake of emphasis). It was on this footing that an objection was raised that where no order for recovery of possession of any premises has been made, there is no provision for any revision or, for that matter, an appeal or a second appeal since the Act was a self- contained Act. Although it is not quite necessary so to do, unless one feels that a provision for appeal prescribed in section 24 of the Act has escaped our attention it is pertinent to note that section 24 unequivocally states that any person aggrieved by an order passed by the controller may, within fifteen days from the date of receipt of such order by him, prefer an appeal in writing to the appellate authority. In this context it is relevant to point out that the suits for eviction are filed under the provisions of the Act not before the Controller but before a civil court of competent jurisdiction. The matters which can be adjudicated upon by the Controller are alien to the questions which we are dealing with. Therefore, the forum for filing suits for eviction on one ground or the other being a civil court of competent jurisdiction, section 24 cannot, by any stretch of imagination, be pressed into service for the purpose of showing that any provision for

appeal has been prescribed under the Act against an order refusing to pass an order of eviction on the grounds mentioned above, namely, personal necessity or efflux of time by contract. The difference in the forum makes all the difference. But this is just by the way, lest it be misunderstood that I am oblivious of the provisions of the section 24 of the Act. It is, however manifest that on a superficial reading of section 14(8) of the Act the landlord has not been provided with any remedy in a case lost by him in which he institutes the suit in a civil court of competent jurisdiction for eviction of a tenant either on the ground of personal necessity reasonably and in good faith or in the case of expiry of the period fixed under the lease as per section 11 (1) (c) and (e) respectively.

2. it is patent, therefore, that in its ordinary meaning and grammatical construction the import of section 14(8) of the Act, as is contended by learned counsel for the opposite party, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended- a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used, as Lord Raid has said in Cramas Properties Ltd. Vrs. Connaught Fur Trimmigns, Ltd. (1965) 1 W.L.R.892 at P. 899 that

he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule. The canons of construction are not so rigid as to prevent a realistic solution." It is, therefore, also an established principle of canons of construction of statutes that sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (c.f.Maxwell on the Interpretation of Statutes (12th Edition) at page 231). It has again therefore, been said as a well settled principle of construction of statues that an Act has to be read as a whole so as not to accuse the legislature of using words here and there which would result in an obvious anomaly. Reading the language of section 14(8) in this context conceptually, I am convinced in my mind that it is a gross case of the draftsman's losseness in choosing the words to be incorporated in that part of the legislative enactment which can well be rectified by the court by making modification and more correction of careless language really giving the true meaning to be attached thereto and the court is not powerless in that regard because this will not amount to an act of legislation but merely a clarification of the statutory object and intent.

3. An example has been given by Mr.S.K.Mazumdar, learned counsel for the petitioner. The submission is that if a literal and grammatical adherence is to be given to section 14(8) of the Act as contended by learned counsel for the opposite party, in the case of a partial eviction that portion of the order which is against the tenant will only be

revisable and not appealable whereas assuming though not admitting, in favour of the opposite party that an appeal would lie at the instance of the landlord, then the landlord will have to seek a remedy by way of an appeal before an appellate court the forum being inferior to that of this Court. What an anomalous situation? I fail to appreciate this point since the Statute has given no right of appeal whatsoever even to a landlord. Therefore, the question of any anomaly does not arise at all.

Can it now be said that the legislature intended that in a suit to be tried by a summary procedure the landlord has no remedy at all under section 14 of the Act. In my considered view the answer would be categorically in the negative I would, therefore, having considered the matter in all its ramifications, hold that the words "no appeal or second appeal shall lie against an order for the recovery of possession of any premises made in accordance with the procedure specified in this section" has to be read as no appeal or second appeal shall lie in connection with any order for the recovery of possession of any premises in accordance with the procedure specified in this section, meaning thereby that the words "against an order for recovery of possession" has to be read as in connection with an order for recovery of possession" which in its turn would be reading the word "against" as "in connection with or relating to."

4. So far I have been dealing with the question as a matter of first impression on the basis of well settled canons of construction of statutes but I am beholden to Mr.Shreenath Singh, a senior counsel of

this Court who amicus curiae stood up and sought permission of the Court duly accorded to him to assist it on the point in controversy by inviting our attention to a decision of the Supreme Court in the case of *Vinod Kumar Chowdhary* Vrs. *Smt.Narain Devi Taneja* (1) which clinches the issue in so far as the question in controversy in the instant case is concerned as a matter of judicial precedent. That was a case dealing with Delhi Rent Control Act, 1958 and it appears that the language of section 14(8) of our Act has, for all practical purposes, been borrowed from the language of section 25 B of the Delhi Act. Section 25 B of the Delhi Act corresponds to section 14 of the Bihar Act with the only difference that in the Delhi Act the forum for adjudication of matters relating to eviction was prescribed to be the court of Controller whereas under the Bihar Act the forum is a civil court of competent jurisdication. The language of section 25B (8) of the Delhi Act has, for all practical purposes, been incorporated in section 14 (8) of the Bihar Act. The only difference is that in the Delhi Act the order for recovery of possession of any premises relates to order made by the controller in accordance with the summary procedure specified in that section whereas in the Bihar Act a petition has to be filed for revision in the High Court under the proviso to section 14(8) of the Act. All that has been said in the proviso to section 25-B (8) of the Delhi Act is that the High Court may, for the purpose of satisfying itself that an order made by the Controller under this

(1) (1980) 2. S.C.C. 120.

section is according to law, call for the records of the case and pass such order in respect there to as it thinks fit. In the Bihar Act the proviso to section 14(8) speaks of an application to be made by the tenant whereas in the Delhi Act such an application is not a must but the High Court may suo moto invoke its revisional jurisdiction. Apart from sub-section (8) of section 25 B of the Delhi Act practically the entire section, namely, section 25 B of the Delhi Act is, for all practical purposes, repeated in section 14 of the Bihar Act. Both these sections are, therefore, clearly in pari materia. A similar question arose in the Delhi High Court on a number of occasions and in a series of decisions the Delhi High Court took the view that revision application was maintainable against the order of the controller at the instance of the landlord also although in express terms section 25-B (8) did not say so. Ultimately in one of such cases the matter came up before the Supreme Court in Vinod Kumar Chowdhary's case (supra) and it was held, having considered the matter threadbare, by their Lordships of the Supreme Court that the remedy of the landlady against the order of the Controller was "by way of revision (and revision only)" of that order by the High Court as laid down in the proviso to sub-section (8) of section 25 B, even though it was an order not directing, but refusing, recovery of possession of the premises in dispute. So is the case here before us with the only difference that the order has been passed not by the Controller as in the Delhi Act which was the proper forum there but by a civil court of a competent jurisdiction as under our Act. Having already held that section 25 B of the Delhi Act and section 14 of the Bihar Act are in pari materia, I am sufficiently fortified in my view that the remedy of the landlord petitioner

against the order of the Court in the present case was" by way of revision (and revision only)" of that order by the High Court as laid down in proviso to sub-section (8) of section 14 of the Act (Bihar Act). Thus the preliminary objection with regard to the maintainablity of the civil revision application raised by learned counsel for the opposite party must be rejected as not tenable in law either on principle or on precedent. I am, therefore, firmly of the view that the civil revision application is maintainable at the Instance of the landlord petitioner.

5. Since this is the only point for which this case was referred to a Division Bench, it is now remitted back to the learned single Judge for entertaining the application and deciding the case for admission on its own merits in accordance with law. In the circumstances, however, I shall make no order as to costs.

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

S.P.J. *Order accordingly.*

CIVIL WRIT JURISDICTION

Before S.S.Sandhawalia, C.J. and N.P.Singh, J.

1986.

August, 30.

*Ram Roop Yadav.**

v.

The State of Bihar and others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), section 16(3) scope and applicability of --- claim for pre-emption --- whether can be defeated by the purchaser on the ground that he himself was a holder of the adjoining lands before an application under section 16(3) was filed.

On a plain reading of section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, the right for reconveyance of the lands transferred can be exercised by a co-sharer or a holder of adjoining land, when the land has been

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*Civil Writ Jurisdiction Case No.1939 of 1980. with Civil Writ Jurisdiction Case No.1940 of 1980. In the matter of an application under Articles 226 and 227 of the Constitution of India.

transferred to any person other than a co-sharer or a raiyat of an adjoining land.

Held, therefore, that in the instant case after the registration of the two sale deeds in respect of two plots in his favour the purchaser petitioner became holder of two adjoining plots. When applications for pre-emption were filed in respect of two plots transferred, the petitioner can legitimately resist the claim for pre-emption on the ground that he himself is a holder of the adjoining plot. It is almost settled that before an application under section 16(3) of the Act is filed, the purchaser by purchasing an adjoining plot can himself become the holder of an adjoining plot in order to defeat the pre-emption application which is filed later.

Bishan Singh v. *Khazan Singh* (1) and *R.C.Shrivastava* v. *P.N.Singh* (2) -- relied on.

Application by the purchaser.

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

Messrs Nagendra Rai, Ajit Kumar and *Rama Kant Sharma* for the petitioner.

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(1) (1958) A.I.R. (S.C.) 838

(2) (1970) B.L.J.R. 1101 F.B.

Mr.Binod Kumar Roy. for the respondents.

N.P.SINGH,J. The dispute involved in both the writ applications is in respect of pre-emption of lands transferred by two sale deeds executed by the same respondent in favour of the petitioner. The pre-emptor - respondents are, however, different. As a common questions of law and fact are involved in both the writ applications they were heard together and are being disposed of by a common judgment.

2. On 16.12.1978, Mostt. Bhawani Devi-respondent 3rd party executed two sale deeds in respect of Plot No.18 and Plot No.22 which are adjacant to each other, of village Hemjapur, District Bhagalpur, in favour of the petitioner, for a consideration of Rs.21,000/- and Rs.20,000/- respectively. The registration was completed on 13.1.1979. On 28.2.1979, two applications under section 16(3) of the Bihar Land Reforms (Fixation of Ceiling Areas and Acquisition of Surplus Land)Act (hereinafter referred to as the Act) were filed on bahalf of respondest Nos, 5 to 7 C.W.J.C. No, 1939 of 1980 and respondent Nos.5 and 6 of C.W.J.C.No 1940 of 1980 , claiming the transfer of the aforesaid two plots, on the ground that they were holders of lands adjoining to the lands transferred in favour of the petitioner. Both the pre-emption applications were dismissed by the deputy collector Land Reforms on a finding that the petitioner having purchased two adjacent plots was himself holder of adjoining lands and as such none the two pre-emption applications filed by two different sets of pre-emptors

could be allowed. The pre-emptors of the two applications being aggrieved by the orders aforesaid filed appeals before the Additional collector, who allowed the same on the finding that as the two pre-emptors were holders of the lands adjacent to the two plots purchased by the petitioner, their right of pre-emption has to be upheld. Revision filed on behalf of the petitioner before the Member, Board of Revenue was dismissed affirming the order of the Additional collector The validity of the orders passed by the Additional Collactor and affirmed by the Member, Board of Revenue , has been questioned in the present two writ applications,

3. Sub-section (3) of section 16 of the Act gives a statutory recognition of customary law of pre-emption with the object of consolidating the holdings , In view of aforesaid sub-section , whenever there is any transfer of land to any person other than a co- sharer or a raiyat of adjoinig land, any co-sharer of the transferor or any raiyat holding land adjoing the land transferred, shall be entitled, within three months of the date of registration of the document of the transfer, to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed. On a plain reading, the right for reconveyance of the lands transferred can be exercised by a co-sharer or a holder of adjoining land, when the la nd has been transfered to any person other than a co-sharer or a raiyat of an adjoining land.

4. In the instant case, the two sale deeds having been executed in respect of plot Nos, 18 and 22 in favour of the petitioner, after the registration of the two deeds the petitioner became holder of two adjoining plots. In this backgroud , when two applications for pre-emption were filed by two separate sets of pre-emptors in respect of two plots transferred, the petitioner can legitimately resist the claim in both the applications that he himself is a holder of the adjoining plot; In other words , the petitioner in application for pre- emption in respect of plot no. 18 filed by respondent Nos. 5 to 7 of C.W.J.C.No 1939 of 1980 can take a defence that he is the holder of adjoining plot No. 22 as such application for pre-emption should not be allowed, Same plea is available to him in the other application for pre-emption in respect of plot no 22 filed by respondent Nos. 5 and 6 of C.W.J.C No. 1940 of 1980 that he himself is the holder of adjoining plot No 18. Perhaps, the matter would have been different if same person or same set of persons had filed the two applications for pre-emption claiming to be adjoining raiyats of both the plots purchased by the petitioner.

5. On behalf of the pre-emptor-respondents it was urged that the petitioner had purchased two plots by two sale deeds with the purpose of defeating any application for pre-emption. It need not be pointed

out that right of pre-emption is a very weak right which can be defeated by the purchaser by any legitimate means. Reference in this connection may be made to the well known case of the Supreme court in the case of *Bishan Singh* v. *khazan Singh(1)* where it was pointed out that the person claiming pre-emption has "to show not only that his right is as good as that of the vendee, but that it is superior to that of the vendee- ------ this superior right must subsist at the time the pre- emptor exercises his right ". A Full Bench of this court in the case of *R.C. Srivastava* v.*P.N. Singh* (2) reiterated the same principle in connection with section 16(3) of the Act itself, pointing out that the right of pre-emption under section 16(3) "is a very week right, that it must subsist at the time when the pre-emptor seeks to exercise it and that it can be defeated if by that time the person against whom it is sought to be exercised has acquired a right or status which is equal to that of the pre-emptor"

6.In view of the series of judgments of this Court, it is almost settled that before an application under section 16(3) of the Act is filed, the purchaser by purchasing an adjoining plot can himself become the holder of an adjoining plot in order to defeat the pre-emption application which is filed later. Of course different considerations will arise where purchser tries

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(1) (1958)A.I.R(S.C)838

(2)(1970)B.L.J.R.1101

to become a holder of an adjoining plot by making purchase of the adjoining land after filing of the application under section 16(3)of the Act, In the instant case , the petitioner has not purchased the adjoining plot on different dates but on the same day and the registration in respect of the two deeds had also been completed much before filing of the two applications under section 16(3) of the Act .As such there should not be any difficulty in holding that when the pre-emption applications were filed by two different sets of pre-emptors for reconveyance of the two plots in two cases, on that day, the petitioner himself had become the holder of adjoining plots in both the cases and he could have resisted the claim for reconveyance of either of the plots, In my view, the Land Reforms deputy collector rightly dismissed the application ,The Additional Collector and the Member, Board of Revenue, have wrongly placed reliance on the full Bench case of Sheo Kumar Dubey v. Sudama Devi (AIR 1962 Patna 124).In the aforesaid case, it had been observed "it is thus evident that the entire land is clogged with an encumbrance in the shape of the right of pre-emption, It is not a personal right; the vendor possesses the property not absolutely but subject to the right of pre-emption".In the case of *R.C. Srivastava* v.*P.N.Singh* (Supra), the Full Bench explained the view expressed in the case of *Sheo Kumar Dubey* v.*Sudama Devi* (supra)and observed as follows;

"In *Sheo Kumar Dubey's* case, Kanhaiya Singh,J, had no occasion to consider the question as to how the right of pre-emption accrues or the question as

to how such a right can be or is lost , His Lordship was merely describing the legal incidents of a perfected right of pre-emption. He was not dealing with a situation arising out of some events which may have the effect of nullifying that right before any step is taken to enforce it ."

The learned Additional Collector should have followed the views expressed in the later Full Bench judgment in connection with an application under section 16(3)of the Act, instead of a view expressed in the earlier Full Bench case in connection with customary right of pre-emption.

7. In the result , the writ applications are allowed. The orders passed by the Member, Board of Revenue and the additional Collector are quashed,

The orders passed by the Land Reforms Deputy Collector dismissing the two applications for pre-emption under section 16(3) of the Act are upheld, In the circumstances of the case , there will be no order as to costs.

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

S.P.J. *Applications allowed*

CIVIL WRIT JURISDICTION

Before N.P. Sihgh and Ashwini Kumar Sinha ,JJ.

1986

September,17.

*Raghav Singh and others.**

V:

The State of Bihar and others,

Direction of State Government dated 21.7.1978--whether directory in nature----- transfer of teachers of Elementary Schools who were office bearers of Primary Teacheres Association in contravention of communication of State Government letter dated 21.7.1978--validity of.

The communication dated 21.7.1978 issued by the Department of Education, Government of Bihar to the different District Education officers and District Superintendants of Education intimating that the office

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*Civil writ Jurisdiction case no 2916 of 1986. In the matter of an application under Articles 226 and 227 of the Constitution of India.

bearers of the recognised Primary Teachers association should not be transferred from one place to another during the period they hold the said offices unless it is against the public interest cannot be held to be mandatory in nature so as to nullify the orders of transfer issued in respect of the writ-petitioners. It is only a directive by the State Government to its officials in respsect of transfer of teachers of the Elementary Schools,

It is well settled rule of construction that statutes creating public duty are directory where as those in conflict with private rights are imperative. It will be all the more difficult to hold an administrative decision in respect of public policy to be mandatory in nature,

Case laws discussed.

Application under Articles 226 and 227 of the Constitution. The facts of the case material to this report are set out in the judgment of N.P Singh J.

Mesers Ganesh Prasad Singh, Syed Farman Ahmad and *Santosh Kumar Sinha for the petitioners. Messrs Daman Kant Jha, G.A. Bipin Bihari Singh , J.C. to G.A. & Shailendra Kumar Sharma J.C. to G.A.-for the state*

N.P.SINGH, J the petitioners, who are Headmasters and Assistant Teachers in different elementary schools , have questioned the validity of orders of their transfers from the schools in question

on the ground that they being the office bearers of the Primary Teachers Association, cannot be transferred, in view of the decision of the State Government, which was communicated by the Deputy Secretary, Department of Education, to all the district Education officers and District Superintendents of Education by his letter dated 21.7.1978

2. It is the case of the petitioners that the differnt Schools, in which they are Headmasters and Teachers, have been taken over by the State Government under the provisions of the Bihar Non-Goverrment Elementary Schools (Takingover of control) Act, 1976 (hereinafter referred to as 'the Act'), It has been asserted that no rules have been framed under the said Act and as such the service conditions including transfers of the different teachers of the said School are governed by the executive instructions issued from time to time by the Department of Education , one such instruction was issued by the aforesaid letter dated 21.7.1978 saying that the office bearers of the Elementary Schools should not he transferred during the period they held such offices unless their transfer is in the public interest.

3.On 9.7.1986 a Bench of this Court passed an order directing the respondents to seek instructions so that this writ application may be disposed of at the stage of admission itself. Some persons have filed an application for intervention challenging the claim of some of the petitioners that they are still continuing as the office bearers of recognised teachers association . The parties were heard, in detail, at the stage of admission itself.

4. On behalf of the petitioners it was submitted

that, in view of the decision aforesaid taken by the State Government in respect of the transfer of the office bearers of the teachers association of differnt Elementary Schools, it was not open to the respondent -District Superintendent of Education to transfer the petitioners from the schools in question to different Schools. It was pointed out that in absence of a rule frameds. under the Act, the circular shall be deemed to be the rule within the meaning of Article 309 of the constitution and infraction there of shall invalidate the orders of transfer issued in respect of the petitioners. In this connection reference was made to the well known judgment of the Supreme Court in the case of Sant Ram Sharma v. State of Rajasthan (A.I.R 1967 S.C 1910)and union of India v. K.P.Joseph (A.I.R. 1973 S.C.303) where it has been pointed out that it is open to the State Government to issue executive instructions to supplement the rules already in existence or in absence thereof. But the question is as to whether all such executive instructions shall have statutory force and shall be mandatory in nature which can be enforced in the Court of law, It need not be pointed out that all provisions even of statutory rules may not be mandatory in nature so as to nullify any decision or action taken in contravention thereof. Reference in this connection can be made to the judgment of the Supreme Court in the case of *State of U.P. v. Manbodhan lal*(1) where it was pointed out;

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of

(1)(1957)A.I.R (S.C)912

this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty , and at the same time could not promote the main object of the Legislature. It has been the practice to hold such provsions to be directroy only, the neglect of them , though punishable not affecting the validity of the acts done"

It is a well settled rule of construction that statutes creating public duty are directory whereas those conflict private rights are imperative. It will be all the more difficult to hold an administrative decsion in respect of a public policy to be mandatory in nature.

5.This Court has considered the question aforesaid in the case of *Man Singh* v. *State of Bihar*(1). The petitioner of that writ application was challenging his order of transfer on the ground that it was contrary to the policy and procedure laid down for transfer and posting of Government employees, as notified by order dated 1.11.1980. The learned Judges after applying the test for determining the provision to be directory or mandatory, came to the conclusion that the decision of the State Government laying down the procedure for transfer of the Government employees was only directory in nature.

6. Recently a Full Bench of this Court had to consider the effect of circulars issued in respect of the settlement of fishery rights in the case of *Chetlal Sao* v. *State* (2). In that connection it was observed

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(1)(1982)P.L.J.R.368

(2) (1986) B.B.C.J. 109.

as follows:-

"Field of the settlement of tanks for fishery or other sairati rights has not been covered by any statutory provisions or rule nor can the ephemeral directions issued from time to time in the governmental discretion be given the status of a statute or raised to the pedestal of being binding either on the State or the citizen.....It is held that the administrative instructions or circulars issued from time to time for the lease of fishery rights in tanks (Sairats) vested in the State are not statutory in nature and consequently not binding."

7. On behalf of the petitioners it was urged that circulars and orders issued by the State Government are meant to be followed. It is true that whenever any administrative instruction is issued or a decision is taken by the State Government it is expected that the authorities shall follow them in form and substance. But if there is any contravention thereof the person concerned cannot move this Court for a writ of mandamus, because such administrative instruction does not have the force of a Statute. I do not understand as to how the communications issued by the Department of Education to the different District Education Officers and the District Superintendents of Education saying that the office bearers of the recognised teachers' association should not be transferred from one place to another during the period they hold the said offices unless it is against the public interest can be held mandatory in nature so as to nullify the orders of transfer issued in respect of the petitioners. It is, in my view, only a directive by the State Government to its officials in respect of transfer of teachers of the Elementary Schools. I must observe that I have

failed to appreciate the object behind such directive being issued by the State Government. The Schools are not industries which need trade unions to protect the interest of its employees while bargaining with the management. The service in the different schools are more or less in the nature of dedication to the different institutions as such there should not be much scope for trade union activities.

8. A learned Judge of this Court in the case of Ram Balak Singh v. The State of Bihar and others without taking into consideration the nature and effect of the aforesaid communication dated 21.7.1978 quashed the transfer of the petitioner of that writ application saying that as he was an office bearer of the recognised association of teachers of Elementary Schools he should not have been transferred till he continued to hold the office in question. I regret my inability to agree with the aforesaid view and the same is overruled.

9. Accordingly, this writ application is dismissed. The order of status quo passed by this Court is vacated.

Ashwini Kumar Sinha,J. *I agree.*

R.D. *Application dismissed.*

APPELLATE CRIMINAL

Before M.P.Varma and Krishna Ballabh Sinha, JJ.

1986.

September, 22.

*Chalu Bin.**

v.

State of Bihar.

Penal Code, 1860 (Act XLV of 1860), sections 302 and 304 part I - offence under section 302 --- punishment for --- culpable homicide not amounting to murder --- Court, whether has discretion in passing order of sentence.

For an offence of murder punishable under section 302 of the Penal code only one of two alternative punishment can be awarded, it is either death or imprisonment for life. But in a case of culpable homicide not amounting to murder,the court certainly has a discretion in passing the order of sentence and that is to be done considering the circumstances of each

*Criminal Appeal no.442 of 1983. Against the judgment dated 12th August, 1983 passed by Sri Anirudh Prasad Sinha, Sessions Judge, Chapra.

case. There is no uniformity in any case in imparting sentence either of imprisonment or of fine; and every judge does so in his own wisdom looking to the circumstances in every case before him. Ordinarily, punishment to be imposed should be sufficiently severe to deter the accused to repeat commission of such offence and act as examplary to others. In the instant case there was nothing to show what was the quarrel between the accused and the deceased and what led the accused to embark upon such an act of giving dagger blow to the deceased. It cannot be ruled out that circumstances might be such, which prompted the accused to commit the offence on the spur of the moment without any premeditation and might not have intended to cause the death.

Held, therefore, that under such circumstances sentence of eight years of imprisonment will meet the ends of justice.

Appeal by the accused.

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

M/S Prakash Narain Pandey (Senior Advocate) and Pramod Kumar. for the appellant.

Mrs. Nilima Thakur. for the State.

M.P. Varma & Krishna Ballabh Sinha,JJ. This is a very short appeal. Sri Prakash Narain Pandey, learned Advocate, with his usual brevity in his argument, has addressed us only on the question of sentence, passed against the appellant. He did not attack the findings of the judgment impunged on merit.

2. The accused was put on trial on a charge under section 302 of the Indian Penal Code (for brevity' the code') for committing the murder of one Garju Bin of Village Gonna (better known as village Gautam Ashthan) under police station Rivilganj in the district of Saran. The learned Sessions Judge, on consideration of the evidence brought on record, held the accused guilty of the offence under section 304 part I of the code, against which the accused has presented this appeal. The case against him is as follows:

3. The deceased Garju Bin, along with P.W.4 Panchdeo Bin and P.W.5 Siri Ram Bin were getting back to their village Sitab Diara and when they reached near Gautam Asthan-temple, they stopped for taking water.P.Ws. 4 and 5 had felt thirsty and both of them went inside the temple for drinking water; whereas the deceased Garju stayed on outside. Some time after, when both the witnesses P.Ws. 4 and 5 came out, they noticed Garju moving in the company of this accused Chalu Bin. They in fact, saw them scuffling over the sandy stretch of land near the bed of river Sarju. It is stated that in course of the struggle, the accused sat over the chest of Garju Bin and hit him with a dagger on the neck and as well as on the abdomen resulting in his instantaneous death. By that time other two witnesses P.Ws. 1 and 3 had also arrived and they too have testified to the fact as eye-witesses to the occurrence. The police officer of the Rivilganj recorded the statement of P.W.4 drew up an F.I.R; registered a case, held inquest over the dead- body and after investigation submitted charge-sheet against this accused. The dead-body was sent for post- mortem examination to hospital at Chapra and the doctor P.W.7 conducted autopsy over the dead-body. The doctor found the following two

ante-mortem injuries over the deceased,

(i) Sharp penetrating wound 3/4 " 1/X2" abdominal cavity deep on the fron of the abdomen on left side resulting in perforating injury of the stomach 1"x3/4 " X stomach cavity deep with collection of about one pint of dark red blood in the abdominal cavity.

(ii) Incised wound 4 "x1.^{1}/2" X Trachea deep on the front of the neck resulting in cutting the tracheal rings and byod bone and neck, blood vessels with dark red blood comming out of the wound.

4. The learned Sessions Judge in paragraph 14 of the judgment impunged has given a long discussion in giving his finding that the case of the accused squarely falls under section 304, part I of the Code and finally, on hearing the Counsel for the accused and also the prosecution, observed that in his opinion, ends of justice would be served in the case if the accused is punished with imprisonment for life and accordingly, the learned judge sentended the accused to undergo rigorous imprisonment for life under the said altered charge under section 304 part I of the code.

5. Sri Pandey, as we have said earlier, did not raise any grievance on the finding arrived at by the learned Sessions Judge with regard to the accusation made against Chalu Bin for causing the murder of Garju Bin. However, it has been contended that the learned Sessions Judge has not assigned any reason whatsoever in imposing the extreme penalty of rigorous imprisonment for life and has disposed of the arguments of the respective parties with a single stroke of pen stating therein that the ends of justice would be served

if the accused is sentenced to suffer rigorous imprisonment for life. In other words, the learned advocate contended that some modulating procedure, should have been adopted by the learned Judge in imposing sentence. It has been urged that it would be always advantageous for the court to look to the past conduct, social status, nature of the crime, the gravity of the offence including the cause for which the crime is committed in passing sentence against an accused. It has also been submitted that if the crime committed is such, which may shock the conscience of the people in general and of the masses then extreme penalty of law may be imposed, otherwise in the present philosophy of imposing sentence, lot of amendements have been brought out in the code of Criminal Procedure in imposing the sentence on accused. It has been submitted that keeping this in view, provision has been made that court should hear the parties before passing an order of sentence. It has also been pointed out that section 428 of the Code of Criminal Procedure has also been introduced for granting set off of period of imprisonment, which the accused has to undergo or has suffered in jail.

6. Keeping the aforesaid facts in view, the learned Advocate has then drawn our attention to the evidence of some other witnesses with this limited purpose only. It has been argued that the informant is silent in the F.I.R.(Ext.I) that the accused sat over the chest of Garju Bin and gave dagger blow either on the neck or on the abdomen. Only P.W.5 is named as an eye-witness in the F.I.R. and this witness too has seriously contradicted himself in his earlier statement before the police with regard to the manner of hitting the deceased with a dagger. In court P.W.5 gave out that accused threw down the deceased Garju Bin and

thereupon assaulted him with a dagger. But in his earlier statement before the police he did not say so. Similar is that fact with regard to P.W.3 He is not named in the F.I.R, but none the less, he did not speak in his earlier statement before the police that he saw the accused giving dagger blow on the chest. While referring to the aforesaid facts brought in evidence, the learned Advocate has argued that there is no evidence of any pre-meditation on the part of the accused to commit such offence. The evidence has been led to show that both were grappling with each other on the sandy portion of the land when Garju Bin had moved in the company of the accused near about the Gautam Asthan Temple. It is not known what happened in between them which made them to struggle on the sandy land. It is no doubt that some dispute must have arisen which made them to fight, but since the witnesses were at a longer distance (through the occurrence was quite visible), but the two were not audible to them and therefore, it remained quite obscure what passed in between the accused and the deceased and to what extent they fought which finally caused the accused to draw out his dagger and pierce on the neck and abdomen of Garju Bin. In other words, it has been argued that it cannot be said and that it cannot be construed that it was a ghastly act and on some altercation between the two, as it appears quite likely that on the spur of the moment, without any premeditation or thinking about it the accused took out his dagger and made an attack which accidently proved fatal, resulting in the death of Garju Bin. It is in this context that the learned Advocate has submitted that the circumstances do indicate for a lenient punishment even if it is held to be a case under section 304 part I of the Code.

7. Mrs. Nilima Thakur, appearing for the State has, however, submitted that it must be held that the accused caused the murder of the deceased with all intent to kill him and it was on this account that he probably took him away from the temple premisses to the open space in the sandy field near the bed of the river. But however, she has further added that in the case of imposition of sentence, it is always the discretion of the court. Needless to mention here that for an offence of murder punishable under section 302 of the Code only one of two alternative punishment can be awarded, it is either death or imprisonment for life. But in a case of culpable homocide not amounting to murder, the court certainly has a discretion in passing the order of sentence and that is to be done considering the circumstances of each case. We may state here that we have not seen any uniformity in any case or in any of the judgment of the court below in imparting sentence either of imprisonment or of fine; and it appears that every judge does so in his own wisdom looking to the circumstances in every case before him. Ordinarily, punishment to be imposed should be sufficiently severe to deter the accused to repeat commission of such offence and act as exemplary to others. But so far the present case is concerned, as observed earlier, the court could not know what was the quarrel between the two and what led the accused to embark upon such an act of giving dagger blow on Garju Bin. Since it is not coming to light, it cannot be ruled out that circumstances might be such, which prompted him to commit the offence on the spur of the moment without any premeditation and might not have intended to cause the death, as observed by the learned Sessions Judge in the judgment impunged, while convicting him under section 302 of the Code.

8. Taking into consideration this fact and also the age of the accused and in the circumstances clear picture not coming before us, which led to committing offence alleged we feel that sentence of eight years of imprisonment will meet the ends of justice and therefore, while upholding the conviction, the accused is sentenced to suffer rigorous imprisonment for eight years.

9. In conclusion, the sentence of imprisonment to life is reduced to a period of eight years. With this modification in the order of sentence, this appeal stands dismissed.

M.K.C. *Order accordingly.*

REVISIONAL CIVIL

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

1986.

September, 25.

*Dr.N.P.Tripathi.**

v.

Smt.Dayamanti Devi and another.

Code of Civil Procedure, 1908 (Central Act No.V of 1908), *section 151 --- ambit of --- resort to this section to stay the eviction suit pending disposal of earlier suit for specific performance of contract, whether will frustrate the legislative mandate in the provisions of section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act --- Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (Bihar Act no.IV of 1983).*

Where the defendant in an eviction suit filed an application in the suit under section 10 of the Code of Civil Procedure, 1908, hereinafter called the Code for staying the eviction suit pending the disposal of the suit filed by him earlier for specific performance of contract which was rejected and then in the revision

*Civil Revision No.155 of 1985. Against the order dated 17.1.1985 passed by Additional Munsif I, Patna.

application in the High Court the plea was taken that in case section 10 of the Code was not applicable, relief be given by taking recourse to section 151 of the Code;

Held, that by resorting to the inherent powers under section 151 of the Code the very object and purpose of a bilateral munificient piece of legislation as the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, hereinafter called the Control Act, will be frustrated, setting at naught the legislative mandate and thereby rendering nugatory the provisions of section 14 of the Control Act. To take recourse to such a procedure would not only be not sub-servient to the ends of justice but would be overriding the Special procedure mandated by a self contained Code as the Control Act. It would indeed be an abuse of the process of the Court by trying to induce the Court to render section 14 of the Control Act as otiose and redundant.

Case laws discussed

Application by the defendant.

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

Mr.Shashi Shekhar Diwivedi for the petitioner.

M/s S.C.Ghose and Kundan Bahadur Singh. for the opposite party.

S.K.JHA,J. This revision application is directed against the order dated 17.1.1985 passed by the Ist Additional Munsif, Patna in Title Suit No.87/83 /57/84 by the defendant in the action. By the impugned order

the trial court has rejected the prayer of the defendant-petitioner that further proceedings in the suit should remain stayed till the decision of Title Suit No.360/82 on an application made by the petitioner under section 10 of the Code of Civil Procedure (hereinafter referred to as the Code). This case was referred by a learned Single Judge of this Court to a Division Bench for an authoritative decision on the point that in the circumstances of the case even if it be held that the provisions of section 10 of the Code do not apply, inherent powers of the court can be invoked under section 151 of the Code. Hence this case before us.

2. If the provisions of section 10 of the Code squarely cover the point debated at the Bar, this application has to be allowed. If, on the contrary, it be held that there is no scope for attracting the provisions of section 10 then only a question arises as to whether in such cases the inherent powers of the Court under section 151 of the Code can be invoked treating them as exception to the general rule that stay be not granted in such cases. Learned counsel for the petitioner while canvassing the case even before us insisted that this case was squarely covered by the provisions of section 10 of the Code and, therefore, the impugned order suffers from jurisdictional infirmity. In the alternative he half-heartedly submitted that recourse may in such cases be taken to section 151 of the Code also. If that were the stand taken by learned counsel before the learned Single Judge, perhaps, this could not have necessitated a reference to a Division Bench at all. But before dealing with the question with regard to the applicability of section 10 of the Code to such a case, the facts first. They follow.

3. Title Suit No.360 of 1982 was instituted by the petitioner for a decree for specific performance of contract against one Ramesh Prasad and his brother whose successors in interest are the plaintiffs in Title Suit No.97/83 (opposite parties 1 and 2 here). The petitioner filed the earlier suit and he has made a defendant in the suit culminating in the impugned order. This suit, namely, Title Suit No.87/83 is one for eviction under the summary procedure as mandated by law in section 14 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (Bihar Act of 1983) hereinafter referred to as the Act) on the ground of personal necessity, pure and simple. In the earlier Title Suit, namely, Title Suit No.360/82 opposite party nos. 1 and 2 were arrayed in the category of defendants as being transferees not for value and not in good faith and with notice of the contract of sale between Ramesh Prasad and others and the present petitioner. A further allegation in the plaint of the earlier suit, namely, the suit for specific performance of contract has been made that a substanital part of the consideration money under the contract had already passed and possession handed over to the petitioner pursuant thereto.The deed of agreement (or contract) is the one dated the 3rd December, 1979. The claim of the petitioner in this application is that after the execution of the deed of agreement he continued to remain in possession not qua tenant but dehors the tenancy in his own right as a transferee. To put it in legal parlance section 53A of the Transfer of Property Act was sought to be used as a sword and not a shield - as a weapon of offence rather than a shelter of defence under the law. That is entirely not permissible under the statutory and salutary provisions of section 53A of the T.P. Act which does not envisage eviction under the Control Act to be inhibited by filing of a

prior suit by the adversary claiming a title on the basis of an alleged deed of agreement of sale and desirous of getting a decree for specific performance of contract therein. It is well-settled that section 53A of the T.P. Act can be used only as a shield and not as a sword. For all practical purposes the trial court has held that the matters directly and substantially in issue in the earlier suit are not directly and substantially in issue in the subsequent suit. It has, therefore, held that the suit did not come within the ambit and scope of section 10 of the Code.

4. It is now contended and it has been debated at the Bar by learned counsel for the petitioner that the matter in the earlier suit is directly and substantially in issue in the subsequent eviction suit and, therefore, the court below has committed an error of jurisdiction in saying that section 10 was not applicable. It was contended that the question for determination in the present suit, namely, the eviction suit which is a subsequent one is with reqard to the establishment of relationship of landlord and tenant between the parties which has a direct and substantial bearing upon the question involved in the earlier suit for specific performance of contract. I do not see any force in this contention. That is for a simple and obvious reason. So far as the suit for specific performance of contract is concerned it has got nothing to do with the question with regard to the relationship of landlord and tenant between the parties or even with regard to the ownership claimed under the deed of agreement of specific performance of contract for sale. Merely filing a suit for specific performance of contract does not confe or is founded upon a fact that a title has accured in the property in question under the deed of agreement or contract for sale. The title becomes perfect only

if two conditions are fulfilled, namely, (1) all the ingredients for a decree to be passed in such suits are found by the court to be correct and (2) a decree for execution of a deed of sale is passed in favour of the plaintiff of that suit within a specified period failing which it shall be registered by and under the order of the court of competent jurisdiction subject, of course, to the payment of full consideration money within the stipulated period as specified in the decree. And such a decree can only be passed, in the event a transfer has already been effected before the institution of the suit in favour of the third party who can claim by virtue of his own right if he establishes that he is entitled to the property in preference to the plaintiff being a bonafide purchaser for valued and without notice of the contract (attracting the provision of caveat emotor). Therefore, the title to the property can pass to the plaintiff in a suit for specific performance of contract only after the fulfilment of the following conditions:

(1) The plaintiff has succeeded in proving that the agreement upon which he based his claim is a true and genuine one;

(2) He has already performed his part of the contract by payment of earnest money;

(3) He is still ready and willing to perform his part of the contract; and

(4) If there is any subsequent purchaser to the agreement before the institution of the suit such a transferee was not a bonafide transferee and had not been able to prove either his bonafide or lack of notice on his part and even after the decree is passed compelling the defendant in such a case it would be in the terms of directing the plaintiff to perform his

part of the imperfected bargain within a certain specified time on the performance of which the defendant in such a suit is ordered or directed to execute a sale deed and get it registered either voluntarily or under the due process of law as specified in the decree. So long as the sale deed is not executed, no title in the property passes to the plaintiff of the suit for specific performance of contract. Merely because he institutes a suit saying that there was an agreement for contract of sale he cannot be said to be the owner of the property, even if it were so held because no sale deed had been executed in his favour till then.

Therefore, it is manifest that the question with regard to the ownership of the property is not the subject- matter of dispute either indirectly or directly and substantially in such a suit vis-a-vis the landlord, who is alleged to be a party to the agreement for sale and who was the original owner thereof.

5. Section 14 of the Act stands on a different footing altogether. The question of title is not directly and substantially in issue in a suit for eviction under section 14 of the Act, because the Control Act is a self-contained Code wherein the term 'landlord' in the definition clause has been given a fictional connotation as including the person who, for the time being, is receiving, or is entitled to receive the rent of a building whether on his own account or on behalf of another or for the benefit of himself and others or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the buildings were let to a tenant. This inclusive definition is, for all practical purposes, an all-embracing definition. Correspondingly, the term 'tenant' has been defined as meaning (not including) any person by whom, or on whose account rent is payable for a building and includes (a) a person continuing in possession after the termination of the tenancy in his favour and (b) a person who occupies a building as an employee of the landlord of such

building either on payment of rent or otherwise, In so far as the definition of the term 'tenant' is concerned, it is a hard and fast definition containing the inclusive clause therein whereas the term 'landlord' has been given an extended meaning by the inclusive clause. The question, therefore, in a suit for eviction under the Act that arises is as whether the plaintiff is a landlord in the suit within the meaning of the Act which, in its turn, has various ramifications.

6. It is admitted, as already noticed above, that the petitioner was in possession of the property as a tenant of the plaintiff-opposite parties in this suit. But in order to forestall such a claim of eviction an earlier suit may well have been filed in the shape of a suit for specific performance of contract. That cannot, in law, enable or entitle the petitioner to say that after the execution of the alleged deed of agreement for sale he continued to remain in possession not qua tenant but do hora the tenancy in his own right as a transferee. Merely by institution of a suit for a specific performance of contract or, for that matter, that by agreement of sale, can it lie in the mouth of the petitioner to say that he is remaining in possession of the premises inducted ponuit by the plaintiff-opposite parties who were admittedly the owners thereof and to whom the petitioner had attorned that he had acquired title merely by entering into a deed of agreement for sale? Can it be said that he became the owner of the property and no longer remained a tenant irrespective of the fact that no title deed (sale deed) has been executed in his favour? Therefore, it is manifest that the matter directly and substantially in issue in the two suits are not the same. The question of attracting the provisions of section 10 of the Code, therefore, does not arise at all because the matter is not even indirectly, what to talk of directly and

substantially, in issue in both the suits.

7. If the petitioner confines his claim to support this application on the basis of section 10 of the Code, there can be no manner of doubt that he must fail. Nonetheless, learned counsel for the petitioner pressed upon our attention a Division Bench decision of the Bombay High Court in the case of *Jai Hind, Mart* Vrs. *Tulsiram Bhagwandas* (1) in which it has been said that section 10 does not contemplate an identity of issues between the two suits, nor does it require that the matter in issue in the two suits should be entirely the same or identical. What the section requires is that the matter in issue in the two suits should be directly and substantially the same, and proper effect must be given to the language used by the legislature in section 10 that the identity required is a substantial identity. There must be an identity of the subject matter; the field of controversy between the parties in the two suits must also be the same, but the identity contemplated and the field of controversy contemplated should not be identical and the same in every particular, but the *identity and the field of controversy must be substantially the same* (underlining is mine for the sake of emphasis). No one can strike a discordant note in principle as laid down by the Bombay High Court. But in the instant case, as I have already indicated, the identity of the subject matter, the field of controversy between the parties in the two suits are not the same nor are they identical in every particular nor is the identity

(1) (1953) A.I.R. (Bom.) 117.

in the field of controversy substantially the same. This case cannot be pressed into service in support of the petitioner. Learned counsel then invited our attention to the case of *Manohar Lal Chopra* Vrs. *Rai Bahadur Rao Raja Seth Hiralal* (1) which is absolutely irrelevant in the context of the present case. Both the facts and the principle were absolutely alien to the ambit of the present suit. The only portion of the Supreme Court judgment, if at all relevant, is to the effect that the question of issuing an order to a party restruining him from proceeding with any other suit in a regularly constituted court of law deserves great care and consideration and such an order is not to be made unless absolutely essential for the ends of justice (underlining is mine for the sake of emphasis). It was held on the facts of that case which are plainly distinguishable from those in the instant case that the provisions of section 10 are clear, definite and mandatory. A court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in cartain specified circumstances. Those specified circumstances have already been taken note of by me earlier and none of them falls within the sweep of the Supreme Court decision.

8. In the last resort learned counsel relied upon a Division Bench decision of this Court in the case of *M/s Bishwanath Balkrishna* Vrs. *Smt. Rampeyari Devi and others* (2) In that case all that has been held by the Division Bench is that where first a suit for

(1) (1962) A.I.R. (S.C.) 527.

(2) (1979) A.I.R. (Pat) 159

eviction under section 11 was filed on the ground of personal need of the landlord and the subsequent suit was filed on the ground of default in payment of rent for more than two months, the second suit could not be barred under section 10 C.P.C. because the cause of action in the first and the second suits were different though the relief claimed was the same. I, for one, fail to appreciate as to how this case, in any manner, can be said to support the stand of the petitioner.

9. In the alternative, then it was contended on behalf of the petitioner that assuming that section 10 in terms or in substance was not applicable, it was a fit case in which the subsequent suit for eviction on the ground of personal necessity be stayed under section 151 of the Code. There are certain well settled principles and norms having the seal of approval of the highest Court of the land in the very case which has been relied upon by learned counsel for the petitioner, namely, the case of *Manohar Lal Chopra* (supra). It has been said therein that it is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the court to make orders necessary *for the ends of justice* (underlining is mine for the sake of emphasis) It has further been said that when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code. If the ends of justice demands it, there being no such expression in section 94 of

the Code which expressly prohibits the issuance of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 C.P.C., if the Court is of opinion that the interests of justice require the issuance of such interim injunction. In nut shell, therefore, inherent powers of the Court have to be resorted to only ex debito justitiae. Lat me pause here for the purpose of examining as to whether the ends of justice require any intervention by the Court under section 151 of the Code. In that context I have already observed earlier that it may have been for the purpose of forestalling the suit for ejectment that the former suit was filed. Can it then be said to be a bonafide act of the petitioner requiring to subserve the ends of justice. But that apart, the contention of learned counsel for the petitioner has to be rejected on a firm ground which no law can countenance. By restoring to the inherent powers under section 151 of the Code the petitioner will be frustrating the very object and purpose of a bilateral munificient piece of legislation such as the Control Act of 1982 setting at naught the legislative mandate thereby rendering nugatory the provisions of section 14 of the Act. I can say with all the vehemance at my command that to take recourse to such a procedure would not only be not subservient to the ends of justice but would be overriding the special procedure mandated by a self contained Code as the Control Act. It would indeed be an abuse of the process of the Court by trying to induce the Court to render section 14 of the Control Act as atiose and redundant. Therefore, ultimately I am constrained to hold that invoking the inherent powers of the Court under section 151 of the Code would,

on the facts and in the circumstances of the case, amount to an abuse of the process of the Court and there can be no manner of doubt that such a recourse cannot be said to subserve the ends of justice; rather would be inducing the Court to resort to a procedure which will do complete injustice to the parties as contrary to *ex debito justitiao.*

10. Having considered the matter in all its ramifications, I have no option but to hold that the impugned order although a short one can be fortified by such a lengthy judgment of a Division Bench of this Court. This application is, accordingly, dismissed but without any cost.

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

R.D. *Application dissmised.*

APPELLATE CRIMINAL

Before M.P.Varma and Krishna Ballabh Sinha, JJ.

1986.

November, 5.

*Ramji Singh.**

v.

The State of Bihar.

Criminal trial --- dying declaration --- recording and mode of --- a few omissions in the statement here and there --- effect of.

Held, that there is no prescribed form to record a dying-declaration and no rigid rule can be for the same. It can only be said that the man who records the dying declaration must satisfy himself that the deponent is in a fit state of mind and quite alert in making statement relating to the injuries sustained by him. A few omissions in the statement here and there, if the statement is otherwise found to be honest and acceptable, cannot be said to be a reasonable cause to reject it, and more so, if other facts reflect

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*Criminal Appeal no.340 of 1983. Against the judgment dated 19.4.1983, passed by Sri Lala Radha Kumar Sinha, 4th Addl. Sessions Judge, Bhojpur.

the same to be as a correct statement.

Appeal by the accused.

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

M/S Jagdish Prasad no.2 and Birendra Kumar Sinha for the appellant.

Mr.G.P.Jaiswal for the State.

M.P.VARMA & KRISHNA BALLABH SINHA,JJ. The sole appellant Ramji Singh has been convicted under the charge under section 302 of the Indian Penal Code for committing the murder of his own uncle Ramdeo Singh. He has been sentenced to suffer imprisonment for life.

2. He was put on trial with his father Kapildeo Singh and his mother Hirjharia alias Phulmati and three other agnetic relations. The other remaining accused were charged under section 302/149 and also under section 148 and 147 of the Code. But all of them have been acquitted. Accused Ramji Singh, besides the charge under section 302 of the Code was further charged under section 148 and also under section 324 for causing voluntary hurt to P.W.6 Radhika Devi wife of deceased Ramdeo Singh, but he has been acquitted of that charge.

3. The occurrence took place on the 29th of September, 1980 in the morning at about 7 A.M. at village Chhotki Kothia about 12 k.m. away from police station Buxar in the district of Bhojpur.

4. The deceased Ramdeo Singh was the full

brother of accused Kapildeo Singh. According to the prosecution version, there was already partition in the family and the deceased was living separately. There is a land in between the houses of the deceased Ramdeo Singh and accused Ramji Singh. The house of the appellant is in the north of the lane and that of deceased Ramdeo in the south, almost facing each other. The lane is between the two houses and it appears from the evidence that in the west of the house of the deceased there is an open space close by belonging to him. The lane goes up to that land. There was already a partition of the ancestral properties, but still there was some dispute lingering on with respect to the said land close to the house of the deceased.

5. The case of the prosecution is that Ramdeo Singh, the deceased was making some fuel cakes out of the cow- dung in that portion of the land. This was objected to by the father and mother of the appellant, but Ramdeo Singh did not budge and made a claim over the land. This led to an altercation and some of the accused persons (acquitted the charges) and one of them namely Kishore Singh, who died before he was put on trial) called out Ramji Singh and asked him to kill Ramdeo. It is said that accused appellant Ramji Singh was carrying a bhala. He struck with it twice hitting in the abdomen of Ramdeo. On hearing Hulla Ramdeo's wife P.W.6 Radhika came out of her house. The allegation is that she too was assaulted by Ramji Singh and other accused had also joined and threw brick-bats and stone-chips and others were hurling lathies. Ramdeo Singh fell down getting the blow. But he was soon removed to Buxar State Dispensary. Some medical aid was given to him and the doctor attending on him sent O.D. slip to

the officer in-charge, police station Buxar intimating that a victim with penetrating abdominal injury was admitted and asked the police to arrange for recording his dying declaration. This O.D. slip has been put in evidence marked as ext.4. It may be stated here that the said doctor has not been examined by the prosecution.

6. On getting information, the A.S.I. of police station Buxar arrived and he took down the fardbeyan of Ramdeo Singh. This statement has been marked as ext.5. On the basis of it a formal F.I.R. marked ext.6 was drawn up. Arrangement for recording the dying-declaration of Ramdeo Singh was also done. The Magistrate P.W.13 Ramnarain Pd. was requisitioned. He recorded the statement of Ramdeo Singh and this statement, described as dying-declaration has been admitted in evidence marked ext.9. Ramdeo Singh was soon removed to the Patna Medical College Hospital for better treatment. But the abdominal injury proved fatal and he died at the P.M.C.H. The police had already taken up investigation. Autopsy was done over the dead-body of Ramdeo Singh by P.W.11 R.P. Srivastava. The post mortem report is ext.3 on the record. The police after investigation finally submitted charge-sheet, thus putting this appellant along with others on trial, and finally by the Additional Sessions Judge by judgment dated 19.4.83 held appellant alone guilty of the charge, as discussed above, against which this appeal arises.

7. The accused in his defence has pleaded innocence and a simple denial of the entire incident. There has been no specific defence taken in the court below beyond the plea of innocence. The prosecution examined 13 witnesses in all to substantiate the charge,

out of whom, P.Ws.4,6,7 and 9 are said to be the eye- witnesses. But the learned Addl. Sessions Judge did not accept the testimony of P.W.4, 7 and 9. Reliance has been placed by the court below on the statement of P.W.6 Radhika Devi, wife of deceased Ramdeo Singh. P.Ws. 2,3 and 5 have been tendered by the prosecution and P.W.8 is the witness to the seizure regarding some blood stained clothes. As noted above, P.W.11 is the doctor namely, R.P.Srivastava, who conducted post mortem examination over the dead-body. P.W.12 is Sub- Inspector of Police, who was then Officer incharge at police Station Buxar. It is he, who investigated the case and submitted charge-sheet. P.W.13 is Ram Narain Pd., Magistrate, who recorded the dying-declaration of Ramdeo Singh at Buxar hospital and beyond this the fardbeyan (Ext.5) recorded by the A.S.I. at Buxar State Dispensary has also been considered as dying- declaration admissible under section 32 of the Evidence Act and the trial court relying on the two successive statements made by the deceased Ramdeo Singh and also of the statement made by his wife P.W.6 Radhika Devi held the appellant guilty of the charge.

8. The learned Advocate for the appellant, in fact, did not challenge the admissibility of the two documents, i.e. the fardbeyan (Ext.5) and the subsequent statement of the deceased (Ext.9) recorded by the Magistrate, but in course of his argument he has made a pungent criticism that the dying-declaration (Ext.9) is not worth acceptance. The learned Advocate has catelogued some of the infermities in the said document, as noticed by him and has argued that in that view the dying-declaration is fit to be rejected outright on the following reasons:

(i) The Out-door slip (Ext.4) would show that the condition of the patient, that is of Ramdeo Singh was getting low and in absence of any certificate by a doctor that he was able to give statement, it would be difficult to admit that Ext.9 was the statement of Ramdeo Singh.

(ii) There is no certificate appended to the document (Ext.9) to indicate that the injured was conscious and that the injury was not such that he could not have made his statement.

(iii) The Magistrate did not record the time of taking down the statement.

(iv) In Ext.9 the deponent has named accused Ramji the appellant as son of Kedar Singh and this would show that his memory was failing and no reliance should be placed on such incoherent statement.

(v) It has not been recorded in the form of question and answer.

9. We have given full consideration to the points raised before us. We get from the trial court judgment that the doctor, who wrote the O.D.slip has gone out of the country and was not available and the O.D.Slip, as pointed out above, has been admitted in evidence as Ext.5. The slip was issued at about 11.40 A.M. and sent after the police arrived and recorded the fardbeyan (Ext.5). The doctor has further opined, as noted in the slip that the patient was to be removed to the Patna Medical College Hospital the same day. It appears that the subsequent statement that his dying-declaration (Ext.9) was recorded sometime in the afternoon and to our mind, non-mentioning of the time in the dying- declaration does not invalidate the

document. It may be noted here that the admissibility of Ext.4 i.e. the O.D. slip has not been disputed by the appellant's Counsel. Rather the learned Counsel for the appellant referred to this document to show that the condition of the patient was low. We could not get from the record any evidence leading to the fact regarding non- availability of the doctor, who wrote the out-door slip but since the admissibility is not in dispute, we do not propose to discuss it at greater length, but even assuming that if this document is kept out of consideration, we see the very attending circumstances and other evidence available on the record to find out if Ramdeo Singh was in a fit state of mind to make the statement which he gave to the Magistrate. The very fact that the doctor gave advice for recording the dying-declaration, for all purposes would mean and we take it that the patient was in full sense and able to talk, in other words, we can say that the O.D.slip (Ext.4) which has been referred to by the learned Advocate is itself a certificate of the fact that the patient was in full sense and quite alert in mind. To be more clear, we may add here that P.W.13 the Magistrate has said in his statement in court that Ramdeo Singh was talking quite alright. So, it cannot be argued now to say that Ramdeo Singh was un-conscious because of his low condition and that the Dying- Declaration was not the statement of Ramdeo Singh.

10. There is of course, some inaccuracy with regard to father's name of accused appellant Ramji Singh. In Ext.9 he has been shown to be the son of Kedar Singh, whereas he is son of the accused Kapildeo, who has been acquitted in this case. We would be repeating that the deceased Ramdeo and Kapildeo are full brothers, both are sons of Kedar

Singh. We like to make it clear that at any stage, the learned Advocate keeping in view the relationship between the parties, did not attack the question of identity of the appellant. It is not in dispute, nor it can be. The deceased Ramdeo is admittedly his own uncle. It appears to us that no sooner Ramdeo Singh gave out the names of his assailant, the Magistrate might have asked the name of his father and in all confusion Ramdeo gave out the name of the his own father Kedar Singh and it was recorded by the Magistrate as Ramji Singh son of Kedar Singh confusing it to be the name of the accused's father. At any rate, this sort of confusion which has been argued in term of being contradictory statement, does not appear to be a discrepancy to falsify the document. Ext.5, which has also been admitted as Dying declaration under section 32 of the Evidence Act and the parentage has been correctly stated in the said document.

11. Lastly, coming to the question raised at the bar that the statement should have been recorded in the form of question and answer, we may only say that no law can be laid down in strict sense of the term to record Dying declaration in form of question and answer. In the instant case, we find, as stated by the Magistrate that he recorded the same in the dialect spoken by the deponent Ramdeo Singh. Thus, we donot find any infirmity therein and we find that these two statements are good piece of evidence, sufficient enough to prove the guilt against the appellant.

12. It is true that no certificate has been appended at the foot of the note of Ext.9. We have discussed this question in the foregoing paragraphs. The

submission of the learned Advocate is that the Magistrate should have given a certificate or should have obtained it from some doctor available that the deponent was in a fit state of mind to make statement. We can understand that we may look for such sort of certificate if some doubt creeps into the mind of the court whether the deponent was mentally alert to make statement and not in every case. The Dying man may, at times, in a conscious moment, make some statement to persons present around him which may or even may not be recorded by any individual and quite likely may die soon thereafter giving no chance to doctor to attend on him. It cannot be said in absence of the certificate that the whole statement should be rejected for want of it, even if otherwise found to be an honest statement. So, in judging the same the totality of the entire circumstance should be looked into and it is just as a rule of caution only to find out that if the deponent was mentally alert and in fit state of mind to make statement. There is no prescribed form to record a dying-declaration and no rigid rule can be for the same. It can only be said that the man who records the dying declaration must satisfy himself that the deponent is in a fit state of mind and quite alert in making statement relating to the injuries sustained by him. A few omissions in the statement here and there, if the statement is otherwise found to be honest and acceptable, cannot be said to be a reasonable cause to reject it, and more so, if other facts reflect the same to be as a correct statement.

13. The learned Advocate has repeatedly submitted and even in his 1st phase of the argument in attacking the genuineness of Ext.9 that there is factual contradiction in it, compared with the statement

of his wife P.W.6 Radhika Devi. Here it has been argued that from the dying-declaration we get that it was Ramji, the appellant, who assaulted Radhika. But she herself said in court that she was assaulted by another accused named Kishore Singh (since died and could not be put on trial). It was of course, on this account that accused Ramji Singh the appellant has been acquitted of the charge under section 324 of the Code. While examining this aspect of the case, we need not emphasise again that the dying-declaration, if acceptable provides a safe ground for conviction of the accused and a court need not look for any corroboration thereof. In the dying-declaration, as pointed out above, declarations are at two stages, and as we get on perusal of the entire evidence both the statements are free from any tutoring or even whispering from any quarter or by any one inimical to the accused. The deponent gave the statement while he was in the apprehension of death. Therefore, some faultering statement made by P.W.6 as to who was her assailant, will not take away the evidenciary value of the aforesaid two statements, who has specifically named this appellant as his assailant. His statement is that while he was preparing cakes of cowdung the accused persons objected to it laying claim over the lane which led to some dispute. Some of the accused commanded Ramji Singh to kill him and Ramdeo Singh has said in his dying-declaration that Ramji Singh, the appellant inflicted two fatal blows in his stomach. The doctor P.W.11, who held post mortem over the dead-body has noticed the following ante mortem injuries on his body:

> 1. Surgically stitched wound 8 "x1/2"x abdomen cavity deep-longitudely right of mid-line above umblicus.

2. Surgically stitched wound 1 "x1/2"x muscle deep on left upper part of abdomen.

3. Surgically incised wounds on both flanks of abdomen for trainage tube.

The doctor has opined that the cause of death of the victim Ramdeo singh was because of the bleeding and shock caused by the injuries mentioned above and we find that these injuries were sufficient in the ordinary course of nature to cause death, although this fact has not been specifically asked by the doctor P.W.11 in court.

14. Lastly, we may state that in the present case P.W.9 has in fact corroborated the dying-declaration made by her husband. She herself got injury in the incident. Although the injury report has not been proved, but fact remains that she was there in the house. Her evidence is that she came out hearing the cry. Her son P.W.4 was then suffering from measles and no sooner she came out, she saw the assault made on her husband by Ramji and on her intervention she too was assaulted. Thus, we get that she has amply corroborated her husband on material particulars, particularly with regard to the appellant inflicting two bhala blows in the abdomen of deceased Ramdeo, which proved fetal and resulted in his death. We therefore, donot see any merit in the appeal and it is fit to be dismissed. But before we part with the judgment, we may further state here that the Counsel for the respondent took us through the statements of P.Ws.4,7 and 9. The evidence of these witnesses has not been relied by the court below, nor the same has been referred to by the learned Advocate for the appellant, except a feable attempt

to show the statement of P.W.4 that he gave out with his mother and when he himself did not see the incident, the statement of his mother P.W.6 should have also been rejected. We would like to say that although we are not reverting back for reappraisal of evidence of these witnesses, but findings of the learned Additional Sessions Judge do not appear to be correct and he has made a very sketchy appraisal in the judgment impugned, which we do not appreciate.

15. As discussed above, we have said that P.W.6 has fully corroborated the two dying-declaration made by her husband Ramdeo, i.e. Ext..5 and 9 which get further support from the post mortem report, which shows that the doctor too found two penetrating injuries in the abdomen.

16. Lastly, the learned Advocate has also made an attack that the prosecution failed to prove the place of occurrence and therefore, the case must be rejected as a whole. We do not find any force in the submission. While discussing this part of the argument, we may like to state that the Investigating Officer does not appear to be honest when he has made his statement in court that he did not examine some of the witnesses regarding which he was asked. Although we donot like to refer to the police diary, but we are constrained to observe that in order to satisfy our conscience we have been taken through some portion of the same and we find that the statement of those witnesses are very much there. The land where the deceased was preparing fuel cake out of cowdung was very much close to his house. P.W.6 has said in her evidence that it takes about hardly a few minutes to go to that open space from her house. We may imagine that when the dispute arise over proparation of cowdung-cake at the spot and there was a cry calling out Ramji Singh to kill Ramdeo Singh, he would not have remained static and moved on. The lane is in

between his house and the house of the accused. The evidence is that other accused had also joined and some of them had thrown brick-bats and stone-chips. The Investigating Officer, in fact, found sign of stone chips at the Darwaza of the deceased. It may also be noted that he found some water in the field, i.e. the disputed land. Presumably this was an attempt to remove and deface the valuable evidence in question. P.W.12 has said that the disputed land is just on the back side of the house of the deceased. He of course, did not point out the place but on inspection he did not find any blood stain and he found that water had been thrown, which obviously suggests that attempts were made to deface or remove the evidence available on the spot and therefore, it cannot be argued that the prosecution has failed to prove the place of occurrence.

17. In the result, the appeal fails and is dismissed.

M.K.C. *Appeal dismissed.*

MISCELLANEOUS CRIMINAL

Before N.P.Singh and Yadunath Sharan Singh, JJ.

1986.

November, 11.

State of Bihar.

v.

Simranjit Singh Mann and ors.

Code of Criminal Procedure, 1973 (Central Act no.II of 1974), section 482 --- order of Special Magistrate separating trial of accused for offences under section 165-A and 165-A read with section 34 of the Penal Code from one under sections 121-A, 124-A and 120-B of the Penal Code --- quashing of, whether will prevent the abuse of the process of the court --- Criminal Law Amendment Act, 1952, (Central Act no.XLVI of 1952), sections 7(3) and 8(1) --- provisions of --- Special Judge, whether can try for offences under sections 121-A and 124-A of the Penal Code without the accused persons having been committed for trial --- Penal Code, 1860 (Central Act no.XLV of 1860), sections 34, 120-B, 121-A, 124-A, and 165-A.

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*Criminal Miscellaneous No.7289 of 1986. In the matter of an application under section 482 of the Code of Criminal Procedure.

Where the State filed an application under section 482 of the Code of Criminal Procedure, 1973, for quashing the order passed by Special Judge separating the trial of the accused for offences under section 165-A and 165-A read with section 34 of the Penal Code, 1860, from the offences under sections 121-A, 124-A and 120-B of the Penal Code;

Held, that the quashing of the impugned order, in the instant case, will prevent the abuse of the process of the court and shall also secure the ends of Justice. On the contrary, if the order of the Special Judge is upheld, it is likely to cause prejudice to the accused persons, in as much as they shall have to face two separate trials, although many evidence in the two trials may be common.

If the offence under section 165-A read with section 34 of the Penal Code is tried separately, the prosecution has to lead the same evidence in connection with the charge of conspiracy alleged to have been entered into between the accused persons in respect of offences under section 121-A and 124-A of the Penal Code because, according to the prosecution, the bribe had been offered to the officials at the checkpost to allow the accused persons to leave the territory of India and to proceed to Nepal.

Held, further, that reading section 7(3) alongwith section 8(1) of the Criminal Law Amendment Act, the Special Judge can try for offences even under sections 121-A and 124-A of the Penal Code without the accused persons being committed to him for trial for the said offences.

Case laws discussed.

Appeal by the State.

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

M/s Basudeo Prasad and *Sunil Kumar* for the petitioner.

M/s B.L.Wadehra and Syed Arshad Ahmad and Mrs. Sudha Rani Jaiswal for the opposite party.

N.P.SINGH,J. This application under section 482 of the Code of Criminal Procedure has been filed on behalf of the State of Bihar, for quashing an order passed by the Special Judge, separating the trial of the accused- opposite party for offences under sections 165-A and 165-A read with section 34 of the Penal Code from offences under sections 121-A, 124-A and 120-B of the Penal Code and directing that offences under sections 121-A, 124-A and 120-B be separetely tried.

2. It is the case of the prosecution that in the night of 29.11.1984 the Security Police Patrol on duty near Jogbani Check-Post, noticed a jeep speeding towards Indo Nepal border. Apprehending that criminals or anti social elements might be inside the jeep, a signal was given to stop. When the jeep stopped five Sikhs were sitting with their faces covered. Enquiries were made about their identification but when none of them divulged their names and the purpose of their going to Nepal they were taken to Jogbani Check-Post. One of the officers on duty identified one of them as Sardar Simranjit Singh Mann, Opposite Party No.1, who had been dismissed from the Indian Police Service. An order of preventive detention under the National

Security Act had been made against him on 28th August, 1984, but the detention order could not be served as he had gone 'underground'. The Special Branch, Patna had informed the officers posted at the Check-Post that the passport of aforesaid Sardar Simranjit Singh Mann dated 1.1.1980 had been confiscated and his movement outside India had been banned. The five occupants in the jeep were searched as also their luggage. As a result of the search, a number of documents were seized. From the person of Simranjit Singh Mann, a copy of lettar dated 2nd June, 1984 addressed by Simranjit Singh Mann to the Chief Secretary, Punjab, a copy of the letter of resignation dated 18th June, 1984 of Simranjit Singh Mann, the passport of Simranjit Singh Mann, two photographs of Jarnail Singh Bhindhrawale, a letter from Simranjit Singh Mann to Birbal Nath, a letter addressed to one Arun Kumar Agarwal asking him to help the bearer of the letter and an anonymous letter warning Simranjit Singh Mann of likely attempts to liquidate him and advising him to leave the country were seized. It is said that during search, a booklet in English 'Simranjit Singh Mann, I.P.S. likely to meet the fate of S.Kapur Singh, I.C.S.', written by Narendra Singh Bullers, containing anti Government and Sikh separatism propagands and one register in which shri Simranjit Singh Mann is said to have written the history of Amritsar, in which Indian army has been described as "enemy" on account of operation blue star and extremist Sikhs have been described as ' nationalists' and ' defenders' of the mother land, are said to have been recovered,apart from other documents. From accused jagpal Singh's suit case, a booklet in English entitled 'Sikhs and Foreign Affairs, and a combined road map of India, Pakistan, Bangladesh, shri Lanka

and Nepal were seized, As the documents were connected with anti national activities the accused-opposite party were arrested, After arrest one of the accused-opposite party Kamikar Singh offered a bribe of Rs 25,000/- for allowing them to proceed to Nepal, it is alleged that thereafter aforesaid Kamikar singh opened a bag lying in the jeep and offerd a higher amount The bag was seized and from that Rs . 62 722/- was recovered.

2A Cognizance had been taken by the Special Judge on the basis of charge-sheet in accordance with the provisions of the Criminal Law Amendment Act, 1952, not only of offences under section I65-A read with section 34 of the Penal code but also of offences under sections 121-A, 124-A 153-A 153-B and 120-B of the Penal code, But at the stage of framing charges under the aforesaid sections, a prayer was made on behalf of the accused persons that the trial under sections 165- A, and 165-A read with section 34 of the Penal Code be separted from the trial for offences under sections 121-A, 124-A and 120-B of the Penal Code be separated as those offences had not been committed in course of same transaction.

3. The Special Public prosecutor purporting to act on behalf of the State filed a petition saying that there was sufficient material for framing charge under section 165-A of the Indian Penal Code against the accused Kamikar Singh and a charge under section 165-A read with section 34 of the Penal Code against the remaining four accused opposite party. It was further stated in the said petition that although there was also evidence to justify framing of the charges under

sections 121-A,124-A,153-A,153-B, and 505 and 120-B of the Penal Code against all the accused persons, but as the offences under sections 165-A and 165-A read with section 34 of the Penal Code were not committed in course of the same transaction with the offences under sections 121-A, 124-A, 120-B and others, the accused persons be tried separately for offences under sections 121-A 124-A, 153-A,153-B and 505 read with section 120-B the Special Judge, by his impugned order dated 9.8.86, upheld the stand taken on behalf of the accused persons as well as by the Special Public Prosecutor on behalf of the State that all the offences had not been committed in the course of same transaction and, therefore, the trial for the offences under sections 165-A and 165-A read with section 34 be separated from other offences the learned Judge further held that he was not competent to try offences under sections 121-A and 124-A etc, as the case had not been committed to the court of Session, in regard to those offences the learned Judge directed that the records be sent back to the District and Sessions Judge, Purnea for proceeding further in accordance with law,

4. In the present applications, the stand of the State of Bihar is that the Special Public Prosecutor under misapprehension of the legal position and without instructiom from the State filed the petition aforesaid for separation of the trial and as such the State is not bound by the admission made by the Special Public Prosecutor before the learned Special Judge, In this oonnection a letter addressed by the Special Public Prosecutor to the Inspector General of Police. C.I.D, Bihar, Patna has been

annexed, In that letter, the Special Public Prosecutor has stated that on a second thought, he was convinced that the stand taken by him before the Special Judge was erroneous in law. He has further stated that he had taken that stand without any instruction from the State Government in that respect.

5. As such the first question which has to be considerd is as to whether the admission of the Special Public Prosecutor at the stage of the framing of the charge that offences under sections 121-A 124-A and 120-B of the Penal Code cannot be tried by the Special Judge, as they had not been committed in the same transaction, was binding on the State of Bihar. This aspect of the matter has been considered from time to time by different Courts, In one of the earliest judgments of the Privy Council in the case of Maharani *Beni Pershad Koeri* v.*Dudh Nath Roy* (1) in respect of an admission made by the counsel of one of the parties in the court below it was observed as follows;-

"The High Court seem to have understood counsel to have admitted that receipt of rent by the Maharajah operated as a confirmation of the pottah, and the only question, therefore, which remained was the construction of the pottah,In the opinion of their Lordships this admission, if correcily understood, was erroneous in point of law, and does not preclude the counsel for the appellant in this appeal from claiming his client's legal rights."

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(1)26 Ind App. 215.

In the case of *Banarsi Das* v. *Kanshi Ram(1)* it was pointed out as follows;-

"The admission, however, would bind him only in so far as facts are cocerned but not in so far as it relates to a question of law,"

A bench of this court in the case of *D.P Srivastava* v.*State*(2) observed as follows;-

"But even if it be taken that the point was conceded by the Government Pleader, it was open to the defendants to show that the concession was made under some misapprehension, as pointed out before the lower appellate court, Besides, it was not in the nature of a concession on a point of fact, but, at best, an opinion, which the Government Pleader formed in his mind from the documents on the record such an opinion can, by no means, be binding upon the defendants like an admission of their counsel on a point of fact. The appellant's case, therefore, does not get any support from the alleged concession of the Government Pleader."

In the case of *Shiv Singh* v. *S.T.A. Tribunal(3)* it was said as follows;-

Obviously therefore , it was an admission on a question of law, and it is well settled that an

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(1) (1963) A.I.R.(S.C.) 1155

(2) (1965) B.L.J.R. 86

(3) (1969) A.I.R. (All.) 14

erroneous admission on a question of law made by a party or his agent is not binding and it does not preclude the party from making an assertion contrary to the admission and from seeking the relief to which on proper construction of the law he is entitled".

Punjabai Bhilasa v. *Bhagvandas Kisandas* (1)was a case in which it had been conceded by the pleader of the party in question in the Court below that section 70 of the Contract Act had no application. In respect of that admisaion the Bombay High Court remarked that a pleader's admission on a question of law is not binding on his client and amounts to no more than his view that the question is unarguable.

6. Dr. Wadehra, the learned counsel appearing for the accused-opposite party, did not contest the legal position that an admission by a counsel on the question of law is not binding on the party to the proceeding and can be challenged before the superior court. He however, submitted that in the facts and circumstances of the present case, the admission by the Special Public Prosecutor, on the question as to whether the different offences had been committed in course of the same transaction , is not a pure question of law but a mixed question of law and fact as such the petitioner is bound, by that admission. In my view, it difficult to accept this contention, Whenever any admission is made even on a question of law by a counsel in a proceeding such admission has a nexus and is related to the facts of that particular case, But that will not make it an admission on question

(1) (1929) A.I.R. (Bombay) 69

of fact in the instant case, whethere the series of acts by which several offences are alleged to have been committed by the accused person are so connected together , as to form the same transaction, is a question of law which was to be decided by the Court. Merely because that question has to be decided on taking into consideration the allegation in respect of different offences, shall not reduce that question into one of fact. In my view, the petitioner can urge that the Special Judge took an erroneous view, on the basis of a concession wrongly made on question of law by the Special Public Prosecutor.

7. Coming on the merit of the issue, in view of section 218 (1), for different offences, separate charges should be framed and every such charge has to be tried separately, Relevant part of section 218 is as follows;-

> :218. (1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately;
>
> (2)Nothing in sub-section (1) shall affect the operation of the provisions or sections 219,220 221 and 223."

Because of sub-section (2) of section 218 , the procedure prescribed under section 220, remains unaffected by sub-section (1) of section 218, section 220 (1) is as follows;-

> "220.(1) If, in one series of acts so connected together as to from the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for,

every such offence."

In view of sub-section (1) of section 220 , if more offences than one are committed by the same person or persons, by series of acts so connected together as to form the same transaction , they may be charged and tried at one trial for all such offences.

8. In the case of State of *Andhra Pradesh* v. *Ganesware Rao* (1) the Supreme Court examined the scope of the expression "same transaction" in connection with joint trial:-

"what is meant by " same transaction" is not defined anywhere in the code, Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the legislature has deliberately left undefined. We have not come across a single decision of any court which has embarked upon the difficult task of defining the expression, but it is generally thought that where there is proximity of time or place or unity of purpose and design or continuty of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction . It is, however, not necessary that every one of these elements should

(1) (1963) A.I.R. (S.C) 1850

co- exist for a transection to be regarded as the same . But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction."

9.On behalf of the petitioner it was pointed out that from a bare reference to the First Information report, the charge-sheet and the documents seized at the check-post from the accused persons it is apparent that the offence under section 165-A by offering bribe to the officials at the check-post was committed to enable the accused persons to proceed to the territory of Nepal , which will amouint to an offence in continuity of the main offence of conspiracy to wage war against the Government of India and to create hatred and dissatisfaction towards the Government established by law in India which are punishable under sections 121-A and 124-A . It was pointed out that even the Supreme Court has come to the conclusion that a prima facie case of conspiracy to commit offences under sections 121-A and 124A has been made out against the accused persons on the materials collected during investgation. Reference was made in this connection to the judgment of the Supreme Court on writ petition (Criminal)No.137 of 1986 with special Leave petition (Criminal) No.577 of 1986 which had been filed before the Supreme Court on behalf of the accused- opposite party for quashing of the criminal proceeding which is pending against them before the Special Judge and for grant of bail in the present case, While considering the question of quashing of the proceeding, the Supreme Court observed as follows;-

"What do we have here ? five persons were seen in a jeep going towards the Indo Nepal border, obviously in an attempt to cross the border. The border patrol the thought that their movements were suspicious. Their answers to questions regarding their names and parentage were not satisfactory.

One of them was identified as a police officer, who had been dismissed from service and who was wanted in connection with an order of detention under the National Secuity Act In the light of contemporary history and in the light of the documents found in the possession of the accused, (to the contents of one of which we will presently refer), the police party suspected that they were crossing the border and going to Nepal in the course of a conspiracy to commit the offences of waging war, etc . Their suspicion must have been strengthened by the offer of a bribe to be allowed to cross the bordor. The police officer whom they apprehended, though apparently a Punjabi, had previously served in the State of Maharashtra while the others were from Calcutta. That several persons from different parts of th country with no apparent connection with each other except that they appeared to belong to the same community were together trying to eross the country's frontier, apparently made the police suspect, in the context of the political situation in the country, that they belonged to some group of persons of that community who were campaigning against the Government, call it what you will, agitating or waging war, a suspicion which must have been further influenced by the letters found in their possession. It may be that these circumstances may lead to no

more then suspicion but the suspicion was enough to justify a investigation by the police---- -Simranjit Singh Mann, as a highly educated person and as a highly placed officer, was bound to emerge, on his dismissal from service, as a hero and martyr in the eyes of a certain section of the people. His statements would be accepted by them as gospel truth and pronouncements of the oracle on the basis of which they should act. If the letter remained addressed to the President and not publicised it would cause little or no harm, But the letter though addressed to the President was clearly meant to be what is called an' open letter' to be given wide publicity.Indeed its full text had been published in the daily press and the accused themselves had such a copy in their possession when they were stopped and searched, We do not know whether any of the accused was responsible for the publicity and whether it was in pursuance of the conspiracy, It may be that Simranjit singh Mann meant no harm and that the contents of the letter were no more than the vehement outpourings of a bitter, and distressed but honest mind in the zealots's Jargon, On the other hand it is possible that the letter was designed to become or became an instrument of faith and used as such. All these are matters for evidence at the trial. ---------Shri Jethmalani aruged that in the case of the accused persons other than Simranjit Singh Mann, there was nothing whatever to connect them with the offences under secs, 121-A ,124-A, etc. It was said that they were not even the authors of any of the letters which were found in the course of the search, we do not want to express any opinion except to say that authorship of seditious material alone is not the gist of any of the offences. Distribution or circulation

of seditious material may also be sufficient on the facts and circumstances of a case. To act as a courier is some times enough in a case of conspiracy, It is also not necesary that a person should be a participant in a conspiracy from start to finish. Conspirators may appear and disappear from stage to stage in the course of a conspiracy. We wish to say no more on the submission of the learned Counsel. Whether such evidence as may now be available in the record to justify the framing of charges is a matter for the trial court and not for us. We refrain from expressing any opinion."

10. In the present application, whether a prima facie case has been made out for framing charges under sections 121-A,124-A,and 120-B of the Penal Code is not to be examined because the Special Judge has not come to the conclusion that there was no material to frame chareges for offences aforesaid, In this application, the only question which has to be answered is as to whether the offence under sections 165-A and 165-A read with section 34.1e. offer of bribe to the officials at the check-post was an independent offence in the sense being a separate tra saction or it was connected with the series of acts constituting offences under sections 121-A, 124-A and 120-B In other words, whether the act of offering bribe was a part of the main conspiracy for committing offences under sections 121-A and 124-A. In my view, in the facts and circumstances of the case, the act of offering bribe to the officials at the Check-post eannot be treated as a independent transetion. On the allegations made, the bribe was offered only to enble the accused persons to get themselves released so that they may pursue the main part of

the conspiracy to leave the territory of India and to proceed to Nepal , If accused parsons had not been arrested, there was no occasion to offer bribe and to commit an offance under section 165-A read with section 34 of the Penal Code, As such it has to be held that the act of offering bribe was connected with the other alleged activities of the accused persons so as to form the same transaction,

11. On behalf of the acc0

used persons it was pointed out that even in cases of conspiracy if the offences have been independently committed, they shall not be held to have been committed in the same transaction , In this connection reliance was placed on the case of *Ram Lal Narang* V. *State* (1). In that case a conspiracy case had been initiated against certain accused persons on the ground that they had replaced certain artieles of great antiquity , beauty and value by fake ones by cheating the Court. Sabsequent investigation revealed that still more persons were involved and the object was to export the articles of antiquity illegally to foreign countries and in fact the genuinet articles were recovered from a foreign country , for exporting the same articles of antiquity to a foreign country a second case of conspiracy was initiated in a different court, On the facts of that particular case, it was held that two conspiracies were in substance and in

(1)(1979)A.I.R.(S.C) 1791.

truth separate and not one and as such there could have been two investigations and cognizance could have been taken by different courts. The facts of that case were different, moreover the question aforesaid had not been considerd in connection with framing of the charge or joint trial but in connection with quashing of the investigation.

12. The counsel for the accused-opposite party then submitted that even if it is held for the porpose of framing charges that all the offences had been commtted in the same transaction, still it was not obligatory on the Court below to try all the offences at the same trial, because section 220(1) is only an enabling provision, Reliance was placed on the judgment of the Supreme Court in the case of *V.N. Kamdar* V. *Municipal Corporation, Delhi* (1) where while constructing the scope of section 20-A of the Prevention of Food Adulteration Act which prescribes that a court during trial of an offence under the Act aforesaid alleged to have been committed by any person, can also proceed against the manufacturer, distributor or dealer as well, it was observed as follows;-

"The section is an enabling one, there is nothing mandatory about it. It is left to the discretion of the magistrate whether, in a particular case, having regard to the evidence adduced, it is necessary, in the interest of justice, to implead the manufacturer, distributor or dealer as the case may be ."

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(1) (1973) (2) S.C.C 207.

Reference was also made to the case of *Ranchhod Lal* v.*State of M.P.* (1) where it was pointed out in respect of section 222 of the old Code (section 212(2) of the New Code) that it was an exception to meet a certain contingeney and was not the normal rule with respect to framing of a charge in cases of criminal breach of trust. It was observed in respect of section 234 of the old Code (section 219 of the New Code) that it was an enabling provision and exception to the general rule as contained in section 233 of the old code (section 218 of the New Code) Reliance was also placed on behalf of the accused- opposite party on the case of *Chhutanni* v. *State of U.P.*(2) where it was pointed out as follows;-

"There is no illegality or irregularity in holding seaparate trials of the same accused persons even in cases where a single trial could have been permissible under the code of Criminal Procedure."

13. All though section 218(1) of the Code says that for distinct offences there should be separate charges and such charges should be tried separately, but section 220(1) vests power in the Court to try different offences together if they have been committed in the same transaction. The court has to be all the more cautious and cirumspect, while trying an

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(1) (1965) A.I.R (S.C) 1248

(2) (1965) A.I.R. (S.C.) 407.

offence of conspiracy, in determining whether the different offences had been committed by the same accused persons in the same transection and as to whether they should be tried together. In *The Case of Babulal* v. *Emperor* (1) while examining section 239 (d) of the old code (section 223(d) of the New Code), it was observed "The one and only limitation there is that the accusation should be of offenes "committed in the course of the same transaction, while examining section 239(d) of the old code (section 223(d) of the New Code), it was observed "The one and only limitation tere is that the accusation should be of offences."committed in the course of the same transaction." Whatever scope of connotation may be included in the words "the same transaction , " it is enough for the present case to say that if sevaral persons conspire to commit offences and commit overt acts in pursuance of the conspiracy (a circamstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it , the common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuanee of it, "The Supreme court in the case of *K. Kunhahammad* v.*the State of Madras*(2) pointed out;-

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(1) (1938) A.I.R.(P.C.) 130.

(2) (1960) A.I.R.(S.C) 661.

" It is true that , in framing the charge against more persons than one and directing their joint trial, Coarts should carefully examine the nature of the accusation; but if they are satisfied that prima facie the accusation made shows that several persons are charged of different offences and that the said offences prima facie appear to have been committed in the course of the same transaction, *their joint trial can and should be ordered.* This question was fully considered by the Privy Council in the Case of Babu lal Choukhani V. emperor, 65 Ind App 158;(AIR 1938 PC 130); and it has been held that the point of time in the proceedings at which it is to be determined whether the condition that the offences alleged had been committed in the course of the same transaction, has been fulfilled or not is at the time when the secusation is made and not when the trial is concluded and the result known. Therefore, *we cannot accept Mr. Purushottam's argument that the framing of the charge of conspiracy was not justified and that the trial of the appellant jointly along with the other persons was either improper or illegal.*" *(emphasis added.*

14. In the case of *Purushottam das* v. *State of W.B.*(1) the desirability of the trial of an offence of criminal conspiracy and all the overt acts committed in pursuance of it was impressed. In that connection

(1) (1961) A.I.R.(S.C) 1589.

it was pointed out as follows:-

"If some of the overt acts were committed outside the jurisdiction of the court trying the offence of criminal conspiracy and if the law be that such overt acta could not be tried by that court, it would mean that either the prosecution is forced to give up its right of prosecuting those accused for the commission of those overt acts or that both the prosecution and the acused are put to unnecessary trouble inasmuch as the prosecution will have to produce the same evidence a second time and the accused will have to test the credibility of that evidence a second time. The time of another Court will be again spent a second time in determining the same question , there would be the risk of the second court coming to a different conclusion from that of the first court, It may also be possible to urge in the second Court that it is not competent to come to a different conclusion."

The same view was reiterated in the case of *L.N.Mukherjee* v. *State of Madras* (1),In my view, once it is held for the purpose of framing charges that diffence under section 165-A read with section 34 were committed in same transaction with offence under sections 121-A, 124-A and 120-B of the Penal Code such offences should be tried together which shall be also in the interest of the accused persons. It

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(1) (1961) A.I.R.(S.C) 1601.

need not be pointed out that if seperate trials are held it is bound to cause harassment not only to the prosecution but also to the accused persons inasmuch as the prosecution has to examine many witesses again in the second trial and they have to be cross-examined again by the accused. The matter would have been different if the act of offering bribe to the officials at the Check-post had been held to be an independent act of one or the other, But once the alleged act of offering bribe is held to be part of the conspiracy to enable the accused persons to leave the territory of India and to cross to Nepal, evidence in respect of offering bribe after arrest, has to be produced at the second trial for offences under sections 121-A, 124-A and 120-B. The learned counsel for the accused could not point out as to how that will be in the interest of the accused persons.

15. Coming to the question as to whether offences under sections 121-A and 124-A can be tried without an order of commitment reference can be made to section 7(3) and section 8(1) of the criminnal Law Amendment Act aforesaid; Sub-section (1) of section 8 vests power in the Special Judge to take cognizance of offences without the accused being committed to him for trial, In view of sub-ssection (3) of section 8 of the Act, the Special Judge shall be deemed to be a court of session. Sub-section (3) of section 7 of the Act provides that while trying an offence under section 165-A, the Special Judge may try any other offence if the accused can be charged for the same at the same trial. Reading section 7(3) along with section 8(1), the Special Judge can try for offence

even under sections 121-A and 124- A without the accused persons being committed to him for trial for the said offences. The learned counsel, who has appeared on behalf of the accused-opposite party, did not contest this position and he admitted that if the offences under section 165-A is held to have been committed in the same transaction with offences under sections 121-A and 124-A read with section 120-B, then the Special Judge can try those offences without there being an order of commitment in view of the specific provisions, mentioned above.

16. On behalf of the accused persons the very maintainability of this application was also challenged on the ground that this Court should not exercise its inherent power under section 482 of the Code because that power has to be exercised to prevent abuse of the process of any Court or to secure ends of justice. In this connection reference was made to the judgment of the Supreme Court in the cases of *V.C.Shukla* v. *State* (1) and *Nand Lal Poddar* v. *State of Bihar* (2) where limitation of entertaining application under section 397(2) and section 482 of the Code against an interlocatory order was impressed and it was pointed out that an application under section 482 should not be entertained to circumvent the bar prescribed under section 397(2) of the Code. In the case of *V. C. Shukla* v. *State* (Supra), it was observed as follows:-

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(1) (1980) A.I.R. (S.C.) 962.

(2) (1979) B.B.C.J. 132.

"Applying this test to the present case it would follow that if the Special Judge did not frame a charge and discharged the accused, the proceedings would no doubt terminate but if it framed charges against the accused the proceeding would continue. Unless, therefore, an order results in a final termination of the proceeding in any way it is decided, the order is of an interlocutory nature."

In the instant case, the Special Judge has refused to frame charges under sections 121-A, 124-A and 120-B of the Penal Code on the ground that those offences had not been committed in the course of same transaction; as such the order which is under challenge, in my view, cannot be held to be an interlocutory in its strict sense. Apart from that, in the case of *Madhu Limaye* v. *State of Maharashtra* (1) the scope of section 397(2) of the Code vis-a-vis section 482 was considered and it was observed as follows:-

"In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated

(1) (1978), A.I.R. (S.C.) 47

above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice, interference by the High Court is absolutely necessary, then nothing contained in Section 387(2) can limit or effect the exercise of the inherent power by the High Court."

In the facts and circumstances of the present case, in my view, the quashing of the order impugned will prevent the abuse of the process of the Court and shall also secure the ends of justice. Even after repeated queries the learned counsel for the accused-opposite party could not point out as to how the accused persons are likely to be prejudiced if they are tried for offences including offences under sections 121-A, 124-A and 120- B or they shall be benefited in any manner if they are tried separately for offences under sections 121-A, 124-A and 120-B. If the order of the Special Judge is upheld, as already mentioned above, it is likely to cause prejudice to the accused persons, inasmuch as they shall have to face two separate trials, although many evidence in the two trials may be common. Even if the offence under section 165-A read with section 34 is tried separetely,

the prosecution has to lead the same evidence in connection with the charge of conspiracy alleged to have been entered into between the accused persons in respect of offences under sections 121-A and 124-A because, according to the prosecution, the bribe had been offred to allow the accused persons to leave the territory of India and to proceed to Nepal. In my view, in the facts and circumstances of the present case, the order separating the trial will lead to abuse of the process of the Court and for ends of justice it should be quashed.

17. This application is, accordingly, allowed and the part of the impugned order separating the trial of offences under sections 121-A, 124-A and 120B etc. is quashed and the learned Special Judge is directed to proceed with the trial as early as possible and to conclude the same at an early date.

18. On behalf of the accused persons a grievance was made that they are not being provided with day to day facilitics which are admissible to a prisoner. Although that grievance cannot be examined in this application but I direct the learned Special Judge as well as the jail authorities to provide all facilities to the accused persons which are admissible under the Jail Manual and the directions issued by the Supreme Court from time to time in respect of the prisoners who are in custody in connection with offences with which the accused persons have been charged in the present case. It will be open to the accused persons to move the learned Special Judge

for any appropriate direction in that respect which shall be issued in accordance with law and shall be complied by the jail authorities.

Yadunath Sharan Singh, J. I agree.

R.D. *Application allowed*

FULL BENCH

Before S.S. Sandhawalia, C.J., Satyeshwar Roy & S. N. Jha, JJ.

1986

November, 18.

*Harihar Prasad Debuka and anr.**

v.

State of Bihar and ors.

Bihar Government Notification No. S.O. 1432 dated 28.11.1985 -- prescribing a declaration form to be carried on a goods carrier for transporting goods through the State of Bihar during the course of inter-state, whether violative of Articles 301 and 304 of the Constitution --- Constitution --- Articles 301 and 304.

Where the petitioners challenged the constitutionality of the Government of Bihar Notification no. S.O. 1432 dated 28th November, 1985 prescribing declaration form to be carried on a goods carrier

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* Civil Writ Jurisdiction Case Nos. 990 and 991 of 1986 (R). In the matter of applications under Articles 226 and 227 of the Constitution of India. C.W.J.C. 991 of 1986 (R) M/s Chetani Trading Co.-petr.

or a vessel for transporting goods through the State

of Bihar during the course of inter State Trade;

Held, that notification no. 1432 dated 28th November, 1985, prescribing the declaration form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of Inter State Trade, is violative of Arcicles 301 and 304 of the Constitution. The notification is hereby quashed.

Hans Raj Bagrecha v. *State of Bihar and ors.* (1) followed.

Madan Mohan Tiwary and ors. v. *The State of Bihar & ors.* (2) -- overruled

Bhagwan Prasad v. *Officer-in-charge. Hathidih Checkpost. Mokamah and ors.* (3) -- affirmed.

M/s Sodhi Transport Co. and anr. v. *State of U.P. and anr.* (4) -- distinguished.

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 S.S. Sandhawalia,

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(1) (1971) I.S.C.C. 59

(2) (1986) C.W.J.C.NO. 165 of 1986 disposed of on 14.5.1986.

(3) (1980) B.R. and L.J. 110.

(4) (1986) A.I.R. (S.C.) 1099.

C.J.

M/s S.B. Gadodia, B. Saran Lal and *M.S. Mittal* for the petitioner.

M/s. R.B. Mahto (A.G.), S.B. Sinha (G.A.). S.K. Chattopadhyay (G.P.1), P.K. Prasad, (J.C. to G.A.) and R.N. *Sahay (J.C. to G.P.1)* for the respondents.

S.S. Sandhawalia, C.J. The significant issue that emerges for adjudication in this reference to the Full Bench is whether the Notification no. S.O. 1432, dated the 28th of November, 1985. issued in exercise of the powers conferred by sub/section (2) (a) of section 31 of the Bihar Finance Act (here-inafter referred to as 'the Act') Prescribing the declaration form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of inter-State trade, is violative of the freedom of trade guaranteed by Articles 301 and 304 of the Constitution of India? Equally at issue is a minor cleavage of judicial opinion within this Court between two Division Bench orders passed at the motion stage.

2. In the context of the aforesaid prestinely legal question, the facts inevitably pale into relative insignificance. These may, therefore, be briefly noticed from Civil Writ Jurisdiction Case No. 990 of 1986 (R) The petitioner therein is the proprietor of M/s. Jai Durga Industries - a firm which regularly imports foodgtrains from other States to its business premises situated at Jamshedpur. The said firm is registered under the Bihar Sales Tax Act as well as under the Central Sales Tax Act. It is averred that the petitioner purchased 165 bags of mustard *(sarso)* from M/s Kapur Chand Girish Chand Jain at Dhaulpur in the State

of Rajasthan, and was transporting the same therefrom to Jamshedpur in the State of Bihar in Truck No. RSG 533. On the 13th of February, 1986 the officers of the Investigation Bureau, Jamshedpur Division, inspected the said truck and all necessary papers including a road permit in Form XXVIII for the 165 bags of mustard *(sarso)* were produced at the time of inspection. Nevertheless, the inspecting officers seized the goods loaded in the aforesaid truck and detained it at Mango Mufassil Police Station at Jamshedpur, on the allegation that the Bill number was not mentioned in column no. 9 of the road permit in Form XXVIII-B and issued show cause notice to the petitioner as to why penalty should not be imposed under section 31(3) of the Act. The petitioner was directed to appear before the inspecting officer on the 14th of February, 1986. The petitioner being a member of the Singhbhum Chambers of Commerce & Industry, moved the said organisation to agitate the matter before the authorities and the said Chamber presented a representation in pursuance where of the truck and the goods therein were released on the 15th of February, 1986. However, in reply to the notice issued against the petitioner for the imposition of penalty, he took the stand that no permit in the required form was necessary and in any case it was violative of the Constitutional right of the freedom of inter-State trade and commerce. The petitioner's stand was, however, rejected and respondent No. 3 is averred to have arbitrarily and without any jurisdiction imposed a parralty of Rs. 8,330/- vide the order Annexure 5, dated the 29th of May, 1986 and the consequential demand notice No. 986 (Annexure 6), dated the 2nd of June, 1986. Aggrieved thereby, present petition has been filed challenging, inter alia, the very

constitutionality of the impugned notification on the ground of its infraction of the freedom of trade guarantee by Articles 301 and 304 of the Constitutuon.

3. The case along with C.W.J.C. 991 of 1986 (R) *(M/S. Chetani Trading Company* Vs. *State of Bihar and others)* in which closely similer issues of fact and law are involved came up for admission before a Division Bench. On behalf of the petitioners firm reliance was placed on Civil Writ Jurisdiction Case No. 1079 of 1985 (R) *(M/S. Lohia Machine Ltd. & Ors* V. *The State of Bihar & Ors.)* decided on 4.9.85 which in turn was rested on 1980 B.R. & L.J. 110 (Bhagwan Prasad Vs. Officer-in-Charge, Hathidih Check Post, Mokameh and others), for contending that in inter - State trade no permit under rule 42 was required to be carried. However, on behalf of the respondent State the recent Division Bench judgment in C.W.J.C. 1625 of 1986 (Madan Mohan Tiwary & Ors V. The State of Bihar & Ors) disposed of on the 14th of May, 1986 was relied upon for contending that the relevant provisions were intra vires and warranted the requirement of a permit to be carried. Noticing a conflict of judicial opinion in the judgments aforesaid, the matter was referred to a larger Bench and that is how it is before us now. It is common ground that the issues in both the connected cases are indentical and learned counsel for the parties are agreed that these would be disposed of by this common judgment.

4. Before adverting to the rival contentions it seems apt and indeed necessary to make some reference to the legislative history. It would appear that the unamended provisions of sub-section (2a) of

section 31 of the Act had held the field for a considerable time within the State. However, an amendment thereof was apparently deemed necessary and by section 9 of the Bihar Finance Act, 1984, enforced on the 2nd of April, 1984, the present sub-section. (2a) was substituted in place of the earlier provision. For ease of reference the amended and the unamended provision may by juxtaposed below :

Amended provision

"(2a) A person transporting goods shall carry a declaration in such form as may be prescribed by the commission supported by either a cash memo, bill or a challan, in case the movement is otherwise than as a result of sale, in respect of goods carrier, or a vessel and shall produce such challan, cash memo or bill along with the aforesaid form of declaration on demand before the prescribed authority :

Provided that the Commissioner, by notification in this respect, may prescribe a form of declaration or adopt a form of declaration for permit prescribed for the purpose of Sections 34 and 35 of this part, and he may also prescribe in the said notification, the manner in which such declaration or permit shall be utilised for verification and assessment of tax payable under this part :

Provided further that the Commissioner may exempt any person or dealer or class of registered dealers from the requirement of this sub/section."

Unamended provision

(2a) A person transporting goods shall carry either a cash memo. or bill issued by a selling dealer

or a challan in case of movement otherwise than as a result of sale in respect of goods which are being transported on a goods carrier, and shall produce such challan or cash memos or bill on demand before the prescribed authority.

It is somewhat plain from the above that the present amended provision of sub-section (2a) more comprehensively authorise the prescription of a declaration form which must be carried, inter alia, by motor vehicles carrying goods in transit through the State even in the course of inter-State trade. In exercise of the power conferred thereby the impugned notification was issued which in terms runs as follows:

"Dated 28 December, 1985 S.O. 1432- In exercise of the powers conferred by sub-section (2a) of Section 31 of the Bihar Finance Act, 1981 (Bihar Act 5 of 1981) Part- I, the Commissioner adopts forms XXVIII A and XXVIIIB as the declaration for the purpose of the aforesaid Sub-section which a person shall carry in respect of goods being transported for the purpose of verification and assessment of tax payable and prescribes the following manners in which such permit shall be utilized for verification and assessment of tax payable under Part I of the said Act :-

(i) A person transporting goods, exceeding the quantity notified under Section 35, on a goods-carrier or a vessel shall carry Form XXVIIIA or XXVIIIB *duly filled up in respect of goods being brought into the State or being sent out the State.*

(ii) *In case a form is found blank or not containing all the particulars, it shall be deemed to be a violation of the provisions of Sub-section (2a) of Section 31 of the said Act.*

(iii) The prescribed authority, after verification of the consignment, shall make appropriate endorsement in respect of the result of verification on both the copies,counterfoils or form XXVIIIA or XXVIIIB, as the case may be, and retain one copy or original counterfoil and return the other copy or duplicate counterfoil to the person transporting the goods.

(iv) The copy or the original counterfoil retained by the inspecting authority shall be forwarded for verification and for assessment of tax to the circle in which the dealer is registered or has his place of business :

(v) The concerned dealer shall preserve the other copy or duplicate counterfoil of XXVIIIA or XXVIIIB, as the case may be, for production before the assessing authority or for inspection at any time before or after assessment.

2. This notification shall come into force with effect from the 1st January, 1986.

5. It remains now to advert to the Forms XXVIIIA and XXVIIIB adopted by the Commissioner which also merits a notice in exenso :

"FORM XXVIIIA

Permit

(See rule 41)

No.

I hereby permit the transport of the consignment

detailed overleaf. This permit will be valid for one month from the date of issue.

Place..... Signature.....

Date ..... Designation .....

DETAILS OF CONSIGNMENT PERMITED TO BE TRANSPORTED

Description of goods	Quantity	Dated signature of the authority issuing the permit
1	2	3

RESULTS OF CHECKING ON THE ROUTE

Description and head-quarters of the authority by whom trans-port of consign-ment was checked	Descrip -tion of goods	Quantity of the goods actually transported	Dated signature of the authority mentioned in column-2
1		2	3

FORM XXVIII-B

Form of permit

See rule 42 (2) of the Bihar sales Tax Rules 1983)

(Original - Not transferable)

Serial No.

(To be filled in by the permit-holder before transport of goods).

1. Name of dealer to whom the permit is granted with registration certificate numbers.

2. Name and address of the consignor.

3. Name and address of the consignee.

4. Place of despatch

5. Designation.

6. Name of notified railway station/other places' from where delivery is to be taken.

7. Number and date of -

(i) Railway receipt

(ii) Other document

8. Description of consignment -

Name of goods Value Quantity

9. Seller's invoice, forwarding note, number and date

10. Mode of transport (vehicle No.).

"I/We hereby declare that the above statements are correct and complete in the best of my/our knowledge and belief.

Signature of dealer/declared manager

Date :- .....

RESULT OF CHECKING ON THE ROUTE

Designation and headquarters of the authority by whom the trans -port of the consignment was checked.	Description of goods	Quantity of the goods actually transported.	Dated signature of the authority mentioned in column I and place of checking.

NOTE :

(1) Separate form should be used for each consignment.

(2) (a) In case of transport across or beyond checkpost, a copy of the form should accompany the consignment.

(b) In case of delivery of consignment from any notified railway station/other such place the original copy of the form shall accompany the consignment in transit and thereafter shall be sent to the appropriate authority of the Commercial Taxes.

6. It is neither in dispute nor possibly could be, that the notification and the forms are applicable in respect of goods being brought into the State and being sent out of the State in excess of the quantity notified under section 35 by every goods carrier or vessel. The impugned notification in express terms

say so. It would thus be common ground that it includes within its sweep the transport of all goods even in inter-State trade through the State of Bihar. Further, clause (ii) of the notification prescribes that if the prescribed form is found blank and even if it does not contain all the minute particulers required in every column therein, it would be deemed to be a violation of the provisions of sub-section 2(a) of section 31 of the Act and consequently carry heavy penalties for the infraction thereof.

7. To clear the decks for a meaningful consideration of the challenge to the notification based on Articles 301 and 304, it is apt to first dispose of an argument raised on behalf of the petitioners which does not appear to me as tenable. Rather, curiously Mr. Gadodia, the learned counsel for the petitioners, opened his attack somewhat off the mark by assailing the impugned motification on the ground of the same being violative of Article 269(1) and on the absence of the competence of the State Legislature by virtue of Entry 92B of List I of Schedule VII of the Constitution. Counsel contended that the wide sweep of sub-section 2(a) makes it applicable not only to the transactions of sale but even to the transport of goods by an owner himself during the course of their inter- State movement. Reliance was sought to be placed on a Division Bench judgment of the Punjab High Court reported in 54 Sales Tax cases 226 *(Bata India Limited* v. *The State of Haryana and another).*

8. The challenge on the lines aforesaid appears to me as not well-conceived. This is plainly so because neither section 31(2) (a) of the Act nor the impugned notification even pretends to levy any tax

on the goods in the course of inter-State trade. The very heading and the contents of Article 269 would leave no manner of doubt that it pertains to the imposition of taxes in the course of inter-State trade and their allocation between the Centre and the respective States. The position remains the same with regard to the recently inserted sub-clauses (g) and (h) of cluse (1) of Article 269. To my mind, it is somewhat plain enough that the penalty imposeable by virtue of cluse (ii) of the impugned notification is merely a sanction for the enforcement of the requirement of carrying the requisite declaration forms. It cannot by any stretch of imagination, be described as a tax on the goods in the course of inter-State trade. For exmple, the Legislature could well prescribe that for the violation of the requirement of carrying the rquisite declaration forms, the person infracting the same would be liable to pay a fine or even suffer imprisonment. Merely because the sanction provided for such enforcement would be a penalty assessable as if it was a violation of the provisions of sub-section 2(a) of section 31 of the Act, would not make it a tax on goods and thereafter to be overzealously brought within the ambit of Article 269 which pertains to the levy of taxes. Equally a plain look at the newly added provisions of sub-cluses (g) and (h) of Article 269 (1) would indicate that these pertain to the levy of taxes *stricto sensu*. Now once it is held, as it must be, that the notification and the prescription of the form is in no way an imposition of a tax, the very foundation of the attack rested on Article 269 disappears. The contention rested thereon must be rejected and consequently fails.

9. However, learned counsel for the petitioners

was on much firmer ground in assailing the impugned notification for imposing unwarranted restrictions on inter-State trade and commerce the freedom whereof stands guaranteed. Herein the very corner-stone of the argument is rested on the ratio of *Hans Raj Bacrecha* v. *State of Bihar and others* (1) Equally the harsh and stringent, if not impossible, restrictions imposed on the inter-State movement of goods by the impugned notification and the prescribed forms were highlighted. Counsel contended with force and plausibility that the present case presented such an identity that it cannot possibly be taken out of the sweep and ambit of the ratio in *Hans Raj Bacrecha's* case (supra).

10. I am inclined to take the view that the submission aforesaid is indeed impeacable and the matter herein is virtually covered on all fours by the binding precedent in Hans Raj Baqrecha's case (supra). Therefore, it would be somewhat wasteful to launch on any digression on first principles. However, before adverting to the applicability of the precedent aforesaid, the sweep and nature of the restrictions clearly imposed on inter-State trade by the impugned notification would call for pointed notice.

11. Now it is manifest from clause 1 (i) of the notification itself that any person transporting the goods on a carrier or vessel which are being brought into the State or being sent out of the State must carry thereon Form XXVIIIA or XXVIIIB duly filled in already. That these provisions apply directly to inter-State trade or commerce is thus not in doubt.

(1) (1971) 1 S.C.C. 59

A reference to Form XXVIIIB would then indicate that the primal requirement is that it must be filled in by the permit-holder before the transport of goods. The names and addresses of the dealer and the consignor as well as the consignee must be filled therein and equally the vehicle number of a goods-carrier where the same is used. Learned counsel for the Petitioners highlighted that in the present day inter-State trade and commerce goods may well originate either from far off Jammu and Kashmir in the north-west or from Kerala in the deep south, which may have to pass through the State of Bihar onwards to West Bengal or Assam. The requirement that such a form should be filled in before the transport of the goods may sometimes, if not always, require that the same must be first sent to the consignor in the State where they originate and as in the present case to Rajasthan itself. The particulars therein have to be filled up in advance including the number of the goods-carrier etc. which may not reasonably be visualised in the State of origin in some cases. On long haulage, goods may have to be transhipped from one vehicle to another and it is difficult, if not impossible, to postulate all the details required by the various columns of the prescribed form. It was then pointed out that Form XXVIIIB is required to be with the driver of the vehicle when he enters the State. This may sometimes be difficult if not impossible of performance. In the context of inter-State trade, for innumerable reasons, the goods which may earlier have been designed to pass through another State may be diverted in transit and may be required to pass through the State of Bihar. This may become necessary by floods, damage to roads or any other reasons for diversion of the route over the long lines of inter-State trade and

commerce in a vast country like ours. However, a stone-wall of blockage, though not impassable, is thereby placed on the free movement of goods in inter-State commerce. Counsel hightlighted that such a form is required even in a case where there may be no sale transaction whatsoever involving sthe imposition of any tax and the owner may be doing nothing more innocuous than transporting his own goods from one State to another. In such a case there would be no incidence of any sales tax or any other tax and to require such an owner to comply with the requirements of the notification and the forms would be impeding the free inter-State movement of the goods even by the owner thereof himself. Noticing all this one may refer back to clause 1 (ii) of the notification itself which in stringent terms lays down that in case any column of the form is blank or does not contain all the particulars, it shall be deemed to be a violation of the provisions of sub-section 2(a) of section 31 of the said Act. This would entail the penalty of heavy financial hazards including three times the value of the goods themselves, apart from other consequences of the infraction of the provisions aforesaid.

12. Yet again reference to Form XXVIIIA would indicate that it is not merely that a from has to be carried on the vehicle but a permit must also be secured by the carrier for the inter-State movement of the goods. It is only after the concerned authority with the requisite designation has issued and signed the permit under Form XXVIIIA that the goods can possibly be allowed to enter and leave the State of Bihar. Such permit is mentioned to be valid for one month from the date of issue and in the case of the goods

being held up would probably require further modes of extension or renewal. It seems unnecessary to labour the point further but the onerous requirements of Form XXVIIIB and of securing the permit in Form XXVIIIA even in the context of the free inter-State movement of goods (on which no State sales tax is leviable) are too manifest to require further elaboration.

13. It is in the light of the above that one may now revert in some detail to the applicability and ratio of Hans Raj Baqrecha's case (supra). That was also a case from Bihar Primarily under the Bihar Sales Tax Act, 1969. Therein apart from other provisions a challenge was laid to rule 31-B framed under section 42 of the Bihar Sales Tax Act. The said rule was in the terms following :

> "31-B (1) No person shall tender at any railway station, steamer station, air-port, post-office or any other place, whether of similar nature or otherwise, notified under Section 42, any consignment of such goods exceeding such quantity, as may be specified in the notification, for transport to any place outside the State of Bihar, unles such person has obtained a despatch permit in Form XXVIII-D, from the appropriate authority referred to in the Explanation to Rule 31 and no person shall accept such tender unless the said permit is surrendered to him."

Their Lordships struck down the aforesaid rule and the notification issued thereunder as being plainly unuthorised and violative of the freedom of inter-State trade and commerce. In holding so it was unequivocally observed as under :

"... A provision which is made by the Act or

by the Rules which seeks to prevent evasion of liability to pay intra-State sales or purchase tax would therefore be within the competence of the Legislature or the authority competent to make the rules. But the State Legislature has no power to legislate for the levy of tax on transactions which are carried on in the course of inter-State trade or commerce or in the course of export. Section 42 of the Bihar Sales Tax Act, 1969, prevents any person from transporting from any railway station, steamer station, air-port, post office or any other place any consignment of such goods exceeding the quantity specified with a view to ensuring that there is no evasion of tax payable under the Act. *But the power under Section 42 can only be exercised in respect of levy, collection and recovery of intra-State sales or purchase-tax. It cannot be utilised for the purpose of ensuring the effective levy of inter-State sales or purchase tax.*

xx xx xx xx

The power of the State Legislature is restricted to legislate in respect of intra-State transactions of sale and purchase and to matters ancillary or incidental thereto: it has no power to legislate for levy of tax on sales and purchase in the course of inter-State transactions. The power conferred by Section 42 authorising the imposition of restriction on transport or movement of goods may only be exercised in respect of transactions which facilitate levy, collection and recovery of tax on transactions of intra-State sale or purchase. When Rule 31-B seeks to prohibit transport of goods to any place outside the State of Bihar unless a certificate is obtained from the appropriate authority, it seeks to prohibit transport of goods pursuant to

transactions which may not even be to the nature of sale or purchase transactions; in any case it restricts transport pursuant to transactions which are in the course of inter-State trade or commerce. *The operation of the rule is not restricted only to transactions in the course of intra-State trade and commerce. The rule authorises restrictions on inter-State transactions and is on that account unauthorised. For the same reasons the notification issued on December 26, 1967, must be regarded as also unauthorised.* "

14. From the aforesaid authoritative enunciation it is somewhat clear that herein the issue also is so similar as to be almost legally identical. To notice the applicability of the ratio in Bagrecha's case (supra), it deserves highlighting that section 42 of the Bihar Sales Tax Act, 1959 is in pari materia with section 35 of the Bihar Finance Act. In the said case rule 31-B framed in pursuance of section 42 was struck down on the ground that it infringed the freedom of inter-State movement of goods, and consequently the inter-State trade and commerce, primarily because it required a despatch permit for the movement of those goods. Herein again under section 35 of the Finance Act the notification prescribes the stringent requirements of the form of the permit under Form XXVIIIB and the securing of a transport permit from the designated authority under Form XXVIIIA. As in Bagrecha's case so here, no tax is being levied. Equally it deserves highlighting that therein the prescribed forms were identical in content and in any case closely similar.

15. Now once it is found as above, it seems plain that the present case cannot be taken out of the ambit of the ratio of Bagrecha's case. Undoubtedly

the goods merely passing in transit through the State of Bihar are not exigible to any State sales tax. Consequently as held in Bagrecha's case the State of Bihar has no competence or power of ensuring the effective levy of inter-State sales tax or to prohibit the transport of goods pursuant to transactions which may not even be of the nature of sale or purchase transaction. That being so, it follows that the present case is even on a firmer and stronger ground than that in Bagrecha's case. Therein what was sought to be obstructed was the movement of goods from within the State to outside the State. The impugned provisions herein even go further and seek to impose onerous restrictions on goods both being brought into the State and being sent out there from. I have already noticed the harsh and stringent, though perhaps not impossible, conditions imposed by the notification and the forms prescribed thereby. These result in impeding and obstructing, though not perhaps, prohibiting' the movement of goods which may neither originate in the State nor are intended to be consumed within the State and are not exigible to any State sales tax, being primarily in the course of inter-State trade and commerce. The present case, to my mind, comes squarely within the sweep of the rule authoritatively laid in *Bagrecha's case* and this Court is bound by the same.

16. In all fairness, one must notice the stand of the learned Advocate General who could only assist us very briefly in the matter. With illimitable fairness he took the stand that if the notification and the prescribed forms are construed as applicable to inter-State trade in the sense of goods entering Bihar from another State and going out there from to yet another,

then the impugned notification would plainly come under the mischief of Bagrecha's case. However, he somewhat ingeniously attempted to contend that the impugned notification may be read down as applicable only to the cases where the goods originate in the State of Bihar and are being sent out therefrom. In that eventuality he had submitted that the State would be legislating not with regard to inter-State trade and commerce but primarily with regard to the export of goods from the State of Bihar.

17. To my mind, even the somewhat diluted stand taken by the learned Advocate General seems to have an Achilles Reel which is somewhat plainly vulnerable. Even the movement of goods from the State of Bihar to another State would be as much part of inter-State trade as those which are purely in transit, as in the case of entering from Uttar Pradesh and going on to West Bengal. The concept of inter-State trade does not ncessarily involve a tripartite movement between three States but would be equally applicable to a bipartite movement from one State to another. If the learned Advocate General's fair concession with regard to the tripartite movement is accepted, the rule would equally hit the bipartite movement with regard to the export of goods originating from Bihar but going outside the State. Therefore, far from in any way aiding the State's stand, the submission of reading down in a way boomerangs upon the respondents' stand. It is well to recall that Bagrecha's case primarily related to the export or the movement of goods from within the State of Bihar to outside places, Yet the impugned provisions were unhesitatingly struck down by their

Lordships.

18. Even otherwise it is not easy to subscribe to the argument of reading down the provisions in the present context. The notification leaves the issue in no manner of doubt. In express terms it talks of goods being brought into the State and being sent out of the State. Such expressive language applicable clearly to the inter-State movement of goods cannot be read with blinkers and construed as if it appertained only to intra-State trade. Reading so would be doing violence to the plain and categoric language of the provisions and, in the celebrated words of a distinguished jurist, would involve a naked usurpation of the legislative function in the thin garb of interpretation.

19. Mr. S.B.Sinha who bore the main brunt of defending the impugned notification, had placed primal reliance on A.I.R. 1986 S.C. 1099 *(M/s. Sodhi Transport Co. & anr.*v. *State of U.P.& anr.*) for contending that the impugned provisions were regulatory in nature and intended to prevent and plug the evasion of the State sales tax. Counsel sought to point out that section 36 of the Bihar Finance Act was broadly in line with section 28B of the U.P. Sales Tax Act and section 34 of the Bihar Finance Act was virtually in *pari materia* with section 28 of the U.P. Act. On this analogy the present case was sought to be brought within the protective cloak of *M/s. Sodhi Transport Co. & anr's case (supra).*

20. I am inclined to the view that the case of *M/s. Sodhi Transport Co. & anr,* is plainly distinguishable. Therein the primal challenge was directed merely to a transit pass on entering the State of U.P. and surrendering it at the exit checkpost. A perusal of the judgment therein would indicate that the basic attack was directed against the very competence of the State Legislature to legislate on the subject which was upheld. What was next assailed therein was the presumption of sale raised in section 28B of the U.P. Sales Tax Act. This was held in terms to be a rebuttable presumption and was found to be neither unconstitutional nor beyond the competence of the State Legislature. The requirement of a mere transit pass was found to be not onerous and not violative of Article 19 (1) (g) of the Constitution. It is true that in the barely ten lines of paragraph 18 of the Report there is a reference to Article 301, but it appears that this aspect was not pointedly pressed and their Lordships otherwise opined that the restrictions imposed had not been shown to be unreasonable. Nevertheless their Lordships granted substantial relief by directing that the assessing authority would pass fresh order of assessment in accordance with law uninfluenced by the previous orders which may have been made not only in the case of the petitioners but others also, with further rights of appeal and revision. I am, therefore, of the view that M/s Sodhi Transport Co.'s case does not in any way advance the case of the respondent State. Assuming entirely for the sake of argument that there

is some conflict of judicial opinion, this Court is obviously bound by the larger Bench of three Judges in Bagrecha's case. As I have already shown earlier, the later case which arose in the context of the Bihar Sales Tax Act is directly applicable and there is thus a virtual identity with the present case and it cannot be taken out of the ratio of *Bagrecha's case.*

21. In fairness to Mr. S.B.Sinha I would notice that he relied on a number of judgments on the point of reading down of a provision in order to uphold its constitutionality. He also cited authorities with regard to validity of extra-territorial legislation. There is no quarrel with these settled propositions and it is, therefore, unnecessary to refer to individual authorities. Counsel placed pointed reliance on A.I.R. 1969 S.C. 147 *(The State of Madras* v. *N.K.Nataraja Mudaliar)*, A.I.R. 1975 S.C. 583 *(G.K.Krishnan etc.* v. *State of Tamil Nadu and another etc.)*, A.I.R. 1984 Notes of Cases 233 (Gujarat) *(Kakoshi Vibhag Buffalo Salvage Commission Agent, Dist. Mehsana, and others etc.* v. *State of Gujarat and others)* and A.I.R. 1986 S.C. 1466 *(State of Maharashtra and another* v. *Basantibai Mohan Lal Khetan and others)*. In my view, these authorities are somewhat off the mark and hardly relevant to the pointed issue we are called upon to adjudicate.

22. It remains to advert to the order, to which I was a party, in Civil Writ Jurisdiction Case No.1625 of 1986 *(Madan Mohan Tiwary & others* v. *The State of Bihar & others)*, decided on 14.3.1986 at the admission stage itself. It would appear that the said

order was coloured by the fact that admittedly out of the 80 packages seized, 28 packages were in intra-State movement which would well have been exigible to the State sales tax. A perusal of the said order would indicate that the learned counsel were sorely remiss in not bringing to the notice of the Bench the binding judgment in Bagrecha's case. Thus in a way the order was rendered *per incuriam.* Even otherwise the matter was not correctly presented with regard to the movement of goods in inter-State trade and commerce and the applicability of Article 301 and 304. The onerous and stringent conditions imposed by the notification and the prescribed forms were not at all projected. Basic reliance on behalf of the petitioners therein was placed only on A.I.R. 1971 S.C. 792 *(The Check Post Officer Coimbatore etc.* v. *M/S. K.P.Abdulla and Bros.)* which was not a case of inter-State trade and commerce and was otherwise found to be not applicable or distinguishable. Learned counsel also failed to bring to the notice of the Bench the earlier orders of the Court in Bhagwan Prasad's case (supra) and Civil Writ Jurisdiction Case No.1079 of 1985 (R) passed on 4.9.85 (supra). For the detailed reasons recorded above, it must be held with respect that the order in *Madan Mohan Tiwary's case* (supra) is not good law and is hereby overruled. The earlier view in 1980 B.R. & L.J. 110 (supra) is hereby affirmed.

23. To finally conclude, the answer to the question posed at the outset is rendered in the affirmative and it is held that Notification No.S.O. 1432, dated the 28th of November, 1985, prescribing the declaration

form to be carried on a goods carrier or a vessel for transporting goods through the State of Bihar during the course of inter-State trade, is violative of Articles 301 and 304 of the Constitution of India. The said notification is consequently quashed hereby.

24. As a necessary result, the impugned orders imposing penalty and the demand notices (Annexures-5 and 6 in C.W.J.C. No.990 of 1986 (R) and Annexures-6 and 7 in C.W.J.C. No.991 of 1986 (R) are hereby set aside. Accordingly, both the writ petitions are hereby allowed, but in view of the difficult legal issues involved and the conflict of judicial opinion, the parties are left to bear their own costs.

Satyeshwar Roy,J. — *I agree*

S.N.Jha, J. — *I entirely agree*

R.D. — *Applications allowed.*

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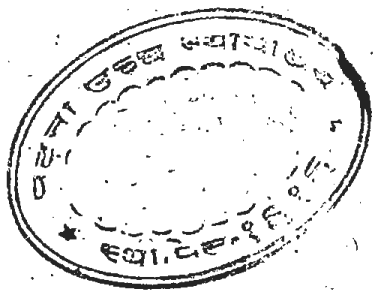
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Assessee --- Throwing his house property, which he earlier returned as 'Individual', in the general hotchpotch and returning the same as 'H.U.F.' for the purpose of the assessment --- income from the house property, whether individual income of the assessee.

Where the assessee retun his income with regard to the house at Patna treating the house property in the status of 'Individual' till assessment year 1967-68, but in the accounting year 1967-68 he claimed that the house had been thrown in hotchpotch of his Hindu Undivided Family hereinafter referred to as 'H.U.F. consisting of himself, his wife and his daughter and claimed tat the income from the house property should be assessed separately as the property of the 'H.U.F.' and therefore he did not include the income from the house property in his return of individual income;

Held, that the Income Tax Appellate Tribunal was not correct in holding that the disputed property belong-ed to the 'H.U.F.' consisting of the assessee, his wife and daughter. It could not be treated as H.U.F. Property. The income therefrom had to be treated as individual income of the assessee.

The declaration by the assessee throwing the separate property in the common hotchpot made no difference. The right of the members of the 'H.U.F.' did not get enlarged for the reason that the property was thrown into the family hotchpot.

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Commissioner of Income Tax, Bihar, Patna v. Rajeshwari Prasad, Advocate (1987) I.L.R. 66 Pat. 329

Bihar and Orissa Co-operative Societies Act, 1935 Section 66-B, scope and applicability of --- Special Officer of the Central Co-operative Bank terminating the services in obedience to the direction of the State Government who had no jurisdiction to issue the direction --- order terminating the services, whether illegal and liable to be quashed.

Where the Special Officer of the Central Co-operative Bank, who had the authority in law to terminate the services of the petitioners and others in accordance with law for some valid reasons, did not do so in exercise of his own discretion or his own judgment but in compliance of the unauthorised direction of the State Government which had been communicated to him through the Additional Secretary of the Co-operative Department as also through the Deputy Commissioner;

Held, therefore, that the impugned order of termination of the services of the petitioners as also the direction of the State Government cannot be sustained in the eye of law and has to be quashed. Section 66-B of the Bihar and Orissa Co-operative Societies Act, on which reliance was placed does not even speak about the termination of services, far from authorising the State Government to issue any direction in this regard.

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Steel ingots falling under Item no. 26 of First Schedule of Central Excise and Salt Act, 1944, answering the description specified in the notification no. 66 of 1973 --- C.E. dated 1-3-1973 issued under sub-rule (1) of Rule 8 of Central Excise Rules, 1944, were exempted from excise duty provided that on the scraps the appropriate duty of excise leviable had already been paid and by notification no. 152 of 1977 dated 18-6-1977 the scraps used for producing ingots were also exempted and as such the writ petitioners who have integrated steel plant and manufacture ingots with the aid of electric furnace had got no liability to pay any excise duty on the scraps in view of the exemption by notification no. 152 of 1977 and on other products from such steel ingots also they have the exemption in view of the notification dated 1-3-1973 and 18-6-1977.

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Held, that the writ petitioners are not lible to pay any excise duty on the ingots which have been manufactured from scraps which answered the description in notification No. 66 of 1973 and on other articles manufactured from the ingots by them in terms of notification No. 152 1977. The writ petitioner, Tata Iron & Steel Company is exempted from any excise duty on the scraps in terms of notification no. 150 of 1977. They have accordingly no liblity to pay the demands.

Tata Yodogawa v. *The Union of India & others.* 341

(1987) I.L.R. 66, Pat.

Code of Criminal Procedure, 1973, section 309 --- physical production of an accused before the Magistrate, whether necessary for extension of his remand to custody --- failure to do so, whether vitiates the order of remand.

Held, that though it is desirable that the accused should be present before the Magistrate but such physical production is not inflexibly mandatory for extending his remand to custody and failure to do so would not vitiate the same.

Mishri Singh v. *The State of Bihar and others* (1987) I.L.R. 66, Pat. 323

Income Tax Act, 1961, sections 143 (3) and 263 --- Mass Communication Scheme envisaged by the Central Board of Direct Taxes, whether applicable to ladies and minors - --

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section 143 (3) --- assessment with regard to the assessee, a lady, whether to be made under section 143 (3) --- section 263 --- order of the Commissioner cancelling the assessment made under section 143 (1) and remanding the case to the Income Tax Officer for fresh assessment under section 143 (3) legality of.

Where in terms of the scheme of Mass Communication envisaged by the Central Board of Direct Taxes the assessee, a married lady filed her return of income for assessment years 1968-69 to 1973-74 on 14.12.72 and the Income Tax Officer, on the report of the Inspector, Income Tax submitted on the same day, made assessment on the same day at the spot for all the assessment years except 1973-74, and the Commissioner of Income Tax considering the assessments to be erroneous issued notice on the assessee in terms of section 263 (1) of the Income Tax, 1961, hereinafter called the Act, to show cause as to why the order of assessment be not modified or cancelled and the Commissioner of Income Tax being of the view that the assessment was prejudicial to the Revenue set aside the assessments holding them to be ereoneous and remanded the case to the Income Income Tax Officer with direction to frame assessment after making close scrutiny as to the extent of the initial capital and the actual income earned by the assessee for the years in question;

Held, that the law in regard to assessment was not modified by the Mass Communication scheme so far as ladies and minors were

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concerned. In the course of Mass Communication whenever a return was filed by a lady or minor, it could have been accepted but could not have been disposed of in terms of the scheme. It should have been treated as original assessment proceeding with all the rigours with regard to initial capital investment. No connection or amelioration of the procedure in the case of ladies and minors was envisaged. These assessments had to be completed in terms of section 143 (3) of the Act and where it was prejudicial to the Revenue, the Commissioner would be fully justified in setting aside such assessment. In the course of Mass Communication Scheme if a return was filed on behalf of a lady or a minor, the Income Tax Office could have been fully justified in not accepting them at the spot and calling upon them to file the return in the Department as if the Scheme did not exist.

Held, further, that the enquiry into the source of initial capital was crucial for the Income Tax Officer. If that was not done the assessment is bound to be erroneous and hence prejudicial to the Revenue.

Held, also, that the Commissioner of Income Tax did not exceed his jurisdiction in exercising his power under section 263 of the Act and cancelling the assessment.

Commissioner of Income Tax, Bihar-II, Patna v. Pushpa Devi (1987) I.L.R. 66, Pat. 292

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Santhal Praganas Regulation, 1872 section 27 --- provisions of --- original transfer aginst the provisions of the section--- plaintiffs not perfecting their title by adverse possession before coming into force of Santhal Praganas Tenancy (Supplementary Provisions) Act, 1949 --- section 20 --- Revenue Court whether had jurisdiction to order eviction against the plaintiff under this section --- Revenue Court disregarding the collusive compromised decree, legality of.

Held, that the originial transfer being against the provisions of section 27 of the Santhal Praganas Regulations, 1872 and the plaintiffs having not perfected their title by adverse possession before coming into force of the Santhal Praganas Tenancy (Supplementary Provisions) Act, 1949, the Revenue Court was well within its jurisdiction to pass order of eviction against the plaintiffs under section 20 of Santhal Praganas Tenancy (Supplementary Provision) Act, 1949 and thus the Revenue Court committed to illegality in disregarding the collusive compromise decree passed in the title suit in which the contesting intervenor- defendents were not parties.

Rajo Mian and others v. Puran Mian and others (1987) I.L.R. 66, Pat. 280

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Seniority --- Officers of the Junior Branch of the Bihar Finance Service merged with the Senior Branch of the Bihar Finance Service with effect from 1-4-1974, 1- 4-75 and 1-4-1976 --- direct recruits appointed in 1976 in the Bihar Finance Service after the last batch of the Junior Branch had already merged --- whether the Officers so merged would rank senior to the direct recruits --- Government of Bihar Department of Personnal Circular No. 3/R I-106/72-P-15784 date 26-8- 1972 Paragraph 3 Subparagraph (vii) --- ambit of --- date of merger, whether to be deemed to be the date of appointment in senior branch of Bihar Finance Service.

The State Government by a resolution dated 1-4-1975 decided to merge the Junior branch of the Bihar Finance Service with the Senior branch into one unified cadre and all the Officers were designated as Commercial Taxes Officers and as a consequence of the merger one third officers of the Junior Branch were to merge with effect from 1-4-1974, the other one third with effect from 1-4-1975 and the rest with effect from 1976.

Held, that the Officers of the Junior Branch of the Bihar Finance Service who merged in the Senior Branch of the Bihar Finance Service, having joined the rank of Senior Branch Officers at a point of time when the direct recruits were not in existence, the former must reckon their seniority from the time they become members of the cadre of the Senior Branch. The direct recuits were

no where till December, 1976, when they were appointed. Till the entire batch of the Officers of the Junior Branch had filled the rank of Senior Branch the direct recuits had not found their berth in the Senior Branch. It is therefore, obvious that the they, must be held senior to the direct recruits.

Held, further, that in terms of paragraph 3 of the subparagraph (vii) of the Circular issued by Government of Bihar in the Department of Personnel being 3/RI- 106/72-P-15784 dated 26th August, 1972, the date of merger must be held to be the date of appointment in the Senior Branch of the Bihar Finance Service. In conjunction with this rule, the merger must be deemed to be a mode of appointment for the purpose of fixing the seniority of the officers in the cadre of Senior Branch.

Kartik Charan Jha and Six others v. *The State of Bihar and 18 others* (1987) I.L.R. 66, Pat. 261

Wilkinson's Rules --- Rules 14 and 31 --- Rule 31 --- application under, having been entertained and considered on merits, whether could be defeated on the ground that appeal under Rule 14 was not filed --- grant of ad-interim injunction by Additional Deputy Commissioner without assigning any reason --- Validity of --- principles and spirit of Code of Civil Procedure 1908, whether will apply in cases under the Wilkinson's Rules.

The Commissioner having entertained the

application of the defendent under Rule 31 of the Wilkinson's Rules and considered the case on merits, the same can not be defeated on the ground that an appeal under Rule 14 should have been filed.

Where the plaintiff filed Kolhan Money suit before Additional Deputy Commissioner for recovery of Rupees thirteen lacs and odd on account of the balance of the amount of advance made to the defendent from time to time for the price of manganese supplied by the defendent to the plaintiff together with interest and prayed for temporary injunction which was allowed without assigning any reason and the application by the defendent therefrom before the Commissioner under Rule 31 of the Wilkinson's Rules was rejected;

Held, that the orders of Additional Deputy Commissioner and the Commissioner did not assign any reason which was mandatory in accordance with the principles and spirit of the provisions of the proviso to Rule 3 of order 39 of the Code of Civil Procedure, 1908, for the Courts to record and therefore, the orders are void.

Although the Code of Civil Procedure has no application and under Wilkinson's Rules there is no provision for grant of injunction, the principle and spirit of Code of Civil Procedure will apply. The quasi judicial order must be supported by reasons. Recording of reason in support of the decision by a Quasi Judicial authority is obligatory as it ensures

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that the decision is reached according to law and is not a reasult of caprice whim or fancy or reached on the ground of policy of expendiency.

M/s. Orissa Magnese and Minerals Pvt. Ltd. v. *The Commissioner of South Chotanagpur Division, Ranchi and ors.* (1987), I.L.R. 66, Pat. 378

CIVIL WRIT JURISDICTION

Before Uday Sinha and Nazir Ahmad, JJ.

1986

April,8

*Kartik Charan Jha and Six others.**

v.

The State of Bihar and 18 others.

Seniority --- Officers of the Junior Branch of the Bihar Finance Service merged with the Senior Branch of the Bihar Finance Service with effect from 1-4-1974, 1- 4-1975 and 1-4-1976 --- direct recruits appointed in 1976 in the Bihar Finance Service after last batch of the Junior Branch had already merged --- whether the Officers so merged would rank senior to the direct recruits --- Government of Bihar Department of Personnel Circular No. 3/RI-106/72-P-15784 dated 26-8-1972 Paragraph 3 Subparagraph (vii) --- ambit of --- date of merger, whether to be deemed to be the date of appointment in senior branch of Bihar Finance Service.

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*Civil Writ Jurisdiction Case Nos. 2335 of 1982 and 4827 of 1984. In the matter of applications under Articles 226 and 227 of the Constitution of India.

C.W.J.C. No. 4827 of 1984: Bhogendra Mishra and 3 others v. The State of Bihar and 31 others.

The State Government by a resolution dated 1-4-1975 decided to merge the Junior branch of the Bihar Finance Service with the Senior branch into one unified cadre and all the Officers were designated as Commercial Taxes Officers and as a consequence of the merger one third officers of the Junior Branch were to merge with effect from 1-4-1974, the other one third with effect from 1-4-1975 and the rest with effect from 1976.

Held, that the Officers of the Junior Branch of the Bihar Finance Service who merged in the Senior Branch of the Bihar Finance Service, having joined the rank of Senior Branch Officers at a point of time when the direct recruits were not in existence, the former must reckon their seniority from the time they become members of the cadre of the Senior Branch. The direct recuits were no where till December, 1976, when they were appointed. Till the entire batch of the Officers of the Junior Branch had filled the rank of Senior Branch the direct recuits had not found their berth in the Senior Branch. It is therefore, obvious that they, must be held senior to the direct recruits.

Held, further, that in terms of paragraph 3 of the subparagraph (vii) of the Circular issued by Government of Bihar in the Department of Personnel being 3/RI- 106/72-P-15784 dated 26th August, 1972, the date of merger must be held to be the date of appointment in the Senior Branch of the Bihar Finance Service. In conjunction with this rule, the merger must be deemed to be a mode of appointment for the purpose of fixing the seniority of the officers in the cadre of Senior Branch.

Case laws discussed.

Applications under Articles 226 and 227 of the Constitution.

The facts of the cases material to this report are set out in the judegment of Uday Sinha,J.

Messrs S. Mukherji and *S.J. Mukhopadhya* for the petitioners in C.W.J.C. 2335 of 1982

Messrs K.N. Keshav, G.P.IV and *Braj Kishore 'Chauhan'(J.C. to G.P.IV.)* for the State in C.W.J.C. 2335 of 1982

Messrs Rana Pratap Singh No. 2, Bhagwati Singh and Vivekanand Singh for the respondents in C.W.J.C 2335 of 1982

Messrs Basudev Prasad and *Sunil Kumar* for the petitioners in C.W.J.C. 4827 of 1984

Messrs Ganesh Prasad Singh and *S. Farman Ahmad* for the *interner* petitioner in C.W.J.C. 4827 of 1984

Messrs J.N. Pandey, G.P. 2 and *A.K.Pandey (J.C. to G.P. 2)* for the State in C.W.J.C. 4827 of 1984

Messrs S.Mukherji and *S.J. Mukhopadhya* for the respondents in C.W.J.C. 4827 of 1984

UDAY SINHA, J:-- These are petitions under Articles 226 and 227 of the Consititution. Common questions of law being involved, they have been heard together and will be governed by this common judgment. The facts necessary for deciding the questions in controversy will be taken from C.WJ.C.No. 2335 of

1982.

2. The petitioners and its concerned respondents in the two writ applications are Commercial Taxes Officers in the Department of Commercial Taxes. In order to determine upon the questions raised in these applications, it will be necessary to refer to the Bihar Finance Service Rules, 1953 and the subsequent amendments which are Annexure-C/1 in C.W.J.C. No. 4827 of 1984. Rules were framed in 1953. In terms of these rules, the Bihar Finance Service consisted of two classes of officers, namely, (a) the Senior branch, and (b) the Junior branch. In terms of rule 3(2) of the said Rules, the Governor was required from time to time determine the number of posts in the respective cadres of the Senior and Junior branches. Rule 5 provided for the recruitment of officers to the two branches of the service. The modes of recruitments were (a) by direct recruitment, and (b) by promotion. Promotion to Senior branch was effected from the Junior branch of the service. Promotion to Junior branch was granted to persons serving in any office under the Government in a permanent post. The question of promotion to Junior branch from other Department under the States Government is of no concern to us. We may, therefore, forget the question of promotion to the Junior branch. In terms of rule 6, the Governor was to decide in each year the number of vacancies in the service in each of the two branches separately to be filled in. The Proviso thereto laid down that the promotion quota would not be less them 50% of the total number of vacancies to be filled in any year. Rule 6 was amended in December, 1971. After amendment it read as follows:

> "6. Fixation of vacancies:-The Governor shall declare in each year the number of vacancies in the service in each of the two branches separately to be filled by direct recruitment and by promotion:
>
> Provided that the number of vacancies to be filled by promotion in the Senior branch of the Service in any one year shall not, unless, the Governor is satisfied that there is not a sufficient number of officers fit for promotion, be less than 50 per cent of the total number of vacancies to be filled in any such year."

After the declaration by the Governor in terms of rule 6, the Commission had to announce in each year the number of vacancies in each branch of the service to be filled by direct recruitment on the result of a competitive examination and invite applications from candidates eligible for appointment; subject to the qualifications mentioned in rules 9 and 10. After receiving the applicationthe Commission was required to make the selection and recommend names for appointments to the Senior branch. That was the mode of direct recruitment. Part IV of the Rules provided for promotion of officers already in Government service. Rule 19 provided for promotion from Junior branch to Senior Brnach. Candidates had to be selected for promotion by a Selection Committes consisting of (i) the Minister of Finance, (ii) the Chief Secretary or in his absence; an officer of the Appointment Department nominated by the Governor, (iii) the Finance Secretary or any other officer nominated by the Governor, and the Commissioner of Commercial Taxes. Rule 39 laid down the procedure for determining Seniority. It read as follows:

"39. Seniority:- Seniority of officers appointed to the Service shall be determined in accordance with the date of their substative appointment to the Service.

Provided that if more then one officer is substantively appointed at the same time:-

(i) to either branch of the Service by direct recruitment, their seniority inter se shall be determined by the order of the preference assigned to them by the Public Service Commission in the list of their recommendations:

(ii) to the Senior branch of the service by promotion, their relative seniority shall be their order of seniority inter se in the Junior branch of the Service;

(iii) to the Junior branch of the Service by promotion, their seniority inter se shall be determined by the order of preference assigned to them by the Public Service Commission, except that where more than one officer is promoted from the same Service or Cadre, their seniority shall be determined by the order of their position inter se in the Service of Cadre from which they are promoted; and

(iv) to either branch of the Service both by direct recruitment and promotion, the officer promoted shall rank senior to the officer recruited direct."

Rule 39 was also amended in December, 1971. The amended rule read as follows:

"39. Seniority:- Not withstanding anything to the contrary contained in any law or contract or any judgment, decree or order of any Court. Tribunal or authority, the seniority of the officers appointed to either branch of the Service shall be determined

with reference to the year of vacancies declared under rule 6, against which they are appointed on probation. If more than one officer is so appointed against vacancies of a particular year:-

(i) to either branch of the service by direct recruitment, their seniority inter se shall be fixed according to the order of merit assigned by the Public Service Commission;

(ii) to either branch of the Service by promotion and by direct recruitment, the officer promoted shall take precedence over the officer recruited direct;

(iii) to the senior branch of the Service by promotion, their inter se seniority shall be the same which they held in the junior branch of the service;

(iv) to the junior branch of the service by promotion from different gazetted services and non-gazetted ranks, their seniority inter se shall be determined by the order of preferance assigned to them by the Public Serivce Commission, except that when more than one officer is promoted from the same service or cadre, their seniority shall be determined by the order of their position inter-se in the service or cadre from which they were promoted;

Provided that in the case where officers are promoted both from gazetted and non-gazetted posts, officers promoted from gazetted posts shall rank senior to those promoted from non-gazatted posts;"

One aspect must be mentioned here although it is not germane to the main question before us. That is in sub-rule (rule 39 above the provision laying

down that rule 39-A be deemed to have been added with effect from the 27th April, 1966. The fixation of the year was Quashed by this Court in *Gaya Prasad Pandey and another* vs *State of Bihar and others.(1)*

(3) It is not in controversy that promotess would rank senior to direct recruits of the same year. In terms of these rules in 1974 the Governor of Bihar declared 27 vacancies in the Senior branch, out of which twelve were to be filled up by direct recruitment and fifteen by promotion from officers of the Junior branch. While steps were being taken to make direct recruitments through the Public Service Commission an incident came to pass which brought about far reaching changes and which has resulted in the tug of war before us. By a Government resolution dated 1-4-1975 the State Government decided to merge the Junior branch and Senior branch into one unified cadre. They were all to be known as Commercial Taxes officers thereafter. The rules for merger were as follows. Fifteen were to be promoted in the vacancies for 1974. The Junior branch officers were to be merged in the Senior branch in three phases. One-third with effect from 1-4-1974, another one-third from 1-4-1975 and the last one-third from 1-4-1976. the amalgamation resolution is Annexure-5 to C.W.J.C. No. 2335 of 1982. At the time the merger resolution was adopted, there were roughly about 300 officers in the Junior branch. In terms of the resolution the first 102 were merged in the Senior branch. Out of these 102, 25 were deemed to be promoted as against the vacancies of 1973 and 1974, in terms of the Governor's declaration of vacancies for promoted officers.

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(1) (1969) B.L.J.R. 293.

The direct recruits are petitioners in C.W.J.C. No. 2335 of 1982 and respondents in C.W.J.C. No. 4827 of 1984. They do not dispute the seniority of these promotees over them. The rest officers of the Junior branch were merged with the Senior branch with effect from 1-4-1974. the other two-thirds were merged in the Senior branch with effect from 1-4-1975 and 1-4-1976. These merged officers (i.e. leaving aside the promoted officers) were not considered to be promotees.

4. After the merger had been effected, comes another batch of direct recruits, who are petitioners in C.W.J.C.No. 2335 of 1982 and respondents in the other writ application. They were appointed Commercial Taxes officers by notifications dated 18-12-1976, 31-1-1977 and 29-4-1977. The notifications in regard to their appointments are Annexure-2 and 3 to this petition. The notification in regard to petitioner No.2 has not been annexed. Thus between 1974 and 1976 there were three classes of officers in the Commercial Taxes, Department, namely, (i) the direct recruits, (ii) promotses, and (iii) merged officers who will hereinafter referred to as 'mergees'. The clash is between direct recruits appointed by Annexures-2 and 3 and the officers who had been merged in three different stages. All 'Mergees' became officers of the Senior branch prior to the appointment of the direct recruits. The direct recruits claim that they had been appointed as against declared vacancies of 1974 and 1975 and, therefore, they should rank Senior to the mergees, who had not been promoted. According to them, the mergees were Ex-cadre. The stand of the 'Mergees' on the other hand, is that although they were not promoted

officers, but they had entered the cadre of Commercial Taxes officers, i.e. the Senior branch before the direct recruits had been appointed. Question is of the status of the 'Mergees'. The short question thus falling for consideration is whether mergees are seniors or the direct recruits are Seniors. If the mergees are held to the officers of the Senior branch from the day they were merged, they must be held to be seniors to the direct recruits. If, on the other hand, the mergees are held to be waiting on the side lines, the direct recruits must be held to be seniors.

5. In order to determine the core question it is necessary to set out the resolution for the merger. An English rendering of the relevant aspects of the resolution reads as follows:

> "The proposal of amalgamation of the Bihar Finance Service Junior and Senior branches was under consideration of the State Government. The State Government, after mature consideration, has resolved that the two branches of the Bihar Finance Service be amalgamated/merged. The two branches shall be merged as follows:
>
> (a) The merger of the Senior and Junior branches shall be effective from 1-4-1974.
>
> (b) The officers of Junior branch of the Bihar Finance Service shall be merged with the officers of Senior branch.
>
> (c) Leaving aside such of those officers, who will be promoted to the Senior branch of the Service in accordance with the available vacancies on 1-4-1974, the others officers shall be merged serially within three years. One-third officers of the Junior branch

shall be merged in order of seniority with effect from 1974. The next one-third from 1975 and the rest one- third in 1976.

(d) As a result of the amalgamation leaving aside such of the officers, who may be promoted to the Senior branch from the Junior branch in accordance with the available vacancies of 1974, other officers merged with the Senior branch shall not be deemed to have been promoted to the Senior branch. Their salaries will be fixed in terms of rule 78(a) of the Bihar Finance Code in the Senior branch at the first stage.

(e) Where the Bihar Public Service Commission had held competitive examination for appointments to the Junior branch of the Finance Service, they shall be appointed to the Junior branch and later they will be absorbed in the Senior branch in the third stage.

(f) After the amalgamation appointments shall be made only to the Senior branch."

In terms of the above resolution, the Governor ordered that the Bihar Finance Service Rules 1953 may be amended suitably to incorporate the rules of amalgamation/merger. It is not in controversy that as ordered in the resolution (Annexure-5), the 1953 Rules have not been amended. Thus no rules have been made for the 'mergees'. Question is are they in a state of suspended animations or are they in the cadre of officers of the Senior branch in the Bihar Finance Service?

6. The question of inter-se seniority became critical in 1982 when the time came to promote officers to the rank of Assistant Commissioner, Commercial

Taxes. The direct recruits apprehending that they may not get their due moved this Court by C.W.J.C.No. 2335 of 1982. It was asserted by them that promotions had to be made from a gradation list and since no gradation list had been prepared, the State Government was not entitled to make any promotion. The promotions have brought about the two writ applications.

7. The respondents, on the other hand, asserted that there is a gradation list, but it is tentative as Adhoc, since the principles of seniority have not been determined authoritatively by this Court and the Supreme Court. The promotions also, therefore, will be Ad-hoc, subject to the decisions of this Court and the Supreme Court. We have, therefore, to decide the rules of seniority consistant with Articles 14 and 16(2) of the Constitution.

8. It is elementary that recruitments to any cadre must be made in accordance with the rules. Those rules may be statutory in terms of Article 309 of the Constitution or may be of the nature of notification or Departmental Instructions to fill the gap in absence of statutory rules. In terms of the Bihar Finance Service Rules 1953 as amended from time to time, there were only two modes of recruitments to the Bihar Finance Service (Senior branch). One was by direct recruitments through Bihar Public Service Commission and the other by promotion from the Junior branch. The status of merged officers could not have been covered in the 1953 Rules, since merger de hors the rules.

9. Learned counsel for the petitioners (in C.W.J.C.No. 2335 of 1982) has contended that the rules contemplate only two modes of entries into the Bihar Finance Service Senior branch. There being

only two modes, namely, by direct recruitment and by promotion, the 'Mergees' cannot claim to be in the cadre of Senior branch officers in the Commercial Taxes Department. On that basis it has been contended that the 'Mergees' must be held to be Ex-cadre and must rank junior to the direct recruits. This submission is fallacious. The 'Mergees' were previously, undoubtedly in the cadre of Junior branch officers. In 1975 the two cadres were amalgamated. As a result of amalgamation, it must be held that the cadre of Senior branch officers swelled in terms of the merger resolution. The two cadres having been made one, it is axiomatic that every one in the Junior branch got a berth in the cadre of Senior branch officers. They cannot be held to be waiting on the side lines. In my concluded opinion, therefore, the 'Mergees' did enter the cadre of Commercial Taxes Officers (Senior branch) from 1-4-1974. Thus the submission urged on behalf of the direct recruits that the 'Mergees' were Excadres must be rejected as untenable. That must be so in regard to all the Junior direct officers merged in the Senior branch on 1-4-1974, 1-4-1975 and 1-4-1976.

10. It is true that the 'Mergees' cannot be equated with the promotees, since the merger order, quoted earlier in paragraph 5 clearly states that such of those, who have not been promoted will not be deemed to have been promoted to the Senior branch. Yet, it cannot be doubted that all the merged officers became officers of the Senior branch from the date of merger. The declaration that the merged officers would not be deemed to have been promoted to the Senior branch was only for the purpose of fixations of the their salaries. That is why in the same sentence it was stated that their salary would be fixed in accordance with rule 78(a/1) of the Bihar Service Code at the first stage of the Senior branch. The declaration

that they would not be considered promotees was only for the purpose of fixation of their salary/emoluments in the Senior branch. In all other respects, it cannot be doubted, they became officers of the Senior branch from the dates of merger.

11. Having held that the 'Mergees' entered the cadre of Senior branch officers, question now arises whether the direct recruits, who had been appointed against the declaration of vacancies by the Governor for 1974, they should be permitted to rate their seniority from that date. If the old order had continued, it cannot be doubted that the year of allotment of the direct recruits would have been 1974. But in the changed circumstances, it is difficult to hold that the direct recruits can reckon their seniority from 1974. The quota rule for appointment to the Senior branch evaporated with the merger. If that was so, there was no question of promoting officers to the Senior branch from the Junior branch. In this behalf, we must forget the promotion of officers to the Senior branch from different departments. That is a separate category and we are not concerned with them. But so far as promotions on Junior branch was concerned, that came to an end. That having come to an end, the question of year of allotment lost all significance. Every body would now, after the merger order, be appointed to the Senior branch by direct recruitment. In clause (f) at page 10 of the judgment, it has been stated that after the amalgamation appointments would be made only to the Senior branch. Thus the importance attached to year of allotment in 1974 disappeared in 1975: Consequential changes were required to be made in the 1953 Rules. That is why, it was ordered that the rules should be suitably amended. Unfortunately, no step has been taken in this regard. In the circumstances, however, I have no doubt that the year of allotment lost all significance.

That having lost significance and the 'Mergees' having joined the rank of Senior branch officers at a point of time when the direct recruits were not in existence, the former must rackon their seniority from the time they became members of the cadre of the Senior branch officers. The direct recruits were no where till December, 1976, when they were appointed by Annexures-2 and 3. Till the entire batch of 'Mergees' had filled the rank of Senior branch officers, the direct recruits had not found their berth in the Senior branch. The position is, therefore, obvious that the 'Mergees' must be held to be Senior to the direct recruits.

12. It is not disputed that the case of the 'Mergees' is not covered by rule 39 of the Bihar Finance Service Rules 1953. Question is, are they without any mooring or without any right or can any support be found for them in the rules so as to render justice unto them in terms of Articles 14 and 16(2) of the Constitution. Our attention has been drawn to a Circular issued by Government of Bihar in the Department of Personnel bearing No. 3/RI-106/72-P-15784 dated 26th August, 1972 to all Principal Secretaries, Heads of Departments and Divisional Commissioners. This Circular lays down the general principles and procedure for fixation of inter- se seniority in Service Cadres. Paragraph 3 lays down the principles of fixation of seniority. Sub-paragraph (vii) thereof reads as follows:

> "(vii) *In the event of amalgamation of cadres seniority* is determined with reference *to the date of appointment in the particular grade on substantive* or *continuous officiating basis,* whichever is earlier. But inter se seniority of incumbents in any group of posts as amongst themselves is not to be disturbed in the process of amalgamation."

If the above rule is made applicable to the present situation, there is no anomaly in regard to the position and status of the 'Mergees'. In terms of this rule, the date of merger must be held to be the date of appointment in the Senior branch. Thus this rule provides a berth to the 'Mergees'. In conjunction with this rule the merger must be deemed to be a mode of appointment for the purpose of fixing the seniority of officers in the cadre of Senior branch.

13. Learned counsel for the direct recruits (petitioners in C.W.J.C. No. 2335 of 1982) contended that the circular cannot be given the status of statutory rule and, therefore, it cannot be brought in aid to the 'Mergees'. I regret, I have difficulty in accepting this submission. It was laid down wayback in the case of *Sant Ram Sharma* versus *State of Rajasthan and others*: (1) that where the rules are silent, Government circular of resolution may well fill the gap. In that situation, the circular of notification will have the full force of statutory law. I see no reason why on the authority of *Sant Ram Sharam's* case (supra), it cannot be held that the circular, quoted above, cannot be deemed to be statutory. In my concluded opinion, therefore, the 'Mergees' must be deemed to have been appointed substantively (not promoted) from the date of their merger.

14. On the basis of my conclusion in regard to the date of appointment of the 'Mergees' in Senior brnach, the position which emerges is that all the 'Mergees' had become substantive officers of the Senior branch on 1-4-1974, 1-4-1975 and 1-4-1976. Till those dates the direct recruits were no where in existence

(1) (1967) A.I.R. (S.C.) 1910

in the cadre of Commercial Taxes Officers. The conclusion, therefore, is inescapable that the 'Mergees' must rank their seniority with effect from the date of their merger.

15. The next question is since what date can the direct recruits recvon their standing in the organisation/service? The quota rule vis-a-vis Junior branch and Senior branch having disappeared in 1975, the question of year of allotment lost significance. The direct recruits, therefore, cannot take advantage of the Governor's declaration some time in 1974. They were appointed in December, 1976 and onwards . They can reckon their standing in office only from the date of their appointment.

16. This judgment will not be complete without reference to a Full Bench decision of our own High Court in *Bishundeo Mahto* versus *The State of Bihar and others* :(1) S.Sarwar Ali, J summarised his conclusions in the leading judgment as follows:

"15. I may summarise my views as follows:

(a) Question of Seniority is limited to persons in the cadre. There is no competition with holders of ex cadre post.

(b) The rules 1934 apply at the stage of temporary appointment when the appointment is made on consideration of merit. *Rajib Ranjan's* case (C.W.J.C. No. 290/69 disposed of on 28.4.70) in so far as it holds that the rule is applicable at the stage of temporary appointment has been rightly decided.

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(1) (1982) B.B.C.J. 45.

(c) Ad-hoc temporary appointment on account of administrative exigency unrelated to the consideration of merit is not to be taken into account for the purpose of reckoning seniority or when the question of promotion is decided.

(d) The aforesaid rule is also applicable when non- substantive appointments are made substantive. *Rajib Ranjan's* case in so far as it takes a contrary view, has in my respectful opinion been wrongly decided.

(e) In case of substantive promotions at the same time the seniority shall be determined according to the two rules of 1944.

(f) Where substantive appointments/ promotions are not made at the same time, a person who has been substantively appointed/promoted earlier would be reckoned senior to a person who has been substantively appointed/promoted at a later stage. The only exception would be where the service rules are to the contrary.

(g) When can a person be said to be substantively appointed in the light of what has been explained in paragraph 14 of the judgment."

The conclusion at (a) is not relevant for the present upon my finding/conclusion that the 'Mergees' joined the cadre of Commercial Taxes Officers on the dates of merger, i.e. 1-4-1974, 1-4-1975 and 1-4-1976. They were not ex cadre. The question of an application of 1934 Rules does not arise in the present case. Clause (b), therefore, does not apply to the facts of the present case. The petitioners placed in the

cadre of Commercial Taxes Officer were not "Ad-hoc on account of administrative exigency". Clause (c) also, therefore, would be irrelevent. Clause (d) has no relevance, since in my view, the 'Mergees' must be deemed to be substantive in the cadre from the dates of merger. Clauses (e), (f) and (g) also seem to have no relevance. The case of *Bishundeo Mahto* (supra) does not asist the direct recruits in any manner. The present case has no parallel in any decided case. Law and equitable considerations demand that the 'Mergees' should reckon their berth in the cadre from the date of their merger.

17. For the reasons, stated above, I hold that the seniority of the direct recruits vis-a-vis the 'Mergees' must be decided upon the basis of the principles of entry into the cadre of senior branch officer. The 'Mergees' must reckon their berth from the date of merger. The direct recruits must take their berth from their dates of appointment, i.e. December, 1976 and onwards.

18. Both the applications are disposed of accordingly. C.W.J.C.No. 2335 of 1982 is dismissed and C.W.J.C. No. 4827 of 1984 is allowed. In the special circumstances of the case, there shall be no order as to costs.

Nazir Ahmad, J: I agree

R.D. *Order accordingly*

APPELLATE CIVIL

Before S.S.Sandhawalia, C.J. and Ashwini Kumar Sinha, J.

1986

May,3.

*Rajo Mian and others.**

v.

Puran Mian and others.

Santhal Praganas Regulation, 1872 (Regulation No.III of 1872) section 27 --- provisions of --- original transfer against the provisions of the section --- plaintiffs not perfecting their title by adverse possession before coming into force of Santhal Praganas Tenancy (Supplementary provisions), Act, 1949 --- Santhal Praganas Tenancy (Supplementary Provisions), Act, 1949 (Bihar Act No. XIV of 1949) --- section 20 --- Revenue Court whether had jurisdiction to order eviction against the plaintiff under this section --- Revenue Court disregarding the collusive compromise decree, legality of.

Appeal from Appellate Decree No. 115 of 1976. Decision against the judgment dated 3-10-75 and decree dated 6-12-75 passed by Sri Sambhu Nath Sinha no.1, 3rd Addl. District Judge, Santhal Praganas, Dumka (in T.A.No. 76/38 of 1970/75) arising out of the judgment and decree dated 26-8-70 passed by Sri P.K.Bhattacharya, 3rd Addl. Subordinate Judge, Deoghar, Santhal Praganas (in T.S. No. 130/54 of 1966/69).

Held, that the original transfer being against the provisions of section 27 of the Santhal Praganas Regulations, 1872 and the plaintiffs having not perfected their title by adverse possession before coming into force of the Santhal Praganas Tenancy (Supplementary provisions), Act, 1949, the Revenue Court was well within its jurisdiction to pass order of eviction against the plaintiffs under section 20 of Santhal Praganas Tenancy (Supplementary provisions), Act, 1949 and thus the Revenue Court committed no illegality in disregarding the collusive compromise decree passed in the title suit in which the contesting intervenor-defendents were not parties.

Appeal by the plaintiffs.

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

Mr. Lakshmi Narain Mishra for appellants

None for the respondents

Ashwini Kumar Sinha, J. -- This second appeal is by the plainfiffs against judgment of *reversal.*

2. The substantial question of law to be determined is whether the compromise decree in T.S.No 4/64 could be annulled by the Sub-Divisional Officer, Deoghar (Revenue Officer) in R.E.Case No. 36/64; in other words, whether section 20 of the Bihar Act 14 of 1949 authorised the Revenue Court to evict a person who had come on the land on the basis of a compromise decree of a competent civil court, *if that compromise was collusive?*

3. The learned counsel for the plaintiffs -appellants *contended that the compromise decree in the aforesaid title suit could not be annulled*

by the Sub-Divisional Officer, Deoghar (Revenue court) even though it contravened the provisions of Santhal Praganas Tenancy (Supplementary provisions), Act, 1949 or was against public policy.

In order to appreciate the submission of the learned counsel for the appellants, it is pertinent to state a few facts.

4. Plaintiffs-appellants brought a title suit (No. 130/54 of 1966/69) for declaration of their title and confirmation of possession over 47 decimals of plot no. 371 and 15 decimals of plot no. 372 situate in village Nokhato, in the district of Santhal Praganas. The appellants-plaintiffs founded their claim on the basis of Exchange of the suit lands between Mahatha Main (father of respondent third party) and plaintiff no.4. Their case was that, according to this Exchange, the plaintiff (respondent no.4) got the plots in question in the year 1353 Fs. and the plaintiff no.4 gave his lands to the father of respondent third party (plot no. 214-6 decimals; plot no. 214-19 decimals; and plot no. 373-43 decimals) (in village Manjhali Tikur). The plaintiffs-appellants' case was that after this Exchange the parties to the Exchange took possession of their respective lands. The plaintiffs-appellants' case was that some time later, there was a partition between the plaintiffs and plaintiffs no.1 to 3 got 27 decimals of land in plot no. 371 from scuth and the remaining land of plot no. 371 and plot no. 372 were allotted to plaintiff no.4 (Chhabeli Mian).

According to the plaintiffs-appellants' case, the defendent third party filed a title suit (No.4 of 1964) in the court of Deputy Collector, Deoghar, against plaintiffs no.1 to 3 for declaration of title and recovery of possession of the suit plots in question, i.e. plot no. 371 and 372 of village Nokhata. In the suit plaintiff

no.4 (Chhabeli Mian) also appeared and contested the suit which ended in a compromise between the parties. According to the compromise the plaintiffs were allowed to remain in possession of the suit lands as before.

The plaintiffs' further case was that sometime after, at the instance of the enemies of the plaintiff, defendant no.1, filed an application in the court of the Sub-Divisional Officer *alleging illegal alienation of raiyati lands*. This application before the Sub-Divisional Officer, Deoghar, by defendant no.1, was numbered as R.E.Case No. 36 of 1964. The Sub-Divisional Officer ignored the compromise decree of the Civil Court passed in T.S.No. 4/64 and passed an order of eviction against the plaintiffs and defendant no. 3. The Sub-Divisional Officer further ordered settlement of suit lands with the deserving raiyats.

According to the plaintiffs-appellants, this order of the Sub-Divisional Officer cast a cloud over the plaintiffs' title and hence the suit for declaration of title and confirmation of possession over the suit lands, mainly contending that the order of the Sub- Divisional Officer in R.E.Case No. 36/64 (filed by defendant no.1) was without jurisdiction and hence null and void.

5. Defendant no.3 (Amin Mian) is the son of Mahatha Mian with whom the Exchange took place according to the plaintiffs. This defendant no.3 denied the story of Exchange as set up by the plaintiffs-appellants; on the other hand he asserted that the suit lands were given to the plaintiffs-appellants only on Batai system. He however, supported the compromise arrived at in T.S.No.4/64, and ultimately he did not contest the suit at the time of hearing.

6. The sixteen annas raiyats filed two sets of written statements. In the first set of written statement

the story of Exchange, possession etc. made by the plaintiffs-appellants were admitted; whereas, in the second set of written statement, filed later, the story of Exchange set up by the plaintiffs-appellants was denied and it was asserted that Mahatha Mian (father of defendant no.3) had no right to Exchange any lands of the Jamabandi without the consent of other Jamabandi Raiyat and the village community. They further asserted that plaintiff no.4 never came in possession of the suit lands in the year 1353 Fs. on the basis of the Exchange. Their case was that a little before the filing of R.E.Case No. 36/64, plaintiff no.4, somehow or the other, started cultivating the plots in question which gave rise to the revenue case. They further asserted that there was no partition between the plaintiffs. According to them the plaintiffs no.1 to 3 brought defendant no.3 in their collusion and persuaded later to transfer the suit lands and it was in such collusive state of affairs that defendant no.3 filed the Title Suit No. 4/64 in the court of the Deputy Collector, Deoghar, as no sale deed could have been executed or registared and the filing of a collusive suit was only to get away with the illegal transfer. Thus, in short, in the second set of written statement filed by the sixteen annas raiyats of the village Nakheta, they denied the plaintiffs' case totally a. , amongst others, as stated above, further stated tha. the compromise in the T.S.No. 4/64 was a *collusive one to get an illegal transfer recognised by a court of law. They further pleaded that the transfer was in contravention of section 20 of the Santhal Praganas Tenancy* (Supplementary Provisions) Act, 1949. They further pleaded, in the circumstances, that the compromise decree in the aforesaid title suit was illegal, fraudulent and collusive and hence in R.E.Case No. 36/64 the illegal alienation was set aside and the order passed by the Sub-Divisional Officer in R.E.Case No. 36/64 was well within his jurisdiction.

7. It is pertinent to mention here that one Puran Mian and Halima Bibi were added as intervenor-defendants in the present suit (T.S.No. 130/54 of 1966/69). These two intervenor defendants also filed their written statement contesting the plaintiffs' case *and, in fact, it were these two intervenors-defendants who have really contested the present suit.*

These intervenors-defendants, supporting the written statement filed by the sixteen annas raiyats of the village, contended that they were added as parties in R.E.Case No. 36/64 and that the order of eviction passed in that case was in their presence. But, with ulterior motive the plaintiffs deliberately had not impleaded them initially as party to the suit.

These intervenors-defendants *(who have really contested the present suit),* though accepted the possession over the suit land, have asserted that the plaintiffs came in possession of the suit lands only after the illegal compromise in the collusive T.S.No. 4/64. They pleaded that the eviction order passed by the Sub-Divisional Officer, in R.E.Case was valid and binding. They further pleaded that the eviction order was validily passed by the Sub-Divisional Officer, in view of his power conferred under section 20 of the Santhal Praganas Tenancy (Supplementary Provisions) Act, 1949.

8. The trial court held (i) that the plaintiffs had title over the suit lands and they were entitled to a decree for confirmation of possession; (ii) that the order passed by the Subdivisional Officer in R.E.Case No. 36/64 was without jurisdiction and invalid; (iii) that the story of Exchange set up by the plaintiffs was correct; (iv) that the plaintiffs were in continuous possession of the suit plots and (v) that section 20

of the Santhal Praganas Tenancy (Supplementary Provisions) Act, 1949 did not authorise the Revenue Court to evict a person who had come on the land on the basis of a compromise decree of a competent civil court *even if the compromise was collusive.*

With these findings the suit was decreed.

9. Aggrieved by the trial court decree, the intervenor defendants filed an appeal in the court below. This appeal was numbered as T.S.No. 76/38 of 1970/75.

The court below held (i) that the plaintiffs had failed to prove the story of Exchange from Mahatha Mian in 1353 Fs. (ii) that the story of partition between the plaintiffs, a few years after the Exchange, was not proved by the plaintiffs; (iii) that defendant no.3 initially entered into a transaction of sale with plaintiffs no.1 to 3 against the provisions of law and later in collusion with the plaintiffs filed T.S.No.4/64 and only when plaintiff no. 4 could get the agreement for Exchange (Ext.1) prepared, he intervened and his intervention paid him rich dividend by getting some lands on the basis of compromise; (iv) that the plaintiffs neither acquired any title to the suit lands nor were they entitled to a decree for confirmation of possession; (v) that the possession of the plaintiffs over the suit lands had commenced only after coming into force of Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 and the same had not ripened into indefeasible title, (vi) that the jurisdiction of the Revenue Court could have been ousted only if the plaintiffs had perfected their title by adverse possession before coming into force of the Santhal Praganas Tenancy (Supplementary Provisions) Act, 1949, but they had not done so. In that view of the matter, the Sub-Divisional Officer had full jurisdiction to decide R.E.Case No. 36/64 and the order passed therein was

neither without jurisdiction nor invalid.

With these findings the appeal filed by the intervenors-defendants was allowed and the judgment and decree of the trial court were set aside and the suit filed by the plaintiffs was dismissed.

Thus, the present appeal by the plaintiffs.

10. At the out set it has to be stated that the plaintiffs have neither pleaded prescriptive right nor any issue as such was framed by the trial court nor has this been proved by the plaintiffs.

11. The plaintiffs founded their title on the basis of the Exchange of the year 1353 Fs. and claimed possession ever since the date of Exchange and in order to strengthen their case they have also relied upon the compromise decree passed in T.S.No.4/64.

12. The court of appeal below (the final court of fact), after very carefully appraising the evidences on the record, came to the finding that the story of Exchange set up by the plaintiffs was not correct. This being a pure question of fact and the same having been found against the plaintiffs, the very foundation of titles, as set up by the plaintiffs, fails.

Then the plaintiffs could fall back upon their prescriptive right ripening into the perfect title. As already stated above, such a claim was neither pleaded nor proved nor was such an issue framed by the trial court.

Then remains the only other foundation of the plaintiffs i.e., the compromise decree of T.S.No.4/64. The court of appeal below, on a proper appreciation of the evidence on the record, has held that defendant no.3 had initially entered into transaction of transfer

(Exchange) with the plaintiffs 1 to 3 against the provisions of law i.e., against the provisions contained in section 27 of Regulation 3 of 1872 and later in collusion with the plaintiffs filed T.S.No. 4/64; in other words. Title Suit No. 4/64 was a collusive one, and it has further held that only when plaintiff no.4 could get the agreement for Exchange (Ext.1) prepared, he intervened and his intervention paid him a rich dividend by getting some lands on the basis of compromise decree. Such being the position, i.e., original transfer being in contravention of law, a vendee could not perfect his title by adverse possession after coming into force of 1949 Act and the Revenue Court could order eviction of a transferee who had not completed 12 years on the date of coming into force of 1949 Act. But, if 12 years possession had expired before coming into force of 1949 Act, then no eviction could be ordered by the Revenue court. Such a position in law is well settled.

However, in the present case, it has been positively held by the court of appeal below that the possession of the plaintiffs over the suit lands had commenced only after coming into force of Santhal Parganas (Supplementary Provisions) Act, 1949 (in short, 1949 Act) and thus the original transfer (Exchange) being in contravention of section 27 of the Santhal Parganas Regulation, 1972, as held by the court of appeal below, the plaintiffs could not perfect their title by adverse possession after coming into force of 1949 Act, even if they had pleaded as such.

13. The present contesting respondents, i.e., the intervenor-defendants (respondents 1 and 2 of the present appeal) were not parties in the aforesaid Title Suit No. 4/64, in which the compromise decree was passed.

14. It is well settled that a judgment/decree in a suit is binding upon the parties to the litigation, but the same cannot be binding upon a person who is not a party to the suit. In T.S.No. 4/64, the parties were only the plaintiffs and defendant no.3. In the present suit also they are sailing, practically, on the same boat; as, except filing the written statement, defendant no.3 did not contest the suit. None of the parties in the aforesaid title suit has tried to disregard the aforesaid compromise decree in the present suit. It is only the present contesting respondents, i.e., the intervenor-defendants, who have contested the suit on the ground that T.S.No. 4/64 and the compromise decree therein were collusive one. As they were not parties in the aforesaid suit, they could, in law, very well attack the aforesaid compromise decree. The language of section 27(1) of the Regulation is clear and unambiguous. It prohibits any transfer of a holding by a raiyat either by sale, gift, mortgage or lease or by any other contract or agreement. The section is comprehensive enough to include a transfer of the holding by way of an exchange. Sub-section (2) of section 27 in clear terms also enjoins upon the courts not to recognise any such transfer. It is also well settled that though section 27 of the regulation does not in express terms mention an exchange, a transaction of exchange is not beyond the scope of that section. A transfer of property in completion of an exchange as contemplated by section 118 T.P.Act can be made only in the manner provided for the transfer of such property by sale. *It is not, therefore, right to say that an exchange does not involve transfer of property,* and therefore, does *not fall within the scope of section 27. The language of section 27(1) is comprehensive enough to include any agreement or contract of exchange.*

I have already stated above that the court of

appeal below, on a proper appraisal of the evidences on the record, has held that the original transfer (Exchange) was against the provisions of section 27 of Santhal Parganas Regulation, 1872. The jurisdiction of the revenue Court to evict a person under Santhal Parganas Regulation, 1872 (read with Bihar Act. 1949) is dependent upon whether the transfer of holding was in contravention of the provisions of section 27 of the Santhal Parganas Regulation 1872. It has already been held above that in the present case the original transfer (Exchange) was in contravention of the provisions of Santhal Parganas Regulation, 1872. It has also been held above that T.S.No. 4/64 and the compromise decree arrived at therein were collusive. *In such a situation I hold that section 20 of Bihar Act 14 of 1949 authorised the Revenue Court to evict a person who had come on the land on the basis of an illegal transfer.* In the present case, it has been held that the plaintiffs did not come in possession over the suit lands in 1353 Fs., as alleged by them but they had come in possession only sometime before filing of the suit (the suit having been filed in 1966) which necessarily means that the plaintiffs had come in possession only after coming into force of Santhal ParganasTenancy (Supplementary Provisions) Act, 1949 (Bihar Act 14 of 1949). In such a situation the plaintiffs could not have acquired title as the transaction was against the provisions of the Act. In such a view, I hold that the Sub- Divisional Officer, Deoghar (Revenue Court), was duly authorised, in law, to disregard the compromise decree in the aforesaid T.S.No.4/64.

15. Thus, I hold that the plaintiffs had failed to prove title. I further hold that the court of appeal below has correctly held that the transfer (Exchange) was in contravention of the Santhal Parganas Regulation, 1872. I further hold that the plaintiffs never came in possession in 1353 Fs. on the basis

of a transfer (Exchange), as alleged by them. They came in possession only after coming into force of the Bihar Act 14 of 1949 and only sometime before the filing of the suit. And thus they could not acquire title by adverse possession also (though I have already held above that the plaintiffs never pleaded title by adverse possession). I further hold that, in the facts of the present case, i.e., the original transfer being against the provisions of Santhal Parganas Regulation, 1872 and the plaintiffs having not perfected their title by adverse possession before coming into force of the Santhal Parganas (Supplementary Provisions) Act, 1949 (Bihar Act 14 of 1949); the Revenue Court was well within its jurisdiction to pass order of eviction against the plaintiffs under section 20 of the Bihar Act 14 of 1949 and thus, *in the facts of the present case,* the Revenue Court committed no illegality in disregarding the collusive compromise decree passed in T.S.No. 4/64 in which the present contesting intervenor-defendants were not parties.

16. For the aforesaid reasons. I hold that there is no substance in the submission advanced by the learned counsel for the appellants.

17. In the result, this appeal is dismissed.

However, there will be no order as to costs.

(The lines have been underlined by me for emphasis)

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

R.D. *Appeal dismissed*

TAX CASE

Before Uday Sinha and Ashwini Kumar Sinha, JJ.

1986

June, 13.

*Commissioner of Income-Tax, Bihar II, Patna.**

v.

Pushpa Devi.

Income Tax Act, 1961, (Central Act no. XLIII) of 1961) sections 143 and 263 --- Mass Communication Scheme envisaged by the Central Board of Direct Taxes, whether applicable to ladies and minors --- section 143 (3) --- assessment with regard to the assessee, a lady, whether to be made under section 143 (3) --- section 263 --- order of the Commissioner cancelling the assessment made under section 143(1) and remanding the case to the Income Tax Officer for fresh assessment under section 143(3), legality of.

Where in terms of the scheme of Mass Communication envisaged by the Central Board of Direct Taxes the assessee, a married lady filed her return of income for assessment years 1968-69 to 1973-74 on 14.12.72 and the Income Tax Officer, on the report of the Inspector, Income Tax submitted on the same day, made assessment on the same day at the spot for all the assessement years except 1973-74, and the Commissioner of Income Tax considering the assessments to be erroneous issued notice on the

assessee in terms of section 263 (1) of the Income Tax, 1961, herein after called the Act to show cause as to why the order of assessment be not modified or cancelled and the Commissioner of Income Tax being of the view that the assessment was prejudicial to the Revenue set aside the assessments holding them to be ereoneous and remanded the case to the Income Tax Officer with direction to frame assessment after making close scrutiny as to the extent of the initial capital and the actual income earned by the assessee for the years in question;

Held, that the law in regard to assessment was not modified by the Mass Communication scheme so far as ladies and minors were concerned. In the course of Mass Communication whenever a return was filed by a lady or minor, it could have been accepted but could not have been dispossed of in terms of the scheme. It should have been treated as original assessment proceeding with all the rigours with regard to initial investment. No connection or amelioration of the procedure in the case of ladies and minors was envisaged. These assessments had to be completed in terms of section 143 (3) of the Act and where it was prejudicial to the Revenue, the Commissioner would be fully justified in setting aside such assessment. In the course of Mass Communication Scheme if a return was filed on behalf of lady or a minor, the Income Tax Officer could have

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*Taxation Case Nos. 93 to 98 of 1978 Ref: Statement of case under section 256 (1) of the Income-Tax Act, 1961 by the Income Tax Appellate Tribunal, 'A' Bench, Patna In the matter of assessment of Income Tax on Pushpa Devi for the assessmentyears 1968-69 to 1973-74.

been fully justified in not accepting them at the spot and calling upon them to file the return in the Department as if the Scheme did not exist.

Held, further, that the enquiry into the source of initial capital was crucial for the Income Tax Officer. If that was not done the assessment is bound to be erroneous and hence prejudicial to the Revenue.

Held, also, that the Commissioner of Income Tax did not exceed his jurisdiction in exercising his power under section 263 of the Act and cancelling the assessment.

Case law discussed.

Statement of case under section 256(1) of the Income Tax Act, 1961.

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

Messrs B.P.Rajgarhia, (Sr.S.C., I.T.D.) and S.K.Sharan (Jr. S.C., I.T.D.) for the petitioner.

Messrs L.N.Rastogi and L.N. Khanna for the opposite party.

UDAY SINHA, J. These are six references under section 256 (1) of the Income-Tax Act, 1961 (hereinafter called 'the Act') and relate to assessment years 1968-69 to 1973-74. The core question agitated in these references is whether the jurisdiction of Commissioner of Income-Tax to act under section 263(1) of the Act was ousted by a Scheme evisaged by the Central Board of Direct Taxes (hereinafter called 'the Board'). A subsidiary question is whether the Tribunal had rightly

held that the Commissioner of Income-tax had not followed the rules of natural justice and whether on that score his order was invalid.

2. In 1972 the Board envisaged a Scheme to help new tax payers in Small Income group. This was a follow up of a programme of Mass Communication. In terms of this Scheme no penalty under section 271 or section 273 was to be levied in the case of a person, who had not been assessed, if the return of income was filed voluntarily prior to 1-1-1973 and the income as declared or as assessed did not exceed Rs. 15,000/-. An order under section 119(2)a) of the Act had been issued by the Board authorising Income-Tax Officers not to initiate penalty proceedings under section 271 or section 273 of the Act. In terms of this Scheme, Income-tax Officers (hereinafter called 'the I.T.OS') were required to visit specially selected areas to assist new tax payers to fill in the returns of income and, as far as possible, to complete the assessments on the spot. The areas had to be selected by the Commissioners of Income-tax. Two I.T.Os. were to be deputed for the purpose for one area. Full complement of the staff was to accompany the I.T.Os. so that all formalities relating assessment may be completed on the spot. Crossed cheques were acceptable towards the payment of the tax liability. Paragraph 4 of the Scheme read as follows:

> "4. New cases where the returned income does not exceed Rs. 15,000/- and the capital invested including the borrowed capital does not exceed Rs. 25,000/- should ordinarily be completed under section 143(1). Returns of income filed in the names of minors and ladies should not, however,

be accepted without proper enquiries. Where however, after making the adjustments set forth in section 143(1)(b), the assessable income exceeds Rs. 15,000/- the assessee shall not be entitled to the waiver of panality in terms of Board's order under section 119(2)(a) and he may be advised to make an application to the Commissioner of Income-tax under section271(4A) of the Income-tax Act and the Procedure outlined in Para 7 may be followed. The above instruct-1 ions will also apply in relation to the "First year's assessment" and, to that extent, directions of the Board contained in para 2(iv) of the Instruction No. 289 (F.No.385/32/71-IIB) dated 30.4.1971 as revised by para 2(ii) of Instruction No. 426 (F.No233/1/72-A & PACT) dated 14th June, 1972 stand modifled during the operation of t his scheme.".

The Scheme of mass contact was given wide publicity by the Revenue Department. The Income-tax officials visited different places as a follow up under instructions of the superior officers like Inspacting Assistant Commissioners and Commissioners. Assesses who had taxable income were requested and persuaded to file their returns under the Scheme which were accepted by the I.T.Os. under the directions of the Superiors under section 143(1) of the Act.

3. In terms of the Scheme the assessee, a married lady filed her returns of income for assessment years 1968-69 to 1973-74. Income of Rs. 4,100/- was returned for the years 1968-69, 1969-70 and 1970-71 (A.Y.) For the years 1971-72 and 1972-73 (A.Y.) she returned taxable income of Rs. 5,100/- and in the assessment year 1973-74 filed return of income at Rs. 5,100/-. She declared her initial capital at Rs. 25,000/- stating that she derived income from

pawn broking and oilseeds business. An Inspector of the Income-tax Department was deputed by the I.T.O. to the make necessary enquiries into the affairs of the assessee. He reported that the assessee did carry on pawn broking and oilseeds business and that the derived income from these business. His report is as follows:

> "Enquired into the case of the aforesaid assessee who is the wife of Shri Sita Ram Murodia, one of the partners of M/S Mangal Chand Jai Narain of Raxaul. She carries on Pawn Broking business as well as she purchased oil seeds etc. During the season time she sells them if the market is favourable. When I contacted the lady she immediately called a few gentlemen of Raxaul Bazar, who supported the fact of taking advance from her as loan on pledging on ornaments. They also supported the fact of casual business done by the lady. She has no money-lending licence. I estimate her annual income approximately at Rs. 5,000/-. Submitted."

The I.T.O. assessed the assessee at Rs. 4,100/- for each of the years in one line order which reads as follows:

> "Assessment is made on a total income of Rs. 4,100/- as per under sections 143(1) 247"

The enquiry and the assessment were completed at the spot on 14-12-1972 itself. For the years 1971-72 to 1973-74 (A.Y.) she was assessed on an annual income of Rs. 5,100/- as returned by her. The assessment of the assessee having come to the notice

of Commissioner of Income-tax and the latter having considered it to be erroneous, issued notice to the assessee in terms of section 263(1) to show cause why the order of assessment be not modified or cancelled. Accordingly, the Commissioner being of the view that the assessment was prejudicial to the Revenue and since it was erroneous, set aside the assessments and remanded back the case to the I.T.O. with a direction to frame assessments after making a close scrutiny as to the extent of initial capital and the actual income earned by the assessee for the years in question.

4. Being aggrieved by the order of the Commissioner, the assessee moved the Income-tax Appellate Tribunal. The Tribunal presided over by a single Member by its order dated 27-4-1977 allowed the appeals in terms of an earlier decision of the Tribunal in I.T.A.Nos. 1713 to 1715 of 1974-75. Hence these references under section 256(1) of the Act at the instance of the Revenue.

5. The questions referred to for our opinion are the following:

"(1) Whether, on the facts and in the circumstances, the Tribunal has rightly held that the assessment orders, having been passed by the Income-tax Officer after necessary enquiries in pursuance of the Scheme "to help the new tax payers in the small income groups" launched by the Government, were not erroneous as to enable the Commissioner of Income-tax to assume jurisdiction under section 263(1) of the Income-tax Act, 1961?

(2) Whether, on the facts and in the circumstances of the case, Tribunal has rightly held that the Commissioner of Income-tax did not follow the principles of natural justice before passing the impugned order and so his order is not valid?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the impugned order of the Commissioner of Income-tax is based upon the mere surmises and conjectures and is, therefore, not valid?

(4) Whether, in view of the decision of the Income-tax Appellate Tribunal, Patna, in the case of Smt. Rambha Devi Vs. I.T.O. (I.T.A.Nos. 1713 to 1715 of 1974/75), the Tribunal has rightly held that the Commissioner of Income-tax, acting under section 263(1) of the Income- tax Act, 1961, could not legally set aside an order of the assessment made under section 143(1) in pursuance of the Scheme "to help the new tax payers in the small income groups" evolved by the Government?

(5) Whether, on the facts and in the circumstances, the Tribunal has rightly held that the Commissioner of Income-tax acted in a mechanical manner in setting aside the assessment order for the assessment year 1973-74 and so his order for that year is invalid? and

(6) Whether, on the facts and in the circumstances of the case, the Tribunal has rightly cancelled the consolidated order passed by the Commissioner of Income-tax

under section 263(1) of the Income-tax Act, 1961, for the assessment years 1968-69 to 1973-74 ?"

6. It appears that the Commissioner set aside orders of assessments and ordered re-assessments in the cases of several assessees like the one before us. One such was the case of Rambha Devi. That case was subject matter of appeals before the Appellate Tribunal. That related to assessment years 1970-71, 1971-72 and 1972- 73. the Members of the Tribunal having divergent views in those appeals in regard to the correctness of the order of the Commissioner, the matter was referred to Mr. P.D.Mathur, Vice-President of the Appellate Tribunal as a third Member, who agreeing with the views of Mr. Sukh Dev Bahl set aside the order of the Commissioner on various counts. The appeals of Rambha Devi were thus disposed of by the Tribunal in accordance with the views of Mr. Mathur by order dated 27-10-1976. The appeals of the present assessees were heard by the Judicial sole Member Mr. M.R.Sikka and were disposed of on 27-4-1977. The decision of the Tribunal in the case of Rambha Devi was followed by Mr. Sikka in the case of the present assessee. Learned Senior Standing Counsel has assailed the decision of the Tribunal on various grounds. It is needless to say that Mr. Rastogi, learned counsel for the assessed has supported the Tribunal for the reasons stated in the order of the Tribunal.

7. The order of the I.T.O. is a one line order. From the order it is difficult to gauge the stand of the assessee before him. If the report of the Inspector

Income-tax is any indication, her case before the I.T.O. was that the income was earned by her by pawn broking business and by purchase and sale of oilseeds. Before the Commissioner two affidavits were filed on behalf of the assessee. One was filed by Manu Lal Prasad (Annexure-B) and the other by Dev Raj Agrawal (Annexure-C). The affidavits were sworn on 9-12-1974. The three paragraphs in the affidavit of Manu Lal Prasad read as follows:

> "1. That I carry on the business of brokerage in oil seeds in the town of Raxaul.
>
> 2. That Smt. Pushpa Devi W/S Sri Sita Ram Moredia of Raxaul is known to me. She casually deals in oil seeds. I Managed to purchase linseed in the past as detailed below and charged my brokerage:-
>
> | Year | Bags | Commission charged. Rs. Ps. |
> |---|---|---|
> | 1968 | 100 bags | 50 . 00 |
> | 1970 | 125 bags | 62 . 50 |
> | 1972 | 80 bags | 40 . 00 |
>
> 3. That the aforesaid contents are true to the best of my knowledge and belief."

The five paragraphs in the affidavit of Dewaraj Agarwal read as follows:

> "1. That I carry on the business of cloth on retail basis in the town of Raxaul for the last several years.

2. That Srimati Pushpa Devi W/O Shree Sita Ram Moradia is well known to me and I know that she is a regular money lender.

3. That I use to take cash loan from her by pledging my cloths bales whenever I am in need of money.

4. That I still owe a sum of Rs. 3,500 to her which I had taken from her by pledging my two bales of cloth in January, 1974.

5. That aforesaid contents are true to the best of my knowledge and belief."

Besides the affidavits, the assessee filed written statement before the Commissioner which is Annexure-A to the Statement of the case. In the written statement she spelt out her stand fully. Her case was that she was married to Sita Ram Moradia of Raxaul, who was a man of good means and was income-tax assessee- being assessed on marginal income for many years and that she had been married to him about 20 years back. To put it in her own words, it was further stated as follows:

That the petitioner has got about Rs. 22,500/- by way of cash gifts from parent side as well as from father-in-law side including gift from family friends and relatives at the time of marriage and thereafter upto 1-4-67."

The assessee also stated that her assessment had been effected after proper enquiry regarding the nature of income and the capital employed by the assesses. On this count it was claimed that the proceeding under section 263 of the Act should be dropped.

8. The Commissioner after hearing the parties observed that the order of the I.T.O. did not give the dates of investments or transactions and that there was no evidence to prove the same. The affidavits also did not impress the Commissioner. In regard to the claim of the assessee of having received gifts which formed the basis of her investments, the Commissioner observed that even if it were accepted that she had received such amounts, they could not have been kept idle for twenty years. The assessee could not have waited for investing the sums till 1968-69. In the absence of any material where and how the sums received at the time of marriage were kept till 1968-69, the Commissioner held the matter required a deeper probe. In his view, there was no material in regard to the initial capital investment and that the return was filed with the obvious purpose of accommodating or assisting her husband, who would have been assessed to a much higher rate of tax. They in his view, were undisclosed income of her husband or the firm. In paragraph 7 of his order, the Commissioner observed that the assessments had been completed by the I.T.O. "without making proper enquiry regarding the initial capital, the nature and the real extent of the income and its true owenership". Upon those findings, the Commissioner set aside the assessments and restored (he probably meant remanded) the matter to the file of the I.T.O. with direction to frame assessments, if necessary after making a close scrutiny as to the extent of initial capital and the actual income earned by the assessee in all the assessment years.

9. The Tribunal, on appeal by the assessee, gave four grounds for reversing/cancelling the order

of the Commissioner. The grounds given by the sole Member Tribunal were:

(i) The observation of the Commissioner that the I.T.O. had completed the assessments without enquiry was not correct. Enquiry had been held by the Inspector which was accepted by the I.T.O.

(ii) The Commissioner of Income-tax did not follow the principles of natural justice inasmuch as the affidavits corroborated by the report of the Inspector filed before the Commissioner were rejected for no good reason. The Commissioner should have examined the deponents, if he was not satisfied with the affidavits. Not having called upon the assessee to produce the deponents before him, the Commissioner had not considered the objection of the assessee impartially.

(iii) The order of the Commissioner was based upon mere surmises and conjectures inasmuch as there was no material on the record to support his finding that the income in question belonged to the assessee's husband and that the assessee had declared the same to accommodate her husband; and

(iv) The decision of the Tribunal in the case of Rambha Devi versus I.T.O. (I.T.A.Nos. 1713 to 1715 of 1974-75) held the field and, therefore, the order of the Commissioner under section 263(1) of the Act was liable to be set aside.

10. We have heard counsel for the parties with all the patience that the case required although in our view the issues falling for consideration are short and simple. I shall consider the reasons advanced by the Tribunal seriatim. The Tribunal observed that due enquiry had been held and that the view of the Commissioner that the assessments had been completed without making proper enquiry was unsound. With respect I must observe that the Tribunal failed to appreciate the main thrust of the order of the Commissioner. I shall, therefore, quote the observation of the Commissioner at paragraph 7 so far as it is relevant which reads as follows:

> "As the assessments have been completed by the I.T.O. *without making proper enquiry regarding the initial capital the nature and real extent of the income and its true ownership* the assessments made for all these years are considered erroneous and prejudicial to the interest of revenue."

The Commissioner was emphasizing upon the source of the initial capital and that in his views there should have been proper enquiry as regards the initial capital. The Tribunal was labouring under the impression that the Commissioner was of the view that no enquiry had been held. That would be misreading of the order of the Commissioner. In the case of first assessee the crucial thing to be appreciated is the source of the initial capital and the source thereof. The stand of the assessee was that she was earning from linseed business and from pawn broking business. She may well have been doing the business of buying and selling linseed and pawn broking, but if the funds for them were provided by her husband, who was also a business man and partner of a firm, the income

would be of the husband or of the firm and not of the assessee. Such income would be liable to be added to the income of the assessee's husband or of his firm in terms of section 64 of the Act. If the assessee claimed that the income had accrued to her from her own source De Horse her husband or of the firm in which the husband was the partner, it was incumbent upon her to show that her initial capital came from independent sources and not from the husband or his firm. In the report of the Inspector which I have quoted earlier in paragraph 3 above, nothing was said about the initial capital investment of the assessee. The report was thus of no consequence. The return was filed on 14-12-1974. The enquiry commenced and was completed on the same day and the assessment was effected on the same day. Nothing better could be expected of the Inspector, but that left the core question untouched. The I.T.O. could not have proceeded to assessment on the report of the Inspector which had omitted to enquire into the primal question as to from where did the funds for initial investments came. I shall concede for the sake of argument that during the assessment years in question the assessee was doing the business as claimed by her and she was earning income, but the most important question which remained unanswered was where did the funds come from during the accounting year 1-4-1967 to 31-3-1968, the period when she started her investments. Thus no inquiry, as required was held, the first reason given by the Tribunal for setting aside the order of the Commissioner was thus unsound. The order of the Tribunal suffers from serious infirmily on that score.

11. The second reason for cancelling the order

of the Commissioner was that it was in contravention of the principles of natural justice. Let us examine this aspect of the matter. It cannot be disputed for a moment that any quasi judicial authority-which I shall assume an Income-tax Commissioner to be-must decide with an unbiased mind and impartially and that a judicial which includes a quasi judicial authority cannot permit its judgment to be influenced by matters not disclosed to the assessee. In elaboration of this proposition the Tribunal observed that there was no good reason to reject the affidavits which stood corroborated by report of the Inspector. Let us examine this matter. The affidavits leave us high and dry in regard to the source of the initial capital investments. The affidavit of Manu Lal Prasad only shows that he had some dealing in linseed with Pushpa Devi-the assessee in the years 1968, 1970 and 1972. He does not claim to have any connection with the assessee for the years 1967, 1969 and 1971. The affidavit of Deoraj Agrawal is much worse. He did not state in which accounting year he had pledged cloth and taken loan. Neither of these two affidavits showed where did Pushpa Devi get the capital to indulge in these investments. Conceding every word what is said in the affidavits, yet they shed no light on the crucial questions thrown up in the case. Conceded that she was doing business of pawn broking and in linseeds, who provided the funds for them. The affidavits were not worth the paper on which they were scribed. Can any body deny that the Commissioner had the jurisdiction to reject the affidavits. If he had jurisdiction to accept, he must be conceded the jurisdiction to reject. If the affidavits had touched upon the core question, it may well have been said that the Commissioner could not have rejected them without calling upon the assessee to produce witnesses for cross-examination, but as they did not impinge upon the real issue, the question of calling upon the assessee

to produce the persons who had sworn the affidavits for cross-examination did not arise. In the view I have taken, the decision of the Supreme Court in *Mehata Parckh and Co.* versus *C.I.T.*(1) has no relevance. That was a case where the affidavits had relevance to the main question.

12. The Tribunal also seems to have relied upon the written statement of the assessee. Two facts stated in her written statement are rather significant. The first is that the assessee had been married twenty years earlier. The second fact contained in paragraph 2(d) which I have quoted earlier, is that the petitioner (assessee) had about Rs. 22,500/- by way of cash gifts from parent's side as well as from father- in-law's side at the time of marriage. In the first view one is prone to accept the case of the assessee at its face value, but an analysis thereof shows that the assessee herself does not claim to be possessed of Rs.25,000/- but only of Rs. 22,500/-. A Question which naturally stand out is if those had been received by her at the time of her marriage, where and in which form were they kept till 1-4-1967 when she started earning the income. It is difficult to concede that in the house of a business man Rs.24,500/- which was no mean sum in 1952-53 when she was married, the entire sum remained a dead asset till 1968. I am inclined to agree with the Commissioner in the view that he took in paragraph 4 of his order that the assessee would not have kept her money idle for such a pretty long time, in the background of the fact that her husband was a business man. Further the explanation mentioned in paragraph 2(d) of the written statement said the light of the

(1) 30 I.T.R. 181

day only on 11-12-1974. Neither the affidavits nor the written statement were before the I.T.O. The I.T.O. had before him merely Ipse dixit of the assessee and the report of the Inspector. The Commissioner was thus amply justified in remanding the matter for examining the case of the assessee. He did not pass a final order, but directed the I.T.O. to make "a close scrutiny as to the extent of initial capital". In my view, therefore, the second reason of the Tribunal for cancelling the order of the Commissioner was fallacious and untenable.

13. The third reason for the Tribunal to have cancelled the order of the Commissioner was that the order was based upon surmises and conjectures, as there was nothing on the record to show that the sums belonged to the husband of the assesee and that she was merely a Benamidar. I regret, I am unable to endorse the view of the Tribunal. What is sometimes dubbed as surmises and conjecture is nothing but application of common sense, A judicial authority or tribunal is not precluded from applying a little or its common sense, It is true that in the instant case, there was nothing to show that the intial capital came from the husband, but if the assessee failed to show the source of her initial capital investment , anybody would be justified in con-cluding that the funds must have been provided by the husband, This would be applying a little common sense and no surmises or conjectures. The Commissioner was permitted to apply his common sense. Whether the source of the funds which constituted the initial capital investment came from the husband would in most cases be a question of inference to be drawn from a totality of facts, The Revenue cannot produce direct evidence in that behalf unless the assesee or the husband made a confession

thereon before the Revenue or any other authority. It is not the law that in the absence of any confession, an inference in regard to the source of the initial capital investment when the assessee is a married lady cannot be drawn. I do not intend to dilate upon this aspect in any greater detail, as the assessee is likely to be prejudiced in the assessments before the I.T.O.Suffice it to say, that the conclusion of the Commissioner was neither susrmises nor conjecture. It was mere application of common sense. It is , therefore, not necessary to advert to and distinguish the cases referred to by the Tribunal in paragraphs 15 of its order.

14. We now come to the last ground advanced by the Tribunal, namely, the earlier decision of the Tribunal in the case of Shrimati Rambha Devi versus I.T.O. The decision in that case is subject matter of reference before this court in Taxation Case Nos, 21 to 23of 1978. It has, therefore, to be considered by us whether that case was rightly decided by the Tribunal, The issues which fell for consideration before the Tribunal in the case of Rambha Devi were the following;

"(1) Whether the Commissioner had passed this order after giving the assessee an opportunity of being heard?

(2) Whether from the materials on record it appeared that the assessments had been completed after making proper enquiries as required under the instructions and whether the enquiry made could be held to be proper in respect of the claims made by the assessee in her covering letter as well as the returns filed?

(3) Whether the orders of the Income-tax officer were erroneous in so far as they were perjudicial to the interest of Revenue?

(4) Whether the Commissioner of Income-tax could revive the assessment orders passed under section 143(1)if those orders were passed in pursuance of the scheme launched by the Board?

15. The first question does not arise in the instant case, as it is amply clear that notice had been issued to the assessee and in response thereto written statement and affidavits were filed, After parties were heard, the Commissioner passed the impugned order.

16. The second issue in Rambha Devi's case was the same as ground no i in the instant case, namely, whether the assessment orders had been passed with or without enquiry,as required under the instructions. I have already discussed that matter earlier and I am of the view that the Tribunal was not correct in the instant case in holding that it was not correct that the assessment orders had been passed without enquiry regarding the intial capital, the nature and real extent of the income and its true ownership. The decision of the Tribunal in Rambha Devi's case in this behalf was not correct. Mr.P.D.Mathur, vice -president, appellate Tribunal, observed in paragraph 18 of his order that the Scheme of assessment envisaged by the order of the Central Board of Direct Taxes relaxed the rigors of enquiry and investigation to be made.

17. If the rigors of an enquiry and investigation had been relaxed by the Scheme of the Board, the order of the Tribunal would have been perfectly justified. Let us , therefore, peruse the Scheme, I have quoted earlier the salient aspects of the Scheme. In paragraph 4 it has been specifically stated that" *returns of income filed in the names of minors and ladies should not, however, be accepted without proper enquiries*". What is the content of this sentece. In my view, it clearly means that minors and ladies. were not coverd by the Scheme. It applied to others and not minors and ladies. They not having formed part of the Scheme, there was no relaxation for them. No spot assesment was to be done in the case of return filed by minors and ladies, They must have been excepted precisely on the ground that unscrupulous assessees might endeavour to lessen the tax burden upon themselves by filing returns in the names of their wives and minor children. I must confess, I have some difficulty in appreciating that if the Scheme did not apply to minors and ladies, how the rigors of enquiry and investigation was reduced in their case. It is well established that Circulars of the Board issued in exercise of powers under section 119 have a binding effect and the Revenue are bound to act upon them. It is not necessary to labour on that question, but the moot question is whether the Scheme encompassed ladies and minors. I am clearly of the view that it did not. If it did not include them, any discussion on the binding character of the orders of the Board have no relevance. The Vice- president Mr, Mathur took note of the fact that the Scheme of the Board made a distinction between the adult male assessees and assessees who are ladies and minors, He rightly observed that the distinction was done because government found some

unscrupulous assessees having huge income may be trying to reduce the rate of the tax applicable to them by showing the income in the names of ladies and minors to whom lower rate of tax was applicable. He rightly observed that in the case of ladies and minors the proper enquiry required to be made was only to confirm whether ladies and minors were Benamidars of some other assessees whose income was taxable at higher rate of tax. Was that done? Certainly not. Having missed the central point, the Tribunal fell into a grievous error in holding that the assessment had to be completed within the period of grace. Not to complete it within that period would be denying to a lady or minor assessee to the benefit of the Scheme. I regret the majority conclusion of the Tribunal is fallacious, The law in regard to assessment was not modifed so far as ladies and minors were concerned. In the course of mass Communication when ever a return was filed by a lady or a minor, it could have been accepted , but could not have been disposed of in terms of the Scheme. It should have been treated as an original assessment proceeding with all the rigors in regards to initial capital investment, No connection or amelioration of the procedure in their case was envisaged These assessments had to be completed in terms of section 143(3) and where it was prejudicial to the Revenue the Commissioner would be fully justified in setting aside such assessments. In fact, in the course of mass Communication if a return was filed on behalf of a lady or a minor, the I.T.O. would have been fully justified in not accepting them at the spot and calling upon them to file the return in the Depatment as if the Scheme did not exist, There is slight distinction on facts between the case of Rambha

Devi and the case of the present assessee. In the former case the return had been filed on 22- 12 - 1972, the inspector of income-tax conducted inquiry on 27-12-1972. Thereafter, assessment was made. Thus there was atleast a gap of five days between filing of the return and the assessment. What difference the gap of five days would have, would be a matter to be considered when the reference in the case of Rambha devi is taken up by this Court. But in the instant case, the return was filed on 14-12-1972, and the Inspector's enquiry was completed on the same day and the assessment was made on the very same day for all assessment years except 1973-74 at the spot Mr. P.D.Mathur distinguished the case of *Thalibai F.Jain and others* (1) of the Karnataka High Court on the footing that the I.T.O. had made the assessment without enquiry and evidence and in undue haste. The situation in the instant case, is exactly similar. The filing of return, the enquiry and assessments were all done on, the same day. I am, therefore, firmly of the view that the enquiry, if at all there was any, was conducted in undue haste. If any enquiry worth he name was conducted,. the attention of the Inspector and the I.T.O. was not directed towards ascertainment of the core question, namely, when and from where did funds come and whether the case of the assessee in regard there to was gullible. The enquiry not having been directed towards that question, it was noenquiry. The scheme did not liberalise matters for the assesses, who was a lady, wife of a trader. The assessment thus on the basis of such enquiry was clearly erroneous.

(1) (101) I.T.R. 1.

18.That brings us to the question of jurisdiction of the Commissionor under section 263 of the Act to cancel assessment and direct a fresh assessment. If the assessment in erroneus, it must be presumed to be prejudicial to the interest of the Revenue. The finding of the Commissinor in this case was that the order of assessment was prejudicial to the interest of the Revenue, as the assessee may have been a mere Benamidar of her husband. It is true that the Commissioner did not record a concluded finding that she was a Benamidar. But if he had done so, he would have laid himself open to the charge that the dice had had been loaded against the assessee. The Commissioner, therefore, rightly only ordered further investigation in to the claim of the assesee. Upon this finding if the funds had been provided by the assessee's husband, the income would be taxable in his hands over which a higher rate of tax may have been applicable, in that situation, the order of assessment of the wife would be per se prejudicial to the Revenue., It does not need much argument to convince that if the procedure adopted by an I.T.O. brings in lesser Revenue, then some other procedure, the order would obviously be prejudicial to the Revenue. If that is so, the order of asseement is prejudicial to the Revenue. It cannot be doubted that the Commssioner would have the jurisdiction to act in terms of section 263and order cancellation of the previous assessment and direct fresh assessment , Reliance placed by learned Senior Standing Counsel in this regard in *Smt. Tara Devi Aggarwal* Versus

Commissioner of Income-tax West Bengal(1): is well placed. The Supreme Court in that case observed that -

"Even where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to the interests of the revenue."

The case of the Supreme Court in *Ram Pyari Devi Saraogi* verus *Commissioner of Income-tax, West Bengal and others* (2) also supports the Revenue. The majority view of the Tribunal distinguishes those cases on some misconception.

19. Reference may also be made to the case of *Shakuntala Devi* versus *Commissioner of Income-tax , West Bengal-I* (3). That was also a case of a new assessee. The lady , for the asessee was a lady, filed return for the assessment years 1955-56 to 1961-62. The I.T.O. completed the assessments after making an uniform addition of Rs.1200/= in each of the assessment years, thereafter, the Commissioner of Income-tax issued notice under section 33-B of the Income-tax Act, 1922(which was equivalent to section 263 of the 1961Act). The Commissioner

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(1) (1973) 88 I.T.R.323

(2) (1966) 67 I.T.R.84

(3) (1971) 82 I.T.R.416

cancelled the assessments holding that they were erroneous and prejudicial to the Revenue for various reasons and directed the I.T.O. to assess afresh after making proper enquiry and investigation. The appeals by the assessee before the Tribuanal were dismissed as being withhout merit The Calcutta High Court took note of the observation of the Commissioner that the I.T.O.was not justified in accepting the claim in respact of initial capital investment without any enquiry or evidence whatsoever. In that connection their Lordships at page 429 observed as follows;

" As we have observed before, the acquisition of the initial capital is a *link and a crucial link* at that, it the chain of the assessees explanations with regard to the incomes that she had received."

From the above, it will be seen that an enquiry into the source of the initial capital is crucial for the I.T.O. If that is not done, the assessment is bound to be erroneous and hence prejudicial to the Revenue,

20. Let us for the time being forget the Scheme. If there was no such scheme as in the present case, and if the assessee had filed a return- would her return be accepted without proper investigation as to the source of her intital capital investment , The answer obviously would be in the negative. In such a situation, therefore, order for assessment without enquiry would be clearly erroneous. Being erroneous the Commmisioner obviously would have jurisdiction to act in terms of section 263 of the Act. The reply of the assessee is that the situation in the instant case is different because of the existence of the scheme. We have, therefore, to look to the contents of the

scheme. I have elaborted earlier my views that the Scheme did not cover ladies and minors. The Vice President does not seem to dispute this position as may be seen from his observations at the end of paragraph 16 of the order , The Scheme not being available to the assessee a reguler enquiry and investi gation was a must , The assessments in the case of the assessee had to be done by the ordinary process. That being so, the Commissioner cannot be denied the jurisdiction to act in terms of section 263 of the Act. In fact, it is obligatory upon him to exercise the jurisdiction where the order of assessment is erroneous and prejudicial to the interests of the Revenue. , Not being covered by the Scheme , the assessee had to be assessed in terms of section 143(3) and not in terms of section 143 (1) of the Act.

21. It is somewhat intriguing that the learned Vice -President having conceded in paragraph 16 that the Scheme made a difference between the adult males on the one hand and ladies and minors on the other yet got divested to the Scheme. The question whether the benefit of the liberaliastion Scheme would be available to the assessee or not became Cadit Quasetio. In paragraph 22 the learned Vice -President observed;

"In the instant case before me I am concerned with the assessments which have been made under section 143(1) in accordance with the scheme launched by the Central Board of Direct Taxes to help new tax payers in small income group, In the said scheme the procedure for assessment has also been prescribed. Thus, if the assessments made by the Income-tax officer in accordance with the scheme of the Central Board

of Direct Taxes to help new tax payers in small income group the question of filing an appeal to the Appellate Assistant Commisssioner by the Department could not have arisen even if there was a legal provision in the Act for such on appeal In others words, if the assessments made are on the lines suggested in the Scheme to help new tax payers the said assessments cannot be considered by the Commissoner of Income tax as erroneous in so far as they were prejudicial to the interest of Revenue.'

I regret , I am unable to find the relevance of the above observation. Once it is conceded, as it must be that the liberalisation scheme did not extend to ladies and minors, the entire observation of Mr. Mathur was irrelevent.

22. Upon consideration of the entire materials and law was on the subject, I am alearly of the view that the Commissioner did not exceed his jurisdiction in exercising his power under section 263 and cancelling the assessments. The law laid down in the case of Rambha Devi was incorrectly decided. The fourth ground, therefore, advanced by the Tribunal in the instant case also falls to the ground.

23. None of the grounds advanced by the Tribunal, therefore, have any substance. The Tribunal in the instant case must be held to have erred in setting aside the order of the Commissioner.

24. Learned Senior Standing Counsel for the Revenue invited us to hold that even in cases falling within the Scheme, the Commissioner was not divested of his jurisdiction under section 263 of the Act.

According to him, if an order of assessment was erroneous, it would obviously be prejudicial to the interests of the Revenue and, therefore, even in those cases, the Commissioner would have the jurisdiction to cancel the assessment and order re-assessment. It is not necessary for us to go into that larger question in regard to the jurisdiction of the Commissioner where there is a scheme. The instant case is an exception carved out by the scheme itself and, therefore, the larger question advanced by learned Senior Standing Counsel for the Revenue need not be answered.

25. The assessment for the assessment year 1973-74 and the order of the Commissioner in that behalf is another chapter. Obviously this was not within the Scheme period. I have held earlier that the Scheme did not apply to ladies and minors. This assessment year was outside the period of the Scheme. The assessment for this year had, therefore, to be conducted in terms of section 143(3) of the Act. The order of the Commissioner having been upheld in regard to the earlier assessment year 1973-74 also was perfectly valid. The I.T.O. had no jurisdiction to complete the assessment for 1973-74 (A.Y.) as if the Scheme applied, in terms of section 143(1) of the Act.

26. In my view, therefore, the Tribunal was not right in holding that the assessment orders had been passed by the I.T.O. after necessary enquiries in pursuance of the Scheme. It was not right in holding that the order of the I.T.O. was not erroneous so as to enable the Commissioner of Income-tax to assume jurisdiction under section 263(1) of the Act. The first question must, therefore, be answered in favour of

the Revenue and against the assessed.

In regard to the second question, the Tribunal was not right in holding that the Commissioner of Income-tax did not follow the principles of natural justice before passing the impugned order.

In regard to the third question, I hold that the Tribunal was not right in holding that the impugned order of the Commissioner of Income-tax was based upon mere surmises and conjectures and, therefore not valid.

In regard to the fourth question, it has to be held that the Tribunal did not decide the case of Rambha Devi versus I.T.O (I.T.A.Nos. 1713 to 1715 of 1974-75) correctly. The Tribunal was not right in holding that the Commissioner of Income-tax could not legally set aside the order of assessment made under section 143(1) in pursuance of the Scheme "to help the new tax payers in the small income groups" evoived by the Goverment.

In regard to the fifth question, it has to be held that the Tribunal was not right in holding that the Commissioner of Income-tax acted in a mechanical manner in setting aside the assessment order for the assessment year 1973-74. His order for this assessment year was not invalid.

The answer to question No.6 must be as a follow-up of other answers, that the Tribunal was not right in cancelling the consoldated order passed by the Commissioner of Income-tax under section 263(1) of the Income-tax Act, 1961 for the assessment year 1968-69 to 1973-74.

27. All the question, referred to us, are thus answered in favour of the Revenue and against the assesses. The references are thus answered iagainst the assessee and in favour of the Revenue with costs. Heering fee Rs.250/= (Rupees two hundred and fifty) payable by the assessee to the Revenue.

28. Let a copy of this judgment be transmitted to the Income-tax Appellate Tribunal in terms of section 260 of the Income-tax Act, 1961.

Ashwini Kumar Sinha, J: I agree

R.D. *Question answered*

CRIMINAL WRIT JURISDICTION

Before S.S.Sandhawalia, C.J. and Ram Nandan Prasad, J.

1986

July, 11

Mishri singh.

v.

The State of Bihar and others.

Code of Criminal Procedure, 1973, (Central Act II of 1974), section 309- physical production of an accused before the Magistrate, whether necessary for extension of his remand to custody - failure to do so, whether vitiates the order of remand.

Held, that, though it is desirable that the accused should be present before the Magistrate but such physical production is not inflexibly mandatory for extending his remand to custody and failure to do so would not vitiate the same.

Raj Narain v. Superintendent, Central Jail, New

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* Criminal Writ Jurisdiction Case No.37 of 1986. In the matter of an application under Articles 226 and 227 of the Constitution.

Delhi and Anr.(1) and M. Sambasiva Rao v. *The Union of India and others*(2). relied on.

Application by the accused.

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

The case in the first instance was placed before a single Judge, who refered it to a Division Bench On this refrence.

Mr. K.K.Mandal for the petitioner

Messers Chittartanjan Sinha No.1, C.K.Sinha, Government Pleader I, and Mrs. Kusum Lata Sinha, Standing Counsel for the respondents.

S.S.SANDHAWALIA, C.J., whether the physical production of an accused before the Magistrate is inflexibly mandatory for extending his remand to custody, and the failure to do so would vitiate the order- is the significant question necessitating this reference to the Division Bench.

2. The facts relevant to the aforesaid issue may be noticed with relative brevity. The petitioner has preferred the present habeas corpus petition on the allegation that he was arrested on the charge of murder under section 302 read with section 34 of the Indian Penal Code on the 29th of April, 1985 and was remanded

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(1) (1971) A.I.R. (S.C.) 178

(2) (1973) A.IR. (S.C.) 850

to jail custody by the Subdivisional Judicial Magistrate, at Biharsharif. Thereafter his remand was extended from time to time The petitioner's grievance is that he was not physically produced before the Judicial Magistrate at Biharsharif on the 23rd December, 1985, 6th January, 20th of January, 1986 and 3rd of February, 1986 and 4th of February, 1986, when orders for extending his remand in custody were passed by the Magistrate. Inter alia, it is the case that the production of the petitioner for the extension of his remand was mandatory and this having not been done, the order of further custody stands vitiated.

3. In the affidavit filed on behalf of the first informant in the case, apart from highlighting the heinousness of the offence, it is averred that the petitioner is a hardened criminal and is an accused in several cases including Sessions Trial Case No.315 of 1981, G.R.103 of 1978 and G.R.57 of 1978 which are also pending against the petitioner for trial. In view of this, obvious difficulty and an impossibility arise when the petitioner accused is to be produced on the same date in more than one case. It has been averred that on the 23rd of December, 1985 and 6th of January, 1986 the petitioner was produced before Shri A.P.Verma, subdivisional Judicial Magistrate, Biharsharif, Nalanda, and shri Pathan respectively and further on the same day,. i.e., 6th of January, 1986 he was also produced before the 2nd Additional District and Sessions Judge, Nalanda. On the 4th of February, 1986 the petitioner was produced before the 2nd Additional District and Sessions Judge and consequently could not be produced in the court of the Magistrate. Again it was pointed out that on the 20th of February, 1986 the petitioner accused was sick as was indicated by the medical report and, therefore, could not be produced in court, on that day. Lastly it is pointed

out that the accused petitioner was actually produced before the Magistrate on the 4th of March, 1986 when his remand was extended and any earlier irregularity, if at all, with regard to the remand would stand cured.

4. It may be recalled that on the 3rd of March, 1986 the issue of interim relief was strenuously pressed before us. It was contended that since the petitioner admittedly was not produced, his further remand to custody would be vitiated. Learned counsel for the State at the stage was unable to pinpoint any provision of law or precedent exempting production of an accused for the purposs of further remand. In that view of the matter, the accused was directed to be released forthwith on his furnishing a bail bond in the sum of rupees ten thousand. It is not in dispute that in pursuance of that order the petitioner has been released.

5. We are inclined to the view that the crucuial question herein stands concluded by binding precendent and it is, therefore, unnecessary to elaborate the matter on principle. In *Raj Narain v. Superintendent, Central Jail New Delhi and another* (1) this very issue came up pointedly before a Bench of seven Judges. By a majority of 5:2 it was held therein that the presence of the prisoner before the Magistrate was not inflexibly necessary for the extension of his remand. Chief Justice Hidayatullah, speaking for the majority, observed as under:-

"There is no reason why we should order the release of Mr. Raj Narain when we are satistied that he is held on a proper remand by a magistrate and

(1) (1971) A.I.R. (S.C.) 178

there are no circumstances justifying release by us. To "expect the Magistrate to do more under Sec. 344 of the Code in such circumstances is to expect an impossibility from him and the law does not contemplate an impossibility. Indeed, similarly courts trying cases may find it necessary to order a remand in the absence of an accused, e.g. when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to court and in such case the order made without production of accused in court will not be invalid.'

Learned counsel for the petitioner made a vain attempt to wriggle out of the aforesaid authoritative enunciation by harping on the samewhat different facts of that case. It is true that the matrix of facts in the said case was somewhat different in the conte of the requirement of presence of the petitioner Raj Narain before the Lordships of the Supreme Court. However, the principle in the aforequoted observation appears to us as plainly one of general application and cannot be negated by any finical distinction drawn on a particular fact of the said case. However, if any doubt remains on the issue, the same would stand dispelled by the subsequent brief but never the less the unequivocal observations in *M.sambasiva Rao* v. *The Union of India and others* (1). There in it was unhesitatingly observed as under:-

"The petitioner's complaint is that he and the other accused have not been produced before a magistrate for remand, as required by the Criminal Procedure Code, but have been kept in jails and the remand orders have been passed in their absence,

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(1) (1973) A.I.R. (S.C.) 850

which according to the petitioner, is illegal;

"This contention, however, is not sustainable having regard to a Full Bench decision of seven Judges of this court, reported in Raj Narain v. Superintendent, Central Jail, New Delhi 1971 (2) SCR 147: (AIR 1971 SC 178) which by majority of five to two has held that the remand cannot be considered to the invalid merely because an accused has not been produced before the magistrate.

6. In the light of the aforesaid enunciations, the answer to the question posed at the outset is rendered in the negative. It is held that though it is desirable that the accused should be present before the Magistrate but such physical production is not inflexibly mandatory for extending the remand and failure to do so wold not vitiate the same.

7. Once it is held as above, the primal contention raised on behalf of the petitioner must necessarily be rejected. This criminal writ jurisdiction case is consequently dismissed. The interim order of 3rd March, 1986 is vacated and it is directed that the accused petitioner be forthwith taken into custody.

Ram Nandan Prasad, J., I agree

M.K.C. *Petition dismissed*

TAX CASE

Before Uday Sinha and Ashwini Kumar Sinha,JJ.

1986

September,8

*The Commissioner of Income-tax, Bihar, Patna.**

v.

Rajeshwari Prasad, Advocate.

Assessee --- throwing his house property, which he earlier returned as 'Individual; in the general hotchpoch and returning the same as 'H.U.F.'for the purpose of the assessment --- income from the house property, whether individual income of the assessee.

Where the assessee return his income with regard to the house at Patna treating the house property in the status of 'Individual' till assessment year 1967-68, but in the accounting year 1967-68 he claimed that the house had been thrown in hotchpot of his Hindu Undivided Family hereinafter referred to as 'H.U.F.'

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* Taxation Case Nos. 170, 171,175 and 176 of 1976. Re: Statement of case under section 256 (1) of the Income tax Act, 1961 by the Income-tax Appellate Tribunal, 'B'Bench Patna in the matter of assessment of Income-tax on Rajeshwari Prasad for the assessment years 1968-69 and 1969-70 and by the Income-tax Appellate Tribunal, Patna Bench 'A', Patna for the assessment years 1970-71 and 1971-72.

consisting of himself, his wife and his daughter and claimed that the income from the house property should be assessed separately as the property of the 'H.U.F.' and therefore he did not include the income from the house property in his return of individual income;

Held, that the Income Tax Appellate Tribunal was not correct in holding that the disputed property belonged to the 'H.U.F.' consisting of the assessee, his wife and daughter. It could not be treated as H.U.F.property. The income therfrom had to be treated as individual income of the assessee.

The declaration by the assessee throwing the separate property in the common hotchpot made no difference. The right of the members of the 'H.U.F.' did not get enlarged for the reason that the property was thrown into the family hotchpot.

Statement of case under section 256 (1) of the Income Tax Act, 1961.

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

Messrs B.P. Rajgerhia (Sr. S.C., I.T.D.) and S.K. Sharan, (Jr. S.C.I.T.D.) for the petitioner in all the cases.

Mr. A.B.S. Sinha for the opposite partyin all cases.

UDAY SINHA AND ASHWINI KUMAR SINHA, JJ.: These are four references under section 256 (1) of the Income-tax Act, 1981 (herein after to be called 'the Act'). In these references we are concerned with assessment years 1968-69, 1969-70,1970-71 and 1971-72. The facts are common to all the four references. so are the questions referred to us for

our opinion. The question referred to us in Taxation Case Nos.190 and 191 of 1976 is as follows:

"Whether on the facts and in the circumstances or the case, the Tribunal was correct in holding that the disputed property belongs to the H.U.F.consisting of the assessee himself his wife and daughter, consequent upon the declaration made by the assesse on 16-11-1967 ?

The very same question forms question No.1 in Taxation case No.175 and176 of 1976. The second question referred to us in the later two references is:

"2. whether on the facts and circumstances of the case, the Tribunal were correct in law in admitting a fresh piece of evidence which was not produced either before the I.T.O.or the A.A.C. without giving the Department an opportunity to examine the same?"

2. The substantial question is whether the Tribunal was correct in holding that the disputed property had to be treated and assessed as property of the Hindu Undivided Family (hereinafter to be called the HUF) consisting of the assessee, his wife and daughter. In order to appreciate the questions falling for consideration before us, it is essential that we must take notice of some facts.

3. The assesse is now dead. He was a Practising Advocate of this state at Patna. He had a house in this town of Patna. In regard to it, he returned his income treating the house property in the status of 'Individual' till the assessment year 1967-68. In the accounting year 1967-68 he claimed that the house had been thrown in the hotchpot of his H.U.F. consisting

of himself, his wife and his daughter. He claimed that the income from the house property should be assessed separately as property of the HUF and therefore it had not been included in his return of individual income.

4. The Income-tax officer (hereinafter called 'the I.T.O. ') did not accept the claim of the assessee in regard to the house property nor did it find favour with the Appellate Assistant Commissioner (hereinafter called 'the A.A.C.'). The Tribunal, however, took a different view of the matter. Before the Tribunal it was contended that although the house had been constructed out of the professional income of the assessee, yet with effect from 16-11-1967 the house property having been thrown in the common hotchpot, it was imprest with the character of H.U.F. property. The Tribunal referred to certain letters which had been filled before the I.T.O. in which it had been claimed that the part of the cost of construction was met out of the landed properties of the assessee which had come to him on the partition of his joint family which then consisted of himself, his two brothers and his father. A copy of the assesse's declaration dated 16-11-1967 was filed before the Tribunal. In that letter it was mentioned that Rai Bahadur Durga Prasad, father of the assessee died in 1939. There was a partition in the family in 1939 in which the assessee got some landed properties. By that letter the assessee declared that by virtue of the fact that the house had been constructed partially from funds which had accrued from properties, which were joint family properties, it had to be treated as H.U.F. property although the major portion of the costs had been met out of the professional income of the assessee. The Tribunal rejected the claim of the assessee that the house property was joint family property since 1952. The Tribunal, however, took the view that by the assessee's declaration dated 16-11-1967, throwing the disputed

property in the common hotchpot of the H.U.F. consisting of himself, his wife and daughter it had become the asset of the assessee's H.U.F. and the income from that property was not accountable in the hands of the assessee in his individual capacity. The view that the Tribunal took was based upon the decisions of the Supreme court in *Dr. A.R.Shukla versus Commissioner of Gift Tax, Gujarat* (1) and *Coli* Hawariah *versus Commissioner of Gift Tax, Andhra Pradesh* (2) In that view of the matter, the Tribunel directed that on and from assessment year 1968-69 the income from house property had to be assessed as in the H.U.F. property. The Revenue being aggrieved by the order of the Tribunal tresting the income from house property as income of H.U.F. has got the references made to us.

5. The relavant findings of fact thus are that the house property was property of the individual till assessment year 1967-68. The seemed finding of the Tribunal was that by the declaration of throwing this property into hotchpot, the house property was imprest with the character of H.U.F. property, Upon these finding of fact let us consider whether the Tribunal was right in the view that it took.

6. Mr. B.P.Rajgarhia, learned senior Standing Counsel for the petitioner submitted that the present cases fell within the expanse of the decision of the Supreme Court in *Surjit Lal Chhabda versus*

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(1) (1969)74 I.T.R.167

(2))1970) 76 I.T.R. 675

Commissioner of Income-tax, Bombay (1) . Learned counsel for the assessee, on the other hand, contended that the case falls within the ambit of *N.V.Narendranath versus Commissioner of Wealth-tax, Andhra Pradesh* (2). Let us see how not tere stend ? .

7. The facts in the case of *Surjit Lal Chhabda* (Supra) were that for the accounting year 1956-57 corresponding to assessment year 1957-58 the appellant (assessee) declared by a sworn statement before a Presidency Magistrate in Bombay that the house property known as 'Katho ke Lodge'had been thrown by him into the 'family hotchpot' in order to impress it with the character of joint family property and that he could be holding it as Karta of the joint Hindu family consisting of himself, his wife and an unmarried daughter. Upon these facts the question referred to the High Court under section 66(1) of the Income-tax Act, 1922 was "whether, on the facts and in the cuircumstances of the case, the income from property known as 'Katho ke Lodge' was to be assesseed separately as the income of the H.U.F. of which the assessee was the Karta?" The facts thus in that case were exactly identical to those of the present case. The submissions advanced on behalf of the assessee and the Revenue were exactly the same as those before us. The Supreme Court reviewed the decision of the Privy Council in *Kalyanji Vithal Das versus C.I.T.* (3). Parts there of it were explained

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(1) (1975) 101 I.T.R. 776.

(2) (1969) 744 I.T.R. 190

(3) (1957) 5 I.T.R. 90 (P.C)

by the Supreme Court, but in substance, the Supreme Court relied upon it. The Supreme court considered the cases of the Supreme Court in *GowliBudianna versus Commissioner of Income-tax* (1) and *N.V.Narendranath's* case (Supra) and held that although 'Katho ke Lodge' could be described as property of the family after it was thrown into a common stock, but it did not follow that in the eye of Hindu family], it belonged to the family, as it would have, if the property were to devolve upon the appellant as a sole surviving *copancener.*

8. Since reliance has been placed onbehalf of the assessee on the case of *Naredranath* (Supra), it is meet that we should take note of the manner in which the case of *Narendranath* (Supra) was distinguished by the Supreme Court. The Supreme Court observed:

"In both of these cases, Gowli Budiadnna's and Narendranath's, the assessee was the member of a pre-existing joint family and had, in one case on the death of his father and in the other on partition, became the sole sirviving *coparcener.* But the decision in those cases did not rest on the consideration that there was an *antecedent* history of jointness. The alternative argument in gowli Buddenna's case (page 226 was an independent argument uncorrelated to the preexistence of a joint family. The passage which we have extracted from the judgment of Shah J. in that case shows that the decision of this court did not proceed from any such consideration. The court held in terms categorical that the Hindu undivided family as an assessable entity need not consist of at least

(1) (1966) 60 I.T.R. 293.

two male members. The same is true of the decision in Narendranath's case (see Page 826). "

The Supreme Court further observed as follows:

"Having examined the true nature of an undivided family under the Hindu law and in view of the findings of the Tribunal and the High Court on the second aspect, two points emerge clear; firstly, that the appellant constituted a Hindu undivided family with his wife and unmarried daughter and, secondly, that Kathoke Lodge which was the appellant's separate property was thrown by him into the family hotchpot. It remains now to consider whether the income of Kathoke Lodge must be assessed in the hands of the appellant as an individual or whether it can be assessed in his status as manager of the Hindu undivided family. "

It will thus be seen whereas in the case of *Narendranath* (Supra), property was of the H.U.F. from its inception and, therefore, the fact that there was only one male member could not deviate from the condusion that it had to be treated at all times as H.U.F. and the income therefrom would be assessed as such. The case of *Surjit Lal Chhabda* (Supra) was decided on the footing that although there was an H.U.F., the property was not property of the H.U.F. and in that regard we can do no better than quote the observations of the Supreme Court. The Supreme Court observed as follows:

"In this connection, a distinction must be drawn between two classes of cases where an assessee is sought to be assessed in respect of ancastral property held by him: (1) where property not originally joint is received by the assesses and the question has to be asked whether it has scquired the character of a joint family property in the hands of the assessee

and(2) where the property already impressed with the character of joint family property comes into the hands of the assessee as a single coparcener and the question required to be considered is whether it has retained the character of joint family property in the hands of the assessee or in converted into absolute property of the assessee."

And further at page 793 the Supreme Court observed:

"There are thus two classes of cases, each requiring a different approach. In cases falling within the rule in *Gowli Budianna's* case, the question to ask is whether property which belonged to a subsisting undivided family ceases to have that character merely because the family is represented by a sole surviving coparcener who possesses rights which an owner of property may possess. For the ,matter of that, the same question has to be asked in cases where the family, for the time being, consists of widows of decessed coparceners as in *Commissioner of Income-tax v. Ms. Ar. Veereppa Chettiar* (1970) 76 ITR467, 470 (SC) so long as the property which was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided amongst them. In cases falling within the rule in Kalyanji's case, the question to ask is whether property which did not belong to a subsisting undivided family has truly acquired the character of joint family property in the hands of the assessee. In this class of cases, the composition of the family is a matter of great relevance for, though a joint Hindu family may consist of a man, his wife and daughter, the mere existence of a wife and daughter will not justify the assessment of income from the joint family property

in the status of the head as managert of the joint family. The appellant's case falls within the rule in Kalyanji's case since the property, before it came into his hands, was not impressed with the character of joint family property. It is of great relevance that he has no son and his joint family consists, for the time being, of himself, his wife and daugher. "

Ultimately, the Supreme Court observed as follows:

"These two sets of tests, both evolved by the Privy Council, govern two distinct sets of cases and there is no inconsistency between the two tests. The test evolved in Kalyanji's case., not in Arunachalam's or *Gowli Buddianna's* case, has to be applied to the instant case.

Kathoke Lodge was not an asset of a pre-existing joint family of which the appellant was a member. It became an item of joint family property for the first time when the appellant there what was his separate property into the family hotchpot. The appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever. Their prior right to be maintained out off the income of Kathoke Lodge remains what it was even after the property was thrown into the family hotchpot: the right of maintenance, neither

more nor less. Thus, Kathoke Lodge may be usefully described as the property of the family after it was thrown into the common stock, but it does not follow that in the eye of Hindu law it belongs to the *family,* as it would have, if the property were to devolve on the appellant as a sole surviving coparcener."

9. The facts of the present case as found are exactly the same as in the case of *Surjit Lal Chhabda* (Supra). In this case also although there was an H.U.F. , but the declaration also throwing the separate property into the common hotchpot made no difference. The rights of the members of the H.U.F did not get enlarged for the reason that the property was thrown into the family hotchpot. The house property of the assessee could be described as property of the family after it was thrown into the common stock, but as observed by the Supreme Court in *Surjit Lal Chhabda's case* (Supra), it did not follow that in the eye of Hindu law it belonged to the family, as it would have, if the property were to devolve on the assessee as a sole surviving coparcener. The property of the appellant put in the common stock, could change its legal incidents on the birth of a son. But that event not having come to pass, the property in the eye of Hindu law, was really of the assessee, He could deal with it as a full owner unrestrained by considerations of legal necessity or benefit of the estste. He could sell or mortgage that or make a gift of that. Even a son born or adopted after alienation would have to take the family hotchpot as he found it. In that view of the matter, the present case is governned by the case of *Surjit Lal Chhalada* (Supra) and not by the case of *Narendranath* (Supra). There is thus no escape from the position that the Tribunal was not correct

in holding that the disputed property belonged to the H.U.F.consisting of the assessee, his wife and daughter. It could not be treated as H.U.F. property. The income therefrom had to be treated as individal income of the assessee. The question thus referred in Taxation Case Nos.170 and 171 of 1976 and the first question in the other two cases must, therefore be answered in favour of the Revenue and against the assessee.

10. In the view that we have taken of the aforesaid question, the second question referred to us has become academic and need not be answered. We, therefore, refuse to answer the second question. since the assessee is now dead, the references are answered without costs.

11. Let a copy of this judgement be transmitted to the Assistant Registrar to the Income-tax Appellate Tribunal, Patna in terms of section 260 of the Income-tax Act, 1961.

R.D. *Question answered*

CIVIL ,WRIT JURISDICTION

Before Prabha Shanker Mishra and Madan Mohan Prasad, JJ.*

1986

September,9.

*Tata Yodogawa Limited.***

v.

The Union of India & others.

Central Excise Rules, 1944 --- Rule 8 sub-rule (1) --- Notification No.66 of 1973 and 152 of 1977 --- issued under --- exempting steel Ingots falling under Item No.26 of first schedule of Central Excise and Salt Act, 1944 --- Steel Ingots manufactured from scraps answering the description in Notification No. 66 of 1973 and other articles manufactured from Ingots in terms of Notification No.152 of 1977, whether exempted from Excise duty.

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* Sifting at Ranchi

*Civil Writ Jurisdiction Case Nos. 337 & 338 of 1981(R). In the matter of anplications under Articles 226 and 227 of the Constitution of India.

Tata Iron and Steel Co. Ltd. -- Petitioners in C.W.J.C. 338/81 (R).

Steel ingots falling under Item No.26 of First Schedule of Central Excise and Salt Act, 1944, answering the description specified in the notification no.66 of 1973 --- C.E. dated 1-3-1973 issued under sub-rule (1) of Rule 8 of Central Excise Rules, 1944, were exempted from excise duty provided that on the scraps the appropriate duty of excise leviable had already been paid and by notification no.152 of 1977 dated 18-6-1977 the scraps used for producing ingots were also exempted and as such the writ petitioners who have integrated steel plant and manufacture ingots with the aid of electric furnace had got no liability to pay any excise duty on the scraps in view of the exemption by notification no.152 of 1977 and on other products from such steel ingots also they have the exemption in view of the notification dated 1-3-1973 and 18-6-1977.

Held, that the writ petitioners are not lible to pay any excise duty on the ingots which have been manufactured from the scraps which answered the description in notification No.66 of 1973 and on other articles manufactured from the ingots by them in terms of notification No. 152 1977. The writ petitioner, Tata Iron & Steel Company is exempted from any excise duty on the scraps in terms of notification no.150 of 1977. They have accordingly no liability to pay the demands.

Case laws discussed.

Applications under Articles 226 and 227 of the Constitution.

The facts of the cases materials to this report are set out in the judgment of P.S.Mishra, J.

The cases in the first instance were placed before a learned Single judge, who referred them to a Division Bench.On this reference

Messrs R.J.Joshi and F.H.Taleyar Khan for the petitioner in C.W.J.C.No.337 OF 1981 (R).

Messrs K.D.Chatterjee, Bishwanath Prasad and *B.P.Verma* for the petitioners in C.W.J.C.No. 338 OF 1981 (R).

Messrs Debi Prasad and A.Sahay for the respondents in both cases.

P.S.MISHRA, J. -- A learned single Judge of this Court has referred these two cases to a Division Bench recording in his order "I consider that the questions involved are of great significance and considerable importance." Except differing in a few descriptions and details about payment of the excise duty, these two cases involve common questions for determination. They have, accordingly, been heard by us one after the other and are being disposed of by this common judgment.

2. The petitioner in C.W.J.C.No.337 of 1981(R), namely, Tata Yodogawa Limited, Jamshedpur (hereinafter to be called as "Tayo") owns a factory at Adityapur in the City of Jamshedpur where ingots are manufactured out of the scraps received from the main works of the Tata Iron and SteelCompany Limited (hereinafter described as "Tisco"), the petitioner in C.W.J.C.No.338 of 1981(R).They receive the scraps under an agreement to convert the scraps belonging to the Tisco into steel ingots in which agreement the scraps as well as ingots remain the property of Tisco.The Tisco which obtain the scraps in their main

works which is an integrated steel plant and admittedly the scraps fulfil the description of "fresh unused steel melting scrap" (hereinafter referred to as "the scraps") also convert scraps into ingots in one of their subsidiaries and from ingots received from Tayo and ingots produced by them, they manufacture various kinds of products like billets, blooms etc. Besides receiving scraps from Tisco Tayo also purchase scraps to make ingots for sale to other parties.

3. It is not in dispute that ingots produced by the petitioners answer reference to the description of goods in Item No.26 of the First Schedule to the Central Excise and Salt Act, 1944 (hereinafter referred to as "the Act") and excise duty is leviable at the ingot at the rate specified therein. The Central Government exercising its powers conferred by sub rule (1) of Rule 8 of the Central Excise Rules, 1944 (hereinafter to be called as "theRules") issued notification No.66 of 1973-C.E. dated 1.3.1973 (Annexure1) exempting steel ingots falling under Item No.26 of the First Schedule to the Act from the whole of the duty of excise leviable thereon, provided that-

> "(a)all such ingots are manufactured exclusively from fresh unused steel melting scrap on which the appropriate duty of excise leviable under the aforesaid Item No.26 of the said First Schedule has already been paid; and
>
> (b)no set off or proforma credit has been availed of in respect of the duty paid on such steel melting scrap used in the manufacture of such steel ingots."

It issued yet another Notification No.150 of 1977-C.E. dated 18.6.1977 in exercise of the powers

conferred by the said sub-rule exempting fresh unused steel melting scraps of the types commonly known as (i) skull scraps,(ii)broken ingot moulds, (iii) butts and shorts, (iv)mould splashings which arise in steel melting shops, and (v) furnings and borings, falling under item No.26 of the First Schedule to the Act from the whole of the duty of excise leviable thereon, provided that-

> "(a) such fresh unused steel melting scrap is cleared direct from an integrated steel plant and it is proved to the satisfaction of an officer not below the rank of an Assistant Collector of Central Excise that such scrap is intended to be used as melting scrap in the manufacture of steel ingots or semi-finished steel, as the case may be, by a manufacturer manufacturing such ingots or semifinished steel with the aid of electric furnace; and
>
> (b) the procedure set out in Chapter X of the Central Excises Rules, 1944 is follows."

4. Tisco who are liable to pay the excise duty on their steel products, do not dispute their liability to pay such duty in respect of the products which fall under Item No.26-AA of the First Schedule of the Act, but they refer to a notification issued by the Central Government vide Notification No.152 of 1977-C.E. dated 18.6.1977, which says that the Central Government has exempted iron or steel products falling under item No.26-AA of the First Schedule of the Act and specified in column (2) of the table there to annexed, from so much of the duty of excise leviable thereon as is in excess of the duty specified in the corresponding entries in column (3) of the said table, subject to the conditions laid down in the corresponding entries

in column (4) thereof. Column (2) in serial No.2 of the table mentions "all products falling under sub-item (ia) of Item 26AA (other than rails and sleeper bars specified in Serial No.3)."In the proviso thereto it is stated as follows:-

> "provided that where the products mentioned in the Table are made from steel ingots, falling under Item No.26 of the aforesaid Schedule, which have been cleared from the factory, prior to the 18th day of June, 1977, on payment of duty at the appropriate rate, the duty specified in the corresponding entries in column (3)of the Table shall be reduced by two hundred rupees per metric tonns;
>
> provided further that where the products mentioned in the Table, other than bars and rods, falling under sub-item (ia) of Item no.26 AA referred to in srial No.3 of the Table, are made from semi- finished steel on which duty at the appropriate rate has already been paid, or from steel ingots falling under Item No.26 of the aforesaid Schedule which are cleared from the factory on or after the 18 th day of June, 1977 on payment of duty, the duty specified in the corresponding entries in column (3) of the Table shall be reduced by three hundred and thirty rupees per metric tonne;
>
> provided also that where the duty paid on steel ingots or semi-finished steel, as the case may be, used in the manufacture of any quantity of the products mentioned in the Table is in excess of the duty leviable on such products, the amount eligible for adjustment towards the exemption shall be restricted to the amount of duty leviable on the quantity of the said products:

provided also that in the case of the products mentioned in the Table and manufactured with the aid of electric furnace from any of the following materials,namely,

(i) old iron or steel melting scrap;

(ii) a combination of the material referred at(i)with fresh unused steel melting scrap on which the appropriate duty of excise has been paid; and

(iii) iron in any crude form falling under Item No.25 of the said First Schedule on which the appropriate duty of excise has been paid, in combination with the materials referred to at (i)and(ii);

the duty specified against the corresponding entries in column (3) of the Table shall be reduced by three hundred and thirty rupees per metric tonne."

5. Apparently to answer certain doubts which had been created on various terms in the tariff Item Nos, 26.and 26 AA of the First Schedule to the Act a clarification was made by the Central Goverrnment stating that where duty on melting scrap is nil the manufacturers of ingots would be eligible for exemption under Notification Nos. 152 of 1977 and 153 of 1978.This notification has posed the question-

" Whether the expression "fresh unused steel melting srap on which appropriate duty of excise has been paid," appearing in the last proviso of the notification No.152/77- C.E. dated 18.6.1977 also covers the specified types of fresh unused steel melting scrap which are conditionally exempted under notification No.150 /77 -C.E dated 18.6.1977,"

and has been answered-

" assessment includes nil duty and the expression paid has to be construed to mean 'contracted to be paid' and it is not necessary that some amount of duty should have been assessed and actually paid for interpreting the said expression. Specified types of melting scrap which are exepted under Notification No. 150/77 -C.E. are thus to be treated to have paid the appropriate duty of excise for eligibility to duty reduction in terms of the 4th proviso to each of the Notification Nos ,.152/77 -C.E. and 153/77-C.E. as amended."

6. The petitioners have alleged that understanding the law and knowing that the scraps satisfy the description of the notification of the exemption and the ingots also answer the descriptions fully, treated their steel ingots exempted from the excise duty and continued with that until a letter came from the Central Board of Excise and customs on 18.8.1980 advising the collector of Central Excise, Patna that the duty was leviable on ingots, pussuant to the said advice , on 18.9.1980 the Deputy Collector of Central Excise, Patna issued a letter containing instructions to the officers concerned to levy duty on the ingots and on 9.2.1981 the Superintendent of Excise, Jamshedpur asked the petitioners to pay duty on steel ingots and to move a fresh classification list, The petitioners thereafter represented against the above order on 25.2.1981 but on 5.3.1981 the Superintendent of Excise, Jamshedpur approved the classification list regarding steel ingots without granting exemption, and on 6.3.1981 the Assis- tant Collector upheld the order dated 9.2.1981 of the Superintendent of Excise on the ground that the classification issued by the Central Government stating that where the duty of melting scrap is nil the manufacturers of ingots would be eligible for exemption did not apply for exemption under Notification No,66 of 1973.

7. Side by side it appears that the demands were made and in the case of Tayo it came on 17.2.1981, for the period September, 1980 to the 7th March, 1981, bearing no . 89376 for the period April, 1979 n to August, 1980 bearing no. 98377, and for the period September, 1980 to March, 1979 bearing no .89378. In the case of Tisco (C.W.J.C.No.338 of 1981 (R)) demand notice was given to them on 18.2.1981 for the period form 20.11.78 to 18.6.80 vide demand no .89381, for the period from September, 1980 to 9.2.81 vide demand no. 89379 and for the period from, 19.6.80 to August, 1980 vide demand no .89380.

8. From the facts stated above it emerges clearly that the steel ingots answering the description specified in the notification no.66/73-C.E dated 1.3.73 were exempted from excise duty provided that on the scraps the appropriate duty of excise leviable had already been paid and by a notification issued on 18.6.1977 the scraps used for producing ingots were also exempted, as according to the petitioners, Tisco is an integrated steel plant and they manufacture ingots with the aid of electric furnace, Tisco, is further submission is that it has no liability to pay any excise duty on the scraps in view of the exemption by a notification dated 18.6.1977 and on other products from such steel ingots also they have the exemption in view of the notification dated 1.3.73 and 18.6.77.

9. In their return the respondents have hardly questioned any fact, but according to them, excise duty is leviable on the ingots manufactured as the scraps which they used was such on which the appropriate duty of excise had not been paid and either on such scraps or on ingots or on other products from ingots the Tisco is liable to pay the excise duty.

10. In view of the stand taken by the parties before us contentions are limited to the interpretation that they put to the words used in the notification dated 1.3.73 namely, by which the appropriate duty of excise leviable ... has already been paid".

11. Mr, R,J,Joshi who has appeared for Tayo, and Mr,K.D. Chatterjee who has appeared for Tisco, have contended that-(i) the words "already been paid"appearing in the proviso to Notification No.66/73 must be read to mean,required to be paid or ought to have been paid or contracted to have been paid and in that the assessment to nil duty on the scraps must mean duty already been paid; (ii) that the respondents are estopped from making any demand and are precluded by the principle of promissory estopel from taking any steps or proceedings to recover any excise duty on the basis that their earlier representations were a mistake; and (iii) that the demands are barred by limitation prescribed under Section 11-A of the Act as also for the reason that as prescribed therein the respondents never served any notice calling upon them to show cause within six months of the date when the duty was allegedly short paid.

12. It has to be seen that the clarification in respect of the expression " fresh unused melting scraps" on which duty of excise has been paid, appearing in Notification No. 152/77 dated 18.6.1977. has made no reference to the Notification No.66/73 dated 1.3.1973, yet one can notice in it administrative construction for the said expression and by reference to contemporania expositio apply the same meaning to the words in notification No.66/73 also. Before doing so, however, it has to be borne in mind that the petitioners have not denied their liability to pay the

excise duty but have claimed exemption in terms of Notification No.66/73 Until june, 1977 all types of steel melting scraps were assessable to the full rate of duty and in terms of Notification No .66/73 those receiving scraps and manufactruring ingots were exempted subject to the duty paid by the transferee or as in the case of Tisco by paying duty on the scraps thus claiming exmption from duty on the ingots. By Notification No. 150/77 fresh unused melting scraps of certain types only as specified therein were exempted from excise duty provided that-

> "Such fresh unused steel melting scrap was cleared direct from an integrated steel pant, was intended to be used as melting scrap in the manufacture of steel ingots and was so used by a manufacturer manufacturing steel ingots with the aid of electric furnace."

13. We have already noticed that it is not in dispute that Tisco is an integrated steel plant and the scraps were used in the manufacture of steel ingots with the aid of electric furnace both by Tayo and by Tisco, although Notification No. 150/77 is not a general exemption for all fresh unused steel melting scraps, the petitioners may have a claim if they satisfy the condition that the duty leviable on the scraps had already been paid. Since the scraps so used by the petitioners were also exempted from the duty by Notification No. 150/77, the scraps were assessed to nil duty-payment. The question thus naturally arises whether on such exemption and nil assessment the ingots manufactured from the scraps by the petitioners, are liable to any excise duty or not. It is in this context that a clarification was needed and it was so needed to clarify the Notification No, 150/77 as

also the Notification No. 66/73. The clarification came but in however, the words used in Notification no. 150/77 were taken for interpretation and, as noticed above , it was said that the assessment include nil duty and the expression paid had to be construed to mean contracted to be paid and it was not necessary that the same amount of duty had actually been assessed and actually been paid. The petitioners have asserted and the respondents have not denied that accepting the said interpretation to apply to the ingots manufactured by them, they (the petitioners) were exempted from payment of any duty until they received demand notices and it was only when further advice came from the Central Board of Excise and Customs to the Collector of Central Excise, Patna on 18.8.1980 that they were asked to pay duty on the ingots.

14. In the letter addressed to the Collector of Central Excise, Patna, dated 18.8.1980 it has been stated that Notification No. 150/77 exempted fresh unused steel melting scraps from the whole of the duty of excise leviable thereon subject to the fulfilment of the conditions specified therein. If ingots were manufactured out of the scraps mentioned under Notification no. 150/77 duty exemption could not be availed of under Notification No 66/73 as on the fresh unused steel melting scraps appropriate duty of excise had not been paid. It is further stated in the said letter that since no duty had been paid on the fresh unused steel melting scrap, no exemption could be allowed under Notification No. 66/73 dated 1.3.1973, and that the instructions contained in the Board's latter dated 30.8.1977 made it clear that the specified types of scraps which are exempted under Notification No. 150/77, were to be treated for eligibility

to duty reduction in terms of 4th proviso to Notification No.152/77 and 153/77.

15. I have already referred to the contents of the Notification No 150/77. One cannot fail to notice that by the said notification certain specified types of fresh unused steel melting scraps have been exempted from duty, but by Notification No. 152/77 which too has already been noticed by me the exemption has been extended to the products from steel ingots falling under Item No. 26 of the First schedule of the Act. The stage at which the exemption in terms of the notification No. 152/77 can be availed of is after the scraps are converted into ingots and the ingots thus become available for conversion into other items manufactured by the petitioners. It is obvious therefore, that no exemption can be claimed in terms of the Notification No, 152/77 unless the duty is paid on the ingots and any exemtion of ingots has to be claimed only in terms of Notification No.66/73. No exemption can be claimed under Notification No66/77 unless the duty is paid on the scraps and we have already said that such exemption can be claimed for scraps under notification No. 150/77.

16 In the case of *Cape* Brauday *Syndicate vs. Inland Revenue Commissioner*(1) rule of construction applicable to the taxing statute has been stated in the following words;

"In a taxing act one has to look merely at what s clearly said. There is no room for any intendment.

(1) (1921) I.K.B. 61, 71

, there is no equity about a tax.There is no presumtion as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used,"

In the case of *A.V. Fernaendez* vs *State of Kerala* (1) the law has been stated by the Supreme court in the following words:

"If... the case is not covered within the four corners of the povisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

As to the interpretation of such statute in the case of *gursahe Saigal* vs, *Commissioner of Income - tax Panjab(2) the Supreme Court has gone a step further and has stated:*

" The provision in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction that is to say, in accordance with the clear intention of the legislature which is to make charge level effective a i/d ....

We do not here have to resort to any equitable rule of consturetion or to alter the meaning of the language used or to add to or vary it in order to arrive at the conclusion that the provision intended to impose a liability to pay interest...

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(1) (1957) A.I.R. (S.C) 657

(2) (1963) A.I.R. (S.C) 1062

17. In yet another case the very words with which we are concerned fell for interpretation before the Supreme Court in the case of *N.B.Sanjana* Vs. *the Elphinstone spinning and weaving mills Co. Ltd* (1) a rule which said-

"Recovery of duties or charges short-levied, or ernoneously refunded. When duties or charges have been short- levied through inadvertance, error, collusion or mis- construction on the part of an officer, or through mis- statement as to the quantity, descriptiorn or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made , shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owners account- current, if any, or from the date of making the refund".

had fallen for interpretation.The supreme court has by the said pronouncement, established two propositions:

(1) expression paid in the context of a particular statute may mean ought to have been paid and (2) Nil assessment may mean assessd to duty. It has referred to a judgment of the court of appeal in the

(1) (1971) A.I.R. (S.C.) 2039

case of *Allen* Vs *Thorn Electrical Industries Ltd* (1) and has said-

The literal meaning of the expression "paid" as actually paid in cash has again not been adopted by the Court of appeal in the case of *Allen* vs *Thorn Electrical Industries Ltd* (1968-- I Queens Bench 487)

Having regard to the context in which the said expression appeared in the particular provision which came up for interpretation, the court of appeal construed the said expression to mean "contracted to be paid".

18. The expression 'paid' in the rule quoted above was given a meaning in the context of the law under consideration by the Supreme Court and it found no error in reading the expression "paid as ought to have been paid" the law stated by the supreme court without any ambiguity makes one aware that the literal meaning of the expression 'paid' as actually paid in cash need not be accepted.

19. Coming closer to the facts of this case, there is yet another decision by the supreme court in the case of *Assistant Collector of Central Excise, Calcutta* Vrs. *National Tobacoo Co . of India Ltd.* (2). Considering rule 10 of the rules, the supreme court has stated as follows;-

"The term ' levy' appears to us to be wider in its import than the term 'assessment'. It may include both 'imposition' of a tax as well as assessmant. The

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(1) (1968) I.Q.B. 487

(2) (1972) A.I.R. (S.C) 2563

term 'imposition' is generally used for the levy of a tax or duty by legislatve provisions indicating the subject matter of the tax and the rates at which it has to be taxed. The term 'assessment' on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate 'levy' with an 'assesement' as well as with the collection of a tax when it held that when the payment of tax is enforced, there is a 'levy'. We think that although the connotation of the term 'levy' seems wider than that of 'assessment', which it includes, yet it does not seem to us to extend to 'collection'. Article 265 of the Constitution makes a distinction between 'levy' and 'collection'. We also find that in *N.R. Sanjana vs. the Elphinstone Spinning and Weaving Mills, co. Ltd.* A.I.R. 1971 S.C. 2039 at page 2045 this court made a distinction between 'levy' and 'collection' as used in the act and the rules before us. It said there with reference to rule 10:

"We are not inclined to accept the contention of Dr, Sayed Mohammad that the expression 'levy' in R10 means actual collection of some amount.The charging provision section 3(1) specifically says; There shall be levied and collected in such a manner as may be prescribed the duty of excise... It is to be noted that sub-section (1) uses both the expressions levied and collected, and that clearly shows that the expression 'levy' has not been used in the Act or the Rules as meaning actual collection."

20 One need not dilate and enter into a quest of authority on the subject as in the case of *Sulekh*

Ram and Sons vs. *Union of India and others (1)* the Delhi High Court has considered the effect of the expression "duty already paid" in a similar Notification No. 206/63 and has stated;

"If the Excise duty on the re-rollable scrap was payable only by the Hindustan Steel Ltd. namely, the manufacturer and never by the petitioner, namely, purchaser what would be the mealning to be attached to the word 'already' in the notification granting the exemption ? If this word is used to mean 'actually' then the exemption would not be available to the petitioner in the present case.Such a construction would, however, be contrary to the system of recovery and levy of excise duty under the Act and the Rules This system secures that in all cases excise duty is recoverd from the manufacturer before the goods are removed from the factory premises. Purchaser of goods from such a manufacturer are entitied to rely upon the system and to presume that the duty had already been recovered from the manufacturer. The exemption authorities issued instructions to purchasers of re -rolllable scrap that goods manufactured by such pruchasers from re-rollable scrap could be removed from the premises of such purchasers without observing the procedure prescribed by rule 9(1).

It would be intolerable if the purchasers of manufactured goods were to be required to ascertain. whether excise duty on the manufectured goods had already been paid by the manufacturer before the sale of such goods or not. Purchaser would have no means of knowing it. Hundreds and thousands of purchsaers

(1) (1978) E.L.T.J. 525

of such goods are made and in no case can any attempt be made by the purchaser to know this fact from the manufacturer, This is why the excise Authorities allowed the petitioner and other persons manufacturing goods fron re-rollable scrap to remove their goods from their premises without following the procedure under Rule 9(1)and without payment of duty under Item No. 26AA(ia) of the First Schedule. In view of this context it would be proper to construe the words 'already paid to' mean that the excise duty must to have been paid at a prior stage or ought to have been paid at prior stage They do not mean that the exvisse duty was actually paid at a prior stage."

21. The same very meaning has been extended to the expression 'already paid' by the High court of Gujarat in the case of Steel Authority of India *Collector of Central Excise, Calcutta* (1) Although interpreted in a different context and for the reasons stated in the judgement, Despande,j. (as he then was in the Delhi High Court) has noticed the relevane of interpreting the words "already paid" to mean 'contracted to be paid' or ought to have been paid. There is no reason why the same meaning be not given to the words used in Notification no .66/73 when in the hands of Tayo the scraps were in the capacity of a transferee for the purpose of manufacturing ingots and even in the hands of the Tisco who may have the liability to pay duty on the scraps since the scraps answered the requirement of the description in the said notification, no daty was payable by them on the ingots,

(1) (1984) F.C.R. 1336

22. Proceeding further, Notification No. 150 /77 has exempted from duty even the scraps and when a duty paid may mean a duty contracted to have been paid on the exemption by Notification No. 150/77, the Tisco may be said to have contracted the said duty and thus have paid it to satisfy the requirement of Notification No 66/73 To this interpretation one can find support from contemperania expositio by the respondents. It is well settled that the administrative construction, i.e.contemporaneous construction placed by adminstrative or executive officers charged with executing a statute generally should be clearly accepted as they do it and follow it realising the true purport of the law, The exemptions are exeptions introduced by the notifications and when they interpreted the notification initially did not make any demand of duty from the petitioners in respect of the ingots manufactured by them. For them, the words" already paid" could not have one meaning to interpret Notification No. 150/77 and another to interpret Notification No.66/73.

23. The advice contained in the letter dated 18.8.1980 of the Central Board of Excise and Customs to the Collector of Central Excise, Patna has neither stated the context nor any reason not to give the same meaning to the words "already paid" used in Notification No. 66/77 as one given to the words used in Notification No.150/77. There is apperently no reason to extend the exemtion end apply the above interrotation to Notification No.66/73 and not to Notification No. 63/73. In their submissions before us the respondents have failed to give any cogent reason for not acknowledging in the words " duty already paid"the meaning the duty contracted to have been paid."

24. Since I have taken the view that a the duty already paid used in Notification No. 66/73 must, on the facts of this case, mean the duty contracted to have been paid no consideration of other contentions raised by the learned counsel is necessary. I do, however, feel duty bound to say that the law of the land has recognised as a rule enshrined in the conduct of the state the rule of promissory astoppel.

25. In the case of *M/s. Motilal Padampat Sugar Mills Co Ltd, vs, The State of Uttar Pradesh and others* (1) dectrine of promissory estonnel has been extended to apply to the statutes which in the words of Bhagwati. j. is a principle evolved by equity to avoid injustice and though commonly named 'promisory estoppel' is neither in the *realm* of contract nor i the realm of estoppel. Where one party has by words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the either party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not.

26. It has been extended to a case of assessment of excise duty by the Supreme Court in the case

(1) (1979) A.I.R. (S.C.) 621

of *Union of India and others vs, Godfrey Philips India Ltd* (1) the Supreme Court has said that the doctrine of promissosry estoppel is applicable against the Government in exercise of its Governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. Of course there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. The doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority bound by the promise or representation made by it the court would not raise equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority.The doctrine of promissory estoppel would be displaced in such a case. But once it is found from their conduct otherwise the Government and other public authorities realised the purport of law and acted accordingly later, it would

(1) (1986) A.I.R. (S.C.) 806

be inappropriate to allow them to go back from their words, It is in this context that the rule of promissory estoppel may reasonably be applied in the instant case and the respondents may be asked to desist from demanding duty from the petitioners without showing that they are obliged to do so under a law that commanded them to act and also commanded the petitioners to pay duty.

27. The last but not the least is an argument which too must fairly be considered and disposed of. It has been urged before us by the learned counsel for the petitioners that assuming that the duty was not levied although it was so required to be levied in terms of Item No 26 and Item No.26 AA of the first Schedule to the Act the respondents could not realise the same without following the procedure laid down in section 11A of the Act. Section 11A(1) of the Act says as follows:-

> "when any duty of excise has not been levied or paid or has been short - levied or short-paid or erroneously refunded, a central excise officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short- levied or short-paid or to whom the refund has erroneously been made,requiring him to show cause why he should not pay the amount specified in the notice:
>
> Provided that where any duty of excise has not been levied or paid or has been short- levied or short- paid or erroneously refunded by reason of fraud, collusion or any wilful mis- statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there-under with intent to evade payment of duty,

by such person or his agent, the provision of this sub- secion shall have effect, as if for the words "six months" the words 'five years' were substituted."

It is not in dispute that no notice to show cause was given to the petitioners within the statutory period of six months for any of the demands.

28. The learned counsel for the state has, however, submitted that in the instant case the words "six months" should be read as " five years" as the duty was not levied upon or paid by the petitioners by reason of fraud, collusion and wilful mis- statement and suppression of facts. He has submtted that even if no case of fraud collusion, wilful mis- statement or supperession of fact is found, it is a clear case of contravention of the provisions in Item No.26 to the First Schedule of the Act and, therefore, the notice served upon the petitioners within five years is well within time. It is not possible, however, to accept the contention of the learned counsel for the respondents for the simple reason that there could be no contravention by the petitioners when the scraps were, as noticed above, assessed to nil duty and on ingots they claimed exemption under Notification No 36/73. There is no case of fraud, collusion wilful mis- statement and/or suppression of facts before us. The respondents were obliged in terms of section 11-A of the act to serve a notice upon the petitioners to show cause and since no notice was served upon them within the statutory period of six months, they are not liable to pay the demands in question.

29. Before I part with this judgment I may refer to the argument advanced by the learned counsel for the respondents on the ground of alternative remedy to the petitioners which they should avail of. It is

clearly a case in which the petitioners were banking upon the interpretation given to the words "duty already paid " in the clarification issued by the central Government about the exemption under notification No 152/77 and 153/77 and un-till February, 1981, as stated above, they were allowed to avail the exemption. It was Central Board of Excise and Customs which turned the table by advising the Collector of Central Excise, Patna to levy duty in respect of the ingots and the demands were served upon the petitioners.

30. It is well settled that a party should not be asked to seek alternative remedy once the application is admitted for hearing by the court, apart from that, any action which is without any authority of law or without jurisdiction, can be directly questioned before this court and for that no alternative remedy can be found in any statute. Once it is noticed that certain authority has acted without any authority of law or without jurisdiction, it is obvious that the party affected by the action has no alternatve remedy to move the court of law. Such observations have been made repeatedly by this court and more than once the Supreme Court has said that if such action is taken under invalid law or without jurisdiction no person can be denied his right to invoke the jurisdiction of the court in exercise of its power under article 226 of the Constitution of India merely because some alternative remedy is suggested by the respondents.

31. Having considered the case in all its aspects, I am of the view that the petitioners are not liable to pay any excise duty on the ingots which have been manufactured from the scraps which answered the descriptions in Notification No 66/73-C.E.and on other articles manufactured from the ingots by them in terms of Notification No .152/77.The petitioner-Tisco

is exempted from any excise duty on the scraps in terms of notification no 150/77- C.E. They have accordingly no liability to pay the demands.

32 In the result the two writ applications are allowed, the demands contained in Annexures 4,5 and 6 in C.W.J.C. No.337 of 1981(R) and annexures 5,6,7, & 8 in CWJCNo 333 of 1981(R) are hereby quashed and the respondents are restrained from demanding any excise duty from the petitioners and treat the scraps, ingots and other articles produced from the ingots exempted so long the above three notiications are in force. Let a writ in the nature of certiorari and consequential mandamus accordingly be issued. The respondents shall pay to the petitioners the costs of litigation, hearing fee Rs.250/- only.

Madan Mohan Prasad,j. I agree.

R.D. *Application allowed*

CIVIL WRIT JURISDICTION

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

1986

September, 11.

Sheoshankar Prasad Sinha and others.

v.

The State of Bihar and others

Bihar and Orissa Co-operative Societies Act, 1935 (B &O Act VI of 1935), section 66-B scope and applicability of--special officer of the Central Co-operative Bank terminating the services in obedience to the direction of the State Government who had no jurisdiction to issue the direction-order terminating the services, whether illegal and liable to be quashed.

Where the special officer of the Central Co-operative Bank who had the authority in law to terminate the services of the petitioners and others in accordance with law for some valid reasons, did not do so in exercise of his own discretion or his own judgment but in compliance of the direction of the State Government which had been communicated

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*. Civil writ jurisdiction Case No 1043 of 1986. In the matter of an application under Articles 226 of the Constitution of India.

to him through the Additional Secretary of the co-operative Department as also through the Deputy Commissioner;

Held, therefore , that the impugned order of termination of the services of the petitioners as also the direction of the State Government cannot be sustained in the eye of law and has to be quashed. Section 66-B of the Bihar and Orissa Co-operative Societies Act, on which reliance was placed, does not even speak about the termination of services, far from authorising the State Government to issue any direction in this regard.

Application by the petitioners.

The facts of the case material to this report are set out in the judgment of Ramnandan prasad,j.

M/s Yogendra Mishra & Mithilesh Kumar khare for the petitioners.

M/s Kamlapti Singh (G.P.VI), Ishwari Singh & Lalit Kishore, for the repondents.

RAMNANDAN PRASAD,J. This writ application has been filed for quashing an order of termination of the services of the petitioners dated 28-5-1985, a copy of which is Anexure- 11 to this writ application as also the direction of the Registrar, co-operative societies, Bihar, dated 26-6-1984, as contained in annexure-7, which motivated the passing of the impugned order (Annexure-11)

2. The case of the petitioners is that in response to an advertisement issued by respondent no.3 Deoghar-Jamtara Central Cooperative Bank (hereinafter referred to as the Bank) for the posts of peons, clerks, Stenographers and Typists, these five petitioners.

submtted applications for the posts of peons. In due course they were called for interview and were selected for appointment, These petitioners were eventually appointed as peons by letter dated 5-3-1984 issued by respondent no .3 and they joined their respective post. In due course they were also confirmed-petitioner nos. 1,2 and 4 by order dated 10-9-1984 and others by order dated 22-9-1984 : In fact, 43 appointments for different posts were made by respondent no .3 and all of them joined their posts in the same manner. After some time, however, the payment of salary was stopped to all the 43 employees including the petitioners and as such they represented their case before the Honorary Secretary of the Bank on 6-3-1985. The Honorary Secretary, however expressed his inability to pay their salary to them in view of the letter of the Registrar of the Cooperative Societies, Bihar (Annexure- 7).

3. Even before the issuance of the said letter dated 26-6-1984(Annexure-7) . an order for termination of their services was passed, which was challenged by some of the employees, namely, Binod Kumar Singh and others in C.W.J.C.No.4112 of 1983 in which their stand was that the Registrar, Cooperative Societies, Bihar, or even the State Government had no authority to terminate the services of the employees of the Cooperative Bank. This writ application was allowed by a Division Bench of this court which also quashed the order of termination of the services of the petitioners of that case, holding that the State Government or even the Registrar of the Cooperative Societies had no power to terminate the services of the employees of the Bank, annexure-8 is a copy of this judgement.

4. Inspite of the aforesaid decision, respondent no.2 i.e. Registrar of the Cooperative Societies, Bihar, directed respondent no .3 to terminate the services

of the petitioners and other employees of the Bank by his letter dated 26-6-1984(Annexure-7). Some of the employees affected by this order, namely, Bipin Pd. Singh and 18 others challenged the said order in C.W.J.C.No.2002 of 1985. A division Bench of this court, of which I was also a member, allowed this writ application and quashed the said order of termination (Annexure-7). A writ of mandamus was also issued to treat the petitioners as in service continuously from the date of their appointment and to make payment of their salary to which they were entitled to in accordance with law, Annexure-9 is the copy of this judgemnt. Respondent nos .3 and 4 moved the Supreme court in S.L.P. no 9695 of 1985 against this judgament, but it was dismissed on 10-10-1985.

5. In the menatime, on 28-5-1985 i.e. during the pendency of the special leave petition before the Supreme Court respondent no.3 terminated the services of all the 43 employees aforesaid including the petitioners, Annexure 11 is the copy of this order. It may be clarified here that by this time the Board of Directors of Deoghar-Jamtara Central Cooperative Bank had been superseded by the Government and the Deputy Commissioner of Deoghar was appointed as Special officer of the Bank and this order of termination (Annexure -11) has been passed by him. However, after the dismissal of the special leave petition by the Supreme Court respondent no.3 reinstated 19 persons, who were petitioners in C.W.J.C. No 2002 of 1985 by his order dated 19-11-1985 and refused to reinstate the present petitioners, as they were not the petitioners in the said writ petition.

The petitioners met the Executive officer of the Bank,namely, Deputy Commissioner in this connection

but to no result, and hence they have been forced to file this writ application.

6.Only the bank (respondent no.3) has filed a counter-affidavit. Its case is that the Executive officer of the Bank has issued an advertisement for appointment to the posts of Assistants ,Stenographers, Typists and peons, and many applications were received in response thereto. The Executive officer thereafter fixed 29-9-1984 as the date for interview, but the Deputy Commissioner, Deoghar,asked him not to do so, as proper procedure was not followed while inviting applications. Accordingly,theExecutive officer postponed the interview and communicated this fact to the secretary, Cooperative Departent, Government of Bihar, and others by his letter no. 387 dated 28-1-1985. But the then Honorary Secrtary of the Bank Sri Jawahar Prasad ignored the said advice of the Deputy Commissioner and the decision of the Executive officer to postpone the interview and proceeded to appoint 43 persons including these petitioners on purely temporary and ad- hoc basis, which was illegal on account of different omissions and commissions as enumerated in paragraph no.4(d) (e) of the counter-affidavit. It has been asserted that on account of these illegal appointments the Bank had to suffer a loss of Rs.96,000/-per year. All these appointments were made against anticipated vacancies which were likely to occur in view of the proposal to open new Branches which were, however, never opened. Indeed the Bank was running at loss and the loss had gone upto Rs.35.05 lakhs on 30-6-1983. On account of the arbitrary and illegal decision of the Honorary Secretary in appointing those 43 persons the liabilities of the Bank increased to Rs. 5. 28 lakhs per year. Neither any vacancy existed for these appointments nor the financial condition of the Bank permitted the appointment of so many persons, But, ignoring all

these considerations the Ex- Secretary made the aforesaid appointments, It has also been alleged that these appointees had no work at all and they used to draw their salaries without any work. It was in this background that the Deputy Commissioner, Deoghar, by his D.O Letter No.552 (residence) dated 9-3-1985 addressed to the Executive officer of the Bank cancelled the appointments made by the Bank and directed the Executive officer not to accept their joining report, The Executive officer, however, failed to persuade the ex-Secretary to cancel the appointments. When the state Government came to know about these illegal appointments, the Additional secretary to the Government of Bihar in the Cooperative Department by his Memo No 1141 dated 14-5-1984 directed the Honorary Secretary of the Bank to cancel the illegal and irregular appointments made by him after 1-1-1984.The Ex- Honorary Secretary, however, did not obey this direction of the State Government and went on paying salaries to these appointees Faced with this situation the State Government superseded the Board of theDirectors of the Bank and the said Honorary Secretary ceased to function with effect from 21-5-1985 on which date the Deputy Commissioner, Deoghar, took over as special officer of the Bank. All the powers of the Board of directors were vested in the special officer. The Deputy Commissioner, Deoghar, in exercise of his powers as Special Officer, cancelled the appointments of all the 43 persons on 28-5-1984(vide annexure-11) as the appointment of these persons was illegal.

7. The crucial question which arises for decision in this case is as to whether the order of termination of the services of the petitioners by the Deputy Commissioner-cum- Special officer of the Bank by his order dated 28- 5-1985 (Annexure-11)is valid or not, A perusal of the last portion of this order would show

that this order of termination was being passed in pursuance of the Letter No. 552 dated 9-3-1984 and Letter no 210 dated 9-3-1984 sent by the Deputy Commissioner, Deoghar, and Letter No. 1141dated 14-5-1985 of the Additional Secretary, Cooperative Department, Government of Bihar. The letter of the Additional Secretary has been annexed as Annexure-4 to the counter- affidavit,

8. This letter (Annexure-4) is addressed to the Honorary Secretary of the Bank and there is a clear direction therein to cancel the appointments, which, according to the Government, were made illegally for the reasons stated therein. There is a further direction therein that this order of the Government should be strictly followed, otherwise legal steps will be taken against the Board of Directors of the Bank. So there is a clear mandate of the state Government in this letter to the bank to terminate the services of the 43 employees and this mandate was sought to be enforced under the threat of dissolution of the Board of Directors of the Bank.

9. The aforsaid two letters sent by the Deputy Commissioner, Deoghar, to the executive officer of the Bank have been annexed as annexures 2 and 1 respectively to the counter, affidavit. These letters were sent by the Deputy Commissioner in the capacity of a functionary of the State Government and there is a direction therein to cancel the appointment as directed by the State Government.

10. Thus,there is a clear direction of the state Government in the aforesaid three letters to the respondent-Bank to cancel the said appointments forthwith. The order of termination (annexure-11) dated 28- 5-1985 passed by the special officer of the bank was evidently made in pursuance of the direcitons

contained in those letters and as such it cannot be said that the special officer of the Bank had acted independently in terminating the services of the petitioners and others. It has not been disputed on behalf of the petitioners that the special officer had the authority in law to terminate the services of the petitioners and others in accordance with law for some valid reasons, But the submission of the learned counsel for the petitioners is that in this case the special officer of the Bank has not exercised his own discretion or own judgement and had passed the order of termination simply in obedience to the direction given by the State Government which had been communicated to him through the Additional Secretary of the Cooperative department as also through the Deputy Commissioner of Deoghar, It may be a coincidence that at the time when the impugned order was passed the Deputy Commissioner happened to be the special officer of the Bank, but that would not change the position, as he had sent the two letters (Annexures 1 and 2)in the capacity of a functionary of the State Government and had passed the impugned order of termination in obedience to the directions of the state Government as contained in the letter of the Additional Secretary, in the capacity of the special officer of the Bank. So it is a clear case in which there has been no indepenedent decision of the special officer for terminating the services of the petitioners and others,and the order of termination has been passed by him in obedience to the direction of the State Government.

11. Now, the question arises as to whether the State Govt. had the legal authority to give direction for cancellation of the appointment to a Cooperative Bank. Learned counsel for respondent no.3 as well as learned Government pleader no.6 appearing on behalf of respondent nos.1 and 2 submitted that the

State Government had the authority to Issue such a direction under section 66-B of the Bihar and Orissa Cooperative Societies Act. This section is as follows;-

> "Notwithstanding anything contained in this Act or the rule and bye-laws made thereunder, the State Government may, from time to time, by special or general order, determine the nature and number of posts to be created and the mode of recruitment of personnel by cooperative societies and prescribe among other things;-
>
> (1) the qualifications, age and experience,
>
> (2) the pay scale and other emoluments,
>
> (3) the method of recruitment
>
> (4) the conditions of service, and
>
> (5) the disciplinary procedure to be followed."

12. A mere reading of this section would convince anyone that it does not authorise the State Government to issue a direction to a Cooperative Bank or Society for terminating the service of any of its employee. In fact, this section gives power to the State Government to lay down general policy with regard to the recruitment including the qualifications, age, experience ,pay scale etc. and the method of recruitment and the procedure to be followed therefor besides the conditions of service this section does not even speak about the termination of service, far from authoring the State Government to issue any direction in this regard. In fact,it does not envisage anything beyond the stage of appointment. A similar stand was taken on behalf of the state Government in C.W.J.C. No 4112 of 1983 and it was forcefully repelled by a Division Bench of this court.Similar view was taken by a Division Bench of

this court in C.W.J.C. No 2002 of 1985. As said above, the Special leave petition filed against the later decision was dismissed by the Supreme Court. So on principle as well as precedent the submission of the learned counsel for the respondents has simply to be noticed and rejected.

13. Thus, it is manifest that the State Government or any of its functionary had no jurisdiction to issue direction to the respondent-Bank to cancel the appointment of the petitioners. Of course, as said above, the Bank, in its own discretion could have cancelled the appointments in accordance with law,but here it is not a case in which the Bank has cancelled the appointment on its own. It is apparent from Annexure-11 that it is the instruction of the Government which motivated the special officer to terminate the services of the petitioners and others.In fact,the special officer issued the order of termination in obedience to the fiat issued by the state Government. Thus it is manifest that the order under Annexure-11 terminating the services of the petitioners was not passed by the Bank on the basis of its own judgement but was passed in compliance of the unauthorised direction of the state Government. The special officer complied with this direction without taking his own decision after examining the pros and cons of the matter.

14.That being so, the impugned order of termination (Annexure-11) cannot be sustained in the eye of law and has to be quashed. Since the State Government has no jurisdiction to issue such a direction, the direction of the State Government as contained in Annexure-4 to the counter-affidavit (letter of the Additional Secretary, Cooperative Dapartment dated 14-5-1984) has also to be quashed.

15. It is, however, made clear that this court

has not considerd whether the appointment of the petitioners and others was illegal and whether the same could be cancelled or terminated by the respondent-Bank. It will be upto the respondent-Bank to examine the matter and take a decision of its own in accordance with law.

16. In the result, this application is allowed and the order of termination of the services of the petitioners as contained in Annexure-11 to the writ application is quashed. Annexure-4 to the counter- affidavit,which is a letter dated 14-5-1984 sent by the Additional Secretary, cooperative department is also quashed. Respondent no 3. is directed to reinstate these petitioners with effect from the date of their termination. There would, however, be no order as to costs.

S.S.Sandhawalia C.J. *I agree*

S.P.J. *Application allowed*

CIVIL WRIT JURISDICTION

Before U.P Singh, J.*

1986

October,1.

*M/s Orissa Magnese and Minerals Pvt. Ltd.**

v.

The Commissioner of south Chotanagpur Division, Ranchi & ors.

Wilkinson's Rules---rules 14 and 31--rule 31--application under, having been enterrtained and considerd on merits whether could be defeated on the ground that appeal under Rule 14 was not filed---grant of ad-interim injunction by Additional Deputy Commissioner without assigning any-reason Validity of -principles and spirit of Code of Civil Procedure 1908, whether will apply in cases under the Wilkinson's Rules.

The Commissioner having entertained the application of the defendent under rule 31 of the Wilkinson's rules and considerd the case on merits, the same can not be defeated on the ground that an appeal under Rule14 should have been filed.

**. Sitting at Ranchi.

*Civil writ jurisdiction case No.199 of 1982 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

Where the plaintiff filed kolhan Money suit before Additional Deputy Commissioner for recovery of Rupees thirteen lacs and odd on account of the balance of the amount of advance made to the defendent from time to time for the price of manganese supplied by the defendent to the plaintiff together with interest and prayed for temporary injunction which was allowed without assigning any reason and the application by the defendent therefrom before the Commissioner under rule 31of the wilkinson's rules was rejected;

Held, that the orders of Additional Deputy Commissioner and the Commissioner did not assign any reason which was mandatory in accordance with the principles and spirit of the provisons of the proviso to Rule 3 of order 39 of the Code of Civil Procedure, 1908, for the courts to record and therefore, the orders are void.

Although the Code of Civil Procedure has no application and under Wilkinson's rules there is no provision for grant of injunction,the principle and spirit of Code of Civil Procedure will apply.The quasi judicial order must be supported by reasons. Recording of reason in support of the decision by a Quasi judicial authority is obligatory as it ensures that the decision is reached according to law and is not a reasult of caprice whim or fancy or reached on the ground of policy or expendiency.

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 U.P.Singh, J

M/s. S.B.Sinha, A.K Sinha, V.Shivnath and Samir prasad for the petitioner

S.K. Chattopadhaya G.P.I Gopal Choudhary for Respondents 1 and 2

M/s. Debi Prasad. A. Sahay S.K.Sen, P.K.Roy , Ts,Prakash and Miss Indrani. Choudhary for Respondent No. 3

U.P.SINGH,J. This writ application is directed against an order dated 25th January, 1982 passed by the Commissioner of south Chotanagpur division, Ranchi(annexure-6) affirming the order of the addl. Deputy Commissioner, Singhbhum at. Chaibasa, dated 30.11.1981 passed exparte in kolhan money suit no.9 of 1981 (annexure-3). By these impugned orders the petitioner-company has been restrained from receiving payment of their bills submitted to the Metal & Mineral Trading Corporation of India Limited, Nalda, Orissa as also to M/s.Tata Iron & Steel Company. Limited, Jamshedpur.They have been further restrained from receiving payment of their future bills which were to be submitted to those two concerns. The facts are these;

2. An application for issue of temporary injunction was filed in the court of the Addl, Deputy Commissioner, Singhbhum by respondent no.3 in Kolhan money suit no 9 of 1981. Respondent no.3, M/s Rungta Sons Private Limited was the plaintiff. A suit for recovery of Rs, 13 lacs and odd had been filed against the defendant-petitioners, on account of the balance of amount of advance made to the petitioners from time to time for the price of manganese supplied by the petitioner company to the respondent no.3 together with interest. It was alleged that the petitioners applied mineral ore to the Mineral and Metal Trading Corporation of India Limited, Nalda as also to theTata Iron & Steel company limited, Jamshedpur, and their bills were pending for payment. It was claimed that these bills

were the only properties of the petitioners wherefrom the decree, if passed, could be satiafied and the they had no other property except these bills.

3. On the application filed by respondent no.3 for issuing temporary injunction, the Addl, Deputy commissioner ,(respondent No.2) passed the following order;-

"Heard, Registrar, Admit. Issue notice. Heard the learned lawyer for the plaintiff. The defendants are hereby restrained from receiving payments of their bills submitted to the Minerals & Metals Trading Corporation Ltd.,Nalda and Tata Iron & Steel Comparny Limited, Jamshedpur, and the futurebills which they may submit to them. Issue notice to the defendants to show cause as to why the above injuctions be made absolute fixing 30.12.1981. Send a copy of this order to each of Minerals & Metal Corporation of India Ltd. Nalda and Tata Iron & Steel Company Limited, Jamshed pur as prayed by the plaintiffs at their cost."

4. On 3.12.1981, Suddenly, the petitioner-company were informed by the Tisco and M.M.T.C. that the payment of their pending bills as well as the current bills to the tune of Rs.13 lac and odd would not be realised because of the said order of temporary injunction passed by the Addl. Deputy Commissioner The petitioner, company then learnt that respondent No.3 had filed the said kolhan money suit No.9 of 1981 for recovery of Rs. 13 lacs and odd from the petitioner- company on account of the balance of amount of advance made to the petitioner from time to time for the price of manganese supplied by the petitioner-company to respondent no.3

5. Under the terms of contract with Tisco and M.M.T.C.the petitioner- company was supplying maganese ore to those two concerns. The average

amount which the petitioner-company received per month was nearly 8 lacs.

6. Against the order of the Addl. Deputy Commissioner the petitioner - company filed an application before the Commissioner, under Rule 31of the Wilkinson rules and contended that the interim order passed by the Addl. Deputy Commissioner had serious repercussions bringing the business of the petitioner-company at a stand-still and irreparable injuries were caused to the petitioner-company. It was further urged that the petitioner-company had long terms contract with the Tisco and MMTC being a joint sector and a Central Government Undertaking respectively. The failure to supply manganese ore to those two concerns will hamper the production of Ferro maganese of TISCO and Bokaro Steel Limited and also of Rourkela Steel plant causing great national loss and the petitioner company may be sued for breach of contract by these two concerns. It was asserted that the suit as such was not maintainable under the Wilkinson rules and the order of the Addl. Deputy Commissioner was without jurisdiction. There is no provision under the said rules for grant of temporary injunction/permanent injunction. As against the aforesaid contentions, respondent no.3 contended that every court has inherent power to issue injunction and Wilkinson rules do not bar issue of injunction.

7. The commissioner held that;

> "In absence of any such bar to issue of injunction under wilkinson's rules, the learned Additional Deputy Commissioner has acted within his jurisdiction in exercising his inherent power indirecting the stoppage of the payments of the bills."

8. Challenging the order of the Commissioner, the petitioner's counsel, Mr. S.B. Sinha strenuously

urged that under the Wilkinson's rules, there is no provision for grant of injunction. Although the code of Civil Procedure has no application but the principle and the spirt of the Code of Civil Procedure will apply. Under order 39,rule 3 of the Code of Civil Procedure, the Court has to record reasons and, if no reasons are assigned, the order will be void and, consequently, the impugned orders contained in Annexures 3 and 6 will have to be set aside.

9. It may be noticed that a proviso has been added to rule 3 of order 39 of the Code of Civil Procedure and where it is proposed to grant an injunction without giving any notice of the application to the opposite party the court shall have to record reasons for the opinion that the object of granting injunction would be defeated by delay.This isa mandatory provision. A similar question has been noticed and decided by the Andhara Pradesh High Court in the case of *Kasuganti anantarao V. Kasunganti aruna and others* (1) it was held;

"The provisons of order 39, rule 3 read in the light of the proviso to it makes two things distinct whenever interim injunction is granted without notice the following are to be fulfilled;

(1) The object of granting the injunction would be defeated by delay.

(2) The court shall record the reasons that the object of granting the injunction would be defeated by delay,"

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(1) (1986) Current Civil Cases 173.

These twin ingradients are mandatory in nature and compliance will vitiate and render the order null void.

10. Now hearing in mind the above, the impugned orders may be noticed. It reads;

> "Heard,Register, Admit, Issue notice. Heard the learned lawyer for,the plaintiff. The defendants are hereby restrained from receiving payment of their bills submitted to the minerals and metals trading corporation Ltd, nalda, and Tata iron & steel company Ltd. Jamshedpur and the future bills which they may submit to them."

11. It is apparent that not a single reason has been assigned in the order passed by the Additional Deputy Commissioner. The reason or reasons will have to be patent, as insisted by the legal mandate, there being absolutely no scope for latent and inferential reason the impugned orders,therefore, suffer from the infirmity of want of any reason. Similar infirmity is found in the order of the Commissioner, when it was stated that;

> "In view of the assertion that these bills were only properties of M/s orissa Manganese during the jurisdiction of the court, there were good reasons for restaining them from receiving payment pending final hearing."

The Commissioner has not recorded whether the petitioner-company were removing the properties in order to defeat the purpose of injuction or that the object of granting injunction would be defeated by delay, the liability was yet to be determined after giving opportunities to the parties to lead evidence.

12 Under the proviso added to order 39, rule 3 of the Code of Civil Procedure where it is proposed to grant an injunction without giving a notice of the application to the opposite party, the court shall record the reasons for its opinion that the objcet of granting injuction would be defeated by delay. No evidence was led to show that the petitioner- company was about to dispose of the whole or any part of his property from the local limits. It must be held that the impugned orders contained in Annexures-3 and 6 did not assign any reasons, which was mandatory for the court to record and, therefore, the orders are void. The quasi judicial order must be supported by reasons. Recording of reasons in support of the decision by a Quasi Judicial authority is obligatory as it ensures that the decision is reached according to law and is not a result of caprice whim or fancy or reached on the ground of policy or expediency.

13. The finding of the Commissoner that every Court of law has got inherent power cannot be accepted. A power to grant injunctions is a statutory power and the said power cannot be exercised by statutory tribunals in absence of specific provision made in that regard by the legislature. The Courts constituted under the Wilkinson's rules are statutory tribunals and they must confine their jurisdiction within the four corners of the statute. The Court constituted under the Wilkinson's rule cannot exercise any jurisdiction which is not specifically vested in it nor can Act it exercise any power for the purpose of grant of injunction which power is admittedly not specifically conferred upon the said statutory tribunals.

14. It may be noticed that the Commissioner having entertained the application of the petitioner-company under Rule 31 of the Wilkinson's rules, and considered the case on merits, the same

cannot be defeated on the ground that an appea under rule 14 should have been filed.It can not b said that extra ordinary circumstances were not existin to entertain the said application under rule 31. I the facts and circumstances of this case, the existenc of extra ordinary cirumstances have been stated b the petitioner-company in his application. After th interim injunction was passed by the Addl. Deput Commissioner, suddenly on 5.12.1981, th petitioner-company was informed by TISCO and MMTC that their pending bills as well as the current bill to the tune of Rs,13 lacks would not be realised becaus of the temporary injunction passed by the Addl. Deput Commissiorer. It may be noticed that neither TISC nor MMTC were party to the said order. Under th terms of contract the petitioner- company was boun to supply manganese ore to those two concerns. Th average amount which the petitioner-Company use to receive every month was about 8 lacs. Even futur bills which the petitioner-company could submit those two concerns were stayed by the interim orde The order, therefore, jeopardised the entire busine of the petitioner-company causing irreparable loss, su being the situation, it could not be said that ext ordinary circumstances for entertaining the applicatio under rule 31 by the Commissioner was not existin The contention of respondant No.3 must, therefor be rejected,

15. In this view, the orders contained annexures-3 and '6'are set- aside and the applicati is allowed, There will be no order as to costs.

R.D. *Application allow*



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It is true that adhoc appointment made under fortuitous circumstances, without following any statutory rule or procedure consistent with Articles 14 and 16 of the Constitution, as a stop gap arrangement, to meet an emergency situation, cannot be held to be on oppointment on temporary basis in its strict sense. But if appoint-ments have been made after due advertisement and selection by a statutory committee or following a procedure consistent with Articles 14 and 16 of the Constitution i.e. selection in order of merit, after giving opportunity to all eligible persons, then such appointments have to be treated at par with temporary appointments even if they are notified as adhoc appointments. In the instant case the petitioners were appointed in accordance with '1974' Rules after

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advertisement, screening and interview' by a stetutory committee consisting of two judges of the High Court and a member of the Commission. In that back ground even if the petitioners were appointed on adhoc basis under the '1974' Rules' their nature of appointment was not inferi or to appointment on temporary basis. Rule 9 itself speaks about the period before absorption as "Service as a temporary Munsif" and provides for absorption of such appointees in permanent cadre. The petitioners and those appointed under '1955 Rules' had been appointed in the same service in accordance with two statutory Rules, were holding identical posts and an appointee under '1974 Rules' used to be transferred to a post held by appointee under 1955 Rules' and they were never treated separately during the period of their temporary appointment.

Held, therefore, that under such a situation the persons appointed under '1974 Rules' are not inferior as a class so that their period of temporary appointment before absorption in the permanent cadre ought to have been ignored by Rule 9. There being no rational basis to treat the petitioners separate as a class from appointees under '1955 Rules' They have to be treated as equal with the appointees under '1955 Rules'.

Held, further, that it is well known that when two equals are treated as unequals Article 14 of the Constitution is attracted and any

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order / rule treating two equals as unequal has to be struck down and as such part of Rule 9 purporting to discriminate the petitioners without any rational basis are ultravires being violative of Articles 14 and 16 (1) of the Constitution and accordingly the seniority of the appointees under '1974 Rules' be re-fixed in accordance with law ignoring the objectionable part of Rules 9.

Rajendra Sinha and ors. V. The State of Bihar and ors (1987) I.L.R. 66, Pat. 404

Penal Code, 1860 --- sections 109, 114 and 149 --- Scope and applicability of --- Sessions Judge taking up hearing of the case and framing wrong charge --- Subsequently case transferred to the court of Additional Sessions Judge and concluded on a wrong charge --- Second Judge, whether could have amended and corrected the charge --- Sections 109, 114 and 149 when attracted.

Where the hearing of the case was earlier taken up by the Sessions Judge who framed wrong charges and subsequently the case was transferred to the court of Additional Session judge in whose court the proceeding was finally conclued on the basis of wrong charge.

Held, that the Second Judge in whose court the case was transferred for disposal was not absolved of the responsibility of looking

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to the charge and he should have made amendment and correction in the charge instead of finally delivering judgment on a wrong charge.

Held, further, that a charge under section 149 postulates assemblage of five or more.

Held, also that in case if an accused abets the commission of the Crime at the spot and also remains present or participates, the proper charge against him would be under section 109 and not under section 114.

In other words the active abetment of commission of a crime is covered by section 109 and section 114 is intended to cover a case in which there is element of abetment previous to the commission of the crime, who happens to be present when the crime is committed. So when a person is present and abets in order to commit the offence, section 109 of the Code and not section 114 of the Code is attracted.

Ramji Singh and another v. The State of Bihar (1987) I.L.R. 66, Pat. 387

Private Educational Institutions (Taking over) Ordinance, 1986 section 6 and Constitution of India. Articles 14,16,19,163(3) and 213 and Entry 42 of the Convurrent List III and entry 66 of List I --- Promulgation of Ordinance No. 15 of 1986 --- Satisfaction

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of the Governor under Article 213 pertaining to the immediacy, whether justiceable --- exereise of legislative power by whether justiceable --- ecercise of legislative power by promulgation of Ordinance by the Governor. whether can be impe impeached on ground of malafides --- malafides of the Chief Minister, whether tantamount to the malafides of the Council of Ministers as a whole and vitiate the exercise of legislative power of promulgation of an Ordinance --- sanction of the President under proviso to clause (1) of Article 213, whether required --- whether void for lack of legislative competence, discriminatory, infract Article 14 and violative of Article 19 (1) (c) --- section 6 of the Ordinance validty of --- power conferred on the State Government to terminate the service of the staff of the institute --- nature of --- whether attracts the principles of natural justice --- services of non-teaching staff, whether, can be terminated under section 6 (4).

The advice tendered by the Council of Ministers to the Governor is constitutionally privileged beyond any probe. Therefore, the result is that not only one cannot probe the mind and satisfaction of a body of persons, but, furhter, the materials on which such satisfaction is to be arrived at are again expressly barred from the scrutiny of the court. Under Article 213, the Governor is not obliged to record any reasons for his satisfaction

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with regard to immediacy. Equally the coun il of Ministers, whilst arriving at a decision, are equally not obliged to record any reasons, and, as a matter of practice they never do. Therefore, in the absence of knowlege about the materials placed or considered by the Council of Ministers the nature of discussions in the cabinet meeting, the secrcy of the proceedings and the lack of requirement of recording any reasons, renders it not only undersirable but almost impossible to Judicially test the consequential satisfaction of the Governor under Article 213, which is only an auphemism for the satisfaction of a large council of Ministers. The cabinet of Ministers are under an oath of secrecy and the details of the proceedings of the Council of Ministers are confidential and sacrosanct. Heroin perhaps what is pre-eminent if not conclusive, is the fact that the power under Article 213 though exercised by the executive head, is in essence a pristinely legislative function. The Constitution, in chapter IV, leaves this aspect in no manner of doubt, when in the very heading it proclaims it to be the "Legislative power of the Governor", and clause (2) of Article 213 declares that an Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor. Now once Article 213 envisages a legislative function, then it deserves highlighting that considerations pertaining to the exercise of executive or

administrative actions are altogether alien thereto.

These fall in an altogether different field than the one of the exercise of the soverign function of legislation. Therefore, to draw any analogy from the field of subjective satisfaction of an individual acting administratively or excutively, with the satisfaction of a legislative body is not only inapt but wholly misleading. Indeed, it is axiomatic that the propriety, expediency and the necessity of a legislative act are for the determination of the legislative authority and not for adjudication by the Courts.

Held, therefore, that both on principle and precedent the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinace is not justiceable.

In the field of constitutionality of legislation colurable exercise of the power is a thing distinct and apart from the ordinary concept of malice in law against executive or administraive action. The concept of colourable exercise of legislative power is not the concept of malice in law but in pith and substance is only a matter with regard to the issue of legislative competence. where an enactment is made by a legislature not competent to legislate on the subject but is merely dressed up in a manner so as to bring it within the field, it is only then that the courts have labelled

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such an attempt as a colourable exercise of legislative power. It has no relevance at all to any oblique motive therefor. The test in such a situation only is to see the nature of the enactment and whether in pith and substance it comes within the ambit of the legislative entries for which a particular legislature may be entitled to legislate. If such an enactment does not come within the competence of the legislature in true essence but is merely clothed in such a garb to bring it within the legislative competence, it is only than that the theory of colourable exercise of legislative power can be invoked. No evil motive or any personal malafides of the legislature as a whole or of the individuals composing the same can be attributed. The theory of colurable exercise of legislative power is consequently a thing distinct and apart from the rule of attributions of any malice---be it one of fact or in law---to the legislature.

The colurable exercise of legistative power is in essence nothing more than the absence of legislative competence. it cannot even remotely buttress the stand that an Ordinace can be impeached on the ground of personal mala fides.

Held, that the exercse of legislative power of promulgation of an Ordinance by the Governor cannot be impeached on the ground of mala fides.

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It is true that in the Parliamentary form of Government the position of the Prime Minister or the Chief Minister is pre- eminent, in so far as the Council of minister is appointed on his recomendation and, he acts as a nyphen betwixt the Executive and the Legislature. But from this fact it is a wrong and unwarranted step to go to the extreme that the Chief Minister is himself the council of Ministers. In a democratic system, there is no other principle to determine the decision of a constitutional body of persons except the settled rule of majority. The only mode for arriving at an answer as to what is the decision of a body of persons co-equal in status, is as to what was the majority opinion of such a body, unless the statute prescribes other-wise or a different mode therefor. The principle of joint responsibility of the cabinet, which is the fundamental base of the Parliamentary form of Government is itself a pointer to the fact that the ministers are not there cyphers attached to the figure of the chief Minister, but are jointly responsible to the legislature and through it to the people for the conduct of the Government. The well know process of decision-making by the Council of Minsters would itself refute the stand that the Chief Minister's earlier predilections would necessarily be the decision of his Council of Ministers. The cabinet is a constitutional and responsible consultative body. Democratic process works by expressions and exchange

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of opinions and even a chief Minister in a cabinet meeting may well be first persuaded against any pre- conceived view or decision arrived at by him earlier. He may even be out voted in the cabinet, if the matter comes to such a head. to presume that the Chief Minister's prior decision or opinion alone, against the views of his council of Ministers and dehors their concurrence, has an overriding finality as such, would be running against the very concept of the principle of Joint cabinet responsibility and the democratic form of Government. Any such stand attributing such dictatorial and arbitrary power to the Chief Minister alone is not to be easily presumed or accepted in a democratic form of Parliamentary Government.

Held, further, that the mala fides of the Chief Minister even if established is not tentamount to the mala fides of the Council of ministers as a whole and cannot. therefore, vitiate the execise of the legislative power of the promuglation of an Ordinance.

A take over or an acquistion or nationalisation of an institution establishment, or a company does not involve any concept of repugnancy and the consequential requirement of the prior concurrence by the President and as such in the instant case the impugned Ordinance did not require the sanction of the president under the proviso to clause (1) of Article 213 of the Constitution.

Entry 66 is confined to the determination of standards for higher education or research and scientific and technical institutions, and Co-ordanating them at the national level. Prescription of standards and co-ordination thereof is something entirely distinct and different from setting up institutions for higher education. Entry 66 of List I cannot possibly be a bar to the establisment of scientific and technical institutions for higher education by the states, which is now clearly a concurrent subject. Education generally including higher education and technical education and universities, would come within the sweep of Entry 25 of List III and consequently by virtue of this Entry the State Government is clearly entitled to legislate for setting up and establishing institutions of this nature, and, if it can do so, it can equally take over and acquire them under its basic power of acquisition for the purpose of nationalisation. The earlier power of acqustion in List I and II have now been substituted by a single comprehensive Entry no. 42 in the Concurrent List III, conferring both on the centre and the state, the power of acquisitioning and requisitioning of properties. Therefore the State has the basic legislative competetnce to pass the legislation for the acqusitioning of the properties of the Institute in the instant case.

Held also, that the impugned Ordinance

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in the instant case is not governed by. Entry 66 of List I. It is well will within the parameters of Entry 42 of the Concurrent List III and as such it is not void for lack of legislative competence.

Discrimination under article 14 in a question of fact which has to be pleaded and the burden is always on the petitioner to prove that persons in equal or in identical circumstances have been treated unequally. In the instant case barring a bold assertion that the II institutions named are similar, there has been placed no factual date or proof on the record to show that the other alleged IIinstitutions are in an identical situation, far from the same having been actually established. Some similarity is not identity and as such the impugned Ordinance is in no way discriminatory, nor does it infract Article 14 of the Constitution in its choice of the petitioner Institute alone for nationalisation in its first phase.

The mere divesting of one of the societies properties, when validly done by the State in its exercise of eminent domain and the power of acquisitioning and requisitioning therefor does not in any way infract or attract the provisions of Article 19 (1) (c) of the Constitution and as such in the instant case the impugned Ordinance does not violate the

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fundamental right to form associations under Article 19 (1) (c) of the Constitution.

Section 6 of Ordinance No. 15 of 1986 is not violative of Article 14, 16 or 19 of the Constitution and is perfectly valid.

The power conferred on the State Government to terminate the services of the staff of the Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna is not quasi Judicial in Nature and Consequently does not attract the principles of natural Justice.

Section 6 (4) of Ordinance No. 15 of 1986 squarely warrants the termination of the services of the non-teaching staff as well.

Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna, and another v. The State of Bihar and others (1987) I.L.R.66, Pat. 432

APPELLATE CRIMINAL

Before P. S. Sahay and M.P. Verma, JJ.

1986

April, 16.

*Ramji Singh and another.**

v.

The State of Bihar.

Penal Code, 1860 (Act XLV of 1860), sections 109, 114 and 149 -- - Scope and applicability of --- Sessions Judge taking up hearing of the case and framing wrong charge --- Subsequently case transferred to the court of Additional Sessions Judge and concluded on a wrong charge --- Second Judge, whether could have amended and corrected the charge --- Sections 109, 114 and 149 when attracted.

Where the hearing of the case was earlier taken up by the Sessions Judge who framed wrong charges and subsequently the case was transferred to the court of Additional Sessions Judge in whose court the proceeding was finally concluded on the basis of wrong charge;

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*Criminal Appeal no. 195 of 1982. Against the judgement dated 5th March, 1982 Passed by Sri Sadaquat Hussain, Second Additional Sessions Judge, Nalanda at Biharshariff.

Held, that the Second Judge in whose court the case was transferred for disposal was not absolved of the responsibility of looking to the charge and he should have made amendment and correction in the charge instead of finally delivering judgment on a wrong charge.

Held, further, that a charge under section 149 postulates assemblage of five or more.

Held, also that in case if an accused abets the commission of the crime at the spot and also remains present or participates, the proper charge against him would be under section 109 and not under section 114.

In other words the active abetment of commission of a crime is covered by section 109 and section 114 is intended to cover a case in which there is element of abetment previous to the commission of the crime, who happens to be present when the crime is committed. So when a person is present and abets in order to commit the offence, section 109 of the Code and not section 114 of the Code is attracted.

Appeal by the accused persons.

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

M/s B.K. Banerjee, K.N. Tiwary and *S.K. Tiwary*. for the appellants

Mr. Ganesh Prasad Jayaswal. for the state

M.P.VARMA, J. : Applellant No. 1, who is the father of appellant no.2, has been convitcted under section 302/114 of the Indian Penal Code (hereinafter to be referred to as 'the Code') (having been put on trial along with four other accused persons on charges under see. 302/149 of the Code), abetting the offence of causing the murder of one Surendra Singh by his son appallant no.2 Rabindra Singh, who has also been convicted of the charge under section 302 of the Code and both of them have been sentenced to suffer rigorous imprisonment for life. Appellant no. 2 caused the death of Surendra Singh by gun shot and he has further been convicted of the charge under section 27 of the Arms Act and sentenced to suffer rigourous imprisoment for three years.

2. The Trial court took the view that the prosecution failed to establish that there was any unlawful assembly with the common object of causing the murder of Surendra Singh. Charge under section 302/149 of the Code was framed against Ramji Singh and three others namely, Sahdeo Singh, Awadh Singh and Jagdish Singh. The trial court recorded an order of acquittal in favour of all the four accused under section 302/149, who were put on trial together. As stated, Ramji Singh (appellant no.1) was held guilty under section 302/114 of the Code and Rabindra Singh (appellant no.2) was independently charged under section 302 of the Code and also under section 27 of the Arms Act and as stated, he too has been convicted under these two heads.

3. The short sroty of the prosecution, as I got

from the F.I.R. lodged by P.W.6 Chandra Shekhar Singh, brother of the deceased Surendra Singh and also from the statement of witnesses examined in the trial court, is that in early morning of 2.9.1980 Surendra Singh was surrounded by appellant no.1 and three other acquitted accused and they all started hurling lathi blows on him. He was coming form the river side after taking bath and was surrounded near his house in his own village Bardiha which is under police station Chandi, district Nalanda and on getting blows he ran for safety and entered into a nearby pond, which was near his house. He was crying for help which attracted the attention of his brother P.W.6 Chandra Shekar Singh and other inmates of his house. But that very moment accused appellant No. 2 Rabindra Singh came out with a gun and on receiving the order from his father accused appellant No.1 Ramji Singh, he fired three gun shots at Surendra Singh, who fell down in the pond. Other villagers also ran and looking at them the accused persons fled away.

4. According to the prosecution about twenty days before the occurrence, the deceased's father Rambrich Singh had purchased a house adjecent to his own house, the other part of which was purchased by the appellant Ramji Singh and it is said that this leds to a quarrel between them, as Ramji Singh was trying to dispossess the prosecution party from the portion of the house purchased by them.

5. The dead-body of Surendra Signh was taken out of the pond, but in the meantime, P.W.8 Mathura pd. Sharma who was then posted at Nagarnausa out-post as sub-Inspector of police under police station

Chandi got the information of the occurrence, came to the place and recorded the fardbeyan of P.W.6 Chandra Shekar Singh, (marked ext. 2) and the same was sent to the police station Chandi, where a First Information Report (marked ext. 7) was drawn up and a case was registered against all the five accused persons named therein. The police after investigation submitted charge-sheet and they were thus, put on trial.

6. In defence, the accused pleaded that the deceased Surendra Singh was a man of questionable character and he was done to death late in the night and was thrown in the pond. The members of the family finding the dead-body in the morning got the accused persons falsely implicated due to enmity which they had in purchasing the part portion of the house by them.

7.Prosecution examined nine witnesses, out of whom the prosecution witnesses nos. 1,3,4.5 and 6 claimed to be eye- witenesses to the ocurrence. P.W.2 is the doctor, who held postmortem on 2.9.80 over the dead-body of Surendra Singh. P.Ws. 8 and 9 are the two police offcers, who investigated the case.

8. In appeal before us, the learned advocate Mr. Banerjee has argued that the finding of the doctor P.W.2 (who conducted post mortem examination over the dead-body totally militates against the prosecution story and it further suggests that the occurrence took place some time late in the night and the witnesses have turned up to support a concocied version for implicating the accused out of enmity. The doctor P.W.2 found following ante mortem injuries on the body of the deceased :-

"1. One pellet injury on the left side of chest piercing the chest wall lower part of the lower lobe of left lung and coming out from the back of chest wall below lower border of the scapula. The wound of entry was in front of the chest. Blackenning and charring of the skin 1" x 1" was found at the wound of entry;

2. Bruise with blackenning of l"x 1/4" x1/4" on the right side of chest wall;

3. Bruise with blackenning of 1"x 1/6" x1/4" on the right side of chest wall;

4. Bruise with blackenning of 1" x 1/6" x 1/4" on the right side of chest wall;

5. Bruise with blackenning 2" x 1/6" on the right side of abdominal wall near navel;

6. Bruise with blackenning 2 1/2" x 1/6" x1/4" on the left elbow postaro-laterally.

Injury no. 1 was caused by bullet and the rest by pellets. Death was due to shock and haemorrhage a result of injury no. 1 which alone was sufficient to cause death ....."

9. The doctor further found undigested Sattu like substance in the stomach and there was stool and gas also in the intestine. Learned Advocate has submitted that each one of the eye witnesses has made a parrot like statement that all the accused started assaulting Surendra Singh with Lathis. On getting blows he ran to the pond for safety. He was chased by all and the accused continued making assault

on him. It was at that moment when the accused appellant Rabindra Singh came carrying a gun that on being asked by his father accused Ramji Singh he fired three rounds at Surendra Singh. On receiving the gun-shots he dropped down dead in the pond. The learned Advocate contends that according to the prosecution several lathi blows ware given, but the doctor did not find even one lathi injury on the person of the deceased. On the other hand, one of the injuries was caused by bullet and the rest by pellets. The death was due to injury no. 1 caused by a bullet on the left side of the chest which had pierced the chest-wall going down upto the lobe of the lung. The learned Advocate has further submitted that in the evidence of P.W.1, who is the son of the informant and was then a school going student has said in his deposition that the gun was fired from a close distance and it was a single barrel country made gun. The other witness has also stated that it was a single barrel gun which was fired from a close range. The counsel for the State could not justify and explain that how the injuries, excepting one were caused by pellets when all the three shots were fired by one and the same single barrel gun. It apperas that some one firing on Surendra Singh had a bullet and there was another firing with some other gun from which pellets were discharged. In addition to it, absence of any lathi injury gives a set back to the whole story and creates a reasonable doubt whether the witnesses had actually seen any occurrence being committed in the pond. The suggestion was made by the defence

that probably Surendra Singh was done to death late in the night and was thrown in the pond from where the dead body was recovered and brought in the lane.

10. The learned Counsel, while referring to the doctor's evidence has next drawn our attention that undigested food was found in the stomach and the intestine also contained faeces, which shows that the deceased was done to death some time after he took his supper and not in the morning after attending call of nature. The brother of the deceased P.W.6, who has figured as informant in this case to explain the discrepancy in his statement in examination-in-chief (at page 5 of the deposition) gave out that his brother used to get up at early morning and after attending call of nature and washing his mouth, he used to take 'Sattu' as he was a patient of gastric trouble.

11. According to the prosecution, the occurrence took place early morning at about 6 or 7. The doctor has said the presence of 'Sattu' in the stomach indicated that the deceased might have enten sattu 3 to 4 hours before death and this fact again indicates that he might have been killed some time late in the night and not in the morning as alleged by the prosecution. It has rightly been sumbitted that there was no point in giving the explanation by P.W. 6 in paragraph 6 of examination in chief regarding eating of Sattu by the deceased in the early morning of the occurrence, and obviously this explanation has been obtained only after the examination of the doctor who has been examined earlier as P.W.2 in this case.

P.W.1 is also cousin of the deceased, but he did not speak about the routine or the eating habits of the deceased and the explanation came through the mouth of P.W.6 only after the doctor's evidence. Needless to mention as contended by the defence Counsel that there is no report of other doctor to justify that the deceased Surendra Singh was a patient of gastric trouble or any doctor had prescribed for taking Sattu for the ailment he was suffering from.

12. I would like to quote here the submission of the learned Counsel for the State before I make further discussion that there was promptness in giving information to the police and the witnesses were also examined at the spot, which excludes the possibility of any deleberation between the members of the family for concocting a false case. It has been contended that the police officer of Nagarnausa (P.W.8) soon reached at the spot on getting information from the Chaukidar and recorded the fardbeyan of P.W.6 (marked ext. 2) and there- after conducted inquest over the dead body. The argument is quite laudible. But there are lot of infirmities which could not be lost sight of. The police officer P.W. 8 has admitted that he first took down the statement of the informant in his note-book and some time after he copied it out on the piece of paper, which is exhibit. The note book has been kept behind. It had not been produced in court. This suppression of the note book, which alone was the first statement of P.W. 6 creates a serious doubt in the mind as the earlier version is not coming before the court. It is simply absurd to accept the statement of P.W.8 that he destroyed his note-book and did not produce in court.

13. There is another serious lacuna which also connot be lost sight of. According to the case of the Prosecution the Chaukidar and the Dafadar came running to the spot and Chaukidar Jaimangal Paswan went to villege Kaula where P.W. 8 was camping and it was on the statement of the Chaukidar that the police officer came to village Bardina and recorded the statement of the informent. Here again the earlier version of the Chaukidar is not coming before the court. It is not known if the informant and other memberes of the family had disclosed the names of the accused persons to the chaukidar who rushed to call the police. In all fairness the Chaukidar should have been brought to court. P.W.8 also does not give any light whether he first recorded the statment of the Chaukidar or what transpired to him and whether he could know the names of the accused culprits from the Chaukidar. These circumstances and the fact of the members of the family not going to the police with the chaukidar creates further doubt and also gives a presumption that possibility of involvement of the enemies in the crime cannot absolutely be ruled out. It is not a case in which any promptness in lodging the information to the police puts a stamp of correctness, Rather it is a case, in which a reasonable doubt has been raised and giving occasion to controversy that the occurrence might have happened in a different manner unnoticed by the members of the family.

14. In the last phase of the argument, the learned Advocate Mr. Banerjee has drawn our attention to the situation and boundaries of the house belonging to the parties. The Investigating officer P.W,9 has prepared a sketch map marked Ext. 5. On persual of the sketch map and reading the evidence of P.W.9 we get that the house of the accued is just on

the eastern portion and of the prosecution party on the western side. A room in the north has also been shown to be in possesion of the members of the prosecution party and on the east attached to this room is the disputed house. Some land, which is on the eastern side was also in dispute. There is a lane running east to west on the north of the house and that lane goes up to the pond and taking a turn to the south. It was in this lane that the deadbody was kept after taking it out from the pond. In the map the opening of the house of the prosecution party has been shown in that very lane which runs north to south with a slight curb touching the frontage of the house of the prosecution party. For going to the pond from the house of the accused one has to move northward to come to the northern lane, which runs east to west and from there moving on the west one has to come to the other lane described above runing north to south in between the pond and the house of the members of the prosecution party -

15. In the map there is no opening or door shown in the disputed portion of the house. In the north the opening of the door is on the east but a lot of confusion has been created in the statement of witnesses and it cannot be correctly made out how and from which door either the witnesses ran or the accused Rabindra Singh had run carrying the gun. P.W.1 had said that he was reading in a room and on hearing hulla he came out in the lane. He had stated the exit of the room was in the west through which he could come in the lane. It is quite likely that he was in the northern portion of the house shown as a room in the map (ext.5). The map indicates that there is a opening of this room in the lane on the west. This witness further adds that his grand-father Rambrich Singh (he is the nephew of deceased Surendra Singh) had purchased some land on the north of the house. It was a fallow land but it was covered

from all the four sides. He further adds that entry in his house was through this purchased portion which is on the northern side of the house. In cross-examination he has added that he was reading on the varandah which faces north and the purchased plot is further north of it and he came out through that purchased land. As discussed abcve, which I got from the map, the disputed house is on the east and not in the north and if one passes through the disputed portion of the house he will come out on the eastern flank and from there to the lane in the north which goes up to the pond taking a turn in the south . P.W.5 who is a member of the family, has stated that when accused persons were assaulting and chasing Surendra Singh he wanted to get into the house but the accused persons prevented him and thereafter Surendra ran towards the pond. She had said that there was a partition between accused Ramji Singh and Rambrich Singh father of the deceased Surendra Singh. They were Pattidarc being descendents of common an cestors. P.W.5 used to live with the family of Rambrich. Rambrich had purchased some land from one Harinandan and Yadunandan and Ramji had got the Kewala executed for his purchase from Hira Singh and Rambrich had obstructed Ramji in using that purchased portion for going and coming over the house. Even a lock was put on the eastern portion, but accused Ramji had got it broken and this Surendra had put another lock. According to her statement, on hearing cry she came to the south of the pond. She had said that there is an entrance door in the west of the purchased portion of the house for going out and through it she came in the south from where she could see the occurrence. This falsifies the statement of P.W.1 that deceased Surendra was

prevented by the accused persons in entering inside his house which was in the north. The evidence of p.w.6 who is the brother of deceased Surendra Singh creates further confusion with regard to his going out. It is he who has stated that his father had purchased a portion of a house and the open space from their Pattidars Yadunandan Singh and Harinandan Singh. The purchase was made about 20 or 22 days prior to the occurrence. Hira Singh was another Pattidar, from whom accused Ramji Singh had made the purchase and got the Kewala executed. Ramji Singh wanted to take possession of the newly purchased plot, which led to the dispute. He further added that there was a partition in the family in which accused Ramji got the eastern portion, whereas the members of the prosecution party got the house in the west and the newly purchased house was in the north. It was surrounded from all sides with exit in the east. He has further admitted that there was no exit in the west and it was through this eastern exit that he and other members of the family came out when there was a Hulla and they could see the occurrence.

16. P.W.7 is the wife of the deceased Surendra Singh. She has made all the more confusing statement that she came out of her house and saw her husband in the north of the pond where the accused persons were assaulting him and subsequently she added that the incident took place in the south of the pond. But from the statement of other witnesses it was neither in the north nor in the south of the pond, rather the prosecution alleges that all happened in the east of the pond in the lane and Surendra was shot at when he entered in the pond for safety.

17. Thus, on consideration of the physical features and also the boundary of the house, the exit and

the dentrance door it appear quite confusing and the statements of the witesses very much inconsistant and it is difficult to hold that they actually could rush at the scene and witness the entire episode. P.W.1 has further admitted that he and all others were also assaulted with the *Hura* of the lathi when they wanted to intervene and save deceased Surendra Singh. But there is no medical report to support that any other witness or the inmates of the house had received injuries at the hands of the accused persons.

18. In the end, it has also been contended that there is no corroborative evidence that Surendra Singh had gone to the river bed for taking bath except the general statement of the members of his family that he used to take bath in the river bed and had it been so, he could have been very well done to death by the river side in stead of waiting for his return to his house. The investigating Officer P.W 8 who prepared the inquest report at the spot, or even the other Investigating Officer P.W.9 did not find any extra wet clothes or towel etc. which might lead to presumption that the deceased had taken a bath in the river, which is in ;the extreme south of the village. While addressing this aspect of the case the learned Counsel appearing for the appellants again reiterated his argument that the possibility of his being killed in the late hour of the night cannot be ruled out and early morning on getting the dead-body P.W.6 and others made out a false case implicating the appellants out of enmity and the dispute which arose between them over the purchase of the house.

19. In the circumstances, discussed above, I feel that the prosecution could not satisfactorily prove its

case against the appellants and the case of the prosecution therefore, must fail.

20. The hearing of the case was earlier taken up by the Sessions Judge Sri G.N.Choubey, who on 5.3.81 had framed charges against appellant no.1 Ramji Singh under section 302/148 of the Code. Subsequently, by order dated 18.11.1981 the case was transferred to the court of the Addl. Sessions Judge Sri S.Hussain, in whose court the proceeding finally concluded. It appears that Sri G.N. Choubey has committed error in framing of the charges under sec. 302/149 of the Code as against this appellant and three others only. Needless to say that a charge under sec. 149 postulates assemblage of five or more. The second Judge Sri S.Hussain, in whose court the case was transferred for disposal was not absolved of the responsibility of looking to the charge and he should have made amendment and correction in the charge instead of finally delivering judgment on a worng charge. Sri Hussain in paragraph 14 of the Judgment impugned held as follows :

"..... It is clear from this that previously there were only four persons and in absence of any clear evidence that they formed any unlawful assembly with Rabindra Singh, appellant no.2 also, they cannot be held guilty for forming an unlawful assembly with the common object to kill Surendra Singh and thus, they cannot be punished under Section 149 of the I.P.C."

21. The learned Judge; however, on the

discussion made above, did not find appelant Ramji Singh guilty of the charge under section 302/149 of the Code and acquitted him thereunder. The learned Judge however, held him guilty of the charge under sec. 302/114 of the Code. No such charge was framed at the trial stage. I may, however, refer here that in case if an accused abets the comission of the crime at the spot and also remains present or participates, the proper charge against him would be under sec. 109 of the Code and not under sec. 114. In other words, I like to say that active abetment of commission of a crime is covered by section 109 and sec.114 is intended to cover a case in which there is element of abetment previous to the commission of the crime, who happens to be present when the crime is committed. So, it is clear that when a person is present and abets in order to commit the offence, section 109 of the Code and not Section 114 of the Code is attracted.

22. Be that as it may, in the instant case there was no charge of abetment at all and the appellant had pleaded prejudice and has made an attack on the findings of the trial court in convicting him under the newly added charge under section 302/114 of the Code, though not framed and charged with at any stage of the trial. A prejudice has been claimed more on the ground that no specific and independent question was put to Ramji Singh to explain the circumstance, appearing in evidence against him on the allegation of abetting the appellant no.2 for causing the murder of Surendra Singh. I therefors, have my

doubt if appellant no.1 Ramji Singh could have been convicted as such under sec. 302/114 of the Code.

23. I, therefore, hold that the judgment impugned suffers from various infirmities. The prosecution failed to prove the charges against the appellants and the appeal therefore, succeeds. The order of conviction and sentence passed is set aside. Let the appellants be discharged from the liability of their bail-bond.

P.S.Sahay, J. *I agree.*

M.K.C. *Appeal allowed*

CIVIL WRIT JURISDICTION

Before N. P. Singh and S.N. Jha, JJ.

1986.

July, 21.

*Rajendra Sinha and ors.**

v.

The State of Bihar and ors.

Bihar Civil Service (Judicial Branch) (Adhoc Recruitments on Temporary Basis), Rules, 1974, rule 9 and Bihar Civil ;Service (Judicial Branch) (Recruitment) Rules 1955---- persons appointed in same service in accordance with two statutory Rules and holding identical posts ---- whether to be treated as different classes --- seniority between the two-determination of --- two equals treated as unequals --- Article 14 of the Constitution, whether attracted-rule 9 of 1974 Rules whether discriminatory and ultra vires as violative of Articles 14 and 16 (1) of the Constitution-Constitution of India, Articles 14 and 16 (1)

It is true that adhoc appointment made under

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*Civil writ Jurisdiction Case No. 6126 of 1985. In the matter of an application under Articles 226 and 227 of the Constitution of India.

fortuitous circumstances, without following any statutory rule or a procedure consistent with Articles 14 and 16 of the Constitution, as a stop gap arrangement, to meet an emergency situation, cannot be held to be an appointment on temporary basis in its strict sense. But if appointments have been made after due advertisement and selection by a statutory commiittee or following a procedure consistent with Articles 14 and 16 of the constitution i.e. selection in order of merit, after giving opportunity to all eligible persons, then such appointments have to be treated at par with temporary appointments even if they are notified as adhoc appointments. In the instant case the petitioners were appointed in accordance with '1974' Rules' after advertisment, screening and interview by a statutory committee consisting of two Judges of the High Court and a member of the Commission. In that back ground even if the petitioners were appointed on adhoc basis under the '1974' Rules their nature of apppintment was not inferi or to appointment on temporary basis. Rule 9 itself speaks about the period before absorption as "Service as a temporary Munsif" and provides for absorption of such appointees in permanent cadre. The petitioners and those appointed under '1955 Rules' had been appointed in the same service in accordance with two statutory Rules, were holding identical posts and an appointee under '1974 Rules' used to be transferred to a post held by appointee under '1955 Rules' and they were never treated separetely during the period of their temporary appointment.

Held, therefore, that under such a situation the persons appointed under '1974 Rules' are not inferior as a class so that their period of temporary appointment before absorption in the permanent cadre ought to have been ignored by Rule 9. There being no rational basis to treat the petitioners separate as a class from appointees under '1955 Rules', they have to be treated as equal with the appointees under '1955 Rules'.

Held, further, that it is well known that when two equals are treated as unequals Article 14 of the Constitution is attracted and any order / rule treating two equals as unequal has to be struck down and as such part of Rule 9 purporting to discriminate the petitioners without any rational basis are ultravires being violative of Articles 14 and 16(1) of the Constitution and accordingly the seniority of the appointees under '1974 Rules' be re-fixed in accordance with law ignoring the objectionable part of Rule 9.

S.B. Patwardhan v. *State of Maharastra* (1), *Taraka Nath Sharma* v. *State of Bihar* (2), *A. P. M. Mayankutty* v. *Secretary* (3), *S. M. Pandit* v. *State of Gujarat* (4) and *State of Andhra Pradesh* v. *Raja Redddy*

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(1) (1977) A.I.R. (S.C.) 2051

(2) (1985) P.L.J.R. 829

(3) (1977) (2) S.C.C. 360

(4) (1972) (1) L.L.J. 127

(1) --- referred to [Baleshwar Das and ors v. *State of U. P. and ors* (2) --- distinguished.]

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

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

Messrs Basudev Prasad, Anil Kumar and *Sunil Kumar*. for the petitioners.

Messrs Tara Kant Jha, Shyama Prasad Mukherjee, Ashok Kumar Choudhary, Birendra Prasad Sinha, Ratan Kumar Sinha, Narayan Singh and *Md. Wasi Akhtar* For the Respondents

Messrs R. B. Mahto, A.G. And *S.K.P. Sinha, J.C. to A.G.* for the State

N.P. SINGH, J. The petitioners, who have been appointed as Munsifs in accordance with the provisions of the Bihar Civil Service (Judicial Branch) (Adhoc Recruitments on Temporary Basis) Rules, 1974 (hereinafter referred to as 'the 1974 Rules'), have questioned the validity of part of Rule 9 of the '1974 Rules'. They have also made a prayer for a direction to the respondents to re-determine their seniority

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(1) (1967) A.I.R. (S.C.) 1458

(2) (1981) A.I.R. (S.C.) 41

vis-a-vis the Munsifs who have bean appointed after them, in accordance with the provisions of the Bihar Civil Service (Judicial Branch) (Recruitment) Rules, 1955 (hereinafter referred to as 'the 1955 Rules'). It may be mentioned that both the rules have been framed in exercise of the powers conferred by Article 234 of the Constitution by the Government of Bihar in consultation with the High Court of Judicature at Patna and the Bihar Public Service Commission (herein-after referred to as 'the Commission').

2. In the year 1973, the State Government took a decision to create 152 temporary posts of Munsifs in the Bihar Civil Service (Judicial Branch), as the Code of Criminal Procedure, 1973 was coming in force with effect from 1.1.1974 and because of that many cases which used to be heard and decided by the Executive Magistrates were to be heard and decided by the judicial Magistrates. On 18.5.1974, the '1974 Rules' framed by the Governor in consulation with the Patna High Court and the Commission, ;were published in the Bihar Gazette.

3. On 14.10.1974, advertisement for appointment as temporary Munsifs against the aforesaid 152 posts was issued in accordance with the provisions of '1974 Rules'. The petitioners along with others applied. It has been stated on behalf of the petitioners that after a written compatitive test, petitioners were called for interview by the Selection Committee. On 23.5.1975, on the basis of recommendation of the Selection Committee, a notification was issued by the State Government appointing the petitioners and others on

adhoc basis as Munsifs for a period of six months from the date of the issuance of the notification.

4. It may be mentioned that in the meantime steps had also been taken to appoint Munsifs in accordance with the provisions of '1955 Rules' and for that purpose 15th competitive examination had been held. Out of the candidates, who had appeared at the aforesaid 15th competitive examination, 158 persons were appointed as Munsifs on temporary basis against temporary posts before the appointment of the petitioners in accordance with the '1955 Rules' between March, 1975 to 22nd May, 1975. On the basis of 15th competitive examination, nine more candidates were appointed after the appointment of the petitioners as temporary Munsifs against temporary posts between 14.6.1975 to 4.8.1975.

5. By two notifications dated 17.11.1975 and 23.2.1976, petitioners and others, who had been appointed on adhoc basis under '1974 Rules' for a period of six months, by aforesaid notification dated 23.5.1975, were again appointed Munsifs on adhoc and purely temporary basis. In the aforesaid notifications, no period of appointment was mentioned like the earlier notification dated 23.5.1975.

6. Between 17.6.1976 and 1.9.1976, 33 more candidates, who had appeared at the 15th Judicial Examination, were appointed according to the '1955 Rules'. Thereafter 16th Judicial Examination was held and Munsifs were appointed according to the '1955 Rules' between 13.9.1977 and 8.10.1977. In March, 1979, more Munsifs were appointed on the basis of

the 17th Judicial Exmination held in accordance with the '1955 Rules'. Again in June, 1980, more Munsifs were appointed on the basis of the 18th Judicial Examination held in accordance with the '1955 Rules'.

7. It may be mentioned that the petitioners and others, who had been appointed according to the '1974 Rules'. have been confirmend by a Government Notification dated 22.11.1985 with effect from 1.9.1980 whereas the candidates appointed out of 15th Judicial Examination were confirmend by a notification dated 9.3.1983 with effect from different date in the years 1977 and 1978. Similarly, the candidates, who had been appointed Munsifs out of 16th, 17th and 18th Judicial Examination, were confirmed with effect from earlier dates.

8. According to the petitioners, there was no justification on the part of the State Government to confirm the petitioners from a later dates than the Munsifs, who had been appointed after the petitioners, on the basis of 15th, 16th, 17th and 18th Judicial Examinations aforesaid, when the petitioners were senior to them and had been appointed before them as temporary Munsifs. It was pointed out on behalf of the petitioners that the date of their confirmation and seniority has been fixed on the basis of the invalid part of Rule 9 of the '1974 Rules' which says that on absorption a Munsif appointed under the Rules "will not be entitled to reckon the period of his service as a temporary Munsif for the purpose of his seniority". It was urged that persons appointed under '1974 Rules' as well as those appointed under '1955 Rules', having been appointed in the same service on temporary basis,

after proper advertisement and their names having been recommended by the two statutory committees, in one case by the committee constituted under Rule 4 of '1974 Rules' and in other by the Commission, there was no rational basis to ignore the period of temporary appointment in one case and to add the same in the other for purpose of determining the seniority. In other words, according to the petitioners, two equals are being treated as an unequal without any rational basis which amounts to discrimination within the meaning of Article 14 of the Constitution.

9. Several appointees out of 15th, 16th, 17th and 18th Judicial Examinataions filed application for being added as respondents to this application apprehending that their seniority is likely to be affected, in case this writ application was allowed. Their prayer has been allowed by this Court and they have been added as respondents to this application. Counter affidavits have been filed on their behalf.

10. Before I discuss the question as to whether the persons appointed under '1974 Rules' can be held to be equal to persons appointed under '1955 Rules', I consider it advisable to refer to the salient features of '1974 Rules' and '1955 Rules'. Rules 3 and 4 of '1974 Rules' which are relevant are as follows :-

> 3. Ad hoc recruitment to the posts of Munsifs - Ad hoc recruitment to the post of Munsifs purely on temporary basis shall be made by the Governor on recommendation of the Selection Committee to be constituted in accordance with Rules 4.

4. Constitution of Selection Committee - The Selection Committee shall consist of the following persons namely :-

a) The Chief Justice or the Judge of the High Court to be nominated by him in this behalf.

b) One more Judge of the High Court to be nominated by the Chief Justice in this behalf, and

c) The Chairman of the Commission or any member of the Commission to be nominated by the Chairman in this behalf.

Rules 6 requires applications to be invited by advertisement in the manner to be decided by the Chief Justice. Rule 7 prescribes the age limit as well as the condition that the applicant must have practised at least three years at the Bar on the date of advertisement. Rules 8, 9 and 10 are as follows:-

8. Procedure for selection and recommendation for appointment - The Selection Committee shall select candidates for interview on the basis of a short written test or by such other method as the Selection Committee may decide. Recommendation will be finally made by the Selection Committee for appointment of candidates as Munsif under these Rules in order of merit, to the Governor, only on the basis of the performance of the selected candidates at such interview.

9. A Munsif appointed may be absorbed in the permanent cadre - A Munsif appointed under these Rules may be absorbed in the permanent

cadre of the Bihar Civil Sevice (Judicial Branch) by the Governor on the recommendation of the High Court in consultation with the Commission. *On such absorption a Munsif will not be entitled to reckon the period of his service as a temporary Munsif for the purpose of his seniority.*

(emphasis added)

10. A Munsif appointed not required to undergo training.- Munsif appointed under these Rules are not to be required to undergo training under the Training and Departmental Examination Rules, 1963.

Provided that the temporaray Munsifs after being absorbed in the permanent cadre shall not be confirmed until they pass the departmental examination as provided under the Training and Departmental Examination Rules, 1978.

11. In the '1955 Rules', service has been defined to mean Bihar Civil Service (Judicial Branch). Rule 3 vests power in the Governor to decide each year the number of vacancies in the posts of Munsifs to be filled up on a substantive basis or a temporary basis. Under Rule 4 the Commission has to advertise the vacancies and to invite applications from eligible candidates. Rule 14 prescribes that an examination shall be held according to the syllabus specified in Appendix 'C' to those rules which are liable to alteration from time to time by Government after consultation with the High Court and the Commission. Under Rule 15 the Commission has discretion to fix the qualifying marks in any or all the subjects at the written examination in consultation with the Patna High Court. In view of Rule 17, on the basis of the marks obtained

at the written examination, the Commission has to arrange for viva voce test of the candidates. Rule 19 provides that the number of marks obtained at the viva voce test shall be added to the marks obtained at the written examination and then a list of successful candidates in order of merit shall be prepared. Thereafter such recommendation has to be submitted to the Governor. Rules 25 and 26 prescribe the mode of appointment of Munsifs on temporary basis and their confirmation. They are as follows :-

> 25. A candidate appointed on a temporary basis shall have to undergo all the training for the post as if he were appointed on a substantive basis.
>
> 26. Notwithstanding anything to the contrary contained in these rules, a Munsif appointed on temporary basis shall be eligible for permanent appointment to the Sevice without there being any upper age limit subject to the conditions that -
>
> (i) He has completed two years of service from the date of his first appointment,
>
> (ii) he has passed such tests as may from time to time be prescribed in the Departmental Examination Rules, and
>
> (iii) he is recommended by High Court for such permanent appointment.

12. It may be pointed out that candidates appearing at 15th to 18th competitive examinaations held according to the '1955 Rules' had also been

appointed on temporary basis under Rules 25. Later they have been confirmed and made permanent in accordance with Rule 26 with retrospective effect, covering even the period of their temporary appointment, whereas in case of petitioners and others appointed under '1974 Rules' their period of temporary appointment between 23.5.1975 and 1.9.1980 has been ignored in view of Rule 9 aforesaid.

13. On behalf of the petitioners it was first submitted that as the patitioners had been appointed in the Bihar Civil Service (Judicial Branch) since the very inception although on temporary basis, after proper advertisement, screening and test by a high level statutory committee constituted under Rule 4, it shall be deemed that they have been absorbed in the cadre with effect from the date of their initial appointment. In other words, according to the petitioners, their absorption in the permanent cadre of the Bihar Civil Service (Judicial Branch) and seniority shall not be dependent on the compliance of the procedure provided under Rule 9. In this connection reference was made to the well-known case of the Supreme Court in the case of *S.B. Patwardhan* v. *State of Maharashtra* (1). In the aforesaid case, the Supreme Court had to consider the effect of confirmation in a service. While examining the scope of rule 8(iii) of Bombay Service of Enginners (Class I and Class II) Recruitment Rules, 1960 it was observed :-

"Instead of adopting an intelligible differentia, Rules 8(iii) leaves seniority to be determined on the

(1) (1977) A.I.R. (S.C.) 2051

sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies."

It was further pointed out :

"Rule 8(ii) in the instant case adopts the seniority-cum-merit test for preparing the statewise Select List of seniority. And yet Clause (iii) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That, under Arts. 14 and 16 of the Constitution, is impermissible and therefore we must strike down Rule 8(iii) as being unconstitutional."

On the basis of the aforesaid judgment of the Supreme Court it was urged that the seniority of the petitioners in the cadre should not be dependent on the notifications of absorption or confirmation as prescribed under Rule 9 and Rule 10 of the '1974 Rules'. It was pointed out that if the seniority of the petitioners is made dependent on absorption in accordance with Rule 9 then Rule 9 has to be struck down as unconstitutional.

14. On behalf of the petitioners reference was also made to the well-known case of *Baleshwar Das and others* vs. *State of U.P. and others* (1). There Supreme Court considered the question as to what is meant by "substantive appointment in service". It was pointed out in that case that merely a person

(1) (1981) A.I.R. (S.C.) 41

has been appointed on temporary basis that does not mean that till he is confirmed he has not been appointed on substantive basis. It that connection it was observed as follows :-

"we see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the public Service Commission, they are not appointed to a substantive capacity ..... That is to say, although they are temporary appointees, if their probation is completed and other formalities fulfilled, they become members of the Service. It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfils the necessary conditions for regular appointment such as probation and consultation with the Public Service Commissions etc."

It was observed in the aforesaid case that confirmation cannot be the sole touchstone of seniority. Following the aforesaid judgments of the Supreme Court a Bench of this Court in the case of *Taraka Nath Sharma* vs. *State of Bihar* (1) while interpreting the expressions "with the date of their substantive appointment to the service" occurring in Rules 39 of the Bihar Finance Service Rules came to the conclusion that it did not mean with effect from the date of the confirmation of the appointees concerned.

15. The judgments, referred to above, no

(1) (1985) P.L.J.R. 829

doubt, help the petitioners to a great extent but the facts of the present case are different from the facts of the cases of *Baleshwar Das* vs. *State of U.P. and others* and *Taraka Nath Sharma* vs. *State of Bihar*. In the case of *Baleshswar Das* the relevant rule only defined "members of the service" to mean a Government servant "appointed in a substantive capacity". in that context, it was considered as to whether for appointment in a substantive capacity the order of confirmation is a must. But in that case there was no rule like Rule 9 saying in clear and unembiguous terms that on absorption the appointee shall not be entitled to reckon the period of his service on temporary basis for the purpose of his seniority. Similar is the position in the case of *Taraka Nath Sharma* vs. *State of Bihar*. Rule 39 of that case simply stated "with the date of their substantive appointment to the service". This Court held that it shall not necessarily mean with effect from the date of confirmation. In my view, unless that part of Rule 9 which prescribes a bar on reckoning the period of temporary appointment for the purpose of seniority is held to be ultra vires the seniority of the petitioners and others who have been appointed in accordance with '1974 Rules' cannot be determined with reference to the date of their initial appointment on temporary basis.

16. It was then submitted on behalf of the petitioners that on the principle laid down in the *S.B. Patwardhan's* case, this Court should declare part of Rule 9 to be unconstitutional being in conflict with Articles 14 and 16 of the Constitution. On behalf of

the petitioners it was pointed out that but for appointment of the petitioners and the intervenors under two different rules framed under Article 234 of the Constitution for practical purpose there is no difference so that the petitioners who have been appointed under '1974 Rules' should be treated as a separate class to whom the benefit of their period of temporary appointment should have been denied for the purpose of seniority.

17. The Learned Advocate General, who has appeared on behalf of the State, submitted that as both the rules have been framed under Article 234 of the Constitution and the Governor has made the appointments on the recommendation of the Commission in one case and on the recommendation of the Committee constituted under Rule 4 in the other there is no rational basis for allowing the appointees under '1955 Rules' to count the period of their temporary appointment towards their seniority, whereas to deny the same to the appointees under '1974 Rules'. The Learned Advocate General further pointed out that even the High Court on more than one occasion at earlier stages had been writing to the State Government for deletion of part of Rule 9 so that even appointees under '1974 Rules' could be absorbed with effect from the dates of their temporary appointment as has been done in the case of appointees under '1955 Rules'. In this connection reference was made to a letter dated 3.11.1982 addressed by the Registrar of the Patna High Court to the Commissioner, Department of Personnel and Administrative Reforms, Government of Bihar. The relevant part thereof is as follows :-

" I am directed to say that on reconsideration of

the matter, the Court have decided that the existing Rule 9 of the Bihar Civil Service (Judicial Branch) Ad hoc Recruitment on Temporary Basis Rules, 1974 should be deleted and substituted as follows :-

"Rule 9- A Munsif appointed may be absorbed in the permanent cadre.

A Munsif appointed under the rules may be absorbed in the permanent cadre of the Bihar Civil Service (Judicial Branch) by the Governor on the recommendation of the High Court. On such absorption, a Munsif will reckon the period of his service as a temporary Munsif for the purpose of his seniority from such date as the High Court may fix in relation to Ad hoc Munsifs generally or an individual Ad hoc Munsif in particular.

Provided that :

i) he has completed two years of service from the date of his first appointment, and

ii) he has passed such tests as may, from time to time, be prescribed in the Departmental Examination Rules."

The Court therefore, recommend that necessary amendment in the Bihar Civil Service (Judicial Branch) Ad hoc Recruitment on Temporary Basis Rules, 1974 should be made accordingly.

I am further to request that necessary notification of the State Government giving effect to the above recommendation of the Court may be issued at an early date."

Again the view of the High court in respect

of Rule 9 was communicated to the State Government by letter dated 14.1.1984. The relevant part thereof is as follows :-

> "the Rules were framed in the year 1974 having provision in rule 9 that on absorption in the permanant cadr, the temporary Munsifs appointed under these rules will not be entitled to reckon the period of their service as temporary Munsifs for the purpose of their seniority. But such Rules, in the Hon'ble Court view will operate harshly against the interest of Ad hoc Munsifs appointed in the year 1975 or those who may be appointed on the basis of those Rules in future. The proposed amendment is not going to adversely affect others who have been appointed prior to ad hoc Munsifs. The Hon'ble Court on careful consideration of the pros and cons have made proposal for amendment of Rule 9."

In view of the stand taken by the learned Advocate General on behalf of the State and the opinion of the Patna High Court as contained in the Communications aforesaid it is obvious that now the Patna High Court as well as the State Government admit that there is no rational basis to treat the appointees under '1974 Rules' as a separate class and to deprive them of the period of their temporary appointment for the purpose of reckoning their seniority. The Commission is a respondent to this application but it has not appeared to contest the claim of the petitioners. Normally, in view of the stand taken by the State and the Patna High Court and non-appearance of the Commission, there was no difficulty in declaring the objectionable part of Rule 9 invalid. But that decision is likely to affect the seniority of the intervesors who

although have been appointed in the Bihar Civil Service (Judicial Branch) after the petitioners but have been given seniority over the petitioners by taking note of their period of temporary appointment their objections have to be considered.

18. According to the intervenors, as the appointees under '1974 Rules' cannot be treated as equal to the appointees under '1955 Rules', they being a separate class, Rule 9 rightly ignored their period of temporary appointment. In this connection it was pointed out that under the provisions of '1955 Rules' a written competitive examination is held according to the syllabus specified in Appendix 'C' to those rules. Thereafter interview is held by the Commission and a merit list is prepared. It was urged that in view of Rule 8 of '1974 Rules' Only" a short written test of the applicants' was held. It was further pointed out that the marks obtained at such written test only entitled the selected applicants to appear for the interview but while preparing the merit list the marks obtained at the written test was not added; the merit list was prepared under Rule 8 only on the basis of the performance at the interview. In my opinion, on the ground that the petitioners were selected only on the basis of the interview, it cannot be held that the persons appointed under '1974 Rules' were inferior in merit and as such a separate class. It is well known that in many services appointments are made only on the basis of the interview. Reference in this connection may be made to the appointment of Addl. District Judges by direct recruitment in the State of

Bihar. The recommendation in respect of the appointment of the Add. District Judges are made by the High Court only on the basis of the interview and State Government makes appointment on the basis of that recommendations. In respect of the petitioner admittedly after a short written text they were required to appear for interview before the statutory committee consisting of two Judges of this Court and a Member of the Commission. In this background, it is difficult to hold that merit wise they shall be deemed to be of an inferior class vis-a-vis persons appointed under '1955 Rules'.

19. It was then submitted on behalf of the intervenors that the persons appointed even on temporary basis under '1955 Rules' become the member of the Bihar Civil Service (Judicial Branch) since the date of their initial appointment, whereas persons appointed under '1974 Rules' become the member of that service only after absorption under Rule 9. From bare reference to letter dated 27.3.1974 creating 152 posts for persons to be appointed under '1974 Rules' it is apparent that those posts had been created in the Bihar Civil Sevice (Judicial Branch) with effect from 1.4.1974. A copy of that letter is annexure '14' to the writ application. The preamble of '1974 Rules' says in clear words that rules were being framed "for regulating adhoc recruitment to the Bihar Civil Service (Judicial Branch)". It has been rightly submitted on behelf of the petitioners that when 152 posts against which the petitioners and others were appointed had been created in the Bihar Civil Service (Judicial Branch)

the appointment of the petitioners since very beginning will be deemed to be in that service. Rule 9 speaks of absorption "in the parmanent cadre of the Bihar Civil Service (Judicial Branch)". From Rule 9 it cannot be inferred that till the petitioners were absorbed in accordance with Rule 9 they were not members of the Bihar Civil Service (Judicial Branch); it only means that till that day they were not members of permanent cadre. In my view, it is difficult to hold that till the notification dated 22.11.1985 was issued absorbing the petitioners in the permanent cadre with effect from 1.9.1980 the petitioners had not been appointed to the Bihar Civil Service (judicial Branch). As such no distinction can be made on this ground between the petitioners and the intervenors.

20. Another distinction which was pointed out on behalf of the intervenors was about undergoing training after the appointment. The appointees under '1955 Rules' have to undergo training, whereas the appointees under '1974 Rules' were not required to undergo any training in view of Rule 10 thereof. In my view, this distinction is also not of any consequence. The applicants under '1955 Rules' were required to be a continuous practioner at the Bar for at least one year on the date of advertisement (vide Rule 6 (c)), where as the applicants under 1974 Rules were required to have practised as advocate for "at least three years continuously at the Bar on the date of advertisement (vide Rule 7)". Perhaps, that was the reason that after appointment they were not required to undergo

training by Rule 10. This was also necessary because the new Code of Criminal Procedure had come in force which required more Judicial Magistrates to take up the cases for hearing which used to be heard by the Executive Magistrates prior to coming into force of the New Code. In any case, on this ground, it is difficult to hold that the petitioners belong to a class different from the intervenors.

21. A distinction was also sought to be drawn between appointment on adhoc basis as in the case of the petitioners and on temporary basis as in the case of the intervenors. It was urgad that an appointment on adhoc basis cannot be treated at par with an appointment on temporary basis and as such the period of adhoc appointment has been rightly ignored under Rule 9. In support of the aforesaid contention reliance was pladed on behalf of the intervenors on the case of *A.P.M. Mayankutty* v. *Secretary* (1). In that case after making a referance to Rule 10(a) (i) (1) of the Madras State and Subordinate Services Rules it was pointed out that the aforesaid provision contemplated the making of temporary appointments when it was necessary in the public interest to do so, under an emergency, "other-wise than in accordance with law". In that background, the appointments were held to be a stop gap or emergency arrangement which could not have been taken into account for the purpose of seniority. It is true that adhoc appointment made under fortuitous

(1) (1977) 2 S.C.C. 360

circumstances, without following any statutory rule or a procedure consistent with Articles 14 and 16 of the Constitution, as a stop gap arrangement, to meet an emergency situation, cannot be held to be an appointment on temporary basis in its strict sense. But if appointments have been made after due advertisement and selection by a statutory committee or following a Procedure consistent with Articles 14 and 16 of the Constitution i.e. selection in order of merit, after giving opportunity to all eligible persons, then such appointments have to be treated at par with temporary appointments even if they are notified as adhoc appointments. The petitioners were appointed in acordance with '1974 Rules' after advertisement, screening and interview by a statutory committee consisting of two judges of this Court and a Member of the Commission. In that background, it is difficult to hold that when the petitioners were appointed on adhoc basis under the '1974 Rules' their nature of appointment was inferior to appointment on temporary basis. In this connection it may be pointed out that Rule 9 itself speaks about the period before absorption as "service as a temporary Munsif" and provides for absorption of such appointees in permanent cadre.

22. The petitioners and those appointed under '1955 Rules' had been appointed in the same service in accordance with two statutory Rules, were holding identical posts and an appointee under '1955 Rules' used to be transferred to a post held by appointee under '1955 Rules' and they were never treated separately during the period of their temporary

appointment. Under such a situation, it has to be held that persons appointed under '1974 Rules' are not inferior as a class so that their period of temporary appointment before absorption in the permanent cadre ought to have been ignored by Rule 9. There being no rational basis to treat the petitioners separate as a class from appointees under '1955 Rules' they have to be treated as equals with the appointees under '1955' Rules. It is well known that when two equals are treated as unequals Article 14 of the Constitution is attracted and any order/rule treating two equals as unequals has to be struck down. In the case of *S.M. Pandit* v. *State of Gujarat* (1) the Supreme Court, while considering the question as to whether Mamlatdars directly recruited and those appointed by promotion can be treated as unequals, held as follows :-

"Both the directly recruited Mamlatdars as well as promotee Mamlatdars are designated as Mamlatdars. They have the same pay scale. They discharge same functions. The posts held by them are interchangeable. There is nothing to show that the two groups are kept apart. The only circumstance urged in support of the contention that they form two different classes is that before promotion to the post of deputy Collector, the directly recruited Mamlatdars have to put in a certain minimum period of sevice. This condition, in our opinion, does not indicate that the two groups were kept apart. The High Court seems to think that that condition is not a valid condition. We express no opinion on that question. Even if it

(1) (1972) I.L.L.J. 127

is a valid condition, the same does not show that the directly recruited Mamlatdars formed a different class."

On the aforesaid finding, the concerned rules were held to be violative of Articles 14 and 16 of the Constitution and as such invalid. It was pointed out in the case of State of *Andhra Pradesh* v. *Raja Reddy* (1) "a statutory provision may offend Art. 14 of the Constitution both by finding differences where there are none and by making no difference where there is one". It has been repeatedly pointed out by Courts that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the statute in question. In the instant case, I do not find that either of the tests have been fulfilled. Neither the appointees under '1974 Rules' can be treated as a class separate from the appointees under '1955 Rules', for the reasons mentioned above, nor the differentia has any rational relation to any object which is sought to be achieved by objectionable part of Rule 9 foresaid. The learned counsel for the intervenors could not point out as to what was the object which was sought to be achieved by depriving the appointees under '1974 Rules' the period of their temporary appointment for the purpose of seniority. I on my part find none. As already mentioned above, even the High Court as well as the State Government later have come to the conclusion that the objectionable

(1) (1967) A.I.R. (S.C.) 1458

part of Rule 9 denying the period of appointment on temporary basis prior to absorption for purpose of seniority under Rule 9 was unjust, arbitrary and liable to be deleted. In such a situation I am left with no option but to hold that part of Rule 9 purports to discriminate the petitioners without any rational basis and as such ultra vires being violative of Articles 14 and 16(1) of the Constitution. Accordingly, I direct that the seniority of the appointees under '1974 Rules' be re- fixed in accordance with law ignoring the aforesaid objectionable part of Rule 9.

23. During the course of argument it was brought to our notice on behalf of the intervenors that some of them had been appointed in accordance with '1974 Rules' along with the petitioners but later they were selected in accordance with '1955 Rules' and in view of the objectionable part of Rule 9 they resigned from the post of adhoc Munsifs and accepted their appointments under '1955 Rules'. It was submitted on their behalf that in case the objectionable part of Rule 9 is held to be ultra vires their seniority shall be affected for no fault of theirs. In view of Rule 9, they were justified in accepting their appointments later under '1955 Rules' where there was no bar in reckoning the period of temporary appointments. If no direction is given by this Court an injustice is likely to be prepetuated without any fault of such persons. Accordingly, I direct that in respect of such persons who had been appointed under '1974 Rules' and who later accepted their appointment under '1955 Rules' after resigning their posts, the period of their continuous temporary appointment under the '1974 Rules' be taken into consideration for purpose of determining their seniority, so that they may not become victim of our judgment for no fault of theirs.

24. In the result, this writ application is allowed to the extent indicated above. In the circumstances of the case, there shall be no order as to costs.

S. N. JHA,J. I have had the advantage of going through the judgment prepared by my learned Brother N.P.Singh, J and I entirely agree with his judgment but I am tempted to add a few words of my own.

Both the petitioners and the respondents are members of the Bihar Civil Service (Judicial Branch). The petitioners were appointed as Munsifs under the '1974 Rules' whereas the intervenor respondents were appointed as Munsifs under the '1955 Rules'; both the rules framed in exercise of powers conferred by Article 234 of the Constitution of India by the Governor of Bihar in consultation with the High Court and the Commission respectively as indicated above in the judgement of my learned Brother in detail. It is needless to go into the facts of this case as it is already dealt in the main judgment.

My learned Brother has rightly pointed out that the classification must be based on an intelligible differentia which distinguishes persons or things that are grouped together form others who are left out of the group and that the differentia must have a rational relation to the object sought to be achieved.

In the instant case, can it be said that the petitioners on the one hand the intervenor-respondents on the other form two different classes when they are performing the same duties simply because the petitioners were appointed under the '1974 Rules' and

the respondents were appointed under the '1955 Rules'. It is relevent to mention here that '1974 Rules' were framed by the Governor in consultation with the High Court of Judicature at Patna to appoint certain Munsifs as Code of Criminal Procdeure, 1973 was coming into effect from 1.1.1974 with an object to have complete separation of judiciary from executive branch of the State organ and under the said '1974 Rules' the petitioners were appointed as temporary Munsifs, of course, on ad-hoc basis after proper advertisement and their names having been recommended by a statutory committee, but that does not mean that their nature of appointment was in any way inferior to that of the appointees under '1955 Rules' for the reasons already mentioned in the main judgement. Both the parties holding the same post and discharging similar duties cannot, in my view, be treated differently and termed as "separate class". There cannot be any justification for it.

After giving my anxious consideration to the materials placed before us, I find myself in complete agreement with my learned brother that part of Rule 9 of '1974 Rules' which purports to discriminate the petitioners from intervenor-respondents without any reasonable nexus is ultra-vires to Articles 14 and 16(1) of the Constitution of India and fit to be struck of.

M.K.C. *Application allowed to that extent*

FULL BENCH

Before S. S. Sandhawalia, C.J., Nagendra Prasad Singh and Uday Sinha,JJ.

1986

August,26.

*Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna, and anr.**

v.

The State of Bihar and others.

Private Educational Institutions (Taking over) Ordinance, 1986 (Bihar Ordinance No. 15 of 1986), section 6 and Constitution of India, Articles 14,16,19,163(3) and 213 and Entry 42 of the concurrent List III and Entry 66 of List I --- promulgation of Ordinance No. 15 of 1986 --- Satisfaction of the Governor under Article 213 pertaining to the immediacy, whether justiceable ---- exercise of legislative power by promulgation of ordinance by the Governor, whether can be impeached on ground of malafides --- malafides

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*Civil writ Jurisdiction Case No. 2087 and 2098 of 1986. In the matter of applications under 226 and 227 of the Constitution of India.

C.W.J.C. No. 2087 of 1986: Dr. Jagadanand Jha-petr.

of the Chief Minister, whether tantamount to the malafides of the Council of Ministers as a whole and vitiate the exercise of legislative power of promulgation of an ordinance --- sanction of the president under proviso to clause (1) of Article 213, whether required --- whether void for lack of legislative competence, discriminatory, infract Article 14 and violative of Article 19 (1) (c) --- section 6 of the Ordinance - -validity of ---- power conferred on the State Government to terminate the services of the staff of the institute --- nature of --- whether attracts the principles of natural justice --- service of non- teaching staff, whether, can be terminated under section 6 (4).

The advice tendered by the Council of Ministers to the Governor is constitutionally privileged beyond any probe. Therefore, the result is that not only one cannot probe the mind and satisfaction of a body of persons, but, further, the materials on which such satifaction is to be arrived at are again expressly barred from the scrutiny of the court. Under Article 213, the Governor is not obliged to record any reasons for his satisfaction with regard to immediacy. Equally the Council of Ministers, whilst arriving at a decision, are equally not obliged to record any reasons, and, as a matter of practice they never do. Therefore, in the absence of Knowlege about the materials placed or considered by the Council of Ministers the nature of discussions in the cabinet meeting, the secrcy of the proceedings and the lack of requirement of recording any reasons, renders it not only undersirable but almost impossible to judicially test the consequential

satisfaction of the Governor under Article 213, which is only an euphemism for the satisfaction of a large Council of Ministers. The cabinet of Ministers are under an oath of secrecy and the details of the proceedings of the Council of Ministers are confidential and sacrosanct. Herein perhaps what is pre-eminent if not conclusive, is the fact that the power under Article 213 though exercised by the executive head, is in essence a pristinely legislative function. The Constitution, in chapter IV, leaves this aspect in no manner of doubt, when in the very heading it proclaims it to be the "Legislative power of the Governor", and clause (2) of Article 213 declares that an Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of State assented to by the Governor. Now once Article 213 envisages a legislative function, then it deserves highlighting that considerations pertaining to the exercise of executive or administrative actions are altogether alien thereto. These fall in an altogether different field than the one of the exercise of the soverign function of legislation. Therefore, to draw any analogy from the field of subjective satisfaction of an individual acting administratively or executively, with the satisfaction of a legislative body is not only inapt but wholly misleading. Indeed, it is axiomatic that the propriety, expediency and the necessity of a legislative act are for the determination of the legislative authority and not for adjudication by the Courts.

Held, therefore, that both on principle and precedent the satisfaction of the Governor under Article

213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is not justiceable.

In the field of constitutionality of legislation colurable exercise of the power is a thing distinct and apart from the ordinary concept of malice in law against executive or administrative action. The concept of colourable exercise of legislative power is not the concept of malice in law but in pith and substance is only a matter with regard to the issue of legislative competence. Where an enactment is made by legislature are not competent to legislate on the subject but is merely dressed up in a manner so as to bring it within the field, it is only then that the courts have labelled such an attempt as a colourable exercise of legislative power. It has no relevance at all to any oblique motive therefor. The test in such a situation only is to see the nature of the enactment and whether in pith and substance it comes within the ambit of the legislative entries for which a particular legislature may be entitled to legislate. If such an enactment does not come within the competence of the legislature in true essence but is merely clothed in such a garb to bring it within the legislative competence, it is only than that the theory of colourable exercise of legislative power can be invoked. No evil motive or any personal mala fides of the legislature as a whole or of the individuals composing the same can be attributed. The theory of colirable exercise of legislative power is consequently a thing distinct and apart from the rule of attribution of any malice-be

it one of fact or in law --- to the legislature.The colurable exercise of legistative power is in essence nothing more than the absence of legislative competence. It cannot even remotely buttress the stand that an Ordinance can be impeached on the ground of personal *mala fides.*

Held, that the exercise of legislative power of promulgation of an Ordinance by the Governor cannot be impeached on the ground of *mala fides.*

It is true that in a parliamentary form of Government the position of the Prime Minister or the Chief Minister is pre- eminent, in so far as the Council of Ministers is appointed on his recomendation and, he acts as a hyphen betwixt the Executive and the Legislature. But from this fact it is a wrong and unwarranted step to go to the extreme that the Chief Minister is himself the Council of Ministers. In a democratic system, there is no other principle to determine the decision of a constitutional body of persons, except by the settled rule of mojority. The only mode for arriving at an answer as to what is the decision of a body of persons co-equal in status, is as to what was the majority opinion of such a body., unless the statute prescribes other-wise or a different mode therefor. The principle of joint responsibility of the cabinet, which is the fundamental base of the Parliamentary form of Government is itself a pointer to the fact that the minsters are not mere cyphers attached to the figure of the Chief Minister, but are jointly responsible to the legislature and through

it to the people for the conduct of the Government. The well known process of decision-making by the Council of Ministers would itself refute the stand that the Chief Minister's earlier predilections would necessarily be the decision of his Council of Ministers. The cabinet is a constitutional and resposnsible consultative body. Democratic process works by expressions and exchange of opinions and even a Chief Minister in a cabinet meeting may well be first persuaded against any pre-conceived view of decision arrived at by him earlier. He may even be out-voted in the cabinet, if the matter comes to such a head. To presume that the Chief Minister's prior decision or opinion alone, against the views of the Council of Ministers and dohors their concurrence, has an overriding finality as such, would be running against the very concept of the principle of Joint cabinet responsibility and the democratic form of Government. Any such stand attributing such dictatorial and arbitrary power to the Chief Minister alone is not to be easily presumed or accepted in a democratic form of Parliamentary Government.

Held, Further, that the mala fides of the Chief Minister even if established is not tantamount to the mala fides of the Council of Ministers as a whole and cannot, therefore, vitiate the exercise of the legislative power of the promulgation of an Ordinance.

A take over or an acquisition or nationalisation of an institution, establishment, or a company does not ivolve any concept of repugnancy and the

consequential requirement of the prior concurrence by the President and as such in the instant case the impugned ordinance did not require the sanction of the President under the proviso to clause (1) of Article 213 of the Constitution.

Entry 66 is confined to the determination of standards for higher education or research and scientific and technical institutions, and Co-ordinating them at the national level. Prescription of standards and co-ordination thereof is something entirely distirct and different from setting up institutions for higher education. Entry 66 of List I cannot possibly be a bar to the establisment of scientific and technical institutions for higher education by the states, which is now clearly a concurrent subject. Education generally including higher education and technical education and universities, would come within the sweep of Entry 25 of List III and consequently by virtue of this Entry the State Government is clearly entitiled to legislate for setting up and establishing institutions of this nature, and, if it can do, So it can equally take over and acquire them under its basic power of acquisition for the purpose of nationalisation. The earlier power of acquisition in lists I and II have now been substituted by a single comprehensive Entry No.42 in the concurrent List III conferring both on the centre and the state, the power of acquisitioning and requisitioning of properties. Therefore the State has the basic legislative competence to pass the legislation for the acquisinitiong of the properties of the Institut e in the instant case.

Held also, that the impugned Ordinance in the instant case is not governed by Entry 66 of List I. It is well within the parameters of Entry 42 of the concurrent List III and as such it is not void for lack of legislative competence.

Discrimination under Article 14 is a question of fact which has to be pleaded and the burden is always on the petitioner to prove that persons in equal or in identical circumstances have been treated unequally. In the instant case barring a bold assertion that the 11 institutions named are similar, there has been placed no factual data or proof on the record to show that the other alleged 11 institutions are in an identical situation, far from the same having been actually established. Some similarity is not identity and as such the impugned Ordinance is in no way discriminatory, nor does it infract Article 14 of the Constitution in its choice of the petitioner Institute alone for nationalisation in its first phase.

The mere divesting of one of the societies properties, when validly done by the State in its exercise of eminent domain and the power of acquisitioning and requisitioning therefor does not in any way infract or attract the provisions of Article 19 (1) (c) of the Constitution and as such in the instant case the impugned Ordinance does not violate the fundamental right to from associations under Article 19 (1) (c) of the Constitution.

Section 6 of Ordinance No. 15 of 1986 is not

violative of Article 14, 16 or 19 of the Constitution and is perfectly valid.

The power conferred on the State Government to terminate the services of the staff of the Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna, is not quasi Judicial in nature and consequently does not attract the principles of natural Justice.

Section 6 (4) of Ordinance No. 15 of 1986 squarely warrants the termination of the services of the non-teaching staff as well.

Case laws reviewed.

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

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

Mr. Basudeva Prasad, Mr. Anil Kumar, and, *Mr. Sunil Kumar.* for the petitioners

Mr. Lal Narayan Sinha, Mr. Rambalak Mahto (Advocate General), Mr. S. Rafat Alam, and, *Mr. Mahesh Prasad.* For the Respondence

S.S.SANDHAWALIA, C.J.: In these two connected writ petitions, laying a frontal challenge to the validity

of the private Educational Institutions (Taking Over) Ordinance, 1986 (Bihar Ordinance No.15 of 1986), significant constitutional and legal issues come to the fore, which deserve formulation at the very outset. *Inter alia*, these are :-

(1) whether the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is Justiceable ?

(2) Whether the exercise of legislative power by promulgation of an Ordinance by the Governor can be impeached on the ground of *mala fides* ?

(3) If so, would the *mala fides* of a Chief Minister be tantamount to the *mala fides* of the Council of Ministers as a whole, and, may, consequently, vitiate the exercise of the legislative power of the promulgation of the Ordinance ?

(4) Does the impugned Ordinance require the sanction of the President under the proviso to Clause (1) of Article 213 of the Constitution ?

(5) Is the impugned Ordinance void for lack of legislative competence ?

(6) Whether the impugned Ordinance is discriminatory and infracts Article 14 in so far as it chooses the petitioner Institute alone for nationalisation in its first phase ?

(7) Does the impugned Ordinance violate the fundamental right to form associations under Article 19 (1) (c) of the Constitution ?

2. It is manifest that the primal issues aforesaid are pristinely legal and would conseqeuntly, relegate the facts to a comparative background, despite the volume of the pleadings. Nevertheless, the terrafirma of the matrix giving rise to the issues has necessarily to be noticed, albeit with relative brevity.

3. The petitioner Lalit Narayan Mishra Institute of Economic Development and Social change, Patna (herein-after called the Institute), as its very name indicates, is in the memory of late Shree Lalit Narayan Mishra, who, during the sixties and the early seventies, was a towering political figure both in the State of Bihar and also at the national level as the Cabinet Minister for Railways. He fell to an assissin's bomb at Samastipur in 1974, apparently for reasons political. The petitioner Institute, though primarily if not wholly, financed from the State coffers, has been nursed to its present stature by his brother, Shree Jagannath Mishra, who himself is a prominent politcal figure in his own right, having been earlier the Minster for Irrigation and later the Chief Minister of Bihar from ..... and then from ..... , when he relinquished the said officer.

4. Perhaps, at the very outset it may be noticed that the main writ petition, Civil Writ Jurisdiction Case No.2098, of 1986 as drafted, is somewhat remarkably in the paucity of factual foundation, but repleite with elaboration on the political and legal theory that in spite of the abrogation of the property clause, purporting to abolish the fundamental right to property by deleting Article 19 (1)(f) and Article 13, the right to property neverthe less remains a fundamental right by being comprised in Article 21. Reliance is sought to be place, with substantial quotations from Articles:

and opinions rendered by A.M.Bhattacharya, j., and, professor Tripathi in this context. The basic facts have consequently to be collected from the crevices to achieve a modicum of coherence. The Institute was originally established as the "Bihar Institute of Economic Development" in the year 1973 under the Chairmanship of Shree Jagannath Mishra, who was then the Minsiter for Irrigation in the State, and, was registered under the Societies Registration Act, 1860, on the 28th of March, 1973. In the following year it was recognised by the Magadh University as an Institute for the purpose of research under the provisions of Section 2 (1) of the Magadh University Act, and, a grant of Rs. 50,000/- was released by the said University for the purpose of research. The Institute was re-named in the memory of Shree Lalit Narayan Mishra, with its present name in 1975, vide Bihar Government Resolution No.K.M.1-031475-E-1084 of the 10th June, 1975. A grant of Rs.3,06,000/- only was received from the Government on the 26th of November, 1975, and, it is not in dispute that thereafter liberal grants to the tune of Rs.1,28,84,559/-have been subsequently made by the State of Bihar. In that very year, the Government also sanctioned the posts of 2 professors, 2 Readers, 3 Lecturers, 1 Director, 1 Librarian, and 6 Visiting Professors, apart from the requisite posts of administrative and ministerial staff. On the 23rd of March, 1977, the Magadh University, under Section 73 of the Bihar State Universities Act, recognised the Institute as an autonomous one for a period of three years, subject to the concurrence of the University Grants Commission and the State Government, which was subsequently obtained, and, later this period of autonomy was extended for another three years in May, 1980. The rules and statutes of the Institute, as prepared by the Committee, were approved by its

Governing Council on the 8th of July, 1978. In the year 1975, the Institute started one-year Diploma Course in office Management, followed by a similar Diploma course in Marketing and sales management and in personanel Management and Industrial Relations, and later, a two- year Diploma course in Business Management. In 1981, the two-year Diploma course in Business Management was converted into a Master in Business Management course, recognised by the Magadh University, and, later further changes in the courses conducted by the Institute were made, to which detailed reference is unnecessary .

5. It is averred on behalf of the petitioning Institute that it has close associations with a number of prestigious Institution at the National level and presently the broad division of the Institute is in the Management Education wing and the Research wing. Recently on the 22nd of August, 1986, the State Government sanctioned the upgrading of the post of the Director as the Director-General, carrying a salary of Rs.3,500/-, with liberal perks of the office attached thereto and, Shree Jagannath Mishra was appointed to the said post on a permanent basis. It is alleged that relations between the management of the Institute and Shree Bindeshwary Dubey, the Chief Minister, got somewhat soured and the annual grant of the Institute was stopped by the State Government in spite of a no-objection certificate having been granted by the Education and Finance department officials. This led to a loss of faith reposed in the Institute by the various departments of the Government and the University Grants Commission.

6. In has been averred that on the 19th April, 1986, a meeting of the Council of Ministers of the

State of Bihar was held at 1.30 P.M., and, apparently, in pursunance of their decision, the Private Educational Institutions (Taking over Ordinance, 1986 (Bihar Ordinance No.15 of 1986 : hereinafter called the impugned Ordinance), was thereafter promulgated on that very date. It is alleged that even before the Ordinance was printed and pulished in the Bihar Gazette, an armed police force was posted in the campus of the Institute at 3.30 p.m., along with the Commissioner of Patna Division, on the same day. Shree Jagannath Mishra, the Director-General, who was in his office, however, was not even extended the courtesy of a request to hand over the charge of the Institute. It is common ground that thereafter the Institute was taken over completely by the State Government and both the Director-General and the Governing Council of the Institute were wholly ousted of all vestiges of control and association therewith.

7. As is manifest from the very outset, the impugned Ordinance has been assailed on a number of legal grounds, but, has been equally challenged on the ground of malafides of the Chief Minister. In paragraph 2 (iv) it is averred that Shree Bindeshwari Dubey, the present Chief Minister of the State of Bihar, has of late been erked by the findings of the Institute in respect of some important administrative data which runs counter to his official stand in regard to those matters before the House of the Legislature as well as before the Central Government, and, for that reason, has become biased and motivated to damage the political, social and educational image of the chief founder of the Institute, Shree Jagannath Mishra, in order to secure his own continuance in office. It is

further alleged that some reports based on researches carried on by the Institute revealed large scale misuse of Government funds and suggested measures for full utilisation whereof, which, naturally angered the State administration headed by Shree Dubey and in reaction, the Chief Minister had stopped the annual grants to the Institute, without assigning any valid cause or causes. In paragraphs 9, 10 and 11, it is suggested that the taking over of the Institute has been at the instance of the Chief Minister and the speed with which the take over was made is suggested to be motivated. This is sought to be evidenced by the illegal termination of the permanent employees of the Institute made in violation of section 6 of the impugned Ordinance and the relevant provisions of the Constitution itself.

8. These allegations are sought to be elaborated and supplemented in the reply to the counter-affidavit, and much store is set on the ground that the statements had not been controverted by Shree Bindeshwari Dubey, the Chief Minister of Bihar, on his own affidavit, and, further, that Shree Bhashkar Banerjee, the Education Commissioner, who has sworn the counter-affidavit controverting the allegations, has not done so on his personal knowledge or instructions from the Chief Minister.

9. The counter-affidavit has been filed by Shri Bhashkar Banerjee, Secretary -cum-Education Commissioner of the Government of Bihar. It is averred therein that incorrect and exaggerated accounts of fact have been laid in the writ petition, and, then, in particular, irresponsible imputations of mala fides have been levelled against Respondent No.2, the Chief

Minister. The averments in the writ petition in detail and seriatim are traversed therein, both on points of fact and the proposition of law. It is, however, pointed out that the wild allegations against the Chief Minister are based on no tangible material whatsoever and what is more, there was no cogent connection between the need and circumstances leading to the promulgation of the Ordinance and any alleged animus on the part of the Chief Minister. Apart from the fact that the alleged research papers were unnamed and untraceable, in none of the research publications there was any thing against the Chief Minister of the present Government at all. It is pointed out that the running of the Institute and the utilisation of funds was far from satisfactory, and, indeed, the affairs relating to the institution had already initiated the consideration as to whether the institution should be taken over by the State itself or not way back, 8 years earlier, in 1978, when, altogether a different person, Shree Karpuri Thakur, was the Chief Minster of the State. An extract of the order of the then Chief Minister have been denied as unjustified. It is pointed out that on the date of the promulgation of the Ordinance, the police force had to be posted because of a very reasonable apprehenstion that the records of the institution might disappear and might be otherwise manipulated. It is categorically averred that the impugned Ordinance was promulgated and published in the Gazette on the 19th of April, 1986, and, because of the aforesaid apprehension, possession of the Institute in accordance therewith was speedily taken soon thereafter. The allegation that even before the Ordinance was promulgated, the Commissioner, Patna Division, took over the institution is averred to the totally false.

10. The allegtion in paragraph 9 (c) are then denied as baseless and false. It is pointed out that the financial grant had to be stopped, in order to prevent its misuse. The charge of political motivation for the promugation of the impugned Ordinance has been expressly controverted and, indeed, as a counter-attack, it is averred that if politics formed any place, it has been nurtured in the Institute itself at the instance of Shree Jagannath Mishra, who, instead of looking after the teaching, started holding political activities in the premises of the Institute, and, utilised its funds intended for advancement of the education, for excessive telephonic calls in course of his political pursuits. The stopping of the annual grant of the Institute is alleged to be not the cause, but the consequence of the deterioration in the affairs of the Institute and the consequential loss of faith reposed by others in it. It is alleged that the take over of the Institute was made only when other methods of improving the affairs of the Institute proved abortive. A chart, showing the remuneration and other facilites to the Director-General and his telephone bills has been annexed as Annexure 'C' to the counter-affidavit. The charge that other institutions similar in nature have not been taken over due to any mala fide motive is denied and it is pointed out that there is no arbitrariness in starting the process of nationalisation with the Institute in question. The suggestions of mala fides repeated in paragraph 11 of the writ petition are expresly controverted. Analogous allegations in the reply to the counter-affidavit have then been closely denied in the rejoinder on behalf of the respondents to the petitioner's reply to the counter-affidavit, by Shree R.N. Dash, the then Commissioner -cum- Secretary to the Government of Bihar, in the Department

of Education, along with annexures, on which reliance has been placed.

11. Whether the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is justicable ? For reasons of clarity, it is not only apt but indeed necessary herein to deal with the issues formulated at the outset separately and seriatim. One may consequently first advert to the question of the satisfaction of the Governor pertaining to the immediacy for the promulgation of the Ordinance and whether the same is justiceable.

12. Learned Counsel for the petitioner, Mr. Basudeva Prasad, launched his attack on the impugned Ordinance by spearheading a challenge to the satisfaction of the Governor under clause (1) of Article 213 of the Constitution. It was forcefully contended that even as regards the necessity for immediate action for the promugation of the Ordinance, the satisfaction of the Governor was subject to the closest judicial scrutiny, and, if it failed to stand that test, the Ordinance must be struck down on that ground alone. Learned Counsel was categoric that this issue was necessarily justiciable. However, he was fair enough to take the stand that neither the statute nor precedent mandated or obliged the Governor to State to record the reasons for such immediacy. Nevertheless, the stand was that, if those reasons were somehow indicated in the impugned Ordinance, then they must be tested on the anvil of a microscopic judicial

examination, and, if basic infirmites were disclosed, the result would be the vitiation of the Ordinance. On this assumption, learned Counsel relied heavily on the first three paragraphs of the preamble to the Ordinance for contending that the indicated resons for immediacy were extranuous and irrelevant to the necessity for the promulgation of the Ordinance before the Houses of Legislature coud meet. Apart from principle, the precedential reliance of the learned Counsel was on *A.K.Roy -vs- The Union of India and another* (1) whilst analogous sustenance was sought from the *State of Rajasthan and others -vs- The Union of India* (2), and, *R.K. Garg -vs- The Union of India and others* (3) .

13. On the other hand, Mr. Lal Narayan Sinha and the learned Advocate General, on behalf of the Respondents, took up a firm and categoric stand that the satisfaction of the Governor under Article 213 is beyond the pale of justiceability. It was submitted that both on settled principle and on a long line of precedent, the issue was well settled and the solitary and somewhat vague and vacillating doubt raised in *A.K.Roy -vs- The Union of India and other (supra)* (paragraphs 28 & 29 of the report) would not place

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(1) (1982) A.I.R. (S.C.) 710

(2) (1977) A.I.R. (S.C.) 1361

(3) (1981) A.I.R. (S.C.) 2138

the issue in a flux afresh. The latest re-affirmance in *T.Venkata Reddy -vs- The State of Andhra Pradesh* (1) was pointedly relied upon. On principle it was highlighted that clause (2) of Article 213 declares that the Ordinance shall have the same force and effect as an Act of the legislature of the State assented to by the Governor. If any doubt remained, the Constitution Bench, in *A.K.Roy -vs- The Union of India* (supra) had itself categorically held that an Ordinance is law for all purposes, barring permanecy. Once it is held that it is law, the learned Advocate-General had contended that all the attributes which apply to an enacted law by the legislature are equally and fully applicable to an Ordinance as well. The Ordinance power is in pith and substance a legislative power and all the attributes of enacted legislation are attracted thereto stricto sensu. Counsel contended that any finical distinction, whether the source of legislation is the executive or the legislature, was rendered irrelevant. There fore, if the motive or the satisfaction of the legislature enacting a law is admittedly not justiciable, then similarly, the motive or satisfaction of the Governor for the immediacy of an ordinance is equally not justicialbe by the Court.

14. Plainly enough the threshold question herein is whether the issue of immediacy necessitating the promulgation of an Ordinance is justiceable or not

(1) (1985) A.I.R. (S.C.) 724

Ere one inevitably adverts to precedent, it is apt to examine the issue on the language of the statute and the basic principle underlying the exercise of legislative power by the executive heads during the interregnum when the legislature is not in session. The relevant parts of the solitary Article 213 in Chapter IV of the Constitution, headed as the 'Legislative power of the Governor", may first be read for facility of reference:

"213: *POWER OF THE GOVERNOR TO PROMULGATE ORDINANCES DURING RECESS OF LEGISLATURE* -

(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council, in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumastances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance, if -

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the legislature ; or,

(b) he would have deemed it necessaray to reserve a Bill containing the same provisions for the consideration of the President ; or,

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect, as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance - ....

15. Even a plain reading of clause (1) would indicate that the issue herein has two distinct aspects - one being pristinely objective and the other being entirely subjective. the objective and the factual aspect is that the legislature, where it is a unicameral one, must not be in session, and, where it is a bicameral one. both the Houses of the legislature should not be in session. This is a pre-condition and obviously is a factual one. If the legislature is in session, the power of the Governor to issue Ordinances is negatived. On this aspect there is indeed no dispute whatsoever about the legal position. Equally, it is common ground that at the material time the Vidhan Sabha of the State of Bihar was not in session and, consequently, the Governor was clothed with the Ordinance making power. Learned Counsel for the petitioners did not build any argument on this ground and further reference to it is thus wholly obviated.

16. Once the aforesaid factual pre-condition is satisfied the other one is the very opposite thereof and it is purely subjective with regard to the existence of circumstances which necessitate the immediacy of the promulgation of the Ordinance. It deserves pointed

notice that it is well settled beyond cavil that the Governor is not obliged to record any reasons for his satisfaction about the immediacy aspect and indeed this was not even remotely disputed on behalf of the petitioners. Consequently, the satisfaction of the Governor is subjective to that authority and is not to be placed on the anvil of any objective test.

17. Now, apart from subjectivity and the limitations, within which such subjective satisfaction can be probed, the issue herein, in the context of Article 213, is to be viewed in the larger framework of both the spirit of the Constitution and its mandates. It was authoritatively held by a Constitution Bench of 7 Judges *in Shamsher Singh -vs- The State of Punjab and another* (1), as under :-

"For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers."

Subsequent precedent has left it in no doubt that, even in the legislative field, the Governor equally, if not doubly, is bound by the aid and advice of the Council of Ministers. (*See R.K.Garg -vs- The Union of India and others* (Supra). This constitutional position is undisputed, and, consequently, in the promulgation of an Ordinance under Article 213, the Governor acts

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(1) (1974) A.I.R. (S.C.) 2192

only as the Constitutional head on the Cabinet's advice and not in his personal capacity. Therefore, when truly and correctly read, Article 213 when it talks of the satisfaction of the Governor, in essence and in subatance, it is the satisfaction of his Council of Minsters. This factor again creates a crucial distinction. Whilst the subjective satisfaction of an individual may, perhaps, be possible of scrutiny and testing it on the anvil of extranousness or otherwise, the satisfaction of a large body of persons, by the very nature of things, eludes such scrutiny at all and very far indeed from a precise judicial introspection thereof. One may probe the working of the mind of an individual, but even the attempt to probe the minds of 20 to 30 or more persons, acting as a body, and that too in strict confidence, is a vain, if not impossible attempt. It is well settled that the Cabinet in its collective decisions acts confidentially. It was authoritatively said long ago that the devil himself knows not what may be in the mind of a man, and, the situtation is only compounded beyond reprieve, when one is dealing with not one but a large body of men. Consequently, where the core issue is the subjective satisfaction of the Council of Ministers as a body, on principle it becomes something beyond the ken of Courts, both on the doctrine of *ab inconvenienti* and also perhaps the rule of *addimpossibili*

18. In the aforesaid context again the constitutional mandate in clause (3) of Article 163 has to be recalled and it is in the following terms :-

> "The question whether any, and, if so, what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

In view of the above, the advice tendered by the Council of Ministers to the Governor is

constitutionally privileged beyond any probe. Therefore, the result is that not only one cannot probe the mind and satisfaction of a body of persons, but, further, the materials on which such satisfaction is to be arrived at are again expressly barred from the scrutiny of the Court. It has already been noticed that under Article 213, the Governor is not obliged to record any reasons for his satisfaction with regard to immediacy. Equally well settled it is that the Council of Ministers, whilst arriving at a decision, are equally not obliged to record any resons, and, as a matter of practice they never do. Therefore, in the absence of knowledge about the materials placed or considered by the Council of Ministers, the nature of discussions in the Cabinet meeting, the secrecy of the proceedings and the lack of requirement of recording any reasons, renders it not only undesirable, but, almost impossible to judicially test the consequential satisfaction of the Governor under Article 213, which is only a euphemism for the satisfaction of a large Council of Ministers. One may recall and remind oneself that the Cabinet of Ministers are under an oath of secrecy and the details of the proceedings of the Council of Ministers are confidential and sacrosanct.

19. Herein perhaps what is pre-eminent, if not conclusive, is the fact that the power under Article 213, though exercised by the executive head, is, in essence a pristinely legislative function. The Constitution, in chapter IV, leaves this aspect in no manner of doubt, when in the very heading it proclaims it to be the "Legislative Power of the Governor", and, clause (2) of Article 213 declares that an Ordinance Promulgated under this article shall have the same force and effect as an act of the Legislature of the

State assented to by the Governor. Now, once it is held, as it must be, that Article 213 envisages a legislative function, then it deserves highlighting that considerations pertaining to the exercise of executive or administrative actions are altogether alien there to. These fall in an altogether different field than the one of the exercise of the sovereign function of legislation. Therefore, to draw any analogy from the field of subjective satisfaction of an individual acting administratively or executively, with the satisfaction of a legislative body is not only inapt but wholly misleading. By way of example, one may imaginatively consider a situation where the Constitution requires that the legislature itself must be satisfied regarding the immediacy of a legislative action. Could it possibly be said that the satisfaction of the legislature as a body in this context would then be tested and become justiciable ? I believe, the answer must necessarily be rendered in the negative. Even Learned Counsel for the petitioners very fairly conceded that where the satisfaction is of the legislature itself, the matter would be beyond the pale of justiciability. Indeed, it is axiomatic that the propriety, expediency and the necessity of a legislative act are for the determination of the legislative authority and not for adjudication by the Courts. However, Mr. Basudeva Prasad had continuously harped on the supposed distinction that under Article 213, though the power was legislative, it was exercised by the executive, and, on that premise, it was contended that the test of an executive and administrative action can equally be applied under

Article 213. This specious submission must fail, because, once it is held under Article 213 that it is a legislative power, then all the attributes of legislation must attach thereto, subject to the limitations under the aforesaid article. The mere fact that it is exercised by the Governor is thus irrelevant to its nature, force and effect. The exercise of this legislative power is neither to be bisected into its executive source and the legislative effect, nor thereafter to be dissected by the probing knife of justiciability.

20. In a way, herein one may also pierce the constitutional veil and recall afresh that the satisfaction here is not personal to the Governor, but of the body of men, who are his Council of Ministers at the material time. Similarly, the contents of the Ordinance are again not framed by the Governor, but, are the handiwork of the Council of Ministers. It is framed by and under the authority of the Cabinet. In a way, during the interregnum, when the legislature is not in session, the power to legislate, in emergent situations, is conferred on the Council of Ministers, acting through the Governor. Temporarily, during that interregnum, the Council of Ministers assumes the role of the legislature. Now, if the satisafaction of the legislature with regard to the necessity, immediacy or propriety of a legislation is beyond judicial scrutiny, the position, a fortiori, would be identical in the case of the issuance of an Ordinance on the aid and advice of the Council of the Ministers, when the legislature is not in session.

21. Lastly, in construing Article 213 (1), the historical retrospect of the Constitutional law relating to the power of the executive to promulgate Ordinances

cannot be possibly lost sight of. For our purposes, it is unnecessary to delve beyond the Government of India Act, 1935, though, the Ordinance making power was even earlier vested in the Governor-General in terms of Section 72 of the Government of India Act, 1915. Mr. Lal Narayan Sinha rightly pin-pointed that the legislative power of the executive by way of the issuance of Ordinances under our Contitution was in a way a legacy from the Government of India Act, 1935. Therein, Section 42 of the said Act conferred such a power on the Governor-General, and, Section 88 thereof vested the same in the Governor. Article 123 and Article 213, respectively, of our Constitution, are in the relevant parts in *pari materia* with the aforesaid provisions. To recall, the relevant parts of Section 42 and Section 88 of the Government of India Act, 1935, were in the terms following :-

> "42. (1) - if at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :
>
> "88. (1) - If at any time wnen the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require :

22. In the pre-Constitution era, there existed a long line of unbroken precedut , holding that the satisfaction of the Governor-General or the Govenor with regard to the immediacy in the Ordinance making

power under the Government of India Acts of 1915 and of 1935 was not justiciable. It suffices to refer to *Bhagat Singh - vs- Emperor* (1) *Emperor -vs- Benoarilal Sharma and others* (2), *Emperor -vs- Sibnath Bannerjee and other* (3) and, the considered view in *Lakhi Narayan Das and others -vs- The province of Bihar* (4) which was a case from this High Court), holding as under :-

"It is admitted that the Bihar legislature was not in session when this Ordinance was passed. It was urged, however, in the Court below, and the argument was repeated before / us, that no circumstance existed as is contemplated by Section 88 (1) which could justify the Governor in promulgating this Ordinance. This obviously is a matter which is not within the competence of Courts to investigate. The languge of the section shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinace. The existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test..... On promugating an Ordinance, the Governor-General is not bound as a matter of law to expound reasons therefor, nor is he bound to prove affirmatively in a court of law that a State of emergency

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(1) (1931) A.I.R. (P.C.) 111

(2) (1945) A.I.R. (P.C.) 48

(3) (1945) A.I.R. (P.C.) 156

(4) (1950) A.I.R. (F.C.) 59

did actually exist. The language of Section 88 postulates only one condition, namely, the satisfaction of the Governor as to the existence of justifying circumstances, and, the preamble to the Ordinance expresses in clear terms that this condition has been fulfilled. The first contention of the appellants must therefore be rejected.

23. Now, once the judicial interpretation had placed the aforesaid firm construction on the Ordinance making power, it is reasonable to presume that the Constituent Assembly was fully aware of the same and intended to retain the same legal results by employing virtually identical phraseology in Article 123 and 213 to give them the same meaning. It is well to recall that despite pre-indpendence criticisms of the Ordinance making power as being arbitrary and undemocratic, the founding fathers thought it necessary and imperative to retain this emergent legislative power in the hands of the executive. It is well to recall that Dr. Ambedkar, in repelling the criticisms against the retention of the Ordinance making power in the constitution, forcefully pointed out that the legislative power conferred on the President and the Governor was not a parallel power of legislation, but one exercisable only when both the houses of the legislature were not in session.

24. In Craies on Statute Law, Seventh Edition (1971), it has been authoritatively stated as under :-

"when a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a

sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them."

25. Apart from the pre-Constitution legal position, the post- Constitution construction of the Ordinance making power has been equally consistent on the point that the issue of immediacy is not one which is justiciable by the Courts. Reference in this connection may be made first to the *State of Punjab -vs- Satpal Dang* (1), *Rustom Cavasjee Cooper -vs- The Union of India* (2) and, in particular, to the categoric enunciation of the law by the Constitution Bench in *S.K.G.Sugar Private Limited -vs- The State of Bihar and others* (3) :-

"It is, however, well settled that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstanes necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on ground of error of judgment or other wise in Court."

The aforesaid view has been tacitly reiterated in *R.K.Garg -vs- The Union of India (supra).*

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(1) (1969) A.I.R. (S.C.) 903

(2) (1970) A.I.R. (S.C.) 564

(3) (1994) A.I.R. (S.C.) 1533

26. However, there is no gainsaying the fact that a pandora's box seems to have been opened by a discordant note struck in *A.K.Roy -vs- Union of India (supra)* in this context. Therein, whilst leaving the question open, it has been observed as under :-

"... It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction."

And again,

"That is why we do not feel called upon to examine the correctness of the submission made by the learned Attorney General that in the very nature of things, the 'satisfaction' of the President which is the basis on which he promulgates an Ordinance is founded upon materials which may not be available to others and which may not be disclosed without detriment to public interest and that, the circumstances justifying the issuance of the Ordinance as well as the necessity to issue it lie solely within the President's judgment and are, therefore, not justiciable."

27. Mr. Basudeva Prasad, Learned counsel for the petitioners pinned himself on the aforesaid observations for contending that the issue of justiciability with regard to immediacy has been again put in a ferment afresh. Not only that, counsel relied on further observation in the said case, with regad to the burden of proof in such a context. Equally

reliance was placed by way of analogy on the observations of Bhagwati, J., (as his Lordshi than was) in the *State of Rajasthan v. The Union of India* (1) though made in the context of Article 356 (1). On these foundations, learned counsel contended that the matter was justiciable and he was entitled to discharge the burden laid upon him by showing manifest extraneousness from the recitals in the preamble of the Ordinance itself.

28. It is plain that in the context of a long consistent precedent, the issue is whether some vacciliating doubt raised in A.K. Roy's case (supra) and the alleged conflict of high authority is now resolvable.

29. It deserves recalling that by the Constitution (38th Amendment) Act, 1975, a finality clause was inserted in the Constitution by way of clause (4) to Article 213. This, however, was later adopted by the Constitution (44th Amendment) Act, 1978, with effect form the 20th of June, 1979. The necessary consequence is that in the constitutional position the *status quo ante* was restored as existing prior to the 38th Amendment in 1975. Inevitably the earlier precedents construing the Ordinance-making power would be restored in their effect. Therefore the categoric enunciation in *S.K.G. Sugar Private Limited* v. *The State of Bihar and others* (2) where in their Lordships held

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(1) (1977) A.I.R. (S.C.) 1361

(2) (1974) A.I.R. (S.C.) 1533

that it is well settled that the concept of immediacy is not justiceiable would still hold the field. That view has, to my knowledge, not been distinguished or dissented from by the final Court. Consequently, what their Lordships opined to be well settled beyond cavil therein would continue to be so well settled. Merely because there was some discussion of the issue afresh and their Lordships left the question open and did not pronounce upon it in *A.K.Roy's case* (supra) it cannot be said that it in any way would unsettle the law and put it in a ferment afresh. At the highest it can be said in favour of the petitioners that a coequal Bench has not itself indpendently chosen to decide the issue. On the theory of precedent, where co-equal Benches of the superior Court have considered the identical matter and one Bench has categorically decided the issue and the other has left it open, the High Courts would clearly remain bound by the categoric positive adjudication. Mr. Lal Narayan Sinha pointed out that to differ or vary from the *S.K.G.'s case*(supra) it was necessary to have a larger Bench opining to the contrary,which admittedly is not the position.

31. To my mind, all further doubts in this field are set at rest by the recent Constitution Bench judgment in *T.Venkata Reddy etc.etc.* v. *State of Andhra Pradesh* (1). Their Lordships therein not only referred to but indeed relied on *A.K.Roy'* vs. *Union of India* (supra) for finally summing up the legal position with regards to the Ordinance-making power. It was held in no uncertain terms that the exercise of this power is subject only to the limitations of being violative

(1) (1985) A.I.R. (S.C.) 724

of the Constitution, i.e., either because of the lack of copetence or because of the violation of a fundamental right or any other specific provision of the Constitution itself and on no other ground. Ordinance legislation is not to be tested on the anvil of those tests which are applicable to executive or administrative action. These tests are totally alien in this field. It has been concluded therein as under :-

"The above view has been approved by another Constitution Bench of this Court in A.K. "Roy'v. Union of India (1982) 2 S.C.R. 262 at page 299. Both these decisions have firmly established that an ordinance is a 'law' and should be approached on that basis. The language of clause (2) of Art. 123 and of clause (2) of Art. 123 of the Constitution leaves no room for doubt. An Ordinance promulgated under either of these two articles has the same force and effect as an Act of Parliament or an Act of the State Legislature, as the case may be. When once the above conclusion is reached the next question which arises for consideration is whether it is permissible to strike down an Ordinance on the ground of non-application of mind of mala fides or that the prevailing circumstances did not warrent the issue of the Ordinance. In other words, the question is whether the validity of an Ordinance can be tested on ground similar to those on which an executive or judicial action is tested. The legislative action under our Constitution is subject only to the limitations prescribed by the Constitution and to no other. Any law made by the legislature, which it is not competent to pass, which is violative

of the provisions of part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute "uncontitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumend that the legislative discretion is properly exercised. The motives of the legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions or a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts. An Ordinance passed either under Art. 123 or under Act, 213 of the Constitution stands on the same footing. When the Constitution says that the Ordinance making power is legislative power and an Ordinance shall have the same force as an Act, an Ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision."

32.Equally significant it is to notice that in the aforesaid case, Chandrachud,C.J, and D.A. Desai J.

(who were party to judgment in *A.K.Roy's Case*) have unreservedly assented to the aforequoted view. Therefore, this must now be taken as the last word on the subject of precedent extending over more than half a century and in the long symphony a single discordant note is now overwhelmed and merges in a consistent harmony.

33. Learned counsel's for the petitioners reliance on the observations of Bhagwati,J., (as his Lordship then was) in *the State of Rajasthan* v. *The Union of India* (1) are again of no aid to him. Admittedly that was a case under clause (1) of Article 256. There is no dispute that the presidential action under the said Article is executive in its nature. The significant difference is that under Article 213 the exercise of the power is pristinely legislative. The language of clause (1) of Article 316 and that of Art.213 (1) is not in pari materia and the considerations for the exercise of the power under the two provisions are entirely different. Apart from principle in *T.Venkata Reddy's case* (supra), it has been now authoritatively said that the ordinance-making power is clothed with all the attributes of an Act of the legislature carrying with it all incidents, immunities and limitations and that it cannot be treated as an executive action or an administrative action. The case is thus entirely distinguishable.

34. Learned counsel for the petitioners was fair enough to concede that he could cite no positive

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(1) (1977) A.I.R. (S.C.) 1361

authority in support of his stand in which an Ordinance had been struck down on the ground of the lack of immediacy. It is significant to note that admittedly since the promulgation of the Constitution hundreds of ordinance have been promulgated by the President and undoubtedly those promulgated by the Governors in the States run into thousands. That not one such ordinance has ever been struck down by the Court in the absence of immediacy is in itself a pointer that the requirement of immediacy is neither justiceable nor vulnerable. to any such challenge.

35. To conclude on the legal aspect, the answer to question no.1 is rendered in the negative. It is held that both on principle and precedent the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an ordinance is not justiceable.

36. Though the aforesaid should, in a way, conclude the matter on this aspect, it has to be borne in mind that this is not the final Court. Learned counsel for the respondents indeed not only invited but pressed us to give a finding on the factual challenge to the immediacy aspect as well. Learned coundel for the petitioners was equally insisting in pressing his claim as already noticed on the basis of the observation in *A.K.Roy's case.* In fairness to the parties, this exercise, to my mind, cannot possibly be avoided.

37. Mr. Basudeva Prasad was fair enough to concede at the very outset that the Governor is not obliged or required to record any reason about existence of immediacy for the promulgation of the

Ordinance. Howerer, his ingenous stand was that though he may give no reason at all, yet if gratuitously or otherwise any reason is given or is discernible then the same has to be tested on the anvil of reasonableness. If such reason is extraneous or irrelevant to immediacy then the Governor cannot be said to be reasonably satisfied and the Ordinance must be struck down on that score. In his search for the factual materials for his stand, learned counsel leaned on the recitals in the preamble of the Ordinance itself. It was submitted that the alleged reasons for immediacy were both individually and collectively without any nexus or connection with the same and were, therefore, extraneous or perverse. Reliance was placed on *Ratna Roy* v. *State of Bihar* (1).

38. To appreciate the rival stand of the parties in this context, it is necessary to quote the preamble of the Ordinance :

> "Whereas, the State of Bihar has bright prospects of rapid growth of Industrial and Economic Development, the relevancy and importance of specialised knowledge of Business Management has assumed great importance :
>
> And whereas for that purpose it is necessary to ensure a high level of educational and training facilities and the coordination of the training with important industrial and business units.
>
> And, whereas, it has been resolved to nationalise this branch of education in phases.

(1) (1950) A.I.R. (Pat) 332

> Preamble. - Whereas the legislature of the State of Bihar is not in session;
>
> And, whereas, the Governor of Bihar is satisfied that the circumstances exist which render it necessary for him to take immediate action to provide for acquisition and taking over of certain Scheduled institutions in the State of Bihar and for the matter connected therewith or incidental thereto;
>
> Now, therefore, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India, the Governor is pleased to promulgate the following Ordinance :-"

39. Now, a somewhat curious and ingenious argument of Mr. Basudeva Prasad is that the first three paragraphs of the aforequoted preamble are the alleged reasons for the immediacy of the promulgation of the Ordinance. On that premise the counsel assailed them as being wholly irrelevant or extraneous to the issue. It was sought to be submitted that the prospects of rapid growth of industrial and economic development in the State of Bihar and the importance of the specialised knowledge of business managment are in no way a matter so urgent that it cannot brook any delay or await the meeting of the legislature a few months hence. Equally it was contended that even though it may have been resolved to nationalise, no emergency or urgency for doing so is either indicated or could be imagined. Nor the avowed purpose of ensuring a high level of educational and training facilities and co-ordination of the training with important industrial and business units was a matter deserving

an immediate legislative attention.

39.A. The submission aforesaid, though it might bring some credit to the ingenuity of the learned Counsel, is nevertheless obviously fallacious. The first three paragraphs of the preamble on a plain reading have no connection with the issue of immediacy. Plainly enough that aspect is dealt with in the soucceeding three paragraphs, which are formally named as the preambles. To first read the reasons for the enactment of the Ordinance as the reasons for immediacy and then to contend that they have no nexus therewith is obviously begging the question, and, indeed, an acute logical distortion. To put it in homely language the argument is a proverbial example of the adage - give a dog a bad name and hang him. As already noticed, if at all the recitals in the preamble are to be looked at for immediacy, the last three recitals clearly spell out the requisite requirements of the legislature being not in session and further about the satisfaction of the Governor for the necessity of immediate action directed to the object of acquiring and taking over of certain institutions. I am unable to even remotely agree with the learned Counsel for the petitioners that the first three recitals in the preamble have any relevance to the issue of immediacy.

39. In this context, Mr. Lal Narayan Sinha taking the line of least resistance himself relied on *A.K.Roy's case* (supra) for contending that the burden lay heavily on the petitioners for at least making out a prima facie case about the absence of immediacy. He submitted that there was no material whatsoever which has been brought on the record to doubt or assail the satisfaction of the Governor on the question of immediacy and consequently, without more, in line

with the observations in *A.K.Roy's case* the stand of the learned counsel for the petitioners must be rejected.

40. Learned counsel for the respondents is on the firmest footing in this context. It was rightly highlighted that the present case was one of take over and acquisition of institutions for the purpose of nationalising this branch of education. Mr. Sinha submitted that the underlying silent premises of all acquisitions by the State - whether under the land Acquisition Act or by independent legislative exercise -is that the existence of a public purpose must prevail such an acquisition. That this is, in terms, expressly provided for in the Land Acquisition Act is undeniable. Even where it is not so, counsel highlighted that any acquistion by the State must be inbind with a public purpose and if this is totally absent, it would perhaps be challengeable at the very root. Reliance was placed on *The State of Bihar* v. *Sir Kameshawar Singh* (1) despite the fact that Article 31 now stands repelled. Our attention was also rightly drawn to the Coking Coal Mines (Emergency Provisions) Ordinance, 1971 (ordinance No.12 of 1971) and the preamble relevent -part whereof is as under :-

> "whereas it is expedient in the public interest that the coking coalmines should be nationalised with a view to re-organising and reconstructing them for the purpose of protecting, conserving and promoting scientific development of the resoureces of coking coal needed to meet growing requirements of the iron and steel industry ;

(1) (1952) A.I.R. (S.C.) 252

> And, whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;"

It seems axiomatic and equally manifest from the above that in the instances of acquision or taking over by the State for purposes of nationalisation the public interest therefor may be specifically explicit or is necessarily implicit.

41. Once it is assumed as it must be that there has to be some public purpose in an acquisition, it is at least apt, if not necessary, that this must appear from the legislative enactment which can either be by way of a preamble or may otherwise be clearly incorporated in the body of the Act itself. This is so because there is authority for the proposition that the requirement of a public purpose in a statute cannot be merely added on by subsequent averments or affidavits by its authors but it is something which must spring from or be inherent in the statute itself. Consequently it was incumbent that in the Ordinance the requirement of public purpose is indicated and spelt out. The first two paragraphs of the preamble of the Ordinance were, thus, intended to satisfy the prime condition of the existence of public purpose for the acquisition and the enactment. They are in essence the reasons for the need of the enactment itself and have no relevance whatsoever to immediacy. To first mislabel the reasons for enactment and public purpose behind the same as the reasons for immediacy and then to assail them on the ground that they were futile and extraneous thereto is, thus, an illogical exercise. The last three paragraphs of the preamble are the ones which alone are directed to immediacy

and they in obvious strictitude conform to the same both with regard to the objective aspect of the legislature of the state of Bihar being not in session and the subjective aspect of the satisfaction of the Governor.

42. Learned counsel's for the petitioners reliance on *Ratan Roy* v. *State of Bihar* (1) is yet again of little aid to him. That was a case in which on a difference of opinion Chief Justice Meredit and Sarjoo Prasad,J., the case was placed before B.P.Sinha,J, (as he then was) who concurred with the view of Sarjoo Prasad,J. A close perusal of the judgment and in particular of of paragraph 31 of the report would make it manifest that the issue of imediacy was not at all in doubt or controversy and all the learned Judges seemed agreed thereon. The pointed difference was that Chief Justice Meredit required another different condition for the validity of an Ordinance and in his own words it must be incorporated in the preamble in the following terms :-

"and whereas these circumstances, in the

"opinion of the Governor, require the promulgation of an Ordinance in the following terms;

Now, therefore, etc. etc."

The learned Chief Justice observed in paragraph 32 of the report that this point at first glance may appear highly technical or evern trivial but nevertheless he opined that this was the rock wheron the ordinance must founder. This hyper-technical view, however, was not agreed to by Sarjoo prasad, J., for the detailed reasons, who reiterated the settled view that in all such cases it is for the Governor alone to decide

(1) (1950) A.I.R. (Pat). 332

in the forum of his conscience, whether he has a reasonable cause to be satisfied of the necessity of promulgating an Ordinance of the nature promulgated by him. B.P.Sinha, J., (as he then was), unreservedly agreed whith Sarjoo prasad, J., on this point. The majority view thus boomerangs upon the stand taken on behalf of the petitioners. Even otherwise, this case has little or no relevance to the issue of the justiceability of immediacy for an Ordinance. Even as regards the necessity of the particular provisions of the Ordinance, the majority took a view contrary to that of Meredith, C.J.

43. Nor does *Rustom Cavasjee Cooper vs. Union of India* (1), in any way, advance the case of the petitioners.

44. To sum up on this aspect, even if it were to be assumed that the issue of immediacy was justiceable, I am unable to find any extraneous, irrelevant or perverse reasons for the promulgation of the Ordinance and no other material has been brought to our notice in this context. Since the petitioners have not even made out a prima facie case and laid no acceptable foundation for holding that no circumstances whatsoever existed which rendered an immediate action by the Governor necessary, I am wholly unable to entertain the contention that the ordinance is invalid for the reason that the pre-conditions for the ordinance-making) power have not been fulfilled.

QUESTION NO. (2) :

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(1) (1970) A.I.R. (S.C.) pares. 25 to 27

Whether the exercise of legislative power by promulgation of an Ordinance by the Governor can be impeached on the ground of mala fides?

45. We may now move on to question no.2 . When again Mr. Basudeva Prasad took the extreme and categoric stand that both malice in fact and malice in law can be laid at the door of the Governor for challenging the exercise of the legislative power of promulgation of ordinances. Yet again a distinction was sought to be drawn betwixt the exercise of legislative power by the legislature itself stricto sensu and such exercise by the executive under Article 213. Counsel, was fair enough to concede that malice in fact cannot be lavelled against the legislature as such but stuck to his guns for contending that malice in law can even be levelled against the legislature as well. However, as regards an ordinance, he was dogmatic that this can be impeached on the ground of malice in law and equally on the foundation of the mala fides of the executive. Basic reliance was on *S.Pratap Singh appelant* v. *State of punjab, respondent* (1) for contending that herein personal allegations of mala fides had been expressly raised against the Chief Minister himself. According to counsel, these pertained to the state of the mind of the Chief Minister and his personal knwledge which he alone could deny. Consequently the rebuttal of the allegations of mala fides by Secretaries to the Government however highly placed, based as it was on the record, could not be accepted and the allegations must be deemed to be untraversed and consequently

(1) (1964) A.I.R. (S.C.) 72

proved on the record. Pointed reliance was on paragraphs 8, 13 and 14 of the report in *Pratap Singh kairon's case* (supra). On that premise we were invited to strike down the Ordinance on the allegad grounds of proven mala fides of the Chief Minister. Sustenance was also sought from observation in *Emperor -vs- Benoarilal Sharma and others* (1) and *The State of Rajasthan -vs- The Union of India and others* (2).

46. In elaborating the aforesaid stand, learned Counsel for the petitioners placed basic reliance on the concept of the colourable exercise of power by the legislature. It was contended that even where the legislature itself is enacting laws, they may be tainted with unconstitutionality on the ground of a colourable exercise of power. Reliance was placed on the observations of Mahajan, J. (as his Lordship then was), in *The State of Bihar -vs- Sir Kameshwar Singh* (supra) (Paragraph 61 of the report). Equally placing reliance on the observation that a colourable piece of legislation, with a different object altogether, is merely dressed up as a law pretended to give effect to the purpose which would fail to pass the rigid constitutional test in *His Holiness Kesavananda Bharati Sripadagalvaru -vs- The State of Kerala and another* (3), Counsel contended that both an Act and an Ordinance can be assailed on such grounds.

46.A. The aforesaid argument based on the two decisions relied upon, despite the ingenuity with which

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(1) (1945) A.I.R. (P.C.) 48

(2) (1977) A.I.R. (S.C.) 1361, para. 144

(3) (1973) A.I.R. (S.C.) 1461

it has been projected, is, in my view, wholly untenable. In the filed of constitutionality of legislation colourable exercise of the power is a thing distinct and apart from the ordinary concept of malice in law against executive or administrative action. Some confusion in this context needs to be lucidly corrected. The concept of colourable exercise of legislative power is not the concept of malice in law but in pith and substance is only a matter with regard to the issue of legislative competence. Where an enactment is made by a legislature not competent to legislate on the subject but is merely dressend up in manner so as to bring it within the field, it is only then that the Courts have labelled such an atempt as a colurable exercise of legislative power. It has, to my mind, no relevance at all to any oblique motive therefor. The test in such a situation only is to see the true nature of the enactment and whether in pith and substance it comes within the ambit of the legislative entries for which a particular legislature may be entitled to legislate. If such an enactment does not come within the competence of the legislature in true essence but is merely clothed in such a garb to bring it within the legislative competence, it is only then that the theory of colourable exercise of legislative power can be invoked. No evil motive or any personal mala fides of the legislature as a whole or of the individuals composing the same can be attributed. The theory of colourable exercise of legislative power, in my view, is consequently a thing distinct and apart from the rule of attribution of any malice - be it one of fact or in law - to the legislature. Indeed, the following observations in The State of Bihar v. Sri Kameshwar singh (supra)on which learned counsel for the petitioners had himself placed reliance directly boomerangs on his stand :-

"The learned Attorney-General has contended that it is beyond the competency of the Court to enter into a question of 'bona fides' or 'mala fides' of the legislature. In a sense this is true. If the legislature is omnipotent, the motives which impel it to enact a particular law, are absolutely irrelevant, and, on the other hand, if it lacks competence the question of motives does not at all arise. But when a legislature has a limited or qualified power and has got to act within a sphere circumscribed by legislative entries, the question whether in purporting to act under these entries, it has, in substance, gone beyond them and has done certain things which cannot be accomplished within the scope of these entries, is really a question affecting the competency of the legislature. In such cases, although the legislation purports to have been enacted under a particular entry, if it is really outside it, it would be void. (See Lefroy and Canadian Constitution, PP.79-80)."

Yet the same view has then been more categorically reiterated in *K.C.Gajapati Narayan Deo & Ors.* v. *State of Orissa* (1) in the terms following :-

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives

(1) (1953) A.I.R. (S.C.) 375

which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power Vide Cooley's Constitutional limitations, vol.1, p.397."

The aforesaid authoritative enunciations have not been deviated from and it is manifest that the colourable exercise of legislative power is in essence nothing more than the absence of legislative competence. It cannot even remotely buttress the learned counsel's for the petitioners stand that an ordinance can be impeached on the ground of personal *mala fides.*

47. Once it is accepted (and indeed it was fairly conceded by the learned counsel for the petitioners) that *mala fides* or malice in fact cannot be levelled against the legislature as such then it is illogical to contend that such *mala fides* can be raised against the same. Legislative exercise by way of an ordinance. it bears repetition that the tenuous distinction sought to be drawn on behalf of the petitioners betwixt exercise of the legislative power by the executive whilst promulgating ordinance and by the legislature itself is wholly untenble. It is now well settled that an ordinance is law for all purposes and has every attribute of a statute barring permanence. Clause (2) of Article 213 sets all doubts at rest by providing that the ordinance shall have the same force and effect as an Act of the letislature. *A.K.Roy's case* is positive authority for the proposition that an ordinance is law for all purposes and well within the meaning of Article 21 as well. The lack of permanence is not something which in any way goes to affect the ordinance being a law because as long as it subsists,

no distinction can be drawn between a law promolgated by an ordinance and law promulgated by an enactment of the legislature. The source from which the law springs is thus irrelevant and in either case such law would enjoy the same protection. If the legisltive enactment is immune to the challenge of mala fides and malice in fact, one fails to see why an ordinance otherwise duly promulgated should not be in the identical position. The true test here is whether this is an attribute of the legislative function and not whether it has been enacted by the legislature as such or the executive in the exercise of its constitutional legislative power.

48. Apart from principle, I am inclined to take the view that *T.Venkata Reddy and others* v. *State of Andhra Pradesh* (1) now directly covers the issue. Therein the question was frontally faced in the following terms :

When once the above conclusion in reached the next question which arises for consideration is whether it is permissible to strike down an Ordinance on the ground of non-application of mind of mala fides or that the prevailing circumstances did not warrant the issue of the Ordinance."

As has been noticed earlier in paragraph 35 of the judgment, the answer to this question was rendered in the categorical negative.

49. To Conclude the answer to question no.2 is rendered in the negative. It is held that the exercise

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(1) (1985) 3 S.C.C. 198

of legislative power of promugation of an ordinance by the Governor cannot be impeached on the ground of *mala fides.*

50. Despite the aforesaid finding, one cannot in fairness obliterate altogether the rival stand of the parties with regard to the actual mala fide levelled and whether they stood established or otherwise Whilst the learned counsel for the petitioners was vehement that in the absence of any denial by the Chief Minister himself, these stood proved and consequently were fatal, the equally categoric stance of the learned Advocate General was that far from even making out a prima facie case these were so vague and unsubstantial as to not merit the compliment of any rebuttal whatsoever. It becomes nesessary to advert to these stands, albeit with some brevity, in view of the finding on the legal issues arrived at above.

51. Adverting now to the actual allegations of mala fides, as already noticed, these are spelt out in paragraphs 2 (iv) (1) (e) (i), and interapersed in 9, 10 and 11 of the writ petition. These have been expressly traversed in paragraphs 3 and 12 of the conter-affidavit filed by Sri Bhasker Banerji, Secretary -cum- Education Commissioner, Education Department, Government of Bihar. References were also made to some ancillary pleadings in the reply to the counter-affidavit, which has again been made by the rejoinder thereto, on the affidavit of Shree R.N. Dash, Secretary to the Government of Bihar, in the Cabinet Co-ordination Department. Supplementing those averments, Mr. Basudeva Prasad wanted to lean also on the action subsequent to the promulgation of the Ordinance and the removal of Shri Jagannath Mishra from the post of the Chairman -cum- Director General,

and, Shri Jagadanand Jha from the post of the Registrar of the Institute, soon thereafter, on the 21st of April, 1986. Counsel's stand was that the totality of the circumstances had to be taken into consideration both before and subsequent to the Ordinance, to arrive at a correct conclusion of the mala fides of governmental action,alleged as it was, at the behest of the Chief Minister in particular. All these, according to the learned Counsel, were clear pointers that from the very beginning right up to the stage of challenge to the Ordinance and the subsequent actions of removal were deeply rooted in the mala fides of the executive. Particular emphasis was placed on the fact that there was no denial on oath by the Chief Minister and no counter-affidavit and reply had been filed by him personally. The traverse by Shri Bhasker Banerji and Shri R. N. Dash was labelled as irrelevant, because it was merely a matter from the record and could not in the least be indicative of the mind of the Chief Minister and the personal *mala fides* therein.

52. The learned Advocate General, whilst unwavoring in his stand that the issue of malafides against the Chief Minister is doubly irrelevant and barred on legal grounds, nevertheless, took the stand that even assuming that this can be considered, then factually also they are wholly baseless and utterly tenuous. At the very threshold it was pointed out that the inordinately long paragraph 2 of the writ petition, in which are interspersed the basic innuendos of malafides, does not even pretend to be a factual statemaet. It begins as under :-

> "That, briefly stating, the following important question of law arise for consideration in the instant case."

On the face of it, therefore, what is sought to be incorporated in paragraph 2 are the conclusions or questions of law, according to the petitioners, which arise in the case and are not the express pleadings of fact giving rise to them, far from being specific allegations of malafides. Again, basic reliance, on behalf of the petitioners is on sub-paragraph (ii) of paragraph 2, which might well be noticed in extenso :-

> "(iv) Whether in the circumstances set forth herein above the impugned Ordinance is also malafide issued at the instance of the present Chief Minister of the State of Bihar, Shri Bindeshwari Dubey, who of late has been irked by findings of the Institute in respect of important administrative data running counter to his official stand in regard to those matters before the House of Legislature, as well as before the Central Government, and, for that reason has become malafide motivated to damage the political, "social and educational image of the Chief Founder of the Institute, Dr. Jagannath Mishra, a former Chief Minister of Bihar, in order to secure his own continuance in office."

53. Learned Advocate General rightly pointed out that the gravamen of the charge herein is with regard to certain "findings of the Institute in respect of important administrative data". Plainly enough, as to what and where are those findings has not even been indicated far from being placed on the record. On such a slippery base, the allegation then is that those supposed data ran counter to the official stand in regard to certain matters, both before the Houses of the Legislature as well as before the Central Government. Again, It is left totolly at sea as to what those findings or data ran counter to or the nature of the stand in the House of the Legislature, and where and when,

is again not even mentioned. In the context of such nebulous allegations, the learned Advocate General was not far wrong in saying that if the allegations of facts are themselves not there, what is there to be rebutted, and the Respondent Chief Minister cannot be pushed into an exercise of futility by combating airy nothings.

54. The other allegation relied upon by the petitioners is again in the following terms :-

> Paragraph 6 (e) (i) : "As reports based on researches carried out by the Institute revealed large scale misuse of Government funds, and suggested measures for full utilisation of funds, naturally angered the State adminstration, headed by Shri Dubey, and, in reaction Shri Dubey, the Chief Minister, stopped annual grant of the Institute in spite of no objection certificate having been granted by the "Education and Finance Department Officials, and the amount of grant being a budgeted amount."

Herein again, the allegation is basically rested on alleged reports based on researches carried out by the Institute. Yet, there is not the least indication as to where those reports are, what their contents and which part of the vast coffers of the State are alleged to have been misused. Far from placing those research papers on the record, they remain totally untraceable even by any remote reference. It is alleged that those reports angered the State adminstration. But not a hint is there as to who are the particular persons who turned venomous on that basis. The learned Advocate General was equally on firm ground in pointing out that the allegations in paragraphs 9 and 11 of the writ petition were again etherial in nature with little or no relevance with the terrafirma of facts.

It was rightly contended on behalf of the respondents that far from individual allegations, even the totality of them does not give the impression that those were matters rested on facts and appear to be nothing more than conclusions or inferences arrived at by the petitioners that the Chief Minister had turned hostile. Consequently, the firm stand on behalf of the respondents was that the ethereal allegations, devoid of factual base, did not even rise to a *prima facie* case, and, all that has been pleaded one innuendos, conclusion and some subjective satisfaction of the petitioner Institute. Consequently, there was nothing which could possibly be refuted or replied to and the Chief Minister was, threfore, right in not stepping into the arena and start tilting at the imaginary wind-mills.

55. Now, apart from the pleadings in the writ petition, it deserves recalling that in the counter-affidavit and the rejoinder to the reply to the counter-affidavit, it had been categorically stated that the wild allegations made against the Chief Minister were based on no tangible material and that the alleged research papers, reports, etc., were neither traceable nor forthcoming. The factual allegations on the record stand categorically traversed. Despite the stand, the petitioners had still not chosen to concretise the airy allegations or even to attempt to place on the record the alleged reports, research papers and any other material on which they were supposedly relying. The learned Advocate General thus submitted that no case on facts whatsoever, far from establishing the malafides, was made out, which either needed rebuttal or could possibly be contradicted, in view of its utter vagueness. I am inclined to the view that the stand of the respondents is well based and the somewhat

fragmentary allegations would not afford any basis upon which the petitioners could be entitled to any relief and thus they need not have been answered, far from the same being nesessarily countered on oath by the Chief Minister himself. Herein one might well recall the observations in *S. Pratap Singh - vs- The State of Punjab* (1), on which case firm reliance was sought to be placed by the petitioners themselves :

"Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is "obviously difficult to establish the state of a man's mind, for that is what the appellant has to establish in this case, though this may sometimes be done. See *Edgington* vs. *Fitzmaurice* (1884)(1) 29 Ch.D.459. The difficulty is not lessened when one has to establish that a person in the position of a Minister aparently acting in the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim."

In the light of the above, it has to be held that the petitioners failed in establishing even a prima faice charge of mala fides even if it be assumed, entirely for the sake of argument, that they were entitiled to do so.

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(1) (1964) A.I.R. (S.C.) 72

QUESTION NO.(3): *Would the malafides of a Chief Minister be tantamount to the malafides of the Council of Ministers as a whole, and, may consequently, vitiate the exercise of the legislative power of the promulgation of the Ordinance ?*

56. Coming now to question No.(3), Mr. Basudeva prasad forcefully projected a somewhat novel thesis that the malafides of the Chief Minister, if established, would *per se* vitiate the exercise of the legislative power of the promulgation of the Ordinance. The core of the submission was that the Chief Minister occupied so paramount a position that his personal malafides is tentamount to the malafides of the Council of Miniters as a whole. It was contended that no further burden in this context would lie on the petitioners' shoulders.

57. I must confess that the novelty ;of the contention and its somewhat fragile base, at first flush, tempted me to ignore the submission. However, as it was seriously and vehemently pressed by the Counsel, the compliment of a rational refutation thereto cannot be avoided.

58. Now the corner stone of Mr. Basudeva Prasad's contention herein was rested on an analogy derived from the position and stature of the Prime Minister in England. Specific reliance was placed on the following extracts from the *British political System* by Andre Mathiot, professor in Law and Director of the Institute of Political studies in the University of Granoble :

"Moreover, as the Prime Minister has to bear the cheif burden of responsibility for cabinet decisions,

he may always refuse to contenance the ideas of other Ministers and penalise those who refuse to confrom by dropping them from his Government. This means that it is normally impossible for any Cabinet Minister to take an independent line on any issue."

Pinning himself on the above view and thereafter sliding into a logical extereme, Mr. Basudeva Prasad submitted with some vehemence that even the Chief Minister of a State in a Federal Constitution like that of India was in essence the Council of Ministers itself. It was the stand that since the Council of Ministers was appointed on the advice of the Chief Minister, the individual Ministers were, in fact, his personal appointees and had no independent status in oppostion to him. According to him, for all practical purposes, the Chief Minister was the Cabinet and no decision in the Cabinet can possibly run counter to the Chief Minister's direction. On that premise, the submission was that constitutionally speaking, the satisfaction under Article 213 was the satisfaction of the Council of Ministers, which , in turn, was nothing but a satisfaction of the flat of the Chief Minister. Relying in particular on Rule 15 of the Rules of Executive Business, Bihar, 1979, and item 13 of the Third Schedule thereto, it was sought to be pointed out that with regard to the promulgation of an Ordinance as well the Chief Minister by himself could initiate emergent action in anticipation of the Cabinet's approval. It was submitted that since the allegations against the Chief Minister have not been rebutted by him personally on affidavit, these must be accepted as proved.

Consequently, if the satisfaction of the Chief Minister was tainted with malafides, the legislative power exercised for the promulgation of an Ordinance stood vitiated and must be struck down on the ground of malafides.

59. Since the inspirational source of the argument above stems from the position of the British Prime Minister, it is apt at the very threshold to notice the significant and even crucial points of difference between his stature and that of a Chief Minister under the Indian Constitution . There is first the hall mark distinction of the un-written British Constitution, rooted in hoary conventions as, against the relatively recent and exhaustively drafted and detailed Constitution of India, which has been classified as, perhaps, the most meticulous one in the world, and, in lighter vein has been described as a paradise for lawyers by an authority no less than Sir Ivor Jennings. Consequently, the constitutional position of the British Prime Minister is significantly different even from that of the Prime Minister of India under our Constitution. However, the position of a State Chief Minister is even more significantly different. This is so because not only India has an exhaustively written Constitution, but, in sharp contrast to the British one, it is Federal in naure, whereas the former is entirely Unitary. The limtations under which the State executive, including the Chief Minister (with the Governor at the apex), can act and function within the parameters of the Constitution, does not have any identity with that of the British Prime Minister. The power of the President to dismiss the

State Cabinet and proclaim presidential Rule under Article 356 (1) and other constitutional inhibitions are matters peculiar to our Constitution. Consequently, to Compare a State Chief Minister in our Federal written Constitution, with the British Prime Minister of an Unitary unwritten Constitution, is an exercise which provides no legal analogy worth the name and can only be misleading.

60. Now, apart from the above, the extreme stand of the learned Counsel for the petitioners herein suffers somewhat patently from the falsehood of extremes which must always be shunned. It is true that in a Parliamentary form of Government, the position of the Prime Minister or the Chief Minister is pre-eminent, insofar as the Council of Ministers is appointed on his recommendation, and, in the words of a well known constitutional authority, he acts as a hyphen betwixt the Executive and the legislature. But, from this fact it is a wrong and unwarranted step to go to the extreme that the Chief Minister is himself the Council of Ministers. Though the learned Advocate General was unable to bring any specific provision in the Rules of Executive Business of Bihar with regard to the decision-making process in the Council of Ministers, yet, in a democratic system, to my mind, there is no other principle to determine the decision of a constitutional body of persons, except by the settled rule of majority. It goes without saying that the only mode for arrving at an answer as to what is the decision of a body of persons co- equal in status, is as to what was the majority opinion of such a body, unless the Statute prescribes

otherwise or a different mode therefor. As already noticed, no such exceptional provision could be pointed out.

61. Yet again, the principle of joint responsibility of the Cabinet, which is the foundational base of the Parliamentary form of Government, is itself a pointer to the fact that the Ministers are not mere cypers attached to the figure of the Chief Minister, but are jointly responsible to the legislature and through it to the people for the conduct of the Government. Again the well-known process of decision-making by the Council of Ministers would itself refute the stand that the Chief Minister's earlier predilections would necessarily be the decision of his Council of Ministers. The Cabinet is a constitutional and responsible consultative body. Democratic process works by expression and exchange of opinions and even a Chief Minister in a Cabinet meeting may well be first persuaded against any pre- conceived view or decision arrived at by him earlier. Further, he may even be outvoted in the Cabinet, if the matter comes to such a head. Therefore, to presume that the Chief Minister's prior decision or poinion alone, against the views of his Council of Ministers and *dehors* their concurrence, has an over-riding finality as such, would, to my mind, be running against the very concept of the principle of joint Caninet responsibility and the democratic form of Government. Any such stand attributing such dictatorial and arbitrary power to the Chief Minister alone is not to be easily presumed or accepted in a democratic form of Parliamentary

Government.

62. Learned Counsel for the petitioners' reliance on Rule 15 of the Rules of Executive Business and Item 13 of the Third Schedule thereto, does not in any way advance his extreme proposition. The Chief Minister's power to take emergent action on certain occasions in anticipation of the approval of his Council of Ministers in no way is symptomatic of the projection that be in himself embodies the whole of the Council of Ministers. The promulgation of an Ordinance would sometimes need urgent consideration, but it is not to be construed as a fire emergency in which even the Council of Ministers is not to be consulted. Indeed, herein coming to specific pleadings, the petitioners' own stand and positive pleading is that a meeting of the Council of Ministers was held on the very day and had approved the Ordinance, which was later promulgated. The immediacy in this context is primarily with regard to the need for action be fore the legislature can possibly assemble and enact a law. Rule 15 and item 13 of the Schedule aforesaid cannot possibly be read to mean that the Chief Minister is in singularity entitled to promulgate an Ordinance by himself.

63. Apart from the above, the learned Advocate General himself leaned on the Rules of Executive Business, Bihar, 1979, for buttressing his submission that the satisfaction of the Council of Ministers is *stricto sensu* the satisfaction of that cllective body and not merely of the Chief Minister alone. Rule 9 was particularly highligted to indicate and declare the collective responsibility of the Cabinet as such. Again, our attention was drawn to Rules 16 and 17 of the Rules of Executive Business, which clearly visualise

the decision of the Council of Ministers by circulation as well, which would clearly imply the decsion by majority and not by any Chief Ministerial fiat. Rules 16 and 20 (5) would then indicate that the Cabinet decisions will be preceded by a discussion and even foresee the possibility of the Chief Minister being absent from such a Cabinet meeting. This is particularly indicative of the fact that the Cabinet decisions are not mere rubber stamps for the decision or whimsicality of the Chief Minister alone, because such a decision can be made entirely in his absence and obviously by majority.

64. Placing reliance on the latest enunciation of the rule in *K. Nagaraja and others -vs- The State of Andhra Pradesh and another* (1), the learned Advocate General reiterated the stand that the satisfaction envisaged by Article 213 is in essence the satisfaction of the Council of Ministers and not the satisfaction of the Chief Minister alone. He highlighted that no precedent has been and could possibly be cited holding that the Chief Minister's satisfaction alone was the constitutional requirement. On the other hand, the consistent view of the Final Court is that the President's or the Governor's satisfaction is in terms the satisfaction of the Council of Ministers. When their Lordships have said so in as many words, they have meant it to be so in terms. This authoritative enunciation cannot be misread as being the satisfaction of the Prime Minister or the Chief Minister alone. It is, as a collective body bound by the principle of joint constitutional responsibility, that the State Cabinet has to act. The Chief Minister may be the first amongst equals and,

(1) (1985) A.I.R. (S.C.) 551

even assuming that he is in a dominant position, still he does not become the Council of Ministers *stricto sensu*. It was pointed out on behalf of the respondents that even in England the position of the Biritish Prime Minister, though preminent, has never been declared to be a substitute for the Cabinet itself. Even the views of Dr. Andre Mathiot, quoted above and relied upon by the learned Counsel for the petitioners, do not go to the logical extreme of saying that the Prime Minister of England was the Cabinet or the Council of Minsiters in its totality. It is not easy to subscribe to the proposition that the Chief Minister is the Council of Ministers and the role of other Ministers in the Parliamentary democracy and the Cabinet system is that of a cypher or a dummy.

65. In the light of the above, it appears to me that the flambeyant but untenable argument that the Chief Minister of the State is in essence the Council of Ministers in himself must be rejected and indeed it is a somewhat feudal and dictatorial argument in a democratic Parliamentary set up. Once it is so, it will follow that the *mala fides* of the Chief Minister, even if established, cannot go to the root of the matter and invalidate the legislative exercise of power by the executive under Article 213 at the behest of the Council of Ministers in its collectivity. Even if established the mala fides of the Chief Minister are not the mala fides of the Council of Ministers as a body. There is and indeed can be no such theory of transfer of malice to be attributed to the whole cabinet on such sketchy foundations. On facts, it is well to recall that it has not even been alleged, far from being established, that the Chief Minister rode rough shod ever the opinion of his cabinet colleagues for ulterier motives. Consequently, the argument of *mala fides* of the Chief

Minister slides into the deepest background, if not of total irrelevancy.

66. To conclude, the answer to Question No. (3) is rendered in the negative. It is held that the malafides of the Chief Minister, even if established is not tantamount to the *mala fides* of the Council of Ministers as a whole and cannot, therefore, viate the exercise of the legislative power of the promulgation of an Ordinance.

QUESTION No.(4) :

Does the impugned Ordinance require the sanction of the President under the proviso to clause (1) of Article 213 of the Constitution?

67. Adverting new to Question No(4), the firm stand of the learned Counsel for the petitioners was that the impugned Ordinance overrode the Societies Registration Act, 1860, which was a Central Act, having at that time been promulagated by the Governor-General, and, consequetly, the Governor could not, without instructions from the President, promulgate the Ordinance. Our attention was drawn to Section 5 of the said Act with regard to the vesting of the property of the Society in its Governing Body, and to Section 13 pertaining to the dissolution of societies and the adjustment of their affairs, and, equally to other provision pertaining to the management of the societies and their governing bodies, etc. It was submitted that by virtue of clause (10) of Article 366, the Act was an *'existing law'*, and Article 254 was attracted to the situation. The contention was that the impugned Ordinance impinged upon and affected and even overrode the field covered by the Societies

Registration Act, and, therefore, the sanction of the President under clause (1) of Article 213 was imperative. Reference was made to Section 3 of the Ordinance which transferred and vested the Institute and its properties absolutely in the State free from all encumbrances, and, again, to Section 4, which provided that the Commissioner shall be deemed to have taken charge of the Institute and to perform all the functions and duties of the governing body and the managing committee under the direction and the control of the State Government. It was submitted that these sections of the Ordinance overrode the corresponding provisions of the Societies Registration Act in its applicability to the petitioner Institute.

68. In elaboration of his aforesaid stand, Mr. Basudev Prasad pointed out that the Societies Registration Act was enacted way back in the middle of the last Century in 1860. At that stage, perhaps there was no demarcation between the Central and provincial legislature and the power to legislate vested entirely in the Governor General. Apart from that, there were at that time no legislative lists atall nor perhaps Central or State legislations, as now understood and the Governor General's power to enact a legislation was plenary. Therefore, it was the submission that the act aforesaid is a Central legislation enacted by the Governor General. Referring to its preamble, it was pointed out that it pertained particularly to societies established for the promotion of literature, science or the fineart, or for the diffusion of useful knowledge or for charitable purposes. On this premise it was submitted that the power to override the said Act can now stem only from the Central and not from the State. According to the learned Counsel, the true test today would be that if such Central law were

to be enacted today or were to be amended, it would draw its source from which of the three legislative lists of the seventh Schedule to the Constitution now. The stand taken was that only the parliament was competent to enact the same and not the State legislature. Reliance was placed on *R. 'Chitralekha -vs- The State of Mysore and others*(1), *Messrs Gujarat Pottery works Private Limted -vs- B.P. Sood and others* (2), and *D.A.V. College, Bhatinda -vs- The State of Punjab and other*(3), and, lastly on *E.Balanandan and another -vs- The State of Punjab and another* (4).

69. It is not possible to subscribe to the somewhat ingenious attempt of the learned Counsel for the petitioners to invoke the concept of repugnancy and the consequential requirment of Presidential sanction before the promulgation of the Ordinance. At first it may be noticed that the declared purpose of the Ordinance was to nationalise a particular branch of education in phases and consequently to take over the instituion in the Schedule thereto. As the very name of the Ordinance indicates, it was a taking over Ordinance. Similarly, the very opening part of the Ordinance leaves no manner of doubt about the acquisition nature of the Ordinance and the taking over of the instiutions in the following terms :-

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(1) (1964) A.I.R. (S.C.) 1823

(2) (1967) A.I.R. (S.C.) 964

(3) (1971) A.I.R. (S.C.) 1731 at 1736

(4) (1979) Cr.L.J. 187

"THE PRIVATE EDUCATAIONAL INSTITUTION (TAKING OVER) ORDINANCE, 1986.

AN

ORDINANCE

TO PROVIDE FOR TAKING OVER BY THE STATE GOVERNMENT OF PRIVATE EDUCATIONAL INSTITUTIONS OF THE STATE OF BIHAR"

70. Once the real purpose and the nature of the Ordinance is clear, then it is well to recall that the concept of repugnancy comes into play only if the two competing statutes are generically applicable in the same field and are contradictory to each other. Merely because of a valid take over or acquisition of an institution any earlier law applicable to it may cease to apply to such an institution, would not bring in the concept of repugnancy of laws as such. Applicability or otherwise of a law to an institution cannot be confused with a head long conflict of laws in the same field. A salient example herein would be the acquisition by the State Government of a company registered under the Companies Act, which, undoubtedly, is a Central statute. It is obvious that on the acquisition or taking over of such a company and its properties vesting in the State, certain provisions of the Companies Act pertaining to its management by the share-holders, etc., may well cease to apply thereto. Could it, therefore, be said that there would arise a repugnancy between the Central Companies Act and the acquisition by the State by a statute. Learned Counsel for the petitioners fairly conceded that even if a regular enactment by the legislature was made, later incorporating the terms of the Ordinance, it would still be bad because of such a

repugnancy and it is not only that the Ordinance suffers from such infirmity. Plainly enough, if this argument of the learned Counsel were to be acceded to, then the States would be perpetually barred from all acquisitions or taking over of any institution or property to which a central statute may have some remote application. I am unable to accede to any such doctrinaire extenstion of the concept of repugnancy of law under Article 254. It has necessarily to be contained and confined to competing statutes directly operating in the same field and in patent confict with each other. A take over or an acquisition or nationalisation of an institution, establisment, or a company does not involve any concept of repugnancy and the consequential requirement of the prior concurrence by the President.

71. Even assuming (without at all holding that the Ordinance in a wayimpinged on the Societies Registration Act, the learned Advocate General dealt a hammer blow to the finical argument that after the enforcement of the Constitution, the States were incompetent to legislate with regard thereto. Specific reliance was placed on Entry 32 of List II, which is in the following terms :-

"32. Incorporation regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies."

Relying on the latter part thereof, learned Advocate General submitted that the societies registered under the Act came squarely within unincorporated "literary, Scientific, religioes and other

societies and associations." The words are widely couched and even otherwise it is the settled law that the items in the Lists are not to be construed in a narrow or pedantic sense. So construing, it is plain that the Societies Registeration Act, 1860, would now come squarely within the field of State legislation. This is manifest from the fact that the said Act has been amended not by one but nearly all the States of the Union and not only once, but on innumerable occasions. This apart, some doubt in this context seems to have been set at rest by the recent decision of their Lordships in *S.P.Mittal -vs- The Union of India and others*(1), which, in turn, places reliance on *the Board of Trustees. Avurvedic & Unani Tibia College -vs- The State of Delhi*(2) and *Katra Educational Society -vs- The State of Uttar Pradesh* (3), which are all indicative of the fact that the field covered by the Societies Registration. Act, 1860, would now come well within the ambit of Entry 32 of List II of the Seventh Schedule to the Constitution.

72. To conclude on this aspect, the answer to Question No.(4) is rendered in the negative and it is held that the impugned Ordinance did not require the sanction of the President under the proviso to clause (1) of Article 213 of the Constitution.

QUESTION NO. (5): *Is the impugned Ordinance*

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(1) (1983) A.I.R. (S.C.) 1, pares. 67 & 68

(2) (1962) A.I.R. (S.C.) 548

(3) (1966) A.I.R.(S.C.) 1307

void for lack of legislative Competence?

73. Now another limb of the aforesaid question, which was projected by Mr. Basudeva Prasad as ancillary thereto may be dealt with as a separate Question No. (5), for the sake of clarity. Herein, Learned Counsel rested himself primarily on Entry 66 of List I, which is in the following terms :-

> "66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

Pinning himself upon the words of the aforesaid Entry and the identity of its language with the second of the opening recital in the Ordinance, (which is, "whereas, for that purpose it is necessary to ensure a high level of educational and training facilities and the co-ordination of the training with important industrial and business units"), it was forecefully contended that the Ordinance falls purely and completely within Entry 66 of List I of the Constitution, and, consequently, was exclusively within the competence of the Parliament alone. Counsel submitted that far from requiring prior concurrence of the President, the very competence of the State to enact a law of this nature was absent, because it fell exclusively within the Union List, and, consequently, entirely within the jurisdiction of Central or Parliamentary legislation. Reliance was placed on clause (1) of Article 246.

74. The contention aforesaid, though plausibly projected on the basis of superficial similarity of Entry 66 and a recital in the preamble of the Ordinance, is nevertheless wholly untenable on a closer analysis. A deeper examination of Entry 66 would leave no

manner of doubt that it is confined to the determination of standards for higher education or research, and scientific and technical institutions, and, co-ordinating them at the national level. Prescription of standards and co-ordination thereof is something entirely distinct and different from setting up institutions for higher education. Entry 66 of List I cannot possibly be a bar to the establishment of scientific and technical institutions for higher education by the States, which is now clearly a concurrent subject. Entry 25 of List III is in the following terms :-

> "25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I, vocational and technical training of labour."

Obviously, education generally including higher education and technial education and universities, would come within the sweep of the aforesaid Entry. Consequently, by virute of this Entry, the State Government is clearly entitled to legislate for setting up and establishing institutions of this nature, and, if it can do so, it can equally take over and acquire them under its basic power of acquistion for the purpose of nationalisation. The learned Advocate General, in this context, rightly placed reliance on *Gujarat University and another -vs- Shri K. R. Mudholkar and others* (1), and, *Rustom Gavasjee Cooper -vs- The Union of India* (2).

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(1) (1963) A.I.R. (S.C.) 703

(2) (1970) A.I.R. (S.C.) 564, Para 40

75. In this context, the heart of the matter is as to what truly is the subect matter of the impugned Ordinance. Herein, what first obviously catches the eye is the very name of the Ordinance, which states that it is a taking over Ordinance. Yet again, the opening part of the preamble states that it is being promulgated to provide for taking over by the State Government of private educational institutions of the State of Bihar. Section 3 (1) is then in the following terms :-

> "With effect from the date of this Ordinance, the institution as specified in the Schedule of this Ordinance shall stand transforred to and shall vest absolutely in the State Government free from all encumbrances."

The learned Advocate General was thus plainly right in his submission that in pith and substance the Ordinance is a legislation for acquistion and take over and nothing else. In the II Sections of the Ordinance there is nothing whatsoever and not even a hint of any prescription of standards, nor is there a remote reference to the co- ordination of any such supposed standard. To mis-label such a legislation as one pertaining to co-ordination and prescription of standards of higher education is thus wholly unwarranted. The learned Advocate General was clearly right that the rule of pith and substance requires one to go in depth as to the naturte of the legislation, and, if the language of the statute is clear, then no external aid for determining the same is necessary or permissible. Once from the body of the impugned Ordinance it is manifest that the purpose and object

is acquistion and take over. then any reference to the preamble is uncalled for becasue of the settled view that the resort to it is only made in the extreme cases of obscurity in the statute itself. Therefore, both by express declaration and the nature and purpose of the statute, it has to be held that the Ordinance is a taking over or acquisitioning legislative exercise.

76. Now once it is held as above, it is plain that the State undoubtedly has legislative competence to acquire. It may be recalled, as matter of history, that the earlier power of acquisition in Lists I and II have now been substituted by a single comprehensive Entry No. 42 in the Concurrent List III, conferring both on the Center and the State, the power of acquisitioning and requisitioning of properties. Therefore, the State has the basic legislative competance to pass the legislation for the acquisitioning of the properties of the Institute. This being so, it is well settled that the power to acquire is independent and distinct from the power to legislate. On that premise, if the matter falls, in pith and substance, under Entry 42 of List III, then there can be acquisition by the State within its territory, irrespective of the fact, whether it is a State or a Central subject in the legislative field. The learned Advocate General placeds reliance herein on parapraph 40 of the Bank Nationalisation Case (A.I.R.1970 Supreme Court 564), and, with more particularity on paragraphs 16, 19, 20 and 41 of the report in *Ishwari Khaitan Sugar Mills Private Limited -vs- The State of U.P. and others* (1). It deserves notice that in this case, though there was some divergence of opinion in the Bench on another matter, on this specific issue there was total unanimity.

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(1) (1980) A.I.R. (S.C.) 1955

It was on that assuption that the taking over of the sugar factories in Bihar by the state was upheld, though, admittedly, sugar was a subject on which only the Centre could legislate. The case is a binding precedent and, a manifest example of acquisition by the State with regard to something and properties which otherwise lay in the legislative field of the Centre alone.

77. To conclude on this aspect, it has to be held that the impugned Ordinance is not governed by Entry 66 of List I. It is well within the parameters of Entry 42 of the Concurrent List III. Therefore, the impugned Ordinance is not void for lack of legislative competence. The answer to question No. (5) is thus rendered in the negative.

QUESTION NO. (6): Whether the impugned Ordinance is discriminatory and in fracts Art, 14 in so far as it chooses the petitioner Institute alone for nationalisation in its first phase ?

78. The challenge on the basis of Article 14 is sought to be rested on the alleged invidious discrimination in choosing the petitioner Institute alone for take over. The sketchy foundational base for this is on the pleading at page 43 of the writ petition, listing II institutions alleged to be similar, some of them being older or more recent ones, out of which the petitioner Institute is alleged to have been arbitrarily picked up. It was contended that and 7 other simoar institutions existed in the State, and, despite the passage of 3 months or more from the promulgataion of the Ordinance, no other institution has been taken over as yet. Reliance was placed on the undisputed

fact that under Section 73 of the Magadh University Act the Institute had been declared as an autonomous body as recently as on the 28th of January, 1986. there fore; it was the claim that it was in no way a case of any long standing mismanagement which necessitated its immediate take over. It was contended that even if nationalisation has to be done in a phased manner, such phasing also must stand the test of reasonableness. It was pointed out that in the conter-affidavits specific facts had not been pleaded to indicate any basis for acquisition or for picking up the petitioner Institute for the take over, whilst leaving the others out of the net of nationalisation. Indeed, Counsel pinned upon the averments in the counter-affidavit that the take over of this Institute was in fact long ago over due as an example of an evil eye roving over the Institute for long and striking at it at the opportune moment. Reliance was placed on *Ram Prasad Narayan Sahi and another -vs- The State of Bihar and others* (1) in which the Sathi land Restoration Act had been struck down.

79. To appreciate the aforesaid contention the significant factor which calls a pointed notice is that the Ordinance itself declares that it has been resolved to nationalise this branch of education in phases. Section 3 (1) declares that the petitioning institute, which has been placed in the Schedule, shall stand

(1) (1953) A.I.R. (S.C.) 215

transfered and vest absolutely in the State. However, Section 3 (2) in terms provides that the State Government may from time to time amend the Schdule by inclusion of any institution therein and the same shall thereafter stand vested in and transferred to the State Government with effect from the date mentioned in the notification. Now it is well settled that phased nationalisation is perfectly legal and has the stamp of validity on it and thus deserves no great elaboration. It is well to recall that nationalisation in phased manner of Banks. Insurance business, collieries, transport, etc., has been undertaken in the country and has been upheld. Therefore, the contention that because all the II allegedly similar institutions have not been taken together in the very first phase, cannot possibly taint the Ordinance with discrimination.

80. On the issue of discrimination under Article 14, it has to be borne in mind that discrimination is a question of fact, which has to be pleaded and the burden is always on the petitioner to prove that persons in equal or in identical circumstances have been treated unequally. Herein, barring a bald assertion that the ii institutions namend are similar, there has been placed no factual data or proof on the record to show that the other alleged ii institutions are in an identical situation, far from the same having been actually established. Some similarity is not identity. Therefore, Mr. Lal Narayan Sinha's stand that the factual base has even not been prepared and the burden for establishing the alleged discrimination has not been discharged is mertorious. Relince on bhalf of the

respondents was rightly placed on *R K Dalmia and others -vs- Sri Justice S.B. Tendulkar*(1) , *Board of Trustees, Ayurvedic and Unani Tibbia College. Delhi -vs- The State of Delhi* (2), and, *Cochin Devaswom Board. Trichur -vs- Vamanna Setti and another* (3) .

81. Now, apart from the above, the learned Advocate General highlighted the fact that since nationalisation herein was sought to be done in phases, in such a situation, inevitably a beginning has to be made by making an initial choice with regard thereto. If the compulsions of finance or management prevent a total take over, there necessarily has to be a selection regarding the beginning to be made with one or two institution. Learned Counsel pointed out that herein there were a host of fctors which rendered the case of the petitioner Institute entirely distinct from others and there were obvious reasons for making the choice, which may well be noticed seriatim as under :-

(i) That from its very inception, the total financial burden to the last penny from 1975 of this Institute has been borne by the coffers of the State.

(ii) that the prime land for housing the Institute had been gifted by the Government at the choicest part of the most prestigious high-way of the town on the Bailey Road and opposite the majestic High

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(1) (1958) A.I.R. (S.C.) 538 at 547

(2) (1962) A.I.R. (S.C.) 458

(3) (1966) A.I.R. (S.C.) 1980

Court premises.

(iii) That the entire finance for the construction of the buildings of the institute and its furnishing, etc., has been provided by the State and the consruction has also been done through the agency of the Public Works Department of the State.

(iv) That the Institute was the only one in the State which had been given comprehensive grants of this nature, running to over a crore, in sharp contrast two any other institutions, (referred to by the petitioners) who have chosen not to take even a penny of aid from the coffers of the State.

(v) That the petitioner Institute was the only institution of its kind located in the Capital City of Patna.

(vi) That the audit report of the Institute showed serious financial irregularities and the State, which had provided every penny of the finance thereto, was entitled and concerned to safeguard its heavy investments therein.

82. In the light of the aforesaid distinguishing factors, it is plain that when viewed in the larger perspective the choice of the petitioner Institute by the Respondent State cannot even remotely be considered as unreasonable, far from being discriminatory. Indeed, if once it is held, as it must be, that the nationalisation is to be in phases, the choice for those phases has to rest with the State and not with the Court, and, ample materials have been pointed out on behalf of the respondent State for the selection of the petitioner Institute as the very

first in its phased programe.

83. Lastly, in this context it is well to recall the famous case of *R.K. Dalmia and others -vs- Shri Justice S.R. Tendolkar* (1), holding that even a single person or institution may be in such a class by itself as to form a valid basis of classification, thus rendering its choice immune from being challenged under Article 14. The petitioner Institute, on the admitted facts, does appear to be a class by itself and the respondent State cannot possibly be charged with discrimination in classifying the same as the first one in its programme of nationalisation.

84. In the light of the aforesaid discussion, the answer to the question No. (6) is rendered in the negative and it is held that the impugned Ordinance is in no way discriminatory, nor does it infract Article 14 of the Constitution in its choice of the petitioner Institute alone for nationalisation in its first phase.

QUESTION NO. (7): Does the impugned Ordinance violate the fundamental right to form associations under Article 19(1) (c) of the Constitution?

85. Lastly, one may now advert to the challenge on the basis of Article 19 (1) (c) of the Constitution,

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(1) (1958) A.I.R. (S.C.) 538

on the alleged ground of the violation of the fundamental right to form associations. It was contended that the registered society runing the Institute and its founder members had the right to form the association and to carry on the running of the educational institution as such and also to hold properties there. By virtue of the impugned Ordinance and the take over, the members of the society had virtually been denied the right to from and to carry on an association of their choice, both legally and financially, the latter because of the take over of the whole of the property of such a society. It was contended that the right under Article 19(1) (c) is not merely to form an association, but to also carry on and continue such an association.

86. In meeting the challenge aforesaid under Article 19 (1)(c), learned Advocate General first pointed out that the registered society as such has not been taken over, and, in law and in fact, can continue. All other avenues of carrying on its activities as also of establishing or maintaining educational or charitable institutions are still entirely open to it, if it is so minded. Consequently, there is no violation of the fundamental right to either form an association or to continue the same. A distinction herein was sharply drawn betwixt the acquisition of the property of a person or a society and the society itself. A man or a legal entity's property can be taken over but this does not necessarily amounto to take over of the person or the legal entiry. In the context of the take over of the property and the nationalisation, the learned Advocate General relied upon the change in the modern approach thereto as also the spirit behind the insertion of the word 'socialist' in the preamble of the Constitution itself. Basic reliance

on the earlier judgments in *All India Bank Employees Association -vs- National Industrial Tribunal (Bank Disputes).*, *Bombay,*(1) and *Rustom Gavasjee Cooper -vs- The Union of India*(2) was placed, apart from the larger philosophical approach in the *Menka Gandhi's case* (Paragraphs 77, 81 and 81A of the report).

87. Herein, the respondents' primal stand, however, was rightly on *Fertilizer Corporation of India, Kamgar Union, Sindri -vs- The Union of India*(3). Therein, in the context of the take over and acquisition of a factory, it was held that it does not infringe the fundemental right of the workers to form Unions under the self-same Article 19 (1) (c), and, to carry on their occupation or employment. Other avenues of employment or occupation and to form unions were open to them and were not barred. It was pointed out that even under Article 311, if the post is abolished, the right to the post is gone and the said article is not attracted. Reliance, by way of analogy, was also placed on *All India Bank Employees Association -vs- National Industrial Tribunal (supra).*

88. The case of *Smt. Damayanti Naranga -vs- The Union of India* (4), which was specifically relied upon by the learned Counsel for the petitioners, in,

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(1) (1962) A.I.R. (S.C.) 171

(2) (1970) A.I.R. (S.C.) 564 at 597

(3) (1981) A.I.R. (S.C.) 344

(4) (1971) A.I.R. (S.C.) 966

no way aids or advances their stand. Plainly enough that was not a case of either nationalisation or acquistion of property. Indeed it pertained to the mandatory induction of members into a society by the Hindi Sahitya Sammelan Act, 1962. Thereby the original Hindi Sahitya Sammelan was divested of its character and the right to carry on its activities by the mandatory induction of members in the society, by virtue of the provisions of the Act. It was in that context that their Lordships held that the right to form an association includes the right to continue the same and, in law, altering the compostion of the association compulsorily will be a breach of the right to form associations. Plainly enough herein there is no compulsive induction of membership nor any forced alteration of the composition of the society. All that has been done is to take over its property. The right of the members to continue the registered society they had founded is in no way taken away, nor impinged, nor is the composition of the membership of the society in any way altered or any forcible induction of unwanted persons into the society has been made. The mere divesting of one of the society's properties, when validly done by the State in its exercise of eminent domain and the power of acquisitioning and requisitioning therefor does not in any way infract or attract the porvisions of Article 19(1) (c) of the Constitution.

88A. To sum up on the last Question No. (7), the answer thereto is rendered in the negative and it is held that the impugned Ordinance does not violate the fundamental right to form association under Article 19 (1)(c) of the Constitution.

89. Before parting with this case, it may, perhaps, be noticed that despite some hint thereof in the

pleadings, not a single argument under Article 21 was even raised, far from being pressed on behalf of the petitioners in course of exhausitve arguments extending over nearly two weeks. Equally the suggested stand that the right to property remains intact as a fundamental right within Article 21 itself despite the designed repeal of Article 31 was not even remotely touched upon by the learned Counsel.

89A. In the end, it seems to me that in this judgement, which could not avoid being exhaustive, it is apt to concisel collate the basic conclusions arrived at. It is consequently restated that -

(i) The satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is no justiceable.

(ii) Even assuming that it was so, no extraneous, irrelevant or perverse reasons for the promulgation of the Ordinance are shown and no *prima facie* case has been made nor an acceptable foundation laid for holding that no circumstance whatsoever existed which rendered an immediate action by the Governor necessary.

(iii) The exercise of legislative power by promulgation of an Ordinance by the Governor cannot be impeached on the ground of *malafides*.

(iv) Even if it is assumed that it could be so impeached, the petitioners have failed to establish even a *prima facie* charge of *malafides*.

(v) The malafides of the Chief Minister, even if established, is not tantamount to the malafides of

the Council of Ministers as a whole and cannot, therefore, vitiate the exercise of the legislative power of the promulgation of an Ordinance.

(vi) The impugned Ordinance did not reguire the sanction of the President under the proviso to clause (1) of Article 213 of the Constitution.

(vii) The impugned Ordinance is not governed by Entry 66 of List I, and is well within the parameters of Entry 42 of the Concurrent List III, and, therefore, is not void for lack of legislative competence.

(viii) The impugned Ordinance is in no way discriminatory nor does it infract Article 14 in its choice of the petitioners Institute alone for nationalisation in its first phase.

(ix) The impugned Ordinance does not violate the fundamental right to form associations under Article 19(1)(c) of the Constitution.

90. In the light of the above, the challenge to the validity of the Private Educational Institutions (Taking Over) Ordinance, 1986 (Bihar Ordinance No. 15 of 1986), must fail and the same is consequently upheld. The writ petition, (C.W.J.C.No. 2098 OF 1986) is hereby dismissed. However, in view of the significant constitutional issues, which have been ably projected by the learned Counsel, we leave the parties to bear their own costs.

CIVIL WRIT JURISDICTION CASE NO. 2087 OF 1986 :

91. Having dealt with and disposed of the main stream case one must now advert separately to its

offshoot in Civil Writ jurisdiction Case No. 2087 of 1986. This has been peferred by Dr. Jagadanand Jha, the Registrar of the Institute, and, is primarily directed against the termination of his service by the order dated the 21st April, 1986 (Annexure '7'). An ancillary challenge to the vires of Section 6 of the Ordinance as being *ultra vires* of Articles 14, 16 and 21 of the Constitution has also been laid. The basic averments with regard to the creation, history and growth of the Institute have already been noticed in detail earlier and do not call for repetition.

91A. The petitioner hearein, apart from other educational qualifications, avers that the Degree of Doctorate of philosophy, for his thesis on Management of Khadi and Village Industries, has been conferred upon him and he was initially appointed as lecturer -cum- registrar -cum- Administrative Officer in the pay scale of Rs.890-1415/-, on a purely temporary basis by the Director General of the Institute on the 1st of May, 1977. Subsequently, the Governing Council is said to have advertised for the appointment to the said post and the petitioner, in pursuance to the said advertisement, sent his application on the 15th of January, 1978. He was thereafter selected and appointed as lecturer/Registrar -cum- Administrative Officer of the said Institute, vide appointment letter dated the 29th July, 1978 (Annexure '2'). Consequent upon the sanctioning of the post of registrar in the Institute by the State Government on the 21st of March, 1983, the petitioner apparently was appointed and confirmed on the said post at a basic salary of Rs. 2,000/-, vide letter dated the 1st February, 1984

(Annexure '4'). However, after the take over of the Institute by the impugned Ordinance, on the 21st of April, 1986, the respondent State issued an order terminating the services of the petitioner as the Registrar of the Institute in alleged violation of Section 6 (4) of the said Ordinance, vide order Annexure '7'. The said order of termination is sought to be impugned on a wide variety of grounds under Articles 14, 16, 19 (1)(g), and 300A of the Constitution, as also the alleged violation of the principles of natural justice.

92. A counter - affidavit on behalf of the respondents has been filed by Shree Bhasker Banerjee, Secretary -cum- Education Commissioner, Government of Bihar. Therein, it has rightly been pointed out that materially the facts herein are common with those in Civil writ Jurisdiction Case No. 2098 of 1986, and leave is sought to rely on the pleadings of the respondents made in the said writ petition. On the peculiar facts of this petition, it is pointed out that the petitioner was initially the Private Secretary to Shree Jagannath Mishra even at the time he was the Irrigation Minister of Bihar, and continued as his Private Secretary till sometime in 1977, whereafter he was appointed in the Institute. It has been averred that the Institute only secoured a sanction from the respondent State for the post of a lecturer, against which the petitioner was appointed and was wrongly shown as Lecturer -cum- Registrar in the Institute's records, and he was given undue benefit of additional pay by showing his designation as lecturer -cum- Registrar -cum-

Administrative Officer. The sanctioned pay scale of the Lecturer was Rs. 890-1415/-, and the post of Registrar had not been sanctioned at all at the relevant time. It was only in the year 1983 that on the request of the Institute, a post of Registrar in the pay scale of Rs.890-1415/- was sanctioned. However, much in excess of the sanctioned amount, the petitioner was unduly favoured by giving him a pay scale of Rs. 2,000/- plus Rs.630/- as dearness allowance, whilst the sanctioned pay scale was only Rs.890-1415/-.

93. It has then been pointed out that the petitioner admittedly possesses a second class Master's Degree and has secured lower Second Class, i.e., less than 52 per cent marks. Acording to the Statutes of the Bihar State Universities Act, the petitioner was consequently not even qualified for the post of a lecturer, but, he has neverthless been drawing the pay equivalent to or similar to that of a professor, as his total emoluments, as paid to the petitioner, were of the order of Rs. 2,738.40 paise. The stand taken then is that the high sounding function of the Registrar of the Institute, in view of the modest number of the staff employed, is, in fact, merely equivalent to that of a section Officer in a Government Department, and, his duties are merely ministerial in nature. The respondent State duly constituted a Committee of three vice-Chancellors, in accord with sub-section (2) of Section 6 of the Ordinance, which reported that the appointment of the petitioner was against the Regulations of the University, and, on examination, it was also found that the post, in the

pay scale allocated to it, is not even required in the Institute. Government, in accordance with the recommendations of the said Committee, then arrived at a decision to terminate the services of the petitioner under Section 6 (4) of the Ordinance, whilst acting *bona fide* and in public interest.

94. A reply to the counter - affidavit has also been filed, controverting some of the averments therein. A supplementary conter-affidavit has then been filed on behalf of the respondents, alleging that the petitioner has falsely stated that he was appointed as Registrar -cum- Administrative Officer, in pursuance of the advertisement made in the newspapers or that his selection was made by any selection Committee. It is the stand that these averments are false, as borne out of the records of the Institute itself. The relevant documents have been annexed as annexure A series.

95. As in the preceding writ petition so in the present one, certain pristinely legal issues have been raised which may perhaps be formulated at the very outset in the terms following:-

1. Whether section 6 of the Ordinance is violative of Article 14, 16 or 19 of the Constitution and is consequently invalid ?

2. Whether the power conferred on the State Government to terminate the services of the staff of the institute is quasi judicial in nature and consequently

attracts the principles of natural justice ?

3. Whether under section 6(4) of the Ordinance the services of the non-teaching staff connot be terminated at all ?

Question No. 1: Whether section 6 of the Ordinance is vloiative of Article 14, 16 or 19 of the Constitution and is consequently invalid ?

Inevitably the controvery herein would revolve around the language of section 6 aforesaid and it is, therefore, apt to read the same at the very outset:-

> "6. Determination of terms of services of the teaching staff and other employees of the institution. - (1) As from the date of the notified order, all the staff employed in the institution shall cease to be the employee of the institution;
>
> Provided that they shall continue to serve the institution on an ad-hoc basis till a decision under sub-sections (3) and (4) is taken by the State Government.
>
> (2) The State Government will set up one or more Committees of experts and knowledgeable persons which will examine the bio-data.
>
> "of each member of the teaching staff and ascertain whether appointment, promotion or confirmation was made in accordance with the University Regulation or Government direction/circular and take into consideration all other relevant materials, such as qualification, experience, research degree, etc. and

submit its report to the State Government.

(3) The State Government on receipt of the report of the Committee or Committees, as the case may be, will decide in respect of each member of teaching staff on the merits of each case, whether to absorb him in Governmnet service or whether to terminate his service or to allow him to continue on an ad-hoc basis for a fixed term or on contract and shall, where necessary, redetermine the rank, pay allowance and other conditions of service.

(4) The State Government shall similarly determine the term of appointment and other conditions of service of other categories of staff of the institution on the basis of facts to be ascertained either by a Committee or by an officer entrusted with the task and the provisions of sub-sections (2) and (3) shall apply mutatis mutandis to such case."

96. Taking the bull by the horns, Mr. Basudeva Prasad first assailed the very constitutionality of section 6. It was contended that the petitioner and many others were permanent and confirmed employees of the institute and had unalienable contrctual rights of service therein. Section 6 in terms took away all those valuable rights without even an express opportunity to show cause. The power was, therefore, labelled as arbitrary and discriminatory and equally violative of the fundamental right to practise any profession or to carry on any occupation. In sum, the contention was that the termination of the services of a permanent employee -- whether for nationalisation or otherwise -- is *per se* unreasonable and discriminatory and consequently violative of Articles 14, 16 and 19. Basic reliance was

placed on the recent decision of their Lordships of the Supreme Court in *West Bengal State Electricity Board and others* v. *Shri Desh Bandhu Ghose and others* (1985 PLJR - Supreme Court - 9).

97. To my mind, the somewhat doctrinaire stand taken on behalf of the petitioner herein is a logical extreme which is hardly tenable. Section 6 inlaid as it is in the mosaic of the other provisions of this Ordinance is not to be construed in isolation. Therefore, the larger question herein is whether in the event of nationalisation or take over of an institution by the State in its power of eminent domain it has authority to terminate the services of the existing employees ? Or, is it bound inflexibly in taking over the property or an institution to take over all its existing employees as well with all their subsisting contractual obligations ? I believe the answer is not in doubt either on principle or on long standing precedent. There is no gainsaying the fact that on a take over or nationalisation of an institution the termination of the contractual rights of the erstwhile employer and employees may cause private hardship to both. There is, however, little doubt that in the States undoubted powers of acquisition expressly recognised and conferred by the Constitution includes within its scope a discretion to either take over or not the services of the employees and on such terms and conditions as it may deem fit. Indeed if it were not to be so, perhaps the very larger purpose of nationalisation or acquisition may be wholly defeated. To say that nationalisation must necessarily mean the absorption and continuance of all earlier

employees on identical terms of employment would in a particular situation be frustrating the very object of such a take over. Therefore, the larger public purpose herein would override the hardship of the private employer and employees, Equally the legal effect of a valid acquisition is that the property vests in the State and the former owner ceases to be so in erstwhile role of the employment. There is thus no subsisting contract between the State taking over an institution and the employees whose contractual rights were obviously bilateral with the former employer. On an indepth analysis, no subsisting right whether contractual or otherwise survives qua the acquisitioning State when and if it chooses in terms to do so free of all encumbrances.

98. Now,apart from principle, there also exists a long line of precedent upholding nationalisation in various fields without taking over the services of the employees and, in fact, terminating them straightaway. Only an a representative example, reference may be made first to the Coking Coal Mines (Nationalisation) Act, 1972.Therein section 17(3) categorically terminated the services of the employees in the terms following:-

> "17(1) .....
>
> (2) .....
>
> (3) Save as otherwise provided in sub-sections (1) and (2), the services of every person employed by the owner or occupier of a coking coal mine

or coke oven plant before the appointed day shall stand terminated on and form the specified date. X X X X"

Similarly section 14(3) of the Coal Mines (Nationalisation) Act, 1973 declared that barring the persons accepted by sub- sections(1) and (2) the services of every person employed by the owner or occupier of a coal mine before the appointed day shall stand terminated on or form the specified day. The aforesaid provisions have well withstood all challanges to their constitutionality. Within this jurisdiction, the aforesaid provisions have recently authoritatively been construed by the Full Bench in *Agent, Murlidhar Colliery of Bharat Coking Coal Ltd.* v. *Sital Chandra Pathak and others* (1986(34) B.L.J.R. 559). Once that is so, one fails to see any reason as to why sub-section (1) of section 6 providing that the staff employed in the institution shall cease to be the employees of the institute is in any way unconstitutional. Indeed, the succeeding sub-sections only soften and liberalise the determination of the services by providing for further consideration and, if found fit, for absorption or re- appcintment in government service. No constitutional taint can thus attach to section 6 of the Ordinance.

98A. The answer to question no.1 is, therefore, rendered in the negative and it is held that section 6 of the Ordinance is not violative of Article 14, 16 or 19 of the Constitution and is perfectly valid.

Question no.2 : Whether the power conferred

on the State Government to terminate the services of the institute is quasi judicial in nature and consequently attracts the principles of natural justice

99. The challenge to the impugned order of termination (annexure7) was then sought to be rested on the basis of section 6 itself. It was contended that section 6 inherently confers only a quasi judicial power on the State Government. Emphasis was sought to be placed on the language of subsection (3) requiring the State to decide in respect of each member of the teaching staff on the merits of each case for considering whether to absorb him in government service or not. It was the submission that the phraseology employed has the trappings of a judicial determination and at the lowest could only be quasi judicial in nature. On these premises it was contended that the rules of natural justice must be read into such a provision and since admittedly no opportunity had been given to the petitioner, the termination was violative of the principles of natural justice.

100. In appraising the aforesaid argument, it is neccessary to recall that the vires of section 6 have already been upheld above. Once that is so, then by virtue of sub-section (1) all the staff employed in the institution ceased to be employees of such institution. Once the provision is valid, because of nationalisation the relationship of employer and employee stood wholly abrogated and apparently no right other then the one spelt out by the section aforesaid survived to the employee. If Section 6 (1)

is valid, than all employees ceased to be so and one should not allow one's mind to boggle at the clear mandate of the law to that effect.

101. Though there was a clear determination of the terms of service of all the staff of the institute, apparently, to tide over the interregnum and avoid all disruption of work the proviso to Section 6 (1) laid down that the staff would continue to serve the institution on an ad hoc basis, till a decision with regard to their absorption or termination under sub-sections (3) or (4) by the State. It is manifest that this was purely a temporary measure and the continuation was purely on an *ad hoc* basis. It needs no erudition to recall that such an *ad hoc* employee is placed at the lowest rung of the employer-employee relationship, having virtually no legal right as such and, if any, the same is entirely ephemeral till its termination. However, if authority was needed in this context, reference may be made to the following observations of the Full Bench in *S.K.Verma and others -vs- The State of Punjab and others* (A.I.R. 1979 Punjab and Haryana 149) :-

"To our mind, the term *'ad hoc employee'* is conveniently used for a wholly temporary employee engaged either for a particular period or for a particular purpose and one whose services can be terminated with the maximum of ease. The dictionary meaning of *ad hoc* in Webster's New International Dictionary has been as 'pertaining to or for the sake of this case alone.' In the Random House Dictionary its meaning has been given as 'for this special purpose, with respect to this subject or thing.'

Therefore, having regard to the ordinary meaning

of the term, no distinction can reasonably be drawn betwixt a temporary employee whose services are terminable without notice or otherwise and an employee characterised as *ad hoc* and employed on similar terms. Indeed, it appears to us that in the gamut of service law an ad hoc employee virtually stands at the lowest rung. As against the permanent, quasi-permanent, and temporary employee, the ad hoc one appears at the lowest level implying that he had been engaged casually, or for a stop-gap arrangement for a short duration or fleeting purposes."

102. Once it is held as above, that the employment of the staff stood completely determined by nationalisation and all that remained was an *ad hoc* continuation for the interregnum, then the provisions of sub-section (3) would fall in proper perspect. To my mind, when read as a whole, the issue herein is not one of termination or removal, because that has already been done, but simply whether the employees should get absorbed in the government service or not to be absorbed and in the alternative to continue them further either on an identical basis or on a fixed term or an a contract, with absolute discretion, to redetermine the rank, pay and other conditions of service. Plainly enough, barring a quibble for the same, the substance of the provision is in terms a consideration for absorption in government service or a virtual fresh appointment on fresh terms. To my mind, such a power far from being judicial or quasi judicial one is purely an administrative one to appoint or not to appoint an employee or to freshly appoint one and involves no lis for the exercise of such power on judicial scales. By any stretch of imagination, such a power cannot be labelled as quasi judicial. Once it is so held, it is obvious that no question

of any implied right or natural justice into the provision would arise. If at all, as a matter of abstruse argument, it could be there, it stands negatived by the imperative terms of sub-section (1). As has been noticed therein already, the provision visualises the total severance of employment as a matter of law without providing any opportunity etc. If the very determination or termination of service is mandated by the section without any further hearing, it seems somewhat illogical to thrust the same into a much lower level of the discretion of the State to absorb or not absorb the existing employees of the insitute or to employ them afresh on altogether new terms and conditions of service.

103. To close on the above aspect, the answer to question no.2 is rendered in the negative. It is held that the power conferred on the State Government to terminate the services of the staff of the institute is not quasi judicial in nature and consequently does not attract the principles of natural justice.

QUESTION NO. (3) : Whether under Section 6 (4) of the Ordinance the services of non- teaching staff cannot be terminated at all ?

104. In fairness to the learned Counsel for the petitioner, one must also notice his somewhat curious stand, which was seriously pressed, that as regards non-teaching staff, there was no power of termination at all under sub-section (4) of Section 6 of the Ordinance. It was contended with some vehemence that as regards this category, the only power was to determine the terms of appointment and other conditions of service.

105. To my mind the submission is only to be noticed and rejected. It seeks to misconstrue

sub-section (4) in total isolation, as if the provision was in a vacuum. It needs no erudition to reiterate the well-settled cannon of construction that not only a section has to be construed as a whole, but even the whole statute has to be interpreted Narmoniously together. Consequently, sub-section (4) is not to be separated and isolated from the preceding three sub-sections and their plain import. The larger scheme is that both the teaching staff and the other categories were broadly treated at a par and even in iedntical terms, and by virtue of sub-section (1) both categories would cease to be the employees of the Institute and by virtue of the proviso thereto, both categories would continue to serve the institution on an ad hoc bais till a decision under sub-sections (3) and (4) is taken by the State Government. For the purpose of taking that decision, the section provided in some detail, with regard to the teaching staff in sub-sections (2) and (3). However, as regards the other categories, by sub-section (4) it was provided that the State government shall *similarly* determine the cases of the non-teaching staff also. The word 'similarly' is crucial and what is more is the fact that this very sub-section further provided that the provisions of sub-section (2) and (3) shall apply *mutatis mutandis* to such a case. Once such a language had been employed, it is vain on the part of the petitioner to contend that the services of the non-teaching staff cannot be terminated at all. The statute was not obliged to repeaat the same provisions of sub-sections (2) and (3) *ad nauseam* and, it rightly adopted the course of declaring that these provision would be equally applicable. Perhaps, the only distinction drawn herein is that whilst in the case of the teaching staff the statute envisaged a committee of experts and knowledgeable persons to examine their cases, with regard to the other categories of staff, an option was to act either on the basis of facts ascertained by such a committee or by an officer entruted with the task. The somewhat tall submission of the learned Counsel for the petitioner has thus no factual or statutory legs to stand upon.

106. Consequently, the answer to Question No. (3) is rendered in the negative and it is held that Section 6 (4) of the Ordinance squarely warrants the termination of the services of the non- teaching staff as well.

107. Now, apart from the aforesaid three purely legal question, learned Counsel sought to assail the impugned order of termination (Annexure '7') on the ground that it was stigmatic because of the observation that the continuance of Shri Jagannath Mishra, Chairman -cum-Director General, and the petitioner as the Registrar in the institution was not in the interest of the said institution. Reliance herein was placed on *Jagadish Mitter -vs- The Union of India* (1), wherein it was observed that the language that a person was undesirable to be retained in Government service was stigmatic. Counsel contended that if undesirability to be retained is so, then holding that the continuance in service of the petitioner was not in the interest of the institution may be equally stigmatic.

108. Since the argument aforesaid must necessarily centre around the language of the impugned order (Annexure 7), it is necessary to quote the same. A true translation thereof is in the terms following :-

GOVERNMENT OF BIHAR

EDUCATION DEPARTMENT

NOTIFICATION

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(1) (1964) A.I.R. (S.C.) 449

Patna, dated the 21st April, 1986. No. 99/C: The Governor of Bihar, in exercise of the power conferred by Section 6 (2), (3) and (4) of the Bihar Private Educational Institution (Taking Over) Ordinance, 1986 (Bihar Ordinance No. 15, 1986), having considered the report of the Committee constituted under Notification No.98/C dated 21.4.86 of the Education Department of the Government of Bihar, has come to the conclusion that the appointment/promotion/confirmation of the following authorities/employees of the Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna, was not made in accordance with the direction and circular of the Government and the University Regulation and their continuance in this Institution is not in the interest of the Institution. Therefore, their sevices in the aforesaid institution are terminated with immediate effect.

(1) Dr. Jagannath Mishra, Chairman-cum-Director General

(2) Dr. Jagadanand Jha; Registrar

By order of the Governor of Bihar

Sd. R. N. Dash

Secretary,

Education Department,

Government of Bihar, Patna."

In the context of the aforequoted order, the contention of the learned Counsel for the petitioner has, in my view, been ably refuted by the learned Advocate General. He rightly pointed out that the

conclusion in the impugned order is not to be read in isolation, but as a whole in the notification. This in terms refers to the report of the Committee constituted under notification no.98/C dated the 21st April, 1986, of the Education Department. The detailed report of the three Vice- Chancellors has been placed on the record, to which fuller reference hereinafter would follows. The impugned order expressly points out that in accord with the said report the Governor has come to the conclusion that the appointment/promotion/ confirmation of the petitioner and the director-General was not in accordance with the direction and circular of the Government and the University Regulation. It is in the context of these basic facts that the Governor had come to the conclusion that the continuance of the petitioner and the Director-General was not in the interest of the institution. It is thus obvius that no stigma or suspicion has been directly cast on the petitioner, but all that is kept in mind or concluded is that the institution no longer requires the continuance of the services of the petitioner and those of the Director General. In the larger prospect, I am unable to hold that the Impugned order of termination cast any stigma on the petitioner. The decision in *Jagdish Mitter* v. *The Union of India* (1) far from aiding the petitioner's stand would, in fact, on closer analysis, boomerang upon him. Therein their Lordships held that the language "not desirable to be retained in Government service" cast on aspersion on the discharged employee. No such language has been used here. Indeed, their Lordships therein themselves

(1) (1964) A.I.R. (S.C.) 449

observed

> "It is obvious that to say that it is undesirable to continue a temporary servant is very much different from saying that it is unnecessary to continue him. In the first case, stigma attaches to the servant, while in the second case, termination of service is due to the consideration that a temporary servant need not be continued, and in that sense, no stigma attaches to him."

Herein the petitioner's case comes plainly within the aforesaid observation. Reference here in may also be instructively made to a judgment of their Lordships of the Supreme Court reported in *Union of India and others* v. *R.S.Dhaba* (1969 Services law Reporter 442) which in turn has relied on *The State of Bombay* v. *F.A.Abraham,* (1962) 8 supp. Services Law Reporter 92 and *I.N.Saksena* v. *State of Madhya Pradesh* (1967 S.L.R. 204).

109. Yet another ground of challenge raised against the impugned order on behalf of the petitioner was that the reasons for the termination of the petitioner's service given in the impugned order were wholly extraneous. The main thurst of the argument was that the University Regulations were not applicable to the institute, nor was it amenable to any Government direction, circular or Memorandum. Reliance was placed on Section 73 of the Bihar State Universities Act, 1976 (Bihar Act XXIII of 1976), whereunder the Institute had been declared an autonomous body. This was projected as a total bar, excluding the application of any other provisions apart from the bye-laws of the registered society. The firm stand was that the rules and regulations of the Institute, framed in 1979, were

statutory in nature and had the force of law, especially applicable to it, and, was exclusionary of any other provisionds Reliance was placed on *Minhas B.S.* -vs- *Indian Statistical Institute and others* (1).

110. Learned counsel's stand, rested as it is on the ground that the rules and regulations of the Institute are overriding law, cannot possibly succeed. It is well settled that bye-laws of a society, corporation or company, including the societies registered under the Societies Registrataion Act, 1860, are not statutory and do not have the force of law. They may well be binding betwixt its members and the employees of such a society, but, they cannot be raised to the pedestal of a law in themselves, which can override the enacted law or to come in conflict therewith. Such provisions must give way and be subservient to statutory legislation. If authority was needed for this basic proposition, it is there in the binding judgment of their Lordships in *Co-operative Central Bank Limited and others -vs- Additional Industrial Tribunal. Andhra Pradesh. & others* (2), in the terms following :-

"we are unable to accept the submission that the bye-laws of a co-operative society framed in pursuance of the provisions of the Act can be held to be law or to have the force of law. It has no doubt been held that, if a statue gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute.

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(1) (1984) A.I.R. (S.C.) 363

(2) (1970) A.I.R. (S.C.) 245

That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or adminstration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute. ... ... The bye-laws that can be framed by a society under the Act are similar in nature to the Articles of Association of a company incorporated under the Companies Act, and, such Articles of Association have never been held to have the force of law."

111. In the light of the aforesaid authoritative enunciation, no rule or regulation of the Institute can possibly override Section 6 of the Ordinance. Once it is held as valid, as above, it must override, and, if necessary efface any bye-laws of the society to the contrary. Sub-section (2) of Section 6 in term provided that the absorption of the staff of the Institute was to be tested on the touch stone, of whether their appointment, promotion or confirmation was made in accordance with the University Regulations or the Government directions/circulars, apart from taking into consideration other relevant materials. So long as Section 6 (2) retains its pristine force and validity, the argument that the University Regulations or Government directions and circulars are excluded or are to be ignored or be irrelevant for determining the absorption of former employees, must necessarily fail and is rejected.

112. Yet again, learned Counsel's reliance on Section 73 of the Bihar State Universities Act, 1976, for contending that the rules and regulations of the

Institute are law, is entirely misplaced. However, to appraise the submission, Section 73 may be notices in extenso :

> "*Autonomous College or Institute* :- Not withstanding any thing contained in any provision of this Act, the University may, subject to its adequate supervision and the manner prescribed in the relevent statutes, confer upon any College or Institue, having outstanding caliber and fulfilling the prescribed conditions, the power to make changes 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."

Plainly enough the aforesaid provision is not even remotely for the conferment of any rule making power on the autonomous college or institute declared under the same. It only confers on such institute the power to make changes or modiffication in the courses of studies prescribed by the University for their students, and the privilege to take examination in such modified courses. In essence, it merely gives academic autonomy to prescribe syllabi and for consequential ancilary matters. Being declared an autonomous institute or college is not, in my view, a declaration of independence, which puts such a body above the law and beyond the pale of either the University Statutes or any other relevant and applicable Governmental direction, circular or memorandum. Reference in this connection may be made to Section 76 of the aforesaid Act, which clearly visualises that Statutes, Ordinances

and Regulations and Rules are to be specifically under the appropriate provisions of the Act. Therefore, Section 73 and the autonomous status given to the Institute does not in any way aid or advance the case of the petitioner in this context.

113. Much ado was sought to be raised on the alleged ground of undue haste in terminating the services of the petitioner. It was contended that the Ordinance was itself promulgated on the 19th April, 1986, and the impugned order was passed two days later, on the 21st April, 1986. Imaginatively, learned Counsel sought to read much into the speady action as being motivated by uncalled for hurry.

114. This ancillary submission, in my view, has been more than amply met on behalf of the respondent State. Taking the bull by the horns, the learned Advocate General candidly stated that the circumstances necessitating the promulgation of the Ordinance and the follow up action cried out for speed and quick action, and, merely because the executive did so, is not a matter for castigation, but, indeed, for commendation. Learned Counsel reiterated the earlier stand that one of the many grounds for selecting the Institute in the first phase of nationalisation were the audit and other reports indicating both financial and academic mismanagement. Therefore, the respondent State apprehended rightly that a serious clash with regard to the adminstration and management of the Institute would have inevitably arisen, if even after the nationalisation and take over, the petitioner, who was hardly required for administrative reasons, was still allowed to continue administratively as incharge thereater. Since the Government had taken over the Institute, it was imperative that its control and

administration in the very initial stage should expeditiously pass in to its hands. The spirit of Section 4 of the Ordinance is manifest in passing immediate and total control into the hands of the Commissioner, who was deemed to have taken charge of the institute and was directed to perform the functions and duties of the Governing Body forthwith, until such time as alternative arrangements were made by the State Government. The learned Advocate General forcefully highlighted and fell back on the earlier sorry experience of the State in the nationalisation of colleges and schools, wherein private managements had, in a short interregnum, inducted thousands of unauthorised persons in to non-existent posts, in order to pass on a back-breaking financial burden to the State and to saddle it with unworthy incumbents on unwanted posts. Consequently, it was submitted that the administration in this context was now taking no chances and deliberately acted with speed. It was not only admitted, but proudly claimed on behalf of the respondents that immediately after the promulgation of the Ordinance the Commissioner, patna Division, took over possession of the Institute with police help and froze everything in the Institute. It was the case that because of the fact that the State was acting determinedly with speed in the situation, is not by itself to be viewed with pointless suspicion, when it was done bona fide and with a designed public purpose. The State Government, under Section 4(2), immediately set up a Committee of three Vice Chancellors, who, admittedly, submitted a report, and, accepting the same and in accord therewith, it was decided not to absorb the petitioner, as in the view of the Committee, for a small Institute, his services were hardly required, nor his emoluments commensurate to a ministerial job.

115. Lastly, it appears That the piecemeal attack from various angles on the termination of the petitioner's services in a way obfuscates the broader picture and the larger vista in wihch the follow up governmental action in the wake of the provisions of the Ordinance has to be viewed. What, perhaps, deserves highlighting here is the uncontroverted fact that the Institute was very modestly staffed and did not have more than 20 teaching posts and a somewhat inflated ministerial staff of another 20 persons, the overall number being less than 40. The report submitted by the Committee of three Vice Chancellors namely, Dr. Devendra Nath Sharma, Dr. Kedarnath Prasad, and Dr. Chetkar Jha, which has been placed on the record, is illuminating in this context. It is manifest therefrom that the administrative posts were only two, namely, that of the Director General, held by Shree Jagannath Mishra, and the other of the Registrar, held by the petitioner. The record with regard to them consisted not more than a file or two. This was forthwith examined by the Committee and indeed, in its report, it was noticed as follows :-

> "The Committee examined and papers concerning the appointment of the Registrar of the Institute. The Committee also examined the resolution of the Governing Council connecting with the appointment of the Registrar of the Institute and the letters of the Government in connection with the sanction of this post. The Committee also perused the sanction order of the Government for the post of Registrar. The Governing Council, vide letter No.204/77 dated 24.6.1977, had requested the Government for the creation of the post of Registrar. The State Government, vide its letter no.328 dated 21.3.1983, sanctioned the post of Registrar in the pay-scale of Rs.890/1450/-."

The Committee came to the conclusion that the appointment of the petitioner was both contrary to the procedures for appointment as also to the sanctioned pay-scale of the Registrar. It was pointed out that the petitioner was allegedly appointed even prior to the date of the sanction of the post of the Registrar and imposed a pointlessly heavy financial burden on the Institute. On examining the duties and functions of the Registrar, the Committee opined that these were purely ministerial and no better than a Section Officer's job in a matching governmental or University set up. It was also noticed that the scale of pay given to the petitioner had virtually been doubled than the sanctioned scale and retrospective effect thereto had been given. There was thus not the least analogy between the alleged Registrar of the Institute and that of the Registrar of an University or any such matching organisation. The Committee summed up as under :-

> "... Institute is a small institution, in which altogether 40 persons have been working. Hence, it is the conclusion of the Committee that the appointment of the Registrar has neither been made in accordance with the rules nor in accordance with the directions given by the State Government. The post of the Registrar of the Institute, to a great extent, comes under the ministerial category. Hence, it cannot be said to be proper to pay him so much salary. In fact, this is an unnecessary financial burden on the Institute. It is neither necessary nor proper to keep the Registrar in this pay scale."

116. Relying basically on the report of the Committee of the three Vice Chancellors, the learned Advocate General drew sustenance from Annexures '1' to '5' of the writ petition itself and Annexures

'A', 'A/1', 'A/2' and 'A/4', placed on the record by the respondent State, to contend that the petitioner had been appointed wholly irregularly in violation of even the by-laws of the Society and had been pampered with emoluments which were disproportionate to his job and contrary to the sanctioned pay scale for the post granted later by the Government. It was highlighted that though some pretence was made, in fact, no advertisement for the post of this nature was at all made, nor any Selection Committee was constituted. and the petitioner was appointed primarily because of his previous long existing connection with the Director General of the Institute. Though the post of the Registrar was sanctioned only in May, 1983 and the pay scale therefor was Rs.890-1450/-, yet, the petitioner was drawing emoluments beyond Rs. 3,000/- or even more, apart from other perks. Resting himself on the pleadings in the counter- affidavit, the respondent State's stand was that there was neither any valid appointment of the petitoner, nor any valid financial sanction for the amounts which were being doled out to him.

117. Against the aforesaid submission the learned Advocate General pinpointed that under Section 6 (2) of the Ordinance, the Committee of Vice Chancellors' was duly constituted. It examined the record pertaining to the petitioner and opined about his appointment, promotion or Government directions and circulars and further took into consideration all other materials. It had come to the conclusion that it was neither necessary nor proper to keep the Registrar nor to give him the pay-scale he was drawing. Indeed, by virtue of the control having been passed completely to the Commissioner, the post of the Registrar was rendered superfluous. The State Government, under Section 6 (3) was to consider whether to absorb the petitioner in the Governmnet service or not. Accepting the report of the Committee aforesaid and in accord therewith

the Governor issued the notification Annexure '7' and thereby declined to absorb him in Government service. In the Context of section 6 and the consequential action, the test is whe ther no reasonable man could have come to the aforesaid conclusion. To my mind, it cannot even remotely be said that the decision not to absorb the petitioner has in any way the hall mark of perversity or illegality, and, indeed, in my view, it suffers from no legal infirmity whatsoever. The challenge to the termination of the petitioner's service, therefore, is repelled.

118. As a necessary consequence, this writ petition (C.W.J.C.No. 2087 of 1986) also fails and is hereby dismissed. However, there will be no order as to costs.

Nagendra Prasad Singh, J. I agree

Uday Sinha, J. I agree

M.K.C. *Petitions dismissed.*

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Bihar State Universities Act, 1976 section 60 sub-section 4—— exercise of powers under, by the University in appointing ad-hoc committee of a College administered and established by a minority community— whether without jurisdiction—— Declaration by the State Government of the minority character of the institution— requirement of — action of the University in removing the Governing Body of the College appointed by a religious minority without affording opportunity to show cause— whether against the principles of natural justice. **Page**

Where, the writ petitioners and association of people professing faith in Budhism, established Sangmitra College and constituted Governing Body adhering to the regulations and statutes of the Ranchi University which was granted temporary affiliation by the Ranchi University and the Government of Bihar and they also applied to the State Government for declaring the college as one established and administered by a minority community on the ground of religion but the declaration was not yet made by the Government.

Held, that though before the Governing Body is constituted in accordance with the provisions of the Statutes, a declaration by the State Government that the institution was governed and managed by a Minority Community may be required but that in itself cannot mean that until and unless a declaration is made by the State Government, the university shall extend its powers under sub-section 4 of section 60 of the Bihar Universities Act, 1976 and remove the Governing Body appointed by the sponsors and

appoint an ad-hoc committee. Page.

Held, further that the Vice Chancellor and the Syndicate of the Ranchi University acted without jurisdiction in appointing ad-hoc Governing Body for the College.

Held, also , that appointment of ad-hoc Committee without disclosing the facts as to why actions were taken by the university to remove the Governing Body appointed by the religious minority and without assinging any reason was without complying with the requirements of natural justice and as such the impugned order appointing an ad-hoc committee is without jurisdiction.

Bishwa Budha Parishad and anr. V. The Ranchi University and others (1987) I.L.R. 66, Pat. 603

Central sales Tax Act. 1956 - section 14 clause (vi) —— Oilseed —— meaning of ——— Copra, whether assessable to sales Tax at the rate of 3% only under section 6(3) of the Bihar Sales Tax Act. 1959 --- Bihar Sales Tax Act. 1959 section 6 (3).

Reading the definition of oilseeds under section 14 clause (vi) of the Central sales Tax Act 1956, it is implicit that 'copra' i.e. dry coconut was an oilseed and thus being covered within the purview of that definition, it was assessable at the rate of 3% only under section 6(3) of the Bihar Sales Tax Act, 1959.

Commissioner of Commercial Taxes, Bihar, Patna V. *M/s Ekbal Ram Lakhman Prasad.* (1987) I.L.R. 66 Pat. 564

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Constitution ——— Articles 14 and 16 - provisions of - whether violated in respect of Homeopathic Diploma holder Vis a Vis Ayurvedic and Unani Degree-holder medical officer in regard to pay scale and status —— classification based on educational qualification made with a view to achieving administrative efficiency whether rest on fortuitous circumstances.

The fourth pay revision Committee recommended different pay-scales for two types of Medical Officers namely, the Ayurvedic and Unani Degree holder medical officers on the one hand, and the Homeopathic Diploma- holders, on the other describing the former as gazetted officers and the latter as non-gazetted. The State Government had taken a decision both in regard to the pay scale and with regard to their status in conformity within the recommendation of the pay Revision Committee.

No prejudice has been caused to the writ petitioners, the Homeopathic Diploma holders, which may be said to be violative of Articles 14 and 16 of the Constitution.

Classification on the basis of educational qualification made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances, Classification must be truly founded on substantial differences which distinguished persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved, judicial scrutiny can, therefore extend only to the consideration whether it bears

nexus with the object in view. It can not extend to embarking upon a nice or mathematical evaluation of the basis of classification. Page

Dr. Mathura Prasad and others, v. The State of Bihar and others. (1987) I.L.R. 66, Pat. 650

Income-tax Act, 1961 - [- 1 section 143 (1) and 263 (1) —— section 263 (1) —— order passed by the Commissioner Income-tax under the provision ——— legality of —— Income-tax Officer not taking note of provisions of section 143 (1) and not making enquiry—— order passed by Income-tax Officer, whether erroneous and prejudicial.

Income-tax Appellate Tribunal was not right in cancelling the order passed by the Commissioner of Income-tax under section 263 (1) of the Income-tax Act, 1961 hereinafter called, the Act. The order of the Income-tax Officer was erroneous and prejudical by not having taken note of the provisions of section 143 (1) of the Act. It was prejudicial to the Income tax Department, as the necessary enquiry had not been made by the Income-tax officer.

Commissioner of Income-tax Bihar-II. Patna. V. Smt. Rambha Devi (1987) I.L.R., 66 Pat. 575

-[-2- Section 212 (3A) and 221 — section 212-(3A) ---- assessee filing estimate under, but not paying advance tax— section 221 -- Income-tax Officer, after issuance of notice and show cause by assessee, Imposing penalty for not payment of advance tax -- validity of -- circular no 18 -D (XLV-14) of 1963 issued by Central Board of Direct Taxes in regard to levy of penalty under section 221 —

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effect of.

The assessee filed estimate in terms of section 212 (3A) of the Income Tax Act, 1961, hereinafter called the Act, and in accordance with the estimate, advance Tax of Rs. 12100/- become payable on 15.3.1971 but the advance tax was not paid and on 16.2.72 the assessee filed regular return and on the basis thereof paid tax Rs. 18417/-. The Income Tax Officer on 16.12.1972 called upon the assessee to show cause in terms of section 221 of the Act as to why penalty be not imposed for non-payment of advance tax and on cause being shown, by order dated 3.2.1973 the Income-tax Officer imposed penalty of Rs. 1500/- for non-payment of advance tax.

Held, that in terms of circular no. 18-D(XLV-14) of 1963 dated 15.7.1963 in regard to levy of penalty under section 221 of the Act, issued by Central Board of Direct Taxes, no penalty could have been levied. The assessee was certainly in default, but the circular of Central Board of Direct Taxes being binding on the Officer employed in execution of the Act under section 5 (8) of the Act, were bound to give effect to the circular. Hence the Income Tax Appellate Tribunal was justified in cancelling the penalty imposed under section 221 of the Act for failure to pay advance tax on the basis of the estimate filed under section 212 (3A) of the Act after the tax had been paid on the basis of regular return.

Commissioner of Income-tax, Bihar, Patna v. Sriram Agrawal. (1987) I.L.R. 66, Pat. 591

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-[-3- Section 251(2) —— notice under issued on the assessee for showing cause fixing 31.3.1975 by the Appellate Assistant Commissioner Income Tax—— Appeal heard on 26.3.1975 and enhancement made on concession of the counsel of the assessee—— validity of .

Where notice under section 251 (2) of the Income Tax Act, 1961 was issued in appeal to the assessee, the 'Individual', fixing 31.3.1975 to show cause as to why his income be not enhanced by making suitable addition in respect of household expenses incurred by him during the year under review but the Appeal was taken up for hearing on 26.3.75 and the counsel for the assessee conceded that the addition was called for and the Appellate Assistant Commissioner Income Tax enhanced the assessment for the assessment year 1973-74;

Held, that the Income Tax Appellate Tribunal was right in holding that the concession made by the counsel for the assessee on 26.3.1975 in absence of the assessee when the notice under section 251 (2) fixed 31.3.1975 for hearing was not a valid concession.

Commissioner of Income-tax, Bihar-1, Patna v. M/s Jyoti Tube-well Co., Patna (1987) I.L.R. 66, Pat. 569

-[-4- Section 253 and Section 256 (2) —— application by Revenue against restoration of appeal by income tax Appellate Tribunal before High Court under section 256(2) — whether competent— section 253 - ambit of.

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Where the assesee filed an application before Income tax Appellate Tribunal hereinafter called the Tribunal, for restoration of her Appeals as she had not been given reasonable opportunity to place her case and the Tribunal restored the appeal for rehearing whereupon the Revenue being aggrieved by the order of Tribunal moved the High Court under section 256 (2) of the Income tax Act, 1961 hereinafter called the Act:

Held, that the order passed on such a petition does not come within the periphery of section 253 of the Act and therefore no reference could be made to the High Court. The reference is thus obviously in competent.

On reading sections 253 (1),254(1) and 256 of the Act, it is obvious that an application for reference can be filed only against the order which comes within the ambit of section 254 of the Act.

Commissioner of Income-tax, Bihar-1, Patna v. Dr. (Mrs.) Krishna Rana, Deputy Superintendent, Civil Assistant Surgeon, Arrah (1987) I.L.R. 66, Pat. 631

Motor Vehicles Act, 1939 -[- Sections 2(18), 93, 94(3) proviso, 110 and 110 A (i) (C) — ambit of —— uninsured vehicles, exempted by section 94(3), whether come within the scope of section 110— sections under chapter VIII of the Act clearly indicating that all vehicles covered by definition of motor vehicles under section 2(18) whether insured or not come within its scope — 'Heading' of Chapter VIII whether can negative it —— claim application by father of the injured boy before claims Tribunal,

whether maintainable —— section 110A (i) (C) — Expression 'duly authorised 'agent' — construction of. Page

Father of the injured minor boy who was run over by truck belonging to respondent, a welfare organisation, which was exempted by sub-section (3) of Section 94 of the Motor Vehicles Act, 1939, hereinafter called the Act, from the requirement of getting the vehicle insured, filed claim case before claims Tribunal.

Held, that an examination of the language of section 110 read with sections 2 (18), and 93 and that of the proviso to section 94 (3) of the Act lead to the irresistible conclusion that uninsured vehicles are also within the scope of section 110 of the Act.

Held, further, that as the sections of chapter VIII of the Act clearly lead to the conclusion that all the vehicles covered by the definition of "Motor Vehicle" in section 2(18) of the Act whether insured, or not, are within its scope, the 'Heading' of the chapter can not be relied upon for negativing it.

It is well settled that the 'Heading' of a chapter cannot control the plain words of the statute. The court is entitled to look at the 'Heading" of a chapter for resolving any doubt that it may have as to the ambiguous words but, if the meaning of the section is clear, it cannot be used for giving a different effect.

The object of establishment of claims Tribunals by the amendment in the Act was to ensure speedy relief to victims of road accidents by a less expensive process and there is no reason to place the victims

of accidents involving uninsured vehicles at a disadvantage. Page

Held, that the claim petition of the appellant filed before the claims Tribunal cannot be held to be not maintainable.

Held, further, that the expression 'duly authorised' 'Agent' referred to in clause (C) of subsection (1) of section 110 A of the Act should not be construed narrowly so as to mean a person expressly authorised or having the authority in writing. It must be given a wide and liberal meaning as including a person having implied authority to claim compensation.

The father-applicant besides suffering severe mental strain on account of the injury to his son injured in the accident, had to spend considerable amount of money over the treatment of the boy for which he was rightly compensated by the Claims Tribunal.

Parmanand Thakur V. The Commissioner, Coal Mines Welfare Organisation , (1987) I.L.R. 66, Pat. 639

Nomination paper — Scrutiny of — candidates or their proposers not explaining to the Returning Officer the correct part and serial number of proposer in the electoral roll — nomination paper rejected by Returning Officer — validity of.

Where neither the candidates nor their proposers explained to the Returning officer the correct part and serial number in the electoral roll with respect to the proposers resulting in the

Returning Officer getting no assistance in locating the correct part, number and serial number of the proposers and hence the nomination papers of the candidates were rejected by the Returning Officer; Page

Held, that the election petitioner has failed to prove that the nomination paper of the two candidates were illegally rejected.

Held, further that it is not a statutory obligation of the Returning officer to scrutinise the electoral roll for finding out the identity of the proposer when the Serial number given in the nomination paper turns out to be wrong.

The enquiry made by the Returning Officer or Assistant Returning Officer at the time of the presentation of the nomination papers is only peripheral enquiry and it is on the date of the scrutiny of nomination paper that the nomination papers come up for detailed consideration at the hands of Returning Officer against whom there is no estoppel in regard to the statutory duty of scruniny.

Sidh Nath Rai v. Sri Sonadhari (1987) I.L.R. 66, Pat. 663

Service——Company, whether could transfer its workman from one of its units to another in exigencies and for administrative reasons-- nothing on record to show that appointment of the workman was to a particular post in one unit and was not transferable— conduct of the workman whether lends support to the stand, of employer company that the workman's job was transferable.

Where neither the letter of appointment nor the terms and condition of service were brought on record nor there was any thing in the standing order of the employer-company or its different units showing that the appointment of the workman to a particular post in one unit was not transferable and the workman challenged his transfer to another unit of the same company. Page

Held, that employer-company was at liberty to transfer its workman to different units in the exigencies and for administrative reasons.

Held, further, that the conduct of the workman itself shows and lends support to the stand taken by the employer-company that the workman's job was transferable since, as for back as 1971 when the workman had been transferred to the company's head office he had requested for his retransfer and he was re-transferred to Barachaki a branch of the company.

Champaran Sugar Company Limited, Barrah Factory Branch, Barrah, Barachakia District East Champaran v. The State of Bihar and ors.(1987) I.L.R.66 Pat. 581

Wilkinsons's Rules — Rule 20 —— Provisions —— all the Panches not nominated by the Agent, i.e. the Deputy Commissioner —— award given by Panches and the decree passed in pursuant thereto, whether without jurisdiction.

Where in a suit was instituted in Kholan area to which wilkinson's Rules are applicable and Deputy Commissioner i.e, the, Agent proceeded to dispose

of the matter in terms of Rule 20 of the Wilkinson's Rules by appointing Panches but actually Panches were got nominated by the two parties to the suit and the third panch was nominated by the Deputy Commissioner himself where upon the panches made award: Page

Held, that in view of the fact that all the three Panches were not nominated by the agent, i.e., the Deputy Commissioner in accordance with Rule 20 of Wilkinsons Rules, entire proceeding became vitiated in law and award made by the panches was wholly without jurisdiction and as such the decree passed pursuant thereto was set aside.

Kushnu Sinku V. The State of Bihar & 42 others (1987) I.L.R. 66, Pat. 690

Workmen' Compensation Act, 1923 , section 3 subsection (1) —— ambit of—— workman not meeting with any accident during the course of his employment— workman, whether entitled to compensation from the employer.

Where the Presiding officer, Labour Court had found that the workman did not meet with any accident during the course of his employment and that the medical evidence showed that the body of the workman did not have any external or internal injury;

Held, that sub-section(1) of section 3 of the Workmen's Compensation Act, 1923, envisages the payment of compensation to a workman by the employer only upon the occurrence of an actual

physical accident and consequential injury resulting therefrom. Page

Superintendent of Mines v. Smt. Lalo Devi (1987) I.L.R. 66, Pat. 545

physical accident and consequential injury resulting therefrom. Page

Superintendent of Mines v. Smt. Lalo Devi (1987) I.L.R. 66, Pat. 545

APPELLATE CIVIL

Before S.S. Sandhawalia, C.J. And Satyeshwar Roy, J

1985
March,28.

*Superintendent of Mines.***

v.

Smt. Lalo Devi.

Workmen' Compensation Act, 1923 (Central Act no.VIII of 1923), section 3 subsection (1) —— ambit of—— workman not meeting with any accident during the course of his employment— workman, whether entitled to compensation from the employer.

Where the Presiding officer, Labour Court had found that the workman did not meet with any accident during the course of his employment and that the medical evidence showed that the body of the workman did not have any external or internal injury;

Held, that sub-section(1) of section 3 of the Workmen's Compensation Act, 1923, envisages the payment of compensation to a workman by the employer only upon the occurrence of an actual physical accident and consequential

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*Sitting at Ranchi.

**Appeal From Original Order no. 23 of 1981 (R). From a decision of Shri Sushil Kumar Dwivedi, Presiding officer, Labour Court, Ranchi dated the 30th December, 1980.

injury resulting therefrom.

Case laws discussed.

Appeal by the employer.

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

Messrs. S.B.Sinha and *U.K.Sarkar* for the appellant

Mr. Tapen Sen for the respondent.

S.S.SANDHAWALIA, C.J., Does sub-section (1) of section 3 of the Workmen's Compensation Act, 1923 envisage the payment of compensation to a workman dehors the occurrence of any actual accident and consequential personal injury resulting therefrom ? This is the somewhat ticklish and significant issue which falls for determination in this appeal.

2. Facts lie in a narrow compass and, indeed, are not in serious dispute. In view of the primarily legal issue involved, a brief reference to them suffices. The respondent, Shrimati Lalo Devi, had claimed compensation for the death of her husband, Mahadeo Oraon, who was employed as a coal loader under the appellant in a colliery. In substance, the express case spelt out on her behalf was that on the Ist of June, 1978 Mahadeo Oraon aforesaid was loading coal at his place of work when a big chunk of coal fell down from the running belt and hit his body, on account of which he fell down and died instantaneously of the injury.

It was claimed that the death of her husband was caused by the accident arising out of and in course of his employment

and consequently the appellant was liable for compensation.

3. The firm stand taken on behalf of the appellant was that Mahadeo Oraon did not die because of any accident at all, the very happening of which was denied. The case in defence was that no coal at all fell from the running belt and the workman, who was loading coal, was suddenly taken ill and collapsed and was immediately sent to the hospital where the medical examination disclosed that he was already dead.

Consequently, the stand was that the claim did not come within the ambit of section 3 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the 'Act').

4. The learned Presiding Officer of the Labour Court particularly referred to the medical evidence including the postmortem report which did not show any external or internal injury on the body of deceased workman, along with the other evidence. He, therefore, concluded that the case set up by his widow that he died because of the injury sustained by him on account of the fall of the coal from the running belt was wholly unsustainable. Nevertheless, he proceeded to grant compensation to the tune of Rs, 30,000/- on the entirely conjectural ground that because Mahadeo Oraon had become unconscious whilst loading coal, he was either physically weak or was suffering from some disease and his death was accelerated because of the exertion involved in the work in which he, at the time, was employed. Reliance was primary placed on *Shrimati Laxmibai* and *Port Trust. Bombay* (1)

(1) (1954) A.I.R (Bombay) 180.

5. Learned Counsel for the appellant has assiduously assailed the tenuously conjectural view taken in the judgement under appeal. It was forcefully contended that the happening of an actual physical accident and a consequential personal injury resulting therefrom is the *sine qua non* for the liability envisaged under sub-section (1) of section 3 of the Act. Unless the happening of actual accident is first established, which directly results in injury to the workman, no question of compensation under section 3(1) can possibly arise. It was pointed out that the present case is not one of occupational disease covered by sub-section (2) and, therefore, the question of any physical weakness or acceleration of death by such disease or exertion was wholly irrelevant to the issue. It was contended that the court below having come to the clear finding that, in fact, there was no accident all or any fall of coal from the running belt resulting in any external or internal injury on the workman, the inevitable consequence would be the failure of the claim for compensation.

6. On behalf of the respondent, in essence, the stand taken is that in all cases where a workman dies in the course of his employment , he would be entitled to compensation. Any disease resulting in his death whilst on duty would attract the provisions of section 3 of the Act, according to the learned Counsel for the claimant. It was sought to be submitted that even under sub-section (1) the right to compensation would not be defeated by the total absence of any physical accident or consequential personal injury resulting therefrom.

7. It is plain that the appraisal of the aforesaid rival contentions must revolve around the somewhat exhaustive provisions of section 3. It is, therefore, apt to read the relevant

parts thereof at the very outset:-

3. EMPLOYER'S LIABILITY FOR COMPENSATION.

(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable-

(b) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to-

(i) the workman having been at the time there of under the influence of drink or drugs, or

(ii) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen.

(2) If a workman employed in any employment specified in Part A of Schedule III contract any disease specified there in as an occupational disease peculiar to that employment, or if a workman, whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment, or if any workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment, contract any disease specified there in as an occupational disease peculiar to that employment, the

contracting any disease shall be deemed to be an injury by accident within the meaning of this section and unless the contrary is proved, the accident shall be deemed to have arisen out of, and in course of the employment;

Provided that if it is proved,-

"(a) that a workman whilst in the service of one or more employers in any employment specified in part C of Schedule III has contracted a disease specified there in as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment, and

(b) that the disease has arisen out of and in the course of the employment ;

the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section:

Provided further that if it is proved that a workman who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in part C of that Schedule, for continuous period specified under this sub-section for that employment and he has after the cessation of such service contracted any disease specified in the said part B or the said part C, as the case may be, as an occupational disease peculiar to the employment and that such disease arose out of the employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section.

x x x x

8 Before one goes into a close and in-depth analysis of sub-section (1) (which admittedly is the provision applicable here), it is necessary to look at the broad scheme of the employer's liability for compensation provided by section 3 as a whole. Herein there is sharp line of distinction between sub-

section (1) and sub-section (2). Indeed, much confusion in this field could perhaps have been avoided if the watershed betwixt the two had been clearly kept in mind. Subsection (1) is general in nature which spells out the employer's liability to pay compensation arising out of actual accident resulting in personal injury to the workman in the course of his employment. However, sub-section (2) is a particular provision with regard to occupational diseases arising from certain hazardous employment. This can only be meaningful misunderstood by reference to Schedule III and Parts A, B and C. there of. This schedule gives a list of occupational diseases specified under three distinct heads. These have been recently altered and somewhat exhaustively amended by Act 22 of 1984. Now, Part A includes in its ambit five occupational diseases and the employment related thereto. Then again, Part B of Schedule III, as now amended, contains as many as twenty four occupational diseases with their corresponding hazardous employment. Similarly, Part C contains five such occupational diseases. Sub-section (2) by a legal fiction provides that the contracting of these occupational diseases would be deemed to be an injury by accident within the meaning of section 3 and unless contrary is proved would be further deemed to have brisen out of and in course of the employment. It seems manifest that it is the particular and peculiar provision of sub-section (2) which brings an occupational disease in its corresponding field of employment within the ambit of an injury by accident entirely by a deeming fiction in express term. It was only in this context that the contracting of a disease as a natural hazard of the employment has, by a legal fiction been brought within the scope of injury by accident. Herein alone the issue of such disease accelerating death, etc., would arise. To my mind, therefore,

the questions of occupational disease, how and when it is contracted and the same either accelerating death or otherwise are wholly foreign to sub-section (1). The line of distinction between the two sub-sections is sharp and clear.

9 Reverting back to sub-section(1) (which, as already noticed, is the only relevant provision for the present case), what would meet the eye is the designed employment of the word 'accident' by the Legislature in the very opening part of the section. What precisely is envisaged by this word herein is indeed the primal question. Though no definition as such has been given in the Act itself, yet the concept of accident is not unknown to law generally or as employed in the specialised field of torts. It seems somewhat plain that this word must be given its ordinary dictionary meaning. It has been defined as "an unlooked for mishap, an untoward event which is not expected or designed" Equally well settled it is by a long line of precedent that the word 'accident' in section 3 has been used in its popular sense and the meaning given to it in common parlance. It has not been employed as a term of art nor technically constricted or enlarged from the basic concept noticed above. It would thus appear that the language of the statute herein is so clear and unambiguous that it would be only doing violence to it by travelling into conjectural field of ordinary disease or acceleration of death there by becoming accident within the scope of sub-section. There appears to be no ambiguity or obscurity in the plain word of this sub-section which can warrant one to launch on a voyage of discovery for the meaning of a word which is unequivocal in its nature.

Reference in this context may be made to the succinct enunciation of the rule in Maxwell Treatise on the interpretation

of statutes (12th Edition) at page 28:-

"The length and detail of modern legislation,' wrote Lord Evershed M.R., 'has undoubtedly reinforced the claim of literal construction as the only safe rule' (Maxwell, 11th Ed.,Page.VI). If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences (See *Att.Gen.* v. *Mutual Tontine west-Minister Chambers* "*Association Ltd.* (1876) 1 Ex.D. 469, per Jessel M.R.; *Brandlaugh* v. *Clarke* (1883) 8 App.Case 354, per Lord Fitzgerald; *Re No.12 Regent St..Oxford* (1948) ch. 735.`The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases' (*Barrell* v. *Fordee* (1932) A.C. 676, Per Lord Warrington of Clyffe at P. 682).

The rule of construction is to intend the Legislature to have meant what they have actually expressed' (*R.*v.*Renbury (inhabitants)* (1834) I A. & E. 130, per Parke J.at p.142). The object of all interpretation is to discover the intention of Parliament, but the intention of Parliament must be deduced from the language used' (*Capper* v. *Paldwin* (1965) 2Q.B.53, per Lord Parker C.J.at p.61), for it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament, cannot make the law.'(*Davies Jenkins & Co.. Ltd.* v. *Davies* (1967)2 W.L.R 1139, per Lord Morris of Borth -y-Guest at p. 1156; *I.R.C.* v. *Dowdall*, o'Mahoney & Co. (1952) E.C.401, per Lord Reid."

To the same tenor are the following words in Crawfords Construction of Statutes at page 274:-

"The first source from which the legislative intent is to be sought is the words of the statute.. Then an examination should be made of the context, and the subject matter and purpose of the enactment.."

10. The view that the word 'accident' herein to be given its plain and known connotation is further buttressed when reference is made to sub-clauses (i), (ii) and (iii) of clause (b) to the proviso to sub-section (1) of section 3. Sub-clause (i) exonerates the employer where the workman has been under the influence of drink or drugs at the time of the accident. The words "at the time" there of are significant and clearly refer to the occurrence of happening of an actual physical accident. Similarly, sub-clause (ii) exonerates the employer from the payment of compensation where there is wilful disobedience by the workman to any order or rule framed for the purpose of securing the safety of workmen. This again visualises a factory or establishment where the prevention of accidents sought to be effected by certain safety measures. To the same effect are the provisions of clause (iii) pertaining to the wilful removal or disregard by the workman of any safety guard or other device provided for the purpose of securing the safety of workmen. All these provisions, when viewed together, would leave no manner of doubt that in sub-section (1) the word 'accident' is being employed not figuratively but as an actual physical happening which was avoidable by safety measures or other care or caution at the time of its happening.

11. The same result seems to flow when reference is made to the procedural provision of section 10 providing for notice prior to making a claim for compensation . The relevant sub-sections (1) and (2) there of are in the terms following:

"10. Notice and Claim.

(i) No claim for compensation shall be entertained by a Commissioner unless notice of accident has been given in the manner here in after provided as soon as practicable after the happening there of and unless the claim is preferred before him within two years of the occurrence of the accident or, in case of death, within two years from the date of death:

(ii) Every such notice shall give the name and address of the person injured and shall state in ordinary language the case of the injury and the date on which the accident happened, and shall be served on the employer or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

12 An analysis of the above would indicate that the statute visualises the actual happening or the occurrence of an accident. It further require that the notice containing, inter alia, the specific date of occurrence of an accident. It further requires that the notice containing, *inter alia,* the specific date on which the accident happened, should be served on the employer. A period of limitation of two years from the specific date of occurrence is then prescribed for making a claim in cases other than those of death. All these provisions, therefore, seem to be consistent only with the actual happening or occurrence of a physical accident which, in term causes the injury to the workman for which compensation is claimed.

13 In the light of the above, and confining one self strictly to sub-section (1) of section 3, it would appear that the statute prescribes three basic preconditions for the employer's

liability for compensation. Firstly, there must be an accident in the sense of actual physical happening or occurrence of "an unlooked for mishap, an untoward event, which is not expected or designed", secondly, such an accident must directly result in a personal injury to the workman and thirdly the accident must arise out of and in course of the employment of the workman. These precondition appear to be foundational for the claim of compensation by the workman. This however, can still be defeated if the employer can bring the case within clauses (a) and (b) of the proviso to sub-section (1) of section 3. It seems plain that under sub-section (1) even by a strained or most liberal construction ordinary disease cannot be termed as accident nor can these distinct concepts be treated as if they were synonymous.

14. Even at the cost of some repetition, one must sound a clear note of caution that sub-section (2) of section 3 is on an entirely different and independent footing. This is so because of an express legal and deeming fiction in terms provided therein.

15. Now adverting to precedent, pride of place must inevitably be given to *Mackinnon Mackenzie and Co. Private Ltd.* v. *Ibrahim Mohammed Issak* (1) even though it does not directly cover the issue. Their Lordships reversed the judgement of the High Court and dismissed the claim for compensation for the death of a missing seaman employed as a deck-hand aboard the ship. It was held unequivocally there in that the burden of proof rests upon the workman to prove that the accident arose out of the employment as well as in the course

(1) (1970) A.I.R. (S.C.) 1906

of employment. More directly in issue is the Division Bench judgment of Bombay High Court in The Municipal Corporation for *Greater Bombay* v. *Smt.Sulochanabai Sadashiv Joil* (1) where in it has been held as under:-

"Three factors must be established to attract the liability under S.3 of the Act. Firstly, there must be an injury. Secondly, it should be caused in an accident. Thirdly, it should be caused in ordinary course of employment. Mere death in ordinary course by some bodily aliment for even in the course by employment cannot attract liability of the employer in S-3. The words 'injury's and 'accident' in S-3 of the Act imply the existence of some external factor to course death apart from internal aliment of the body.

To the same tenor are the observations in *Mrs. Kamlabai Chintman* v. *Divisional Superintendent, Central Railway, Nagpur* (2) holding that it was clear that in all cases where a workman dies in course of the employment, he cannot be given compensation merely on that score. Reference may also be made to *Mrs. Leticia Martins* v. *M/s Mackinnon Mackenzie and Ltd. Con. Pvt. Ltd. and another* (3) and *M/s Sarat Chatterjee & Co.. (P.)* v. *Smt. Kairunnessa* (4).

16. In fairness to Mr. Tapen Sen, learned counsel for the respondent, reference must now be made to *Srimati Laxmibai's case* (supra) which forms the cornerstone for his stand.

(1) (1977) Labour and I.C 1735
(2) (1971) A.I.R. (Bom.) 200
(3) (1976) Labour and I.C. 664
(4) (1969) Labour and I.C. 778

Undoubtedly this case, by analogy, lends considerable support to the respondent's case. Therein a watchman employed by the Port Trust complained of pain in the chest whilst on duty around midnight. He was asked to lie down but thereafter his condition deteriorated and at about 6 A.M.he died. The medical evidence showed that the deceased was suffering from heart disease and death was caused thereby. The Commissioner for Workmen's Compensation dismissed the claim of the widow of the workman for compensation. The Division Bench, however, on appeal reversed the judgment and allowed compensation.

17. With the greatest deference, I am unable to agree with the approach and line of reasoning which seems to have been tacitly adopted in *Srimati Laxmibai's case.* It would appear that the sharp distinction between sub-section (1) and sub-section (2) of section 3 was altogether missed. The concept of occupational disease and its prescription in parts A, B and C of Schedule III to the Act seems to have been altogether lost sight of. Equally, the deeming fiction in terms provided in sub-section (2), which brings occupational disease within the ambit of an injury by accident went totally unnoticed.

18. Reliance in the said judgment was plainly on English cases without clearly noticing the identity or otherwise of the law as also with regard to the fact whether those three cases of occupational disease or cases *Simpliciter* of accident. The judgment again seems to proceed on a concession of Mr. Patigara, the learned counsel for the employers, who did not seriously dispute the proposition that in that case death was caused by an accident. The whole matter seems to have proceeded on the assumption that it was an accident and the issue debated primarily was whether there was any c usal connection between the assumed accident and the employment

of the workman. It seems to me that it would be doing great violence to the plain English language to term disease as an accident for the purposes of sub-section (1). With respect, cardiac arrest or heart failure cannot *per se* be termed as accidents to grant compensation to the legal representative of the workmen who died because of the same whilst merely on duty. What has then to be borne in mind is the fact that under sub-section (1) it is not merely an accident for which compensation is envisaged but a direct physical injury caused thereby to the workman. To my mind, plainly enough sub-section (1) envisages an accident in the physical and not in the figurative or poetic sense. Both the accident and the personal injury directly resulting therefrom have to be co-terminus and, indeed, must concur to bring into play the provisions of the sub-section with the added requirement that the accident had arisen out of and in course of the employment. With the deepest deference. I would wish to record my dissent from *Srimati Laxmibai's case.*

19. For identical reasons, I am unable to agree with the Learned Single Judge's view in *The Indian News Chronicle Ltd.* v. *Mrs. Luis Lazarus* (1) Therein, without any elaborate discussion, it seems to have been held that pneumonia allegedly contracted by working in a cooling room would be an accident within the meaning of section 3(1).

20. Similarly, it is not possible to subscribe to the observations in paragraph 6 of *Parwatibai* v. *Manager, Rajkumar Mills, Indore* (2). The workman therein was suffering from heart disease and died therefrom. It has been observed in the said judgment as under :-

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(1) (1951) A.I.R. (Punjab) 102.

(2) (1959) A.I.R. (M.P.) 281.

"If the injury or death from the point of view of the workman, who dies or suffers the injury is unexpected or without design on his part, then the death or injury would be by accident although it was brought about by a heart attack or some other cause to be found in the condition of the workman himself. Kalu clearly did not design the heart attack or intend that he should die as a result of it. His death was thus caused by an accident

With the deepest deference, if such a view were to be adhered to, then, indeed, all deaths by heart attacks or otherwise would be accidents because the person had himself not designed the heart attack or disease or intended that he should die. I am indeed constrained to record my dissent from so wide ranging an observation which could not be supported by either principle or other precedent.

21. Equally I record my inability to subscribe wholly the somewhat overtly wide ranging observation made in paragraph 9 in *Bai Shakri* v. *New Manekchowk Mills Co. Ltd.* (1).

22. With the greatest deference, it appears to me that the common fallacy underlying the aforesaid judgments is their reference to and reliance on English cases without noticing the wide difference and divergence of the language of English statutes from what we are called upon to construe under section 3(1) of the Act. Plainly enough, the English statutes are not in *pari materia* and in some respects are radically different and further have undergone various statutory changes which inevitably had been construed by English Judgments. It would perhaps suffice to mention that in England earlier provision was

(1) (1961) A.I.R. (Guj.) 34.

of the Workmen's Compensation Act, 1906. This was then amended by the Workman Compensation Act, 1923. Thereafter the Workmen's Compensation Act, 1925 was enacted to consolidate the law relating to compensation for workmen. It deserves notice that prior to 1906 no disease was recognised as a cause of injury unless it could be shown to have been occasioned by some accident or untoward event; but in that year provisions as to compensation were made applicable to certain industrial diseases and these were further extended by section 43 of the English Workmen's scheme and the language of the statutory provisions in England are distinct and different from the one prevailing in our Act and in particular the sharp line of distinction betwixt sub-section (1) and sub-section (2) of section 3. Even in England where, as has been pointed out, the language of the section is distinct and different and inevitably so the line of precedent, Lord Atkinson had observed as follows in *clover, Clayton & Co, Limited* v. *Hughes* (1) :-

" I think the meaning put upon the word 'accident' in *Fenton* v. *Thorley* (1903) A.C. 443 must now be accepted in all cases turning on the construction of the phrase 'injury by accident' used in the workmen's compensation Act, 1906 as its true meaning, namely' an unlooked for mishap or an untoward event which is not expected or designed'. It must exclude disease. What is 'unlooked for or unexpected' must in every case, exist either in the external influences to which the sufferer is subjected, or in the effect upon him which those influences produce."

In that very case, Lord Shaw unequivocally observed as follows (at page 257) :-

" Apart from these cases, my Lords, and on these facts,

(1) (1910) A.C. 242.

I am of opinion that this workman did not die owing to injury by accident, but died of heart disease. There was nothing unusual or abnormal in the work, no strain 'more than ordinary' was imposed or involved, no occurrence took place to intercept or even disturb the work or the workman; all that can be said is that being at work, and diseased, he died, His death was caused, in my view, not by any injury by accident, but simply by the disease under which he unhappily suffered. That, my Lords, is my opinion on the facts, apart from the decisions; and having considered the latter with much anxiety and respect, and recognising to the full the delicacy of some of the distinctions drawn, I am confirmed in the opinion that neither in language nor intention does the Workmen's Compensation Act, 1906 apply to this case."

Reference in this connection may also be made to *Ormond* v. *C.D. Holmes & Co. Ltd.* (1937) 2 All. E.R.795. It would thus be manifest that even in England where the language of the statute is distinctly different, there exists a strong line of judicial thought that the death of a workman by disease is not synonymous with accident, barring the case of occupational diseases which have been brought within the ambit by an express legal fiction. As I have earlier shown, under sub-section (1) of section 3 of the Act, this seems to be more so.

23. Learned Counsel for the respondent had attempted to place reliance on *Bai Diva Kaluji* v. *Silver Cotton Mills Ltd.*(1) *Imperial Tobacco Company (India) . Ltd.* v. *Satona Bai* (2) and *Assam Railways and Trading Co. Ltd.* v. *Saraswati Devi* (3) But these cases either turn entirely on their own facts or are otherwise distinguishable.

(1) (1956) (I) L.L.J 740.

(2) (1956) (II) L.L.J 35.

(3) (1963) A.I.R (Assam) 127.

24. To conclude, the answer to the question posed at the very outset is rendered in the negative and it is held that sub-section (1) of section 3 envisages the payment of compensation to a workman only upon the occurrence of an actual physical accident and consequential personal injury resulting therefrom.

25. Now, applying the above, it is common ground herein that court below had come to the firm finding that in fact there was no accident at all in the present case. No chunk of coal from the running belt fell nor any question of any injury to the workman therefrom thus arose and indeed the medical evidence showed that the body did not have any external or internal injury. That finding was very fairly not even assailed on behalf of the respondent and, indeed could hardly be in the present proceedings wherein an appeal lies only on a question of law. Once it is held that in fact there was no accident as such then the very foundation of the claim under sub-section (1) of section 3 is eroded. Herein admittedly there was no question of any occupational disease or the applicability of sub-section (2). That being so, the appeal must succeed and is hereby allowed. The judgment of the labour court is set aside and the claim application dismissed. There will, however, be no order as to costs.

Satyeshwar Roy J., I agree.

R.D. *Appeal allowed.*

Before Hari Lal Agrawal and Nazir Ahmad, JJ.

1986

April, 7.

*Commissioner of Commercial Taxes, Bihar, Patna.**

v.

M/s. Ekbal Ram Lakshman Prasad.

Central Sales Tax Act. 1956 (Central Act No. LXXIV of 1956) section 14 clause (vi) —— Oilseed —— meaning of —— — Copra, whether assessable to sales Tax at the rate of 3% only under section 6 (3) of the Bihar Sales Tax Act. 1959 (Bihar Act no. XIX of 1959) section 6 (3).

Reading the definition of oilseeds under section 14 clause (vi) of the Central Sales Tax Act, 1956, it is implicit that, 'copra' i.e. dry coconut was an oilseed and thus being covered within the purview of that definition, it was assessable at the rate of 3% only under section 6(3) of the Bihar Sales Tax Act 1956.

Statement of case under section 33(1) of the Bihar Sales Tax Act, 1959.

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

Mr. K.N Kehsav, G.P.IV with Mr. Abhay Kumar Singh No.1

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*Taxation Case No. 3 of 1977. Re:- Statement of case under section 33(1) of the Bihar Sales Tax Act, 1959 by the Commercial Taxes Tribunal, Bihar, Patna, in the matter of assessment of sales tax on M/s. Ekbal Ram Lakshman Prasad for the period 1967-68.

(J.C.) for the petitioner.

None for the opposite party.

HARI LAL AGRAWAL & NAZIR AHMAD, JJ. A reference has been made by the Commissioner of Commercial Taxes, Bihar Patna. under section 33(1) of the Bihar Sales Tax Act, 1959 for answering the following question of law:

" Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that copra (Gari Gola) is oil seed' within the meaning of the expression as used in clause (6) of section 14 of the Central Sales Tax Act 1956, and sales thereof are taxable at the rate of 3% under section 6(3) of the Bihar Sales Tax Act ,1959, read with section 15 of the Central Sales Tax Act, 1956?"

2. This reference has been made in view of the conflicting decisions of the various High Courts in the country as whether dry coconut which is commonly known as 'Gari Gola' is an oilseed within the meaning of the expression used is clause (vi) of section 14 of the Central sales Tax Act, 1956.

3. From the statement of case the relevant facts which appear are briefly as follows. M/s. Ekbal Ram Laxman Prasad is a registered dealer carrying business in the town of Arrah. For the financial year 1967-68 it submitted a gross turn over for Rs. 20, 27, 978. 82.

The Assistant Commissioner of Commercial Taxes Shahabad circle, by his order dated 4.2.1970 accepted that gross turn over as returned as well as the various claims for deductions except to the extent of Rs. 6,984/- disallowing the claim of the dealer that transactions in copra were taxable only

@ 3% and not @ 5%. The dealer preferred an appeal claiming that copra being an 'oilseed' under the provisions to be mentioned hereinafter, could be taxed only @ 3%. The dealer's plea was accepted by the appellate authority which held that copra was oilseed within the meaning of the expression used in section 14 of the Central Sales Tax Act and thus it was exigible only @ 3%.

4. The Deputy Commissioner of Commercial Taxes moved the Tribunal in revision on this question of law, but the Tribunal maintained the view of appellate authority and then the Department filed an application for reference to this Court and accordingly a reference has been made.

5. It would appear from the judgment of the Tribunal as well as the statement of case made by the Tribunal that this question had fallen for decision in different High Courts. Whereas in the cases of *Ramavatar Budha Prasad V. The Assistant Sales Tax Officer, Akola & anr.* (1) *Commissioner of sales Tax, Madhya Pradesh, Indore* v. *Bakhat Rai and Co.* (2) *City oil Mill* v. *The Joint Commercial Tax Officer, Royapuram Division, Madras-1, and another* (3) *Hans Raj Choudhri* v. *J.S. Rajyana, Excise and Taxation Officer (Enforcement)* (4) and *S.Kamappa Mudahir* v. *State of Madras* (5) some High Courts have taken the view that copra was not an oilseed, in the cases

(1) 12 S.T.C. 286.
(2) 18 S.T.C. 285.
(3) 25 S.T.C. 33.
(4) 19 S.T.C. 489.
(5) 21 S.T.C 41.

of *(1) Kasturi Suhagiri Pai and co.* v. *The Deputy Commissioner of South Kamar* (1) (2) *M.T.Kumaran & Co.* V., *Secretary, Malabar Market Committee* (2) and (3) Sales Tax Officer, *Kozhikode* v. *K.V. Moosa Koya and another* (3) the High Courts have taken a contrary view and have held that copra was an oilseed within the meaning of section 14 of the Central Sales Tax Act and, therefore, liable to lesser rate of sales tax.

6. Before we proceed to discuss the matter further we may state the legislative amendment of section 14 by Act 61 of 1972. Prior to the amendment by the Central Act section 14 was very small and clause (vi) thereof dealing with oilseeds read as follows:

> "(vi) oil- seeds, that is to say, seeds yielding nonvolatile oils used for human consumption, or in industry, or in the manufacture of varnishes, soaps and the like, or in lubrication, and volatile oils used chiefly in medicines, perfumes, cosmetics and the like;"

By the Amending Act of 1972 it was made very comprehensive and more exhaustive. In clause (viii) of the amending provision of section 14, coconut, i.e. copra (excluding tender coconuts) was categorically included to remove all doubts. It may be mentioned that prior to this certain state amendments had included watery coconuts within the definition of 'oilseed'.and some of the decisions which are in favour of the Revenue are based on that, one of them being noticed in *Sri Siddhi Vinayaka Coconut & Co. and others* v. *State of Andhra Pradesh & Ors.* (4)

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(1) 12 S.T.C. 629.
(2) 15 S.T.C. 634.
(3) 18 S.T.C. 464.
(4) 34 S.T.C. 103

7. It is no doubt true that in the last decision which is of the Supreme Court, there is an observation that the amendments must be prospective, which proposition cannot be disputed but on referring to some of the rules of interpretation it would appear that if the earlier Act is ambiguous the later Act may throw light on it and where a particular construction of the earlier Act will render the later incorporated Act infeffectual, it lies within the authority of the legislature to amend an earlier Act or to declare its meaning by enacting a new Act.

8. Reading the earlier definition before the amendment, extracted herein before, we are inclined to take a view that 'copra' i.e., dry coconut, was an oilseed and thus being covered within the purview of that definition, it was assessable to sales tax @3% only. We need not venture upon to give our reasons as we adopt the reasons given in the three decisions of the different High Courts and to shorten the matter, will simply content ourselves by falling in line with the reasons given by the learned Judges in those cases.

9. The result of the above discussions is that the answer to be given is that 'copra' is an oilseed within the meaning of section 14 (vi) (viii) of the Central Sales Tax Act, 1956 and therefore, taxable @ 3% only under section 6(3) of the Bihar Sales Tax Act, 1959. In short, the answer is against the Revenue and in favour of the dealer. Since the dealer has not turned up to contest the matter, there shall be no order as to costs.

R.D

Order accordingly

Before Uday Sinha and Ashwini Kumar Sinha, JJ.

1986
May,2.

Commissioner of income-tax, Bihar-I, Patna. *

v.

M/s Jyoti Tube-well Co., Patna.

Income Tax Act, 1961 (Central Act No XLIII of 1961) section 251(2) —— notice under issued on the assessee for showing cause fixing 31.3.1975 by the Appellate Assistant Commissioner Income Tax—— Appeal heard on 26.3.1975 and enhancement made on concession of the counsel of the assessee—— validity of .

Where notice under section 251 (2) of the Income Tax Act, 1961 was issued in appeal to the assessee, the 'Individual' fixing 31.3.1975 to show cause as to why his income be not enhanced by making suitable addition in respect of household expenses incurred by him during the year under review but the Appeal was taken up for hearing on 26.3.75 and the counsel for the assessee conceded that the addition was called for and the appellate Assistant Commissioner Income Tax enhanced the assessment for the assessment year 1973-74;

Held, that the Income Tax Appellate Tribunal was right in holding that the concession made by the counsel for the

* Taxation case No. 4 of 1977. Re: Statement of the case by the Income-tax Appellate Tribunal, Patna Bench, 'A' Patna in the matter of assessment of Income-Tax on M/s Jyoti Tube-well Co. Patna for the assessment year 1973-74.

assessee on 26.3.1975 in absence of the assessee when the notice under section 251 (2) fixed 31.3.1975 for hearing was not a valid concession.

Statement of case under section 256 (1) of the Income Tax Act. 1961.

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

Messrs. B.P. Rajgarhia Sr. S.C.. I.T.D. and *S.K. Sharan, Jr. S.C. I.T.D.* for the petitioner.

Messrs. K.N. Jain Shambhu Sharan, B.N. Nayak and *S.K. Narayan*. for the opposite party.

UDAY SINHA AND ASHWINI KUMAR SINHA, JJ. This is reference under section 256(1) of the Income-tax Act at the instance of the Revenue. The questions referred to us for our opinion are as follows.

"(i) whether on the facts and in the circumstances of the case Tribunal has rightly held that the concession made by the counsel for the assessee on 26-3-75 before the Appellate Assistant Commissioner in the absence of the assessee to whom notice U/S 251(2) was issued for 31-3-75, was not a valid concession?

(2) whether on the facts and in the circumstances of the case, the Tribunal has rightly set aside the order of the Appellate Assistant Commissioner and restored the case to his file for a fresh decision after furnishing an opportunity to the assessee?"

2. This reference relates to assessment year 1973-74.

The assessee is an 'Individual' and undertakes tube-well sinking contracts. For the year in question the assessee filed his return. In terms of the return the Income-tax Officer applied the 10% gross profit rate on the total receipts of the assessee. The total receipts according to the Income-tax Officer (hereinafter called 'the I.T.O.'), was Rs 3,26,874/- Assessment was done accordingly. The assessee being aggrieved by the order of assessment filed appeal before Appellate Assistant Commissioner (to be called the 'A.A.C.') In course of hearing of the appeal, the A.A.C showed to the counsel appearing for the assessee two certificates. One of them was issued by the Executive Engineer, Tube well Division Bihar Water Development Corporation Ltd. Purnea showing payment of Rs. 1,26,814/- to the assessee. The other certificate had been granted by Executive Engineer, P and T., Civil Division, Patna showing payment of Rs. 21,954/- As against these receipts, the assessee had shown receipts from the two Engineers at Rs. 1,11,976 and Rs. 19,656/= respectively. The gross receipts were thus short by RS 14.833/- and Rs. 2.298/- respectively. When the discrepancy was pointed out to the counsel for the assessee, the latter conceded that there was mistake in showing the net receipts. Notice was, therefore, issued by the A.A.C to the assessee in terms of section 251(2) of the income-tax Act. The notice reads as follows :

> "Please refer to the above appeal which came up for hearing before me to day i.e. 2nd March, 1975. A perusal of your books of account showed that during the previous year relevant for the assessment year 1973-74 not a single paisa was drawn by you for meeting your household expenses. In the assessment year 1974-75 when the business was carried on as a firm the total withdrawals made by the two partners were Rs. 9,600/-. your representatives *admitted before me*

in writing that you had no sources of income. Please show cause why your *income be not enhanced by making suitable addition* in the part of the household expenses incurred by you during the previous year review. *The reply to this notice should be submitted on 31st of march 1975 at 11 A.M."*

3. After the notice had been served, the appeal was taken up for hearing on 26-3-1975, although the date mentioned in the notice was 31 of March, 1975. It appears that on the 26th March 1975, the counsel for the assessee could not meet the situations created by the certificates granted by the two Executive Engineers. The counsel therefore conceded that the addition was called for on account of wrong statements of receipts from the two executive Engineers and also on account of non-mention of with drawal for meeting household expenses. The A.A.C thus enhanced the assessment as indicated in the notice (Annexure- B). The assessee being aggrieved by the order of the A.A.C. filed appeal before the Tribunal. The Tribunal noticed that the notice dated 22-3-1975 called upon the assessee to appear on 31-3-1975, but the appeal had been taken up for hearing on 26-3-1975 when the counsel for the assessee made the concession In that view of the matter the Tribunal allowed the appeal of the assesses and remanded back the case to the A.A.C. with a direction that he should proceed afresh in accordance with law after providing opportunity to the assessee. The Revenue being aggrieved by the order of the tribunal has got the present reference made before this Court.

4. Learned Senior Standing Counsel for the Revenue contended that the Tribunal was not correct in holding that the concession of the counsel does not bind a party. This submission overlooks the crux of the matter. The question referred to us is not whether concession of a counsel binds a party or not. It

must be conceded that a concession by a counsel on a question of fact must bind the party. No authority is needed for this proposition, but if any authority is required reference only to the case of Markanda Mahapatra versus Varada Kameshwar Rao Naidu and other: A.I.R. 1949 Patna, page 197, which is a Division Bench decision of this Court, may be made. There can be no doubt that a concession on a question of fact binds a party. But the real question in this case is whether in the instant case the matter could have been taken up for hearing on 26-3-1975 and whether the counsel for the assessee should have been allowed to make a concession on facts on that date. We have not the least doubt in observing that when the assessee had been called upon to show cause on 31-3-1975 at 11 A.M., the matter should not have been taken up on the 26th March, 1975. One does not know whether the counsel had been instructed by the date on which the matter had been taken up for hearing. Assuming that the party had instructed his lawyer, even then a party is entitled to give fresh and counter instruction, so it is open to him till the date fixed in the notice to take any particular position on facts. In the view of the matter the counsel in this case had no jurisdiction to make any concession in regard to the additions made in the assessment of the assessee. Thus the real question is not whether concession on facts binds or not but whether the matter should be taken up before the date fixed in the notice or not. There may be cases where cases may be taken up before date. But in that situation, the I.T.O or the A.A.C. must be fully satisfied that the date of hearing is being pulled back with the instructions of the assessee. In that view of the matter, in the special facts and circumstances of the case we have not the least hesitation in holding that the Tribunal was right in holding that the concession made by the

counsel for the assessee on 26-3-1975 in absence of the assessee, When the notice under section 251(2) fixed 31-3-1975 for hearing was not a valid concession.

5. The second question referred to us is a corollary to the first question. The Tribunal having set aside the order of the A.A.C., and in our view, rightly, the only proper course was to remand back the case to the A.A.C. The assessment could not have been knocked off as a whole. Remand was the natural consequence in that situation. In that view of the matter, it has to be held that the Tribunal was right in remading back the matter to the A.A.C after setting aside the order of the A.A.C.

6. For the reasons stated above, the two questions are answered against the Revenue with costs. Hearing fee Rs. 250/- (Rupees two hundred and fifty).

7. Let a copy of this judgment be transmitted to the In come-tax Appellate Tribunal in terms of section 260 of the income tax Act. 1961.

R.D. *Order accordingly*

Before Uday Sinha and Ashwini Kumar Sinha, JJ.

1986

September, 4.

Commissioner of Income-Tax, Bihar-II, Patna. *

v.

Smt. Rambha Devi

Income-tax Act, 1961 (Central Act no. XLIII of 1961) section 143 (1) and 263 (1) —— section 263 (1) —— order passed by the Commissioner Income-tax under the provision ——— legality of —— Income-tax Officer not taking note of provisions of section 143 (1) and not making enquiry—— order passed by Income-tax Officer, whether erroneous and prejudicial.

Income-tax Appellate Tribunal was not right in cancelling the order passed by the Commissioner of Income-tax under section 263 (1) of the Income-tax Act, 1961 hereinafter called, the Act. The order of the Income-tax Officer was erroneous and prejudicial by not having taken note of the provisions of section 143 (1) of the Act. It was prejudicial to the Income tax Department, as the necessary enquiry had not been made by the Income-tax Officer.

Case laws discussed.

* Taxation Case Nos. 21 to 23 of 1978. Ref. :- Statement of case under section 256(1) of the Income-tax, Act, 1961 by the Income-tax Appellate Tribunal, Patna Bench - 'A' in the matter of assessment of income tax on Smt. Rambha Devi, Ghorasahan, East Champaran, for the assessment year 1970-71, 1971-72 and 1972-73.

Statement of case under section 256(1) of the Income-tax Act, 1961.

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

Messrs. B.P. Rajgarhia (Sr. S.C., I.T.D.) and *S.K. Sharan (Jr. S.C., I.T.D.)*. for the petitioner.

Mr. L.N. Rastogi. for the opposite party.

UDAY SINHA AND ASHWINI KUMAR SINHA, JJ : There are three references in terms of section 256(1) of the Income-tax Act, 1961 (hereinafter called 'the Act') The question referred to us for our opinion are the following :

(1) Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the Commissioner of Income-tax, Acting under section 363(1) of the Income-tax Act, 1961, could not interfere with order of assessment made under section 143 (1) in pursuance of the "scheme to help the new taxpayers in small income group" launched by the Government?

(2) Whether on the facts and in the circumstances of the case, the Tribunal has rightly cancelled the order passed by the Commissioner of Income-tax under section 263(1) of the income tax Act, 1961 for each of the assessment years 1970-71, 1971-72 and 1973-74.

2. Earlier we had heard Taxation case Nos. 93 to 98 of 1978 (*The Commissioner of Income Tax, Bihar II Patna* versus *Pushpa Devi*) which was disposed of by our judgment dated 13-6-1986. The question referred to us for our consideration in the present references fell for consideration in the earlier cases

as well. In the aforesaid earlier cases question Nos. 1 and 4 are as follows :-

"(1) Whether, on the facts and in the circumstances the Tribunal has rightly said that the assessment orders, having been passed by the income-tax Officer after necessary enquiries in pursuance of the Scheme to help the new tax payers in the small income groups" launched by the Government, were not erroneous as to enable the Commissioner of Income-tax to assume jurisdiction under section 263(1) of the income-tax Act. 1961?

(4) Whether, in view of the decision of the Income tax Appellate Tribunal Patna, In the case of *Smt. Rambha Devi Vs. I.T.O (I.T.A Nos.* 1713 to 1715 of 1974-75) the Tribunal has rightly held that the Commissioner of Income-tax, acting under section 263(1) of the income-tax Act, 1961, could not legally set aside an order of the assessment made under section 143(1) in pursuance of the scheme "to help the new tax payers in the small income groups" evolved by the Government ?"

3. Question No. 1 was identical in both the cases. Question No. 1 in both the cases referred to power of the Commissioner to act under section 263(1) of the Act. In that case we held that the Commissioner was not divested of the powers to act in terms of section 263(1) of the Act. The Scheme did not cover cases of ladies and minor and therefore, the Commissioner had full jurisdiction to act in terms of section 263(1) of the Act. In paragraph 26 of the judgment we held that the Tribunal was not right in holding that the order of the Income-tax Officer (to be called the 'I.T.O.') was not erroneous which

could enable the Commissioner to assume jurisdiction under section 263(1) of the Act. The first question was, therefore answered in the negative. That meant that the Tribunal was not right in holding that the Commissioner of Income tax could not interfere with the order of assessment made under section 143(1) of the Act in pursuance of the" Scheme to help the new tax payers in small income groups". It may be stated here that the present case arose as a sequel to the same Scheme as fell for consideration in the case of *Pushpa Devi* (Supra). In our view, therefore, following our earlier decision the first question referred to us in these cases must be answered in the negative in favour of the Revenue and against the assessee.

4. The first question having been answered in favour of the Revenue, it necessarily follows that the Tribunal was right in cancelling the order passed by the Commissioner of Income-tax under section 263(1) of the Act for the assessment years 1970-71, 1971-72 and 1972-73.

5. Mr. Rastogi learned counsel for the assessee contended that even if the decision of this court in regard to question No. 1 is unassailable yet question No. 2 must be answered in favour of the assessee. It was contended that in order to exercise jurisdiction in terms of section 263(1) of the Act. It is not enough to hold that the order was erroneous but the Commissioner must also find that it was prejudical to the Revenue. He contended that nothing had been brought on the record to show that the order was prejudicial to the Revenue. Reliance was placed on a Division Bench decision of this Court in *Commissioner of Income-Tax Bihar versus Shantilal Agrawalla* (1). This case had been cited before us in the case of Pushpa Devi (Supra) as well. We did not refer to it specifically for the

reason that the case was distinguishable on facts. That was a case where order had been passed in terms of section 263(1) of the Act because the order of assessment has been passed by the I.T.O. C-Ward when it should have been passed by I.T.O, B-ward. In that situation, the Bench observed that it was obligatory upon the Revenue to show that by virtue of a different I.T.O having passed orders, there had been under assessment. The present is a case where the necessary fact had not been gone into. A crucial question was whether the source of initial capital had been explained by the assessee or not. On the facts of the present case prejudice is writ large. In the case of first assessee, the assessee had to show the source of the initial capital investment. No enquiry had been held in that regard and the lose digit of the assesses had been accepted. If a proper enquiry had been held, it could show that the capital had been advanced by the husband of the lady. In that situation, the conclusion would be obvious that the declaration by the lady had been made really in regard to the income of husband. That is the special situation in this case. In the case of Shantilal Agrawalla (Supra). N.P. Singh J. observed that the Additional Commissioner had not pointed out as to how the order of assessment was prejudicial to the case of Revenue. In that case this was a relevant question, but on the facts of this case the prejudice is writ large on the face of it. We are in complete agreement with the view propounded by N.P. Singh J.

6. The present case, However is on the line of the Supreme Court cases in *Ram Pyari Devi Sarogi* Vs. *Commissioner of Income-Tax West Bengal and others* (1) and *Smt. Tara Devi Agarwal* Vs. *Commissioner of Income-tax, west*

(1) (1983) 142 I.T.R. 778

Bengal (2) the case relied upon by Mr. Rastogi is distinguishable on the facts. In that view of the matter, we are clearly of the view that the Tribunal was not right in cancelling the order passed by the Commissioner of Income-Tax under section 263(1) of the Act. The order of the I.T.O was erroneous and prejudicial by not having taken note of the provisions of section 143(1) of the Act. It was prejudicial to the Revenue, as the necessary enquiry had not been made by the I.T.O.

In that view of the matter, the second question also has to be answered in favour of the Revenue and against the assessee. In the case of *Pushpa Devi* (Supra) we clearly held that the decision of the Tribunal in the case of Rambha Devi, i.e. the present case was not correct. We reiterate that view once again.

7. For the reasons, stated above, the references are disposed of. Both the questions are answered in favour of the Revenue and against the Assessee. In the special facts and circumstances of the case, there will be no order as to costs.

8. Let a copy of this judgment be transmitted to the Income-tax Appellate Tribunal in terms of section 260 of the Income-tax Act, 1961.

R.D. *Questions answered*

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(1) (1968) 67 I.T.R. 84

(2) (1973) 88 I.T.R. 323

CIVIL WRIT JURISDICTION

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

1986

September, 8

Champaran Sugar Company Limited, Barrah Factory Branch, Barrah, Barachakia, District East Champaran.

v.

The State of Bihar and ors.

Service——Company, whether could transfer its workman from one of its units to another in exigencies and for administrative reasons- nothing on record to show that appointment of the workman was to a particular post in one unit and was not transferable— conduct of the workmen whether lends supports to the stand of employer company that the workman's job was transferable.

Civil Writ juridiction Case Nos. 3111 and 764 of 1981 with Miscellaneous judicial case No. 465 of 1981.

C.W.J.C. 3111/81- in the matter of an application under Articles 226 and 227 of the constitution .

C.W.J.C. 764/81 in the matter of an application under Article 226 of constitution.

M.J.C. 465/81- In the matter of an application under Article 215 of the Constitution read with section 12 of the Contempt of Courts Act. 1971.

M.J.C. 465/81:.... Rabindra Nath Trivedi V. Champaran Co. Ltd. Barrah Factory, Barrah, Barachakia, District East Champaran.

Where neither the letter of appointment nor the terms and condition of service were brought on record nor there was any thing in the standing order of the employer-company or its different units showing that the appointment of the workman to a particular post in one unit was not transferable and the workman challenged his transfer to another unit of the same company.

Held, that employer-company was at liberty to transfer its workman to different units in the exigencies and for administrative reasons.

Held, further, that the conduct of the workman itself shows and lends support to the stand taken by the employer-company that the workman's job was transferable since, as for back as 1971 when the workman had been transferred to the company's head office he had requested for his retransfer and he was re-transferred to Barachakia branch of the company.

Applications under Articles 226 and 227 of the Constitution and Article 215 of the Constitution and section 12 of the Contempt of Courts Act, 1971.

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

Mr. K.N. Gupta and Mr. *Satyendra* for the petitioners in C.W.J.C. 3111 and 764 of 1981.

Mr. Rameshwar Prasad No. II and *M/s Mahesh Prasad* and *Abhay Kumar Singh (J.C. to G.P.II)* for the respondents in C.W.J.C 3111 and 764 of 1981.

Mr. A.C. Nirankar for the petitioner in M.J.C. 465 of 1981

Mr. K.N. Gupta. for the opposite party in M.J.C. 465 of 1981.

S.K.JHA. J. Although the brief of this case, namely, C.W.J.C No. 3111 of 1981 seems to be a voluminous one, the point to be decided is a very short and simple one. Since C.W.J.C No. 764 of 1981 and M.J.C. No. 465 of 1981 are matters incidental to the main writ application being C.W.J.C. No. 3111 of 1981, I propose to deal with all these three cases by this common judgement.

2. *C.W.J.C. No. 3111 of 1981 :*

In this application under Articles 226 and 227 of the Constitution of India, the order and award, dated 14th July, 198 C passed by the presiding Officer. Labour Court, Muzaffarpur, in reference case no. 19 of 1979, as incorporated in Annexure-10 of the writ application has been challenged and the frontal attack to the order can be very simply stated, but before dealing with the ground of attack, a short narration of facts is warranted. Hence, the relevant short facts first.

3. The Government of Bihar in the Department of Labour and Employment under a notification , dated 28th November 1979, referred the industrial dispute between the Management of Champaran Sugar Company Limited, Barrah Factory Branch, Barachakia (East Champaran) and their workman represented by Chini Mazdoor Sangh, Barachakia (East Champaran) under section 10(1) (c) of the Industrial Disputes Act, 1947, to the court for adjudication. The terms of reference run thus :

"Whether the transfer of Shri R.N.Trivedi, Head Clerk, is justified ? If not what relief he is entitled to ?"

Without going into the irrelevant details, suffice it to say that the workman concerned, namely, Shri R.N. Trivedi, was appointed by the Company registered under the Indian Companies Act as an employee of the Company. The appointment letter has not been produced by the workman concerned or by the Union sponsoring his case for reasons best known to them. It is worthwhile to state here that the Company's registered Head Office is situate at Sutherland House, Kanpur (U.P.) It is engaged in the business of manufacture of sugar by vacuum pump process. This Company has two sugar mills units; one at Barachakia (East Champaran) and at Chanpatia (West Champaran). Both the units of the company are engaged in the same business, namely, manufacture of sugar and the system of working, the pattern of administration and other things are the same. Both the aforesaid units are controlled by the company's registered office at Kanpur. The balance sheet of both the units at Barachakia and Chanpatia is one. The Standing Order is the same relating to both of them and there is also a financial integration between the two units of the company. Both the mills are administered jointly by the same Managing Director and also controlled by the same Board-of Directors. Policy matters relating to the manufacture, administration and other things are decided and controlled directly by the Managing Director. All appointments of the office staff and the workmen are made by the company in the name of the company itself for the Company. Appointments are never made by any particular unit or for that unit only. Keeping in view , the administrative requirement of a particular unit, the Company has been transferring their employees from one unit to another as all the members of staff are recruited for the company and by the company . The

Managing Director of the Company has been exercising this power of transfer through the General Manager of the two units. Respondent no. 4 Shri N. Trivedi, the employee concerned was appointed by the petitioner Company, as first office assistant and was placed to work as such at Barrah Factory Branch at Barachakia unit. He was transferred in the year 1971-72 as a member of Internal Audit, which was doing internal audit of both the unit in the petitioner-company. Respondent no. 4 accepted this transfer in order to perform his duty as a member of internal audit team. It is borne out be Annexure-1 to the writ application, which is a memorandum from the petitioner-company to respondent no-4 at Barrah Factory branch, Barachakia. It is dated 18th June 1971 wherein it has been stated that his services had been transferred to Internal Audit under the direct control of the Head Office, which means at Kanpur. A copy of this memorandum was forwarded for information to the General manager of the Barrah Factory. Branch unit with reference to his letter dated 11th June 1971. Respondent no. 4 joined the head Office at Kanpur. Thereafter, it seems the employee concerned namely respondent no 4 made a representation to the petitioner- Company, which is borne out by Annexure-13 to the Writ application, wherein respondent no. 4 has stated that -

> "-I shall be extremely grateful if you kindly consider transferring me back to Barrah Factory since my transfer to internal audit I am facing much difficulty financially as well as physically after serving the Company for about 22 years at one place."

and again, he has stated in Annexure-13 that -

> "I assure you my continued sincerity & loyalty to the Company. I also assure you that I will give no occasion for

any complaint against my work and conduct."

On that very document an order was passed by the Company that in view of the facts and circumstances as discussed, his pleas be approved. This document is dated 4th May 1972. He was consequentially sent back to Barrah Factory at Barachakia. Thereafter on 22nd May 1979 after seven years the petitioner-Company wrote to respondent no. 4 that for administrative reasons it had been decided to transfer his services as Head Clerk to Chanpatia Factory Branch with immediate effect and he was asked to hand over charge of his office to one Shri C.P. Pandey and report for duty to the General manager, Chanpatia Factory Branch. A copy of this order has been appended to this writ application as Annexure-2 and copies thereof were forwarded to the General Manger. Chanpatia Factory Branch and to the Chief Accountant. Champaran Sugar Company Limited. the petitioner-company, with his head Office. at Sutherland House. at Kanpur. It has also been mentioned in Annexure-2 that this order had reference to the Managing Director's confidential letter dated 15th May, 1979. Pursuant to this order of transfer respondent no. 4 wrote to the General Manager Barrah Factory branch Barachakia explaining his difficulty and ultimately prayed that -

> "Under the above circumstances mentioned above and considering my trouble at this old age I earnestly request your honour to kindly reconsider my case and stay transfer order for which I shall ever pray."

This letter was written on 25th May. 1979 and is incorporated in Annexrue-3 to this writ application Without going into unnecessary details, suffice it to say that by a memorandum dated 31st May, 1979 vide Annexure-4 addressed to respondent

no-4 the workman, the Company regretted to express its inability to reconsider and stay his transfer order-Respondent no. 4 was therefore advised to hand over charge to the 1st Assistant Shri C.P.Pandey and to proceed to join at Chanpatia Factory Branch which he never did. He was further informed that it was not possible for the Company to continue respondent no.4 on the Rolls of the Barrah Factory branch. Barachkia, after 2nd June, 1979 Copies of this letter also forwarded to Shri C.P.Pandey aforementioned, the Administrative Officer, Barrah Factory Branch and the Head Time Keeper, Barrah Factory Branch, for information and necessary action. Copies were also forwarded to the General Manager, Chanpatia Factory Branch Chanpatia, for information who was requested to relieve one Shri Nagendra Prasad, to take over charge at Barrah Factory Branch, Barachakia, as Head clerk, and also to the Chief Accountant Champaran Sugar Co. Ltd. Sutherland House, Kanpur, for information. It is this order of transfer of respondent no. 4 from the Barachakia Branch Unit of the Company to the Chanpatia branch, Which ultimately led to the issuance of the notification (Annexure-5) referring the so called industrial dispute in the terms as already mentioned earlier.

4. By the impugned award, the Presiding Officer, Labour Court, Muzaffarpur in his long elaborate and painstaking order and award arrived at a conclusion that respondent no-4 could not be transferred to Chanpatia Branch of the Company and that consequentially, the order of transfer of respondent no.4 from Barrah Factory Branch to Chanpatia Sugar Factory Branch passed by the management was set aside and the petitioner-Company was directed to allow respondent no.4 to continue and work at Barrah Factory Branch, Brachakia, on the post of Head Clerk on the terms and conditions of the service applicable

to him at the time of transfer order. The management of the petitioner-Company was further directed to pay to respondent no.4 all his back wages (although he never worked in any of the mills) which had not been paid to him for the period after the order of transfer was passed. It is very pertinent to point out here that from the date of the order of transfer of respondent no.4 he worked neither at Barrah Factory Branch, Barachakia nor ever joined the Chanpatia Sugar Factory Branch of the Company.

5. The Labour Court has throughout proceeded upon the assumption that the onus of proving the factum of transferability of respondent no.4 from one Branch to the other, namely, from one Unit of the petitioner-Company to its another Unit was on the petitioner Company and that it had not been able to discharge that onus and therefore an inference should be drawn that it is a case of victimization. I am afraid, the entire foundation upon which the structure of the impugned order and/or award of the Labour Court stands is so feeble as not to sustain the structure in the form of the impugned order.

5.A. It is a well settled principle of law that when a registered company employee a workman or an employee in its one branch or unit it is always presumed, until something is there to show to the contrary, that the workman or the employee was serving the Company and was liable to be transferred from one unit of the Company to another. The master is the Company and the Workman or the employee is the servant of the Company. It cannot, therefore, lie in the mouth of the workman concerned to say that his job was non-transferable from one unit of the Master Company to its another unit. As I have already stated earlier, the letter of appointment of respondent no.4 has

not been produced either by respondent no. 4 himself or the respondent Union. There is nothing in the Standing Orders of the Company of the different Units of the Company to show that the post of respondent no. 4 was non-transferable from one units of the master Company to its another unit. No term and condition of service having been brought on record, nor there being anything to the contrary contained in the standing order of either the company or Its different Units showing that the appointment of respondent no. 4 to a particular post in one Unit was non-transferable, the law gives perfect opportunity liberty to the master Company to transfer its employees to its different Units on the exigencies and for administrative reasons. To crown it all, the conduct of respondent no.4 itself shows and lends support to the stand taken by the petitioner Company that his job was transferable since as far back as in the year 1971, when he had been transferred to the Company's Head office at Kanpur and on his own representation for his re-transfer, he was re-transferred to Barachakia Branch or unit of the company by an order, dated the 4th of May, 1972. Can it then lie in the mouth of respondent no.4 or for the matter the respondent Union to challenge the legality and validity of the order of transfer as contained in Annexure-2, dated the 22nd of May 1979? The answer in my considered view is clearly in the negative.

6. Learned counsel for the respondent- Union including respondent no.4 endeavoured to induce us to hold that it was a case of victimisation and an act of mala fide on the part of the Management of the petitioner Company. I fail to appreciate this argument. if in law, it was permissible for the petitioner-Company to transfer respondent no.4 from one Unit to another or for that matter to the Head Office itself, to administrative reason and

for the exigencies of the situation the question of *mala fide* and victimisation does not arise at all. By no stretch of imagination, can it be said that the order of transfer suffers from illegality of any sort.

7. I am, therefore, constrained to hold that the impugned order of the Labour Court as contained in Annexures-10, dated 14th July, 1981, is erroneous on the face of the record-a firm ground impelling this court to hold that a writ of Certiorari he issued to quash the impugned order of the labour Court. I accordingly, allow this application and quash the impugned order and award, dated 14th July, 1981, as contained in Annexure-10 to the writ application with costs. Hearing fee assessed at Rs. 500/-only, payable by respondents no.3 and 4 jointly or severally to the petitioner-Company. This concludes C.W.J.C No. 3111 of 1981.

8. *Re : C.W.J.C. No. 764 of 1981:*

In view of my decision in C.W.J.C No. 3111 of 1981, this application becomes infructuous since this application involves only the question relating to the interim award.

9. *Re: M.J.C. No. 465 of 1981.*

This is an application for contempt filed by respondent no.4 of C.W.J.C. No. 3111 of 1981 against the Company, which is the writ petitioner in C.W.J.C. No. 3111 of 1981. Since I have already allowed that application, no question of contempt arises and the application is dismissed, but without any costs.

10. This disposes of all the three applications.

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

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1986

September, 8.

*Commissioner of Income-tax, Bihar, Patna.**

v.

Sriram Agrawal.

Income-tax Act, 1961 (Central Act no. XLIII of 1961) sections 212 (3A) and 221 —— section 212 (3A) assessee filing estimate under, but not paying advance tax—— section 221 — Income-tax Officer, after issuance of notice and show cause by assessee, imposing penalty for not payment of advance tax— validity of — circular no 18 -D (XLV-14) of 1963 issued by Central Board of Direct Taxes in regard to levy of penalty under section 221 — effect of . . .

The assessee filed estimate in terms of section 212 (3A) of the Income Tax Act 1961, hereinafter called the Act, and in accordance with the estimate, advance Tax of Rs. 12100/- become payable on 15.3.1971 but the advance tax was not paid and on 16.2.72 the assessee filed regular return and on the basis thereof paid tax Rs. 18417/-. The Income Tax Officer on 16.12.1972 called upon the assessee to show cause in terms of section 221 of the Act as to why penalty be not imposed for no-payment of advance tax and on cause being shown, by order

*Taxation Case No. 173 of 1976. Ref : Statement of case under section 256 (1) of the Income-tax Act, 1961 by the Income-tax Appellate Tribunal, Patna Bench 'B' in the matter of assessment of income-tax on Sriram Agrawal for assessement year 1971-72.

dated 3.2.1973 the Income-tax Officer imposed penalty of Rs. 1500/- for non-payment of advance tax.

Held, that in terms of circular no. 18-D(XLV-14) of 1963 dated 15.7.1963 in regard to levy of penalty under section 221 of the Act, issued by Central Board of Direct Taxes, no penalty could have been levied. The assessee was certainly in default, but the circular of Central Board of Direct Taxes being binding on the Officer employed in execution of the Act under section 5 (8) of the Act, were bound to give effect to the circular. Hence the Income Tax Appellate Tribunal was 'justified in cancelling the penalty imposed under section 221 of the Act for failure to pay advance on the basis of the estimate filed under section 212 (3A) of the Act after the tax had been paid on the basis of regular return.

Case laws discussed.

Statement of case under section 256(1) of the Income Tax Act, 1961.

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

Messrs. B.P. Rajgarhia, Sr. S.C., I.T.D. and *S.K. Sharan, Jr. S C., I.T.D.* for the petitioner.

Mr. K.N. Jain. for the opposite party.

UDAY SINHA, J: This is a reference under section 255 (1) of the Income-Tax Act 1981 (hereinafter called the Act'). The question referred to us for our opinion is :

"Whether on the facts and in the circumstances of the case the Tribunal was justified in law in cancelling the penalty

imposed under section 221 for failure to pay tax on the basis of the estimate filed under section 212 (3A) after the tax had been paid on the basis of the regular return ?"

In this reference we are concerned with assessment year 1971-72.

2. The facts, in brief are that the assessee filed estimate in terms of section 212(3A) of the Act. In accordance with that estimate advance tax of Rs. 12,100/= become payable on 15-3-1971. The advance tax was, however, not paid . On 16-2-1972 the assessee filed regular return and on the basis thereof paid tax of Rs. 18,417/= . On 16-12-1972 the Income tax officer (hereinafter called the I.T.O.') called upon the assessee to show cause in terms of section 221 of the Act why penalty be not imposed for non-payment of the balance demand of Rs. 10438/=. After cause had been shown, by order dated 3-2-1973 the I.T.O. imposed penalty of Rs. 1,500/= for non-payment of the advance tax payable as per his own estimate.

3. The Appellate Assistant Commissioner (hereinafter called the 'A.A.C') on appeal confirmed the order of the I.T.O. The Tribunal, however, cancelled the imposition of penalty. Question is, if the demand or obligation of the assesses under the law had not been carried out, would he be said to be in default and would penalty be leviable ?

4. It is not in controversy that the advance tax of Rs. 12,100/= was payable by the 15th March, 1971. It is undisputed that it was not paid by that date. It is also beyond controversy that the entire tax dues was paid by the assessee on 16-2-1972 when he filed regular return. On these facts it is undisputed that the assesses had defaulted in carrying out his legal

obligations under section 212(3A). Section 221 provides that when an assesses is in default in making payment of tax he shall be liable by way of penalty to pay such amount as the I.T.O may direct. This penalty is to be in addition to the amount of arrears and the amount of interest payable by the assessee under sub-section (2) of section 220 of the Act. It is not disputed that in terms of section 212 the law cast an obligation upon the assessee to pay advance tax along with the estimate. If that was the obligation it is axiomatic that the assessee defaulted in carrying out his statutory obligation. He thus became a defaulter in terms of section 221 of the Act. The wordings of section 221 are absolutely explicit. Once he has become a defaulter, the penalty must be imposed. The fact that he paid the tax at a later time will not cure the defect. His act may be condoned, but he would remain the defaulter all the same. It appears that there were some controversies about the content of the words "when an assessee is in default". The Parliament, therefore came forth with an Explanation in 1976 by section 33 of the Taxation Laws (Amendment) Act, 1978. The Explanation was introduced to put the meaning of "when an assessee is in default" beyond controversy. The Explanation reads thus :

> "Explanation - For the removal of doubt it is hereby declared that an assessee shall not cease to be liable to any penalty under this subsection merely by reason of the fact that before the levy of such penalty he has paid the tax."

This Explanation is a complete answer to the situation before us. In this case also the assessee had not paid his tax within the due time, but had paid his entire dues before the penalty could be imposed. The Explanation squarely applies to the case before us. In terms of the Explanation squarely applies to the case before us. In terms of the Explanation there can be

not doubt that the assessee was a defaulter in terms of section 221 of the Act.

5. It was urged that the Explanation not being in existence when the Tribunal disposed of the Assessee's appeal the question of obligation in terms of the Explanation does not arise and therefore the tribunal's order cannot be assailed. It is true that the tribunal did not have the benefit of the Explanation. But the case as it stands now before us, there is no escape from the Explanation. Question is what is the effect of the Explanation. It is well known that a declaratory Statute takes effect retrospectively. The meaning given in the declaratory Statute or the Explanation must be deemed to be the meaning of the original enactment. In Sutherland on Statutory Construction, 3rd Edition Volume 2, it is started as follows :

" The English cases suggest that declaratory statutes were enacted to affirm old customs which had either fallen into disuse or had become disputable and were enacted merely to clarify the state of the Common law and affirm it as it was. (Paragraph 2902 at page 218)."

At paragraph 2904 it is stated as follows :

"Statutes declaratory of the common law are interpreted coextensively with the common law and no change in meaning is presumed to have been intended by the enactment."

At paragraph 2905 it has been stated that -

"Declaratory statutes because they do not change the common law should apply retrospectively for they do not change the past state of the law.————————.They were not

applied retrospectively when rights were vested or litigation settled . ——— In all other cases their retrospective effect remain unquestioned."

6. Craies on Statute Law, 6th Edition at page 394 has the following to state in regard to explanatory and declaratory Acts. According to it, they are retrospective :

"Explanatory and declaratory Acts retrospective where a statute is passed for the purpose of supplying an obvious omission in a former, statute, or as Parke J. (afterwards Baron Parke) said in R.V.Dursley, (1832) 3 B. & Ad 465, 469 " to 'explain' a former statue" the subsequent statute has relation back to the time when the prior Act was passed. Thus, in Att Gen. V. Pougett (1816)2 price 381, 392 it appeared that by a Customs Act of 1873 (53 Cso 3, c, 33) a duty was imposed upon hides of 9s, 4d, but the Act omitted to state that it was to be 9s.4d. per cwt, and to remedy this omission another Customs Act 53 Geo, 3C 105) was passed later in the same year Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s, 4d per cwt. but Thomson C.B. in giving judgment for the Attorney General said the duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed and they must be taken together as if they were one and the same Act."

7. And for this court it was firmly laid down in the *Central*

(1) (1960) A.I.R. (S.C.) 12

Bank of India and others versus *Their workmen, etc* (1) at paragraph 29, the Supreme Court had the following to say.

"What is a declaratory Act ? The following observations (in Craies on Statute Law, Fifth Edition, pp 56-57) are apposite:

'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statues. Usually if not invariable such an Act contains a preamble, and also the word declared as well as the word 'enacted".

8. The Explanation to section 221 was meant to clear any doubt, if there was any, in regard to meaning of content of section 221 of the Act. It is obvious thus that the content of the words "when an assessee is in default" must be held to be the same as mentioned in Explanation from the day section 221(1) was enacted, namely, 1961. Clearly, therefore the assessee was in default at the relevant time by not paying the demand by the 15th March. 1971. The fact that the taxes had been paid in terms of regular assessment before the levy of penalty was of no consequence. He would still be liable to pay the penalty in terms of section 221 and its Explanation.

9. I should like to make it absolutely clear that even De Hors the Explanations section 212 (3A) fixes the time when a person is a defaulter i.e. when he has not acted in terms of section 212 (3A) conclusion is therefore inescapable that the assessee had defaulted in payment of advance tax.

10. Learned counsel for the assessee submitted that the Control Board of Direct Taxes (C.B.D.T.) had issued Circular No. 18-D(XLV-14) of 1963 dated 15-7-1963 in regard to levy of penalty under section 221 which reads as follows :

> "429 Levy of penalty under section 221- Clarification regarding.
>
> Attention is invited to Board's Circular No. 2-D of 1950, dated, 1st March,1950, in which Income-tax Officers were informed that in cases where the tax due had been paid up before the imposition of a penalty under section 46(1) of Income-tax Act, 1922, the imposition of a penalty would not be proper. Subsection (1) of section 221 of the new Act which corresponds to section 46(1) of the old Act goes a step further and requires the Income-tax officer to give the assessee an opportunity of being heard before levying any such penalty. A question has been raised whether where an assessee, who was in default, pays up the tax due before he is given a hearing by the Income-tax Officer under the proviso to the above subsection, it would be proper to levy a penalty on the ground that even though there are no arrears on the date of hearing before the Income-tax officer, a default had actually been committed on the due date. The Board have decided that no penalty should be levied if at the time of appearance before the Income-tax Officer in connection with the hearing given under the proviso to sub-section (1) of section 221, the assessee proves that the tax has already been paid."

In terms of the above circular it was contended that the decision of the C.B.D.T. that no penalty should be levied, if at the time of appearance before the Income-tax officer in connection with the hearing given under the proviso to subsection (1) of section 221, the assessee proved that the tax had already been paid, the assessee was entitled to rely upon the circular and the Revenue was not entitled to levy penalty on

that score.

10.A. Learned Senior Standing Counsel contented that the circular, if given effect to cuts at the very root of the principle of realisation of advance/payment of advance tax. The Income tax Act postulates that where an individual's annual income is above a certain level, he is required to file an estimate of income and to pay advance tax accordingly. The last instalment according to the assessee's own estimate, had to be paid by the 15th March of the relevant accounting year. The effect of the circular would be that an assessee need not pay advance tax at all. This would be nullifying the entire law contained in sections 207 to 219 of the Act in regard to payment of advance tax. It is well established that rules-statutory or otherwise are executive in nature and cannot override the provisions of the Statute. The Rules or circulars may explain or fill up the gap but surely they cannot run counter to the will of the Parliament contained in the Statute and put the provisions of the Act on the shelves. Judged by those standards, the circular mentioned above was clearly issued against the provisions of the Income-tax Act in regard to payment of advance Tax. Thus contended Senior Standing Counsel for the Revenue.

11. Learned counsel for the assessee, on the other hand relied upon the case of *Navnit Lal C. Javeri* versus *K.K.Sen, Appellate Assistant Commissioner of Income-tax, Bombay* (1) where Gajendra-Gadkar, C.J. observed as follows :

" It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under S. 5(8) of the Act. This circular

(1) 56 I.T.R 198 = (1965) A.I.R (S.C.) 1375

pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to effect such transactions and not to bring them within the mischief of the new provision. The officers were therefore asked to intimate to all the companies that if the loans were repaid before the 30th June, 1955 in a genuine manner, they would not be taken into account in determining the tax liability of the shareholders to whom they may have been advanced. In other words past transactions which would normally have attracted the stringent provisions of Section 12(1B) as it was introduced in 1955, were substantially granted exemption from the operation of the said provisions by making it clear to all the companies and their shareholders that if the past loans were genuinely refunded to the companies, they would not be taken into account under Section 12(1B) Section 12(1B) would therefore normally apply to loans granted by the companies to their respective shareholders with full notice of the provisions prescribed by it."

The above observations were quoted with approval in *M/s Ellarman Lines Ltd.* versus *Commissioner of Income-tax West Bengal-I Calcutta* (1) where Hegde, J after quoting from the above observations of Gajendra Gadker, C.J laid down in paragraph 19 in unmistakable terms that direction given in the circulars in the earlier case clearly deviated from the provisions of the Act, yet the Supreme Court held that the circular was binding on the Income-tax Officers. Again in *K.P. Varghese* versus *Income-tax Officer Ernaculan and another* (2) Bhagwati

(1) 82 I.T.R. 913 = (1972) A.I.R. (S.C.) 524.

(2) 131 I.T.R. 597 = (1981) A.I.R. (S.C.) 1922.

J. (as he then was) again observed as below:

"The two circulars of the Central Board of Direct Taxes of which we have just referred are legally binding on the Revenue and this binding character attached to the two circulars even if they be found not in accordance with the correct interpretation of subsection (2) and they depart or deviate from such construction. It is now well settled as a result of two decisions of this Court one in *Navnitlal C. Jhaveri* v. *K.K. Sen* (1965) 56 ITR 198): AIR 1965 S.C. 1375) and the other in *Ellerman Lines Ltd.* V. *Commnr. of Income-tax, West Bengal* (1971) 82 ITR 913 (AIR 1972 SC 524) that circulars issued by the Central Board of Direct Taxes Under Section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act."

The observations in *State Bank of Travancore* versus *Commissioner of Income-tax Kerala* (1) made by Sabyasachi Mukharji, J to the effect that the circulars being executive in character can not alter the provisions of the Act run counter to the observations of Gajendra Gadkar C.J in the case of *Navnitlal C. Javeri* (Supra) The letter being judgment of five judges and the former of three judges, i am bound to follow the case of *Navnitlal C. Javeri* (supra). It is thus obvious that in terms of the circular of the C.B.D.T quoted above, no penalty could have been levied. The assessee was certainly in default but the C.B.D.T. Circular being binding on the officers employed in execution of the Act under section 5(8), they were bound to give

(1) (1986) 158 I.T.R. 102.

effect to the circular, I am, therefore, of the view that the Tribunal was justified in cancelling the penalty imposed under section 221 for failure to pay tax on the basis of estimate filed under section 212(3A) after the tax had been paid on the basis of regular return.

12. For the reasons stated above, the question referred to us is answered in the affirmative in favour of the assessee and against the Revenue. There shall be no order as to costs.

13. Let a copy of this judgment be transmitted to the Income-Tax Applellate Tribunal in terms of section 260 of the Income-Tax Act, 1961.

Nazir Ahmad, J: I agree

R.D. *Question answered.*

CIVIL WRIT JURISDICTION

Before Prabha Shanker Mishra and

Madan Mohan Prasad, JJ.*

1986

September, 19.

*Bishwa Budha Parishad and another.***

v.

The Ranchi University and others.

Bihar State Universities Act, 1976 (Bihar Act no XXIII of 1976) section 60 sub-section 4—— exercise of powers under, by the University in appointing ad-hoc committee of a College administered and established by a minority community— whether without jurisdiction——Declaration by the State Government of the minority character of the institution— requirement of — action of the University in removing the Governing Body of the College appointed by a religious minority without affording opportunity to show cause— whether against the principles of natural justice.

Where, the writ petitioners, an association of people professing faith in Buddhism, established Sangmitra College and constituted Governing Body adhering to the regulations and statutes of the Ranchi University which was granted temporary affiliation by the Ranchi University and the Government of Bihar

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* Sitting at Ranchi.

** Civil Writ Jurisdiction Case No.421 of 1986 (R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

and they also applied to the State Government for declaring the college as one established and administered by a minority community on the ground of religion but the declaration was not yet made by the Government.

Held, that though before the Governing Body is constituted in accordance with the provisions of the Statutes, a declaration by the State Government that the institution was governed and managed by a Minority Community may be required but that in itself cannot mean that until and unless a declaration is made by the State Government, the university shall extend its powers under sub-section 4 of section 60 of the Bihar Universities Act, 1976 and remove the Governing Body appointed by the sponsors and appoint an ad-hoc committee.

Held, further, that the Vice Chancellor and the Syndicate of the Ranchi University acted without jurisdiction in appointing ad-hoc Governing Body for the College.

Held, also , that appointment of ad-hoc Committee without disclosing the facts as to why actions were taken by the university to remove the Governing Body appointed by the religious minority and without assigning any reason and without complying with the requirements of natural justice and as such the impugned order appointing an ad-hoc committee is without jurisdiction.

Case laws discussed.

Application under Articles 226 and 227 of the Constitution.

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

M/s Rajendra Prasad Singh (Sr.Adv.) V. P.Singh, Ramesh Chandra, A.K.Sinha and *B.K.Nag* for the petitioners.

M/s S.B.Sinha (Sr.Adv.) and *Anil Kumar Sinha* for the University.

M/s S.K. Chattopadhyaya (G.P-1) and *Prashant Kumar (J.C. to G.P-1)* for the State.

M/s Kameshwar Prasad (Sr.Adv.) and *Sunil Kumar Sinha* for the intervenor.

Mr. Sohail Anwar for respondent Nos. 3 to 5 and 7

P.S.MISHRA, J. The petitioners, who claim to belong to a religious denomination and who are a religion in minority in the State of Bihar, have moved this Court for a writ in the nature of certiorari to quash the orders appointing an ad hoc Governing Body (Annexures 1 and 26) to administer and manage the affairs of Sangmitra College at Bariyatu in the town of Ranchi.

2 The petitioners say that petitioner no. I is an association of people professing faith in Buddhism which is a religion having freedom to establish and maintain institutions for religious and charitable purposes and to establish and administer educational institutions of their choice. Petitioner no.2 is the Governing Body of Sangmitra college constituted by the followers of the said faith adhering to the regulations and statutes of the Ranchi University. They established a tutorial college in the year 1979 and on 14.10.1982 resolved to establish a college to impart education to women up to degree level. Accordingly, they constituted a Governing Body and applied to the Ranchi University for recognition. The University appointed Inspectors who, as per University's statutes and regulation, verified from

the relevant records and ascertained relevant facts and reported on 5.8.1983 that the college was established and administered by the petitioner no.1, which was a religious minority and recommended for affiliating the college up to degree standard. After receiving the Inspector's report, the University in its turn recommended to the Government of the State of Bihar on 7.6.1983 to accord its approval to the affiliation of the college and on 22.9.84 (vide annexure 3) the Government in its appropriate Department informed the University to grant temporary affiliation without intermediate classes and without any financial liabilities up to degree standard. On 7th February, 1986 the University informed the petitioner no.2 about the grant of affiliation on the condition that there would be no intermediate classes in the college and there would be no financial liability either upon the University or upon the Government.

3 It appears there has been no difficulty until then, but on 30.12.1985 the petitioner no.1 constituted a fresh Governing Body followed by representations against the administration of the college and on 11.2.1986 the President of the Ranchi University Teachers Association addressed some memorandum to the Vice Chancellor of the University making certain allegations against the petitioner no.1. This was followed by further representations by the teachers who made allegations against the petitioners. In these representations the Vice Chancellor was requested to intervene, dissolve the governing Body and appoint an Ad hoc Committee. On 1.3.1986 , the Vice chancellor of the University ordered dissolution of the Governing Body of the College and appointed an ad hoc committee (annexure 1). The petitioner allege that there has been interference in their right of administration and have moved this Court.

4 Although it is not necessary to go into the allegations as to who established the college and who had been administering it, since a larger question has been arisen in respect of which question has framed by a Bench of this Court on 9.4.1986, some more facts are required to be stated.

5. The petitioners approached the University claiming that they are a religious minority in the State of Bihar, that they had established a college and that they had been administering it, They sought affiliation on the basis that they were protected under Article 30 of the Constitution in their right to establish and administer the college. Entertaining their application for affiliation, the University appointed instpectors, who visited the college and recommended for granting affiliation to the college, subject to its fulfilling certain conditions. The University after receiving the said recommendation requested the Government of the State of Bihar to accord its approval/sanction for granting affiliation to the college. There is nothing except the fact that the petitioners claim that they established and were administering the college and were seeking affiliation of the college as one protected under Article 30 of the constitution until the Government's communication (annexure 3) according its sanction to the temporary affiliation of the college was received, except a reservation expressed by one of the Inspectors, namely Dr. S.P. Lal, who added a note of his own to the report signed by him besides four other members of the team of Inspectors, stating that the question of granting minority status may be examined separately. It appears however, that with the constitution of a new Governing Body by the sponsors of the college on 30.12.1985 dispute started and even the

minority and religious status/character of the petitioners was questioned by the President of the Ranchi University Teachers' Association and some other persons.

6. Article 30(1) of the constitution states that a minority, whether based on religion or language, shall have right to establish and maintain an educational institution of their choice. Before the right under Article 30 of the Constitution is claimed, it is necessary that the persons claiming the said right belong to a minority based either on religion or language. Unlike Article 25 of the Constitution, which has enshrined the right to freedom of conscience and free profession, practice and propogation of religion, Article 26 of the Constitution which has guaranteed freedom of managing religious affairs and Article 29 which has guaranteed the protection of interests of minority based on religion or language, Article 30 thereof has recognised the right of all minorities, whether based on religion or language to establish and administer educational institution of their choice. The right guaranteed under Article 30(1) of the Constitution is not in any manner controlled by the rights enshrined in Articles 25, 26 or 29 of the Constitution. Even preservation or conservation of language, culture or script of a particular denomination or community and for the said purposes establishment of an educational institution, which is a right flowing from Article 29 of the Constitution, may or may not combine with the right under Article 30 of the constitution. The law in this behalf found expression combining the rights under Articles 29 and 30 of the Constitution in *Arya Pratinidhi Sabha* vrs. *The State of Bihar and others* (1) speaking for the court, Ramaswami, C.J., as he then was, has stated -

(1) (1958) A.I.R. (Pat.) 359

"The constitutional protection under Articles 29 and 30 is therefore, not absolute and it, does not involve dispensation from obedience to general regulations made by the State for promoting the common good of the community. But in the present case the action of the Government in imposing the ad hoc committee and threatening to withdraw grant-in-aid as ordered by the respondents in Annexures A and A1 transcends these limitations, and I think it infringes the constitutional protection guaranteed under Articles 29 and 30 of the Constitution ....."

Constituting a Full Bench in the case of *Dipendra Nath Sarkar* vrs. *State of Bihar and others* (1) and considering the right of Brahma Samaj, Ramaswami C.J., as he then was, again speaking for the court has said :-

".... Under Article 30 of the Constitution the Samaj a religious minority has two rights- (a) to establish a school of its choice, and (b) to administer it. The language of the Articles does not require that the majority of the students in the school must belong to the religious faith of the minority. The Article does not also impose any limitation that the subjects taught in the school must be connected with the religion of the minority. On the contrary the Article expressly states that the religious minority has a right to establish and administer educational institutions of its choice. The words of its choice are crucial and these words supply the key to the understanding of the true meaning and import of the Article. The crucial phrase in the Article is of their choice and the ambit of the freedom of choice conferred by the Article is therefore as wide as the choice of the particular community may make it. The right expressly

(1) (1962) A.I.R. (Pat.) 101.

conferred by the Article on the minorities to establish educational institutions of their choice. It does not say that the minorities based on religion should establish educational institutions for teaching religion only. What the Article says is that religious minorities should have the right to establish educational institution of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. It is open to the religious minority to establish educational institutions for the purpose of conserving its religion, language or culture. It is also open to the religious minority to establish educational institutions purely for the purpose of giving a thorough good secular education to their children. In my opinion the Article applies to both these classes of institutions....."

In the words of Ramswami, C.J., as he then was, it is not difficult to find the distinction to which Article 30(1) of the Constitution has taken the right of all minorities, whether based on religion or language and there in Article 30(1) of the Constitution itself, exclusion of restrictions that may be found in the words of Article 29 and in that matter in Articles 25 and 26 of the Constitution may be noticed.

7. Once the Buddhist constitute a minority in the State of Bihar and they are a separate religious denomination, they shall be entitled to protection under Article 30 of the Constitution But at this stage comes first the question framed by a bench of this Court on 9.4.1986, whether in view of Explanation II of Article 25(2) of the Constitution of India an institution established by Buddhist Association can be held to be minority institution, because Buddhist religion shall be deemed to be part of Hindu religion?" Explanation II of Article 25 of the Constitution says

that in sub-clause(b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly. The explanation has made a reference to sub-clause (b) of clause (2) of Article 25, which in its turn says:-

> " Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus".

Clause (2) of Article 25 of the Constitution has to be read in the context of the provision made in clause (1) thereof which has guaranteed subject to public order morality and health and to the other provisions of part III of the Constitution all persons equality, freedom of conscience and the right freely to profess, practice and propagate religion. Without the explanation none can read in the word 'Hindus' in Article 25(2)(b) any person professing the Sikh, Jain or Buddhist religion. To make the operation of any existing law possible and to empower the State to make laws providing for social welfare and reform or throwing open of a religious institution of a public character of Sikh, Jain or Buddhist religion, to all classes of people, explanation II provides the necessary aids. Without it, the Constitution would allow the operation of any existing law or permit the State to make law providing for social welfare and reform etc., as contemplated under Article 25(2) (a) & (b) of the Constitution in respect of people professing Hindu religion only. This could not be accomplished for people professing Sikh, Jain and Buddhist religion without the explanation. The Constitution itself has taken care to specify in explanation II itself that Sikh, Jain and Buddhist

are religion in themselves in the words "to persons professing the Sikh, Jain or Buddhist religion". Explanation II has recognised them as a religion, but for the purpose of giving effect to any existing law or to empower the State to make laws for social welfare and re-form like Hindus, Sikh, Jain and Buddhist are also included in Article 25(2) (b) of the Constitution. On this alone the first question framed in the order dated 9.4.1986, in my view, stands answered. Indeed, India has got the proud privilege of having with its faith in, Akoham(एकोहं), Dwait(द्वैत), Adwait (अद्वैत) and Vedant (वेदान्त) faiths in many incarnations and other faiths of Hindus Tirthankars of Jains and the Buddha, the enlightened one, who all have given to their followers faiths and a religion to live for. In the same line are those who profess their faiths in the teachings of Koran, Bible. Guru Granth Sahib etc. They all are separate and independent in their faiths and practice, rites and rituals peculiar to their denomination.

9. In *D.A.V. College* vrs. *The State of Punjab & ors.* (1) the Supreme Court has given sufficient guidelines how to determine a minority and what a linguistic minority of a religious minority may mean and quoted from Encyclopaedia Britannica, with approval (vol. II - 1968 at page 558) the passage which says -

" Arya Samaj, a vigorously reforming sect of Modern Hinduism, founded in 1875 by Swami Dayanand Saraswati (1824-83) at Bombay... The Vedas as interpreted by the method laid down by Dayanand may be said to be the theology of the Arya Samaj and are held to contain all truth and all knowledge, including the basis for modern science. The Arya Samaj is

(1) (1971) A.I.R (S.C.) 1737.

completely opposed to idolatory, is sternly monotheistic and denies the efficacy of priestly intervention. Its organisation and services are strongly reminiscent of Protestantism..... The Arya Samaj opposes the caste system based upon birth, as un-vedic and insists that caste should reflect merit..... The Arya Samaj has sought to revitalise Hindu life and to instill self confidence and national pride among Hindus. It has established a net work of excellent schools and colleges, including the Dayanand Anglo-Vedic College in Lahore, which teach rigorously in the Vedas and in modern sciences....." To show the affinity between Arya Samaj and protestantism a comparison is made in the Encyclopaedia of Religion and Ethics between Dayanand Saraswati and Martin Luther. In Volume 2 at pages 58-59 it is said :

" As Luther the German Monk was a child of the European Renaissance so Dayanand the Gujarati monk was child of the Indian Renaissance..... Luther attacked indulgences, while Dayanand attacked idolatry. Luther appealed from the Roman church and the authority of tradition to the scriptures of the old and New testaments. Swami Dayanand appealed from the Brahmanical church and the authority of Smriti to the earliest and most sacred of Indian Scriptures. The watch-word of Luther was 'Back to the Bible ', the watch-word of Dayanand was 'back to the Vedas'.... but be it noted to the Vedas as interpreted, not by the traditional scholarship of Indian orthodoxy or by the critical scholarship of the West, but by the scholarship of the Arya Samaj alone..... The scripture basis of the Arya Samaj then, while formally the Vedas, is in reality a certain interpretation of the Vedas, which is not recognised as legitimate by a single Sanskrit scholar either Indian or European, outside of the Arya Samaj."

Shri Motilal Setalvad, Learned Advocate for the Respondents contends that there is nothing to indicate that the Arya Samajis should be Hindus " The passages read above show beyond doubt that the Arya Samaj by "rejecting the manifold absurdities found in smriti and in tradition and in seeking a basis in the early literature for a purer and more rational faith" can be considered to be a religious minority, at any rate as part of the Hindu religious minority in the State of Punjab".

This judgment of the Supreme Court is also an authority for the law that to determine a religious or linguistic minority one has to see what that minority is in relation to the particular legislation which is sought to be impugned. If it is a State Legislation, whether the particular community is a minority in that State alone has to be seen and if it is a legislation by the Union, it has to be seen whether it is a minority in relation to the Union of India or not.

10. It appears to me reasonable therefore, to hold that denominations of various lands may exist in a religion and each denomination may distinguish itself in its faith and in that sense constitute a separate religion of itself .It is in that sense that amongst Hindus Brahma Samaj constitute a religion and in relation to a certain legislation in a certain State or in the country as a whole they may stand as a religious minority. The same principle has to be applied to the Arya Samaj and if that be so, there is no reason why the same cannot be applied to Sikh, Jain and Buddhist.

11. The first question framed in the order dated 9.4.1986, therefore, has to be answered thus: Explanation II of Article 25(2) of the Constitution has given to the words 'Hindu' and 'Hindu

religion' and extended meaning for the purpose of that article alone and extended meaning includes Sikh, Jain and Buddhist as well, which in themselves are religion. For the purpose of Article 30 of the Constitution 'religion' means faith of a particular denomination or association of people, who for many purposes may belong to yet another larger association or denomination, but in themselves have separate and distinct characteristics of the religion, Buddhists in all respects qualify as a religion other than Hindus for Article 30 of the Constitution.

12. Since the answer to question no. 2 framed in the order dated 9.4.1986 is intermingled with the answer to the main contention of learned counsel for the University, I shall take up the same along with the contentions of the learned counsel.

13. The third question, whether before the questions aforesaid are decided by this Court, it is necessary that the State Government should be directed to consider the same is not at all a question in itself. It is only a suggestion which on its conclusions the Court may accept or reject.

14. It is not in dispute that the college and the University are governed by the Bihar State Universities Act, 1975 (hereinafter referred to as the Act). A Mahavidyalaya or college has been defined in sub-section (1) of section 2 of the Act to mean an institution affiliated for the privileges of the Act or maintained or controlled by the University or institutions maintained by the State Government, in which, instructions are given, subject to the provisions contained in clause (16) of section 4, to the students, under conditions prescribed in the Statutes. Affiliated college has been defined in section 2 (c) of the Act to mean educational institution having received privileges of the University according to the provisions of the

Act and University statutes relating thereto. Section 60 of the Act speaks of the Governing Body of a college. It provides, inter alia, that there shall be a Governing Body for the management and administration of each affiliated college other than a college owned and maintained by the State Government or a college established and administered by a minority community on the grounds or religion or language or an affiliated technical or medical college. Sub-section (4) of section 60 of the Act says -

> "The syndicate shall constitute an ad hoc committee for management of the college so long as a Governing body is not constituted in accordance with the provisions contained in sub-section(1)".

Confining to these provisions, the University shall have no authority to appoint an ad hoc committee for management of a college established and administered by a minority community on the grounds of religion or language.

15. Learned Counsel for the University has, however placed reliance upon sub-section (5) of section 60 of the Act, which says - "The Governing body/ Managing Committee for the management and administration of a college owned and maintained by the State Government, or established and administered by a minority community, on the ground of religion or language and declared, from time to time as such by the State Government according to yardsticks laid down by it, or of an affiliated technical or medical college shall be constituted in accordance with the provisions prescribed in the Statutes". Sub-section(5) in itself provides for Governing body/Managing Committee for the management and administration of a college, which is excluded by express words used in sub-section (1) of section 60 of the Act, where it is said that there shall be a

governing body for the management and administration of each affiliated college other than a college owned and maintained by the State Government or a college established and administered by a minority community on the grounds of religion or language or an affiliated technical or medical college. Article 171(1) of chapter X-1A of the Statute of the Ranchi University begins with the reiteration of the words used in sub-section (1) of section 60 of the Act and ends with a proviso in respect of the colleges owned and maintained by the Government and another proviso in respect of the colleges established and administered by a minority community.

16. The first proviso is not relevant for us. The second proviso says, " provided further that in the case of colleges established and administered by a minority community, or based on religion or language, or medical colleges or Engineering colleges other than those maintained by the Government, the Governing Body/Managing Committee consisting of seven members shall be constituted by the syndicate in consultation with the sponsors/ authorities of the colleges concerned. Where, however, theSyndicate is able to satisfy itself about the bonafide of the sponsors/ authorities, of such college it may constitute an ad hoc committee consisting of not more than five members. It is obvious that the last sentence of the proviso above has not been happily worded. What it may mean is, however, hidden in it and is that the syndicate may appoint an ad hoc committee in respect of affiliated colleges belonging to the categories mentioned therein, if the Syndicate is satisfied that the sponsors/ authorities of any such college are mal-administering it.

17. It is however, to be noted that in sub-section (5) of section 60 of the Act there are additional words, "..... and

declared, from time to time, as such by the State Government according to yardsticks laid down by it..." attached to the colleges established and administered by a minority community on the ground of religion or language. It is not enough in terms of sub-section or language. It is not enough in terms of sub-section (5) of section 60 of the Act, that the college is one established and managed by a minority community on the ground of religion or language. Governing body is to be constituted for it in accordance with the provisions prescribed in the statute when it is one in respect of which there is a declaration by the State Government according to the yardsticks laid down by it.

18. We are informed at the Bar that no yardstick have been laid down but such declarations are made by the State Government and since such declarations are made by the State Government, the petitioners have also applied to the State Government for declaring the college as one established and administered by a minority community on the ground of religion.

19. In the instant case however, the declaration is yet to come, but a temporary affiliation has been granted to the college by the University and the Government of the State of Bihar. This affiliation has been granted on the basis of the application by the petitioners that they had established and were administering the college. Sub-section (1) of section 60 of the Act, which does not have the words like declared from time to time as such by the State Government " in it and which provision contemplated constitution of a Governing body for the management and administration of each affiliated college, will have no application unless it is assumed or proved that the college in question has not been established and administered by a minority community on the ground of religion.

20. The moot question, therefore, is - can it be said only on the ground that the State Government is yet to declare the college having been established and administered by a minority community on the ground of religion or language, that the college has got no character of an institution established and administered by a minority community on the ground of religion and it shall have such character or status only when the State Government shall so declare it.

21. To my mind to deny to the petitioners, if they are found to have established and administered the college, the right under Article 30 (1) of the Constitution, solely on the ground that for one reason or the other the declaration by the State Government about its minority status has been put in abeyance, will amount to denying the status or character which is enshrined in the institution only by virtue of it being established by a religious minority and administered by it. To read in this context 'declaration by the State Government' for giving to the institution status for protection under Articles 30(1) of the Constitution will amount to reading in Article 30(1) of the Constitution itself the words which are introduced in sub-section (5) of section 60 of the Act. I have already noticed that Article 30(1) of the Constitution says no less and no more than saying that all minority whether based on religion or language, shall have the right to establish and administer institutions of their choice. How then one can even imagine that without a declaration by the State Government that a certain institution has been established by a religious minority or lingustic minority, the right under Article 30 of the Constitution shall not be extended to it.

22. I have failed to understand despite my sincere efforts the logic of learned counsel for the University that until a

declaration is made by the State Government no minority status can be recognised by the University and the University shall in such a situation be obliged to treat an institution established even by a religious or linguistic minority as any other affiliated college. Even if one is aware of the principle of interpretations of statutes and undoubtedly a court of law has got a duty to harmoniously construe the various provisions of law, yet when it comes to a right particularly in part III of the Constitution and a right which has been acknowledged as fundamental and basic in respect of the religious and linguistic minorities any legislation containing a provision to conflict with what is contained in the Constitution must for that reason alone has to be ignored. When I say so, I do not mean that sub-section (5) of section 60 of the Act where it speaks of the declaration by the State Government is ultra vires. It can still be sustained and can be so sustained by reading the law as it has been worded by the framers and construing the words in each part of the Statute as they are used. I have already indicated that in sub-section (1) of section 60 of the Act the words "declared from time to time as such by the State Government according to the yardsticks laid by it" are not to be found with the words established and administered by a minority community on the ground of religion or language . These words are conspicuous by their absence in sub-section (1) of section 60 of the Act. Sub-section (1) of section 60 of the Act alone is a provision in respect of affiliated colleges for constituting Governing bodies as provided therein. Sub-section (4) of section 60 of the Act by categorically indicating that the Syndicate shall constitute an ad hoc committee for management of the college so long as a Governing body is not constituted in accordance with the provisions contained in sub-section (1) has confined the

Syndicate's power to the affiliated colleges other than colleges owned and maintained by the State or colleges established and administered by a minority community on the grounds of religion and language or affiliated or technical or medical colleges. Constitution of a Governing body of a college excluded in section 60 (1) of the Act is governed by sub-section (5) thereof. In that, of course, before a Governing Body is constituted in accordance with the provisions of the Statutes, a declaration of the State Government may be required. But that in itself cannot mean that until such a declaration is made by the State Government, the University shall extend its power under sub-section (4) of section 60 of the Act and remove the Governing body appointed by the sponsors and appoint an ad hoc committee. The relevant statute under Article 171 also read in the context of the discussions made by me above will stand the test of vires and in no way conflict with the right of religious or linguistic minority to establish and administer their own educational institution.

23. Although no specific argument has been advanced before us on behalf of the University that it shall have a right to appoint an ad hoc committee in a college established and administered by a minority community on the ground of religion and language, and the second proviso to Article 171 of Chapter XIA of the Statutes has not been invoked for the said purpose before us, I feel before parting with the above contention of learned counsel for the University, something should be said about it.

24. To administer shall always mean to administer in accordance with the norms laid down for the institutions that impart education to the students including the regulation for

maintaining the standard of teaching and appointment of qualified teachers, Administration can never mean mal-administration. The moment there is mal-administration and there are reasons to hold so, competent authority shall have to intervene to ensure that administration is restored at par with the standard of the educational institution of the kind with which they are concerned. It is in that sense that second proviso in Article 171 of chapter XI A of the Statutes of the University is relevant and the Syndicate of the University may in a given case be required to act even in respect of a college established and administered by a minority community.

25. In the instant case, however there is no necessity to investigate, whether there were any material before the University that the Governing body appointed by the sponsors of the college had mal-administered it, because the stand of the University before us is that until there is a declaration by the State Government that the college is one established and administered by the minority community, the college has to be treated as any other affliated college and accordingly the power has been exercised by the University and the Vice Chancellor has exercised his emergency power followed by approval of the Syndicate to appoint the ad hoc committee in terms of sub-section (4) of section 60 of the Act. This power the University could not exercise and the Vice Chancellor and the Syndicate of the University, in my view, acted without jurisdiction in appointing the ad hoc committee by issuing notification contained in annexures 1 and 26.

26. On the findings above, I have no hesitation in holding that the University's order i.e. the order of the Vice Chancellor and that of the Syndicate, as contained in annexures 1 and 26,

are without jurisdiction and that alone is enough to decide the matter before us. But there is yet another infirmity about which the petitioners have made a grievance before us and it will be proper to take notice of the same also.

27. It is well settled that no person should be visited with any civil consequence which has got the effect of adversely affecting ones right without giving opportunity of hearing to him. This principle of natural justice varies from case to case and fact to fact, but its compliance in one form or the other is recognised as a rule which must be followed even by authorities exercising administrative power or powers vested in them by the Statutes. The thin line that once existed between the administrative and quasi judicial action as pointed out in various pronouncements of the Supreme Court has almost obliterated and in administrative actions visiting a person with civil consequences, requirements of natural justice are noticed as inherent. How and in what way that requirements will be complied with, of course, shall depend upon the facts of the case.

28. In the instant case the petitioners have claimed that they are a religious minority and they have established the college and they have been administering it. It is they who appointed the Governing Body which administered the college until the order contained in annexure 1 was issued. On their claim, appointment of the ad hoc committee without disclosing the facts, why actions were taken by the University to remove the Governing Body appointed by them and without assigning any reason, was without complying with the requirements of natural justice. In that view also the impugned order annexure

1 is without jurisdiction. The Syndicate of the University which came to consider whether to accept or to reject the order of the Vice Chancellor of the University also gave no opportunity to the petitioners, and one opportunity to comply with the requirments of natural justice before the order contained in annexure 1 was approved by the Syndicate of the University was also not given to them by the respondents. The respondents acted in violation of the principle of natural justice in every sense.

29. Learned Counsel for the University has, however, drawn our attention to the fact that when the University received the representation of the president of the teachers' union, it asked for the comments of the Governing body of the college and, according to him, the Vice Chancellor of the University decided to appoint the ad hoc committee after looking into the allegations and the comments thereon by the Governing body. There is nothing in annexure 1 suggesting that the Vice Chancellor of the University, while deciding to appoint the ad hoc committee, looked into the allegations levelled against the Governing body and/or applied his mind to the allegations and for good reason concluded that the ad hoc committee should be appointed. As the rule that an opportunity of hearing should be given is recognised, so the rule that the order by which some right is sought to be affected, should be a speaking order is recognised, like the rule of audi alteram partem the rule that the order, by which a right is determined, must state reasons explicitly recognised as an inherent right of the person affected by the order. Annexure 1 or even in that matter annexures 26 are not in consonance with the rules of natural justice. Moreover,

it is not clear whether in asking for the comments the respondent University was conscious of the rule and/or decided that it had to take action against the petitioners in accordance with the second proviso to Article 171(1) of the Statutes.

30. Another contention still remains to be decided. Is it necessary that the Government of the State should declare and until that declaration is made the status of the college should remain suspended for the college established and administered by a religious minority ? There may be case in which there is a no dispute at all. Facts are so beyond doubt that a declaration by the Government may come as a matter of course. There may be another case in which although a claim is advanced that the institution has been established by a religious minority and is being administered by it, but it is not so. I would have endeavoured to determine on facts whether the claim of the petitioners that they have established the college and they have been administering it, is true or not, but I am not doing so for the simple reason that the State with its agencies available to it at every level can more competently and comprehensively go into this aspect of the matter and determine on facts, whether the college has been established by the petitioners or not and whether they have been administering it or not.

31. I, however, make it clear that there can be no doubt that the petitioners who have claimed to be Buddhist are a religious minority for the purposes of Article 30 of the Constitution. The only question that may require State's attention is to find out whether they have established it or not and they are administering it or not. The Government of the State

of Bihar, while going into this aspect of the matter would be keeping in mind that I have given no finding in regard to the claim of the petitioners that they have established the college and they have been administering it, except for the purposes of limited question, whether before the declaration by the State Government is made, they are entitled to manage the affairs of the college or not.

32. But one complain has come before us, rather, seriously against the management by the sponsors as also by the ad hoc committee and I propose to deal with it. Mr. Kameshwar Prasad, who has appeared for the intervenor-teachers of the college have, rather, been treated shabbily by all concerned. They have not been paid due emoluments, they have not been given their due place, and they have been denied the privileges which a teacher of an affiliated college, whether administered by the Government of the State or by a religious or linguistic minority, is entitled to get.

33. I have no manner of doubt that whosoever is responsible for the administration and management of the affairs of the college is liable to pay to the teachers their due emoluments and to give to them necessary protection of service extended by various regulations, provisions of the Statues and other provisions made by the University and the law makers. By stating in the order granting temporary affiliation that the Government of the State took no financial liability and communicating to the management of the college, the State and the University cannot cease to have the liability to pay to the teachers of the college their due, just and legal claims. A mere

glance to Article 30(2) of the Constitution will make the position abundantly clear that not with standing the fact that a college is established by a religious or linguistic minority, its right to receive grant-in-aid from the State is protected. The Government of the State of Bihar is liable in terms of Article 30(2) of the Constitution to extend to the colleges such grant-in-aid which it pays to other college similarly established by other religious minorities. The University in that matter shall have to bear the same responsibility and if the teachers' emoluments are subsidised, whether they are working in the colleges established and administered by a minority or otherwise by any group of sponsors, the University will have to bear the cost and pay to the teachers of Sangmitra college also.

34. Keeping in view this position in law, we wanted from the University information as to who are the teachers appointed in the college in accordance with the regulations and who fulfilled the requisite criteria. The University has, however, given an incomplete list, but we are informed that there are thirteen teachers whose appointments are concurred with by the college Service Commission and there are thirteen other teachers who are working on the second post in one or other subject including Smt. Annapurna Sinha, who is working as the Prof.- in - change.

35. What has made me suspious is the fact that in the notification appointing the ad hoc committee, two members of the syndicate are named along with others to constitute the ad hoc committee. How could the Syndicate of the University appoint one or other member of the Syndicate itself, that is to say appoint itself as the ad hoc committee of a college when it

was sitting as a judge to decide whether to dissolve the Governing body appointed by the sponsors or not and when such Governing Body is dissolved who should manage the affairs of the college. Even their entry as ad hoc committee to manage the affairs of the college could bring no improvement in the administration is demonstrated in the fact that despite their being members of the ad hoc committee teachers of the college have not been paid their due emoluments. If the Governing body of the sponsors was responsible for neglecting the lot of the teachers, the ad hoc Governing body is equally blame-worthy. It is high time that bodies like Syndicate should know that with the responsibility and power they get as members of the Syndicate, they have to act with more caution and show that they do not only act fairly but their acts appear to be fair. Their appointing themselves as the members of the ad hoc committee after dissolving the Governing body of the college shall always be suspect and that in itself may be a ground to quash the appointment of the ad hoc committee, in which they name themselves as members.

36. Coming to the teachers of the college, I propose to add that henceforth the Governing body of the college shall be obliged to pay to them emoluments in accordance with the scale of pay determined for their respective categories and in that if the University has got the liability to pay such subsidy in lieu of salary, the Governing body shall make a claim and the University shall be obliged to pay the same to the Governing body.

37. I have already said that the Government of the State has got the liability to pay grant-in-aid which is guaranteed in

favour of the sponsors of the college under Article 30 (2) of the Constitution. To make their lot satisfied and motivate them to work, it is necessary to order that the teachers shall be paid their emoluments each month by transfer of their monthly salary and other emoluments to their respective Bank accounts keeping a record for the same available for inspection by the University and by any officer of the Government of the State of Bihar. Since as a result of my judgement today, the Governing Body appointed by the sponsors will come to hold the right to administer the college, the liability to pay the emoluments of the teachers shall *ipso facto* be upon them and accordingly they shall be paying their salary each month by transferring their respective emoluments in their favour in their respective Bank accounts. The Governing body, however, shall be entitled to the grant-in-aid and if they demand, the State of Bihar and the University shall obliged to meet the same.

38. In the result this application is allowed, the orders contained in annexures 1 and 26 are quashed. As a consequence, the Governing body of the petitioners shall be entitled to administer the college until such time the matter is finally decided by the Government of the State of Bihar and/or the constitution of the Coverning body is altered by the competent authority or sponsors in accordance with law. The Governing body of the college shall have liability to pay to the teachers working in the college their emoluments as observed above. It is made clear that no person shall bring any change in the Constitution of the college and/or otherwise interfere with until the matter is finally decided by the Government of the State of

Bihar.

Madan Mohan Prasad, J. I agree.

R.D. *Application allowed.*

TAX CASE

Before Uday Sinha and Ashwini Kumar Sinha, JJ.

1986

October, 28

Commissioner of Income-Tax, Bihar-I, Patna.*

v.

Dr.(Mrs.) Krishna Rana, Deputy Superintendent, Civil Assistant Surgeon, Arrah.

Income-tax Act, 1961 (Central Act no.XLIII of 1961) sections 253 and 256 (2) ——section 256 (2) ——application by Revenue against restoration of appeal by income tax Appellate Tribunal before High Court under section 256(2) — whether competent— section 253 ambit of.

Where the assesee filed an application before Income tax Appellate Tribunal hereinafter called the Tribunal, for restoration of her Appeals as she had not been given reasonable opportunity to place her case and the Tribunal restored the appeal for re-hearing whereupon the Revenue being aggrieved by the order of Tribunal moved the High court under section 256 (2) of the Income tax Act, 1961) hereinafter called the Act:

Held, that the order passed on such a petition does not

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* Taxation Case Nos. 142 and 143 of 1976. Reference :-Statement of the Case drawn by Income-tax Appellate Tribunal - 'A', Patna in the matter of assessment of Income-tax on Dr. (Mrs.) Krishna Rana, Deputy Superintendent Civil Assistant Surgeon, Arrah for assessment years 1970-71 and 1971-72.

come within the periphery of section 253 of the Act and therefore no reference could be made to the High Court. The reference is thus obviously incompetent.

On reading sections 253 (1),254(1) and 256 of the Act, it is obvious that an application for reference can be filed only against the order which comes within the ambit of section 254 of the Act.

Reference under section 256 (2) of the income tax Act 1961.

The facts of the case material to this report are set out in the judgement of Uday Sinha.

Messrs B.P. Rajgarhia, Sr. S.C., I.T.D. and *S.K. Saran, Jr. S.C., I.T.D.* for the petitioner in both cases.

Messrs K.N. Jain, S.C. Bharuka and *M. Nath.* for the opposite party in both cases.

UDAY SINHA, J. These are references under section 256 of the Income-tax Act in relation to assessment years 1970-71 and 1971-72.

2. The assessee is a doctor in the town of Arrah in this State. She was assessed as an Individual, on income from salary and medical profession. She was assessed on a total income of Rs. 15,860/- and Rs. 58,895/- for the two assessment years. The assesse appealed against the order of assessment for two years which were disposed of by a common order by the Appellate Assistant Commissioner (hereinafter called the A.A.C.) The appeals were dismissed with some modification inasmuch as the total income for the assessment year 1970-71 was reduced by Rs. 1000/- and for the subsequent assessment

years 1971-72 the expenses were allowed at Rs. 12,000/- instead of Rs. 5,800 allowed by the Income-tax Officer (hereinafter called 'the I.T.O.') Thus a further relief of Rs. 6200/- was allowed to the assessee for the second assessment year. The assessee filed appeals before the Tribunal. On the date fixed for hearing, i.e. 11-4-1975 no one appeared on behalf of the assessee. The Tribunal heard the Departmental representatives and disposed off the appeals on merit. Whereas; for the assessment year 1970-71 expenses had been allowed to the tune of Rs. 2,000 the Tribunal allowed a further deduction of Rs.1,000/-. The deduction ultimately came to Rs. 3,000/- as against Rs.5,000/- claimed by the assessee. In regard to the subsequent assessment year 1971-72, the Tribunal while up holding the estimate of Income further allowed deduction of Rs. 6000/- on account of expenses. The deduction thus for that year came to Rs.18,000/-.

3. Long after the appeals had been disposed of, on 20-5-1957 an application was filed by the assessee before the Tribunal for restoration of the appeals. The ground for restoration advanced, was that the assessee had not been given reasonable opportunity to place her case. The Tribunal by order dated 19-7-1975 restored the appeals and refixed them for hearing. Being aggrieved by the order of the Tribunal restoring the appeals for re-hearing, the Revenue moved the Tribunal for making a reference to this Court in regard to its power to restore an appeal disposed of on merit. The Revenue failed before the Tribunal. The Revenue thereafter moved this Court under section 256(2) of the Act. This Court allowed the application and called for the following questions, noted below for our opinion. Hence the references.

Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in restoring the appeal to file, which was already decided on merits, by the order dated the 11th April 1975?

4. When the case had been heard for some time on 27-2-1986 and 28-2-1986, this Court called for a supplementary statement of facts. That having been received, the case was again listed for hearing .

5. From the statement of the case-original and supplementary, the comprehensive facts are that the assessee filed appeals on 7-12-1973. On 13-3-1975 theTribinal fixed 10-4-1975 for final hearing. Notice of the hearing was issued and served upon the assesee and the Revenue. On 10-4-1975 the assessee filed a petition in the office for adjournment. The office put -up a note for necessary order to the members. On 9.4.1975 the members ordered that the petition for adjournment be put-up in Court on 10.04.1975 the Judicial member and the Accountant Member made an endorsement on the petition "refused". The prayer for adjournment was thus rejected. A copy of the petition with the necessary endorsement is annexure F to the supplementary statement. On 21.4.1975 the Tribunal passed an exparte order dismissing the appeal on merit after modifying the order of the A.A.C On 20.5.1975 the assessee filed an application for restoration/ rehearing the appeals, which was received in the office of the Tribunal on 20.5.1975. By order dated 19.07.1975, the Tribunal allowed the application for restoration on the ground that the assessee had been denied reasonable opportunity to place her case through her counsel in true perspective. It may also be stated here that the member of the tribunal had changed when the restoration application was

ultimately allowed .

6. On the above facts, the contention urged on behalf the Revenue that the Tribunal had no jurisdiction to order rehearing of the appeals, as it had no power to review its order. In appeals having been dismissed on merit, the order passed for rehearing would amount to review one order dismissing the adjournment petition review and since the power was not conferred upon the Tribunal, it cannot review its judicial order. The stand on behalf of the assessee, on the other hand, is that the Tribunal has inherent power to act in aid of justice. According to Mr.. K.N. Jain, Learned Counsel for the assessee, the Tribunal like any other quasi judicial authority has some incidental power to do justice between the parties and, therefore, when the tribunal was satisfied that the assessee had not had reasonable opportunity of presenting her case, the Tribunal was justified in recording the final order in order to rehear the appeals afresh.

7. Learned Counsel for the assessee placed reliance upon the decisions in the cases of *Murlidhar Sarda* vs. *Income-Tax Appellate Tribunal, Calcutta & others* (1) *Income Tax Officer Appellate District IV and ors.* Vs. *Murlidhar Sarda* and *another* (2) *Commissioner of Income-Tax Tamil Nadu-IV* vs. *Income-Tax Tribunal & another* (3).

Learned Senior Standing Counsel, Income-tax on the other hand, placed reliance upon a single Judge decision of *the Calcutta High Court in Sheo Paper Exchange* vs. *Income-*

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(1) 92 I.T.R. 189
(2) 99 I.T.R. 485
(3) 120 I.T.R. 231

Tax Officer "C" Ward, first. VC 1 Dist. Calcutta & Others. (1)

8. It is well established that the Income-Tax Tribunal is not Court . Also well established that it has no power to review its own order. Thereafter it seems incongrous to clothe it with some incidental powers thus permitting it do indirectly, which it cannot do directly. That is the effect of the decision of the Calcutta High Court. the decision of the Kerala High Court has taken note of Rules 24 and 25 of the Income Tax Rules. Rule 24 expressly permits a Tribunal to restore an appeal for rehearing, where the appeal has been dismissed for default. No such provision has been made in regard to dismissal of appeals on merit. The Kerala High Court has brushed aside the expression vesting jurisdiction in the Tribunal to re-hear the appeals disposed of on merits. The Kerala High Court has brushed aside the distinction only on the footing that the Supreme Court held Rule 24 as invalid. The view of the Kerala High Court appears to be fallacious. The Supreme Court did not strike down rule 24 of the Appellate Tribunal's Rules as it now stands since 1963. The Supreme Court was considering the validity of rule 24 of Appellate Tribunal's Rules 1946 which read as under.

> "Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or may hear it ex parte."

In 1948 it was amended by a Notification dated January 26, 1948 which read as under:

> "Where on the day fixed for hearing or any other day to which

(1) 93 I.T.R. 186

> the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default."

Rule 24 as it now stands under The Income-tax (Appellate Tribunal) Rules, 1963 reads as under.

> "24. Dismissal of appeal for appellant's default, etc. - where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or may hear it ex parte.
>
> Provided that where the appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restoring the appeal."

It will be appreciated that the rule as it now stands along with the provisos brings about sea change in the law. It would now be a moot point whether rule 24 as it now stands would be ultra virus. The Calcutta decisions have not taken notes of the Appellate Tribunal's Rules and seem to have assumed that the Appellate Tribunal has inherent powers. To do justice I seem to have some misgivings about the views of the Calcutta and Kerala High Courts. It is, however, not necessary to go into the matter at any depth, as the case has to be disposed of on another short point.

9. "Learned Counsel for the assessee submitted that the reference is itself bad. Section 256(1) provides for reference to High Court in which notice of an order under section 254 has been passed. Section 254(1) provides that the Appellate Tribunal shall, after hearing the parties, pass such orders

thereon, as it thinks fit. Section 253 provides for appeal to the Appellate Tribunal. On reading sections 253(1), 254(1) and 256, it appears obvious that an application for reference can be filed only against the order which comes within the ambit of section 254 and no other orders.

10. The order in question before us was passed on a miscellaneous petition for rehearing of the appeals by the Appellate Tribunal. The order passed on such a petition does not come within the periphery of section 253. In my view, therefore, no reference could have been made to this Court.

11. The views that I have taken receive support from the case of *Commissioner of Income-tax, Madras versus, MTT. AR.S.AR. Arunachalam Chhettiar (1).* In my view, therefore, no reference could be made to this Court. The reference is thus obviously incompetent.

Since, the reference is incompetent, as we refuse to answer the question of law referred to us for our opinion.

12. Let a copy of this judgment be transmitted to the Assistant Registrar, Income-tax Appellate Tribunal in terms of section 260 of the Income-Tax Act, 1961.

Ashwini Kumar Sinha, J. I agree.

R.D. *Order accordingly.*

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(1) 23 I.T.R. 180

LETTERS PATENT

Before Lalit Mohan Sharma and R.N. Lal, JJ.*

1986

December, 10.

*Parmanand Thakur.***

V.

The Commissioner, Coal Mines Welfare Organisation.

Motor Vehicles Act, 1939 (Central Act no. IV of 1939) Sections 2(18), 93, 94(3) proviso, and 110 A (i) (C) — ambit of —— uninsured vehicles, exempted by section 94(3), whether come within the scope of section 110— sections under chapter VIII of the Act clearly indicating that all vehicles covered by definition of motor vehicles under section 2(18) whether insured or not come within its scope — 'Heading' of Chapter VIII whether can negative it —— claim application by father of the injured boy before claims Tribunal, whether maintainable —— section 110A (i) (C) — Expression 'duly authorised 'agent' — construction of.

Father of the injured minor boy who was run over by truck belonging to respondent, a welfare organisation, which was exempted by sub-section (3) of Section 94 of the Motor Vehicles Act, 1939, hereinafter called the Act, from the requirement of

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*Sitting at Ranchi.

**Letters Patent Appeal No. 9 of 1984(R). In the matter of an appeal under clause 10 of the Letters Patent.

getting the vehicle insured, filed claim case before Claims Tribunal.

Held, that an examination of the language of section 110 read with sections 2 (18), and 93 and that of the proviso to section 94 (3) of the Act lead to the irresistible conclusion that uninsured vehicles are also within the scope of section 110 of the Act.

Held, further, that as the sections of chapter VIII of the Act clearly lead to the conclusion that all the vehicles covered by the definition of "motor vehicle" in section 2(18) of the Act whether insured, or not, are within its scope, the `Heading' of the chapter can not be relied upon for negativing it.

It is well settled that the 'Heading' of a chapter can not control the plain words of the statute. The court is entitled to look at the 'Heading" of a chapter for resolving any doubt that it may have as to the ambiguous words but, if the meaning of the section is clear, it cannot be used for giving a different effect.

R. V. Surrey Assessment Committee (1) — followed

The object of establishment of Claims Tribunals by the amendment in the Act was to ensure speedy relief to victims of road accidents by a less expensive process and there is no reason to place the victims of accidents involving uninsured vehicles at a disadvantage.

Held, that the claim petition of the appellant filed before the claims Tribunal cannot be held to be not maintainable.

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(1) (1948) I.K.B. 28, at P.32

Held, further, that the expression 'duly authorised' 'agent' referred to in clause (c) of subsection (1) of section 110 A of the Act should not be construed narrowly so as to mean a person expressly authorised or having the authority in writing. It must be given a wide and liberal meaning as including a person having implied authority to claim compensation.

The father-applicant besides suffering severe mental strain on account of the injury to his son injured in the accident, had to spend considerable amount of money over the treatment of the boy for which he was rightly compensated by the claims Tribunal.

New India Assurance Co. Ltd, New Delhi and anr v. Punjab Roadways, Ambala City and ors (1) —— followed.

Appeal under clause 10 of the Letters Patent.

The facts of the case material to this report are set out in the judgment of L.M. Sharma, J.

Mr. S.N. Singh for the appellant.

Mr. Debi Prasad, SC.C.G. & Miss Indrani Choudhary for the respondent.

Lalit Mohan Sharma, J. This main question which arises in this case is whether the Motor Accident Claims Tribunal (hereinafter referred to as the 'Tribunal') constituted under section 110 of the Motor Vehicles Act (hereinafter referred to as "the Act")has jurisdiction to adjudicate upon the claim of compensation in respect of an accident involving the death or

(1) (1964) A.I.R. (Punjab) 235.

bodily injury to a person arising out of the use of a motor vehicle not covered by a policy of insurance. On the application of the appellant-claimant the Tribunal awarded compensation amounting to Rs. 13,620/-. The opposite party filed an appeal in this Court under section 110 D of the Act which was registered as Miscellaneous Appeal No.15 of 1978(R). A learned Single Judge of this Court, who heard the appeal, held that the remedy of the claimant (Sic) was by way of a suit in the Civil Court and the application before the Tribunal was not maintainable. He also held that the claim petition was fit to be rejected on the additional ground that it was filed by the father of the injured minor boy and not by the boy himself. The award was accordingly set aside (vide 1981 BLT (Rep.) 285). The present appeal under clause 10 of the Letters Patent is directed against this judgment.

2. The accident took place in June, 1971 when Bachanand Thakur a young boy was run over by a truck belonging to the opposite party-respondent, a Welfare Organisation which is exempted by sub-section 3 of section 94 of the Act from the requirement of getting its vehicles insured. The boy sustained serious injuries, and his father moved the Tribunal claiming compensation of over Rs. 53000/-. The opposite party contested the claim on the ground that the claim petition was not maintainable. As stated earlier, the Tribunal rejected the defence and allowed the claim partially.

3. In support of his view that the claim petition was not maintainable on the ground that the truck involved in the accident was not covered by an insurance policy, the learned Single Judge strongly relied on the heading "Insurance of Motor Vehicles Against 3rd party Risk" of chapter VIII in which the

provisions relating to the constitution of Tribunals and their jurisdiction are included and on section 96 directing the insurer to pay the awarded sum. Mr. Debi Prasad the learned counsel for the respondent has contented that the provisions of chapter VIII support this view. Referring to the Proviso in section 94(3) which is quoted below the learned counsel argued that the requirements of establishing and maintaining a fund for meeting liabilities arising out of road accidents involving uninsured vehicles has been inserted for the reason that the claim arising out of such accidents are beyond the jurisdiction of the Tribunal;

> "94.....
>
> (3) The appropriate Government may by order exempt from the operation of sub-section (1) any vehicle owned by any of the following authorities, namely :-
>
> (a) the Central Government or a State Government if the vehicle is used for Government purposes connected with any commercial enterprise:
>
> (b) any local authority:
>
> (c) any State transport undertaking within the meaning of section 68A;
>
> Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under the Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment incur to third parties....."

Reference was also made to the mandatory nature of the provisions of section 95(1) by the use of the word "must" and the item 17 in the Form of application for compensation

prescribed under the Bihar Motor Vehicles Rules, 1940 relating to the name and address of the insurer.

4. The establishment of Claims Tribunals are dealt with in section 110 which says that the Tribunals may be constituted "for the purpose of adjudication upon claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" The section does not use any word which may be interpreted to narrow down its scope. The clause "arising out of the use of motor vehicles" in the section does not suggest that any category of vehicles is excluded. The expression " motor vehicle" defined in section 2(18) of the Act to mean any mechanically propelled vehicle adopted for use upon roads, is wide in its scope and admits only those vehicles which run upon fixed rails or those of a special type adopted for use only in a factory or in any other enclosed premises, as exception. The distinction between an insured vehicle and an uninsured one is not made . While assigning special meaning to several expressions in section 93 for the purpose of Chapter VIII, "motor vehicle" has not been given a different definition. The intention is clear that motor vehicle has to be understood in the same sense in the Chapter as in the other parts of the Act; and it can certainly not be suggested that uninsured vehicles are entirely beyond the scope of the Act. The learned counsel for the parties took us through all the sections of Chapter VIII in search of provisions helpful to their respective interpretations and I could not discover any such provision which may support the view expressed in the impugned judgment excepting the Heading. The Proviso in section 94(3) directing creation of a fund, relied on by Mr. Debi Prasad does not help him at all. On the contrary, it suggests

that compensation may be awarded in connection with accidents arising out of the use of uninsured vehicles for, in such cases there being no insurer to discharge the liability, creation of a fund for that purpose was considered necessary. The opening sentence in section 95 referred to by Mr. Prasad is of a neutral character in regard to the question under consideration. The word "must" is applicable only to such cases where a policy of insurance is required. To assume that the section is directing insurance in every case will amount to negativing sub-section (3) of section 94 dealing with the power of exemption. Besides even the suggested meaning of section 95 does not advance the defendant's case at all. Similar is the position with respect to section 96 as also section 110B, which is quoted below :-

> " 110B. On receipt of an application for compensation made under section 110A the Claims Tribunal shall after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to it just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them. as the case may be"
>
> (emphasis added)

The provisions relating to apportionment of the liability does not suggest an insurer in every case, because then on the same logic it will be necessary to have a driver of the vehicle apart from the owner. I do not think it can be suggested that an owner driven car is also exempted from the jurisdiction of the Claims Tribunals.

5. Mr. Debi Prasad also placed before us the Form of application prescribed by the Bihar Rules in which column no. 17 is meant for giving the name and address of the insurer. This column obviously, is meant only for such cases where insured vehicles are involved but there is no warrant for assuming that all cases in which any of the column is redundant are excluded from the jurisdiction of the Tribunals. It cannot be suggested that every column in this Form is necessarily applicable to all categories of claim cases. By way of example I would refer to columns 20 and 21 for stating respectively "relationship with the deceased" and "title to the properties of the deceased". This very Form is to be used even in cases where no death occurs as is apparent from columns 2,3,4 and 6 etc. A close examination of the language of section 110 read with sections 2(18) and 93 and that of the Provise to section 94(3) lead to the irresistible conclusion that uninsured vehicles are also within the scope of section 110.

6. Mr. Debi Prasad is of course right in referring to the Heading of the Chapter in support of his argument. The question is whether the language of the Heading can limit the scope of the Chapter which is otherwise clearly wider. It has been uniformly held that Headings cannot control the plain words of the statute. The court is entitled to look at the Heading for resolving any doubt that it may have as to the ambiguous words but, if the meaning of the section is clear, it cannot be used for giving a different effect (see Maxwell on the Interpretation of Statutes). In R. v. *Surrey Assessment Committee*(1), Lord

(1) (1948) I.K.B.2 at p.32.

Goddard, C.J. observed that "While the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous word, the law is quite clear that you cannot use such heading to give different effect to clear words of the section where there cannot be any doubt as to their ordinary meaning "Since the sections of Chapter VIII clearly lead to the conclusion that all the vehicles covered by the definition of section 2(18) whether insured or not are within its scope the Heading cannot be relied upon for negativing it.

7. There is another reason in support of my view. The object of establishment of Claims Tribunals by the amendment in the Act was inter alia to ensure speedy relief to victims of road accidents by a less expensive process and there is no reason to place the victims of accidents involving uninsured vehicles at a disadvantage. If the interpretation as suggested by the respondent is accepted it will lead to illegal discrimination which has to be avoided, I therefore hold that the claim petition of the appellant filed before the Tribunal cannot be held to be not maintainable.

8. The learned Single Judge has also observed that the claim petition having been filed by the father of the injured boy and not by the boy himself was not maintainable. I am afraid this view also cannot be sustained. Section 110A (1) (c) permits the petition to be filed by a duly authorised agent of an injured person. The Proviso to the clause further indicates that the compensation can be claimed in certain cases in a representative capacity. So far the present case is concerned the injured was a young boy reading in class IV and could not

have sued by himself. Even on his behalf his father who is the natural guardian had to take all necessary steps. The father could have authorised any other person under clause (c) of section 110A(1) for making the application; instead he has himself acted in this regard. It has not been suggested on behalf of the opposite party at any stage that he was not empowered to act on behalf of his son. The judgment of the Tribunal does not indicate that the point which found favour with the High Court was even urged in the court below.

I fully agree with the observation of the Punjab High Court in *New India Assurance Co. Ltd., New Delhi and another* v. *Punjab Roadways, Ambala City and others*(1) that the expression "duly authorised agent" referred to in clause(c) should not be construed narrowly so as to mean a person expressly authorised or having the authority in writing. It must be given a wide and liberal meaning as included a person having implied authority to claim compensation. In that case the husband of the injured person was held to be competent to maintain the action. So far the present case is concerned the father applicant besides suffering severe mental strain on account of the injury to his son had to spend considerable amount of money over the treatment of the boy for which he was compensated by the Tribunal. I therefore do not find any merit in the hyper-technical objection taken on behalf of the respondent before us.

9. For the reasons mentioned above, the appeal is

(1) (1964) A.I.R (Punjab) 235

allowed, the judgment in Miscellaneous Appeal No. 13 of 1988(R) is set aside and the decision of the Tribunal is restored. The appellant shall be entitled to the costs of the Misc. Appeal and of the Letters Patent Appeal which together are assessed at Rs. 1000/-

R.N. Lal, J. I agree.

R.D. *Appeal allowed.*

CIVIL WRIT JURISDICTION

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

1987

March, 10

Dr. Mathura Prasad and others. *

v.

The State of Bihar and others.

Constitution ——— Articles 14 and 16 ——— provisions of whether violated in respect of Homeopathic Diploma holder Vis a Vis Ayurvedic and Unani Degree-holder medical officer in regard to pay scale and status ——classification based on educational qualification made with a view to achieving administrative efficiency whether rest on fortuitous circumstances.

The fourth pay revision Committee recommended different pay-scales for two types of Medical Officer namely, the Ayruvedic and Unani Degree holder Medical Officers on the one hand and the Homeopathic Diploma- holders on the other describing the former as gazetted officers and the latter as non-gazetted. The State Government had taken a decision both in regard to the pay scale and with regard to their status in conformity within the recommendation of the pay Revision Committee.

No prejudice has been caused to the writ petitioners, the

* Civil Writ Jurisdication Case No. 796 of 1981. In the matter of an applicaiton under Articles 226 and 227 of the Constitution of India.

Homeopathic Diploma holders which may be said to be violative of Articles 14 and 16 of the Constitution.

Classification on the basis of educational qualification made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances, Classification must be truly founded on substantial differences which distinguished persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. Judicial scrutiny can, therefore extend only to the consideration whether it bears nexus with the object in view. It can not extend to embarking upon a nice or mathematical evaluation of the basis of classification.

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 S.K.Jha, J.

M/s S. M. Javed Anwar and *J.P. Karan.* for the petitioners.

Mr. Birendra Singh, J.C. to G.P. III. for the respondents.

S.K. Jha. J. The alleged invidious discrimination between the Ayurvedic and Unani Medical Officers on the one hand and the Homeopathic Medical Officers on the other by the State Government has pinched the petitioners impelling them to come to their aid through the process of a writ to be issued by the this Court and for the redressal of the grievances of the Homeopathic Medical Officers, who are the petitioners here for compelling the State Government to treat them at par with the

Unani Medical Officers and Ayruvedic Medical Officers. They have therefore, invoked in this writ application under Articles 226 and 227 of the Constitution the aid of Articles 14 and 16 of the Constitution and prayed for issuance of a writ of mandamus to command the respondents to give them a parity with the doctors of two other specialities namely the Unani and Ayruvedic Medicines. There are thirteen petitioners in all. While respondent no. 1 is the State of Bihar respondent no. 2 is the Health Commissioner Bihar respondent no.3 is the Director of Health Services. (Indigenous Medicines and Homeopathy) Patna and respondent no. 4 is the Deputy Director, (Homeopathic Medicines), Health Department of the State Government of Bihar, Patna. Consequentially, they have prayed for quashing that part of the Government Order/Resolution, dated 3.5.1978, which relates to the petitioners and is contained in Annexure-1 to the writ application.

2. The point involved in this writ application is very short and simple, but before dealing with it, some facts are noteworthy relevant as they may be. The petitioners are 4-years Diploma holders in Homeopathic Medicines and are presently serving in the different Dispensaries in the services of Health Department of the Government of Bihar. The writ applicaiton has been filed in a representative capacity by the State Homeopathic Medical Officers' Association of which petitioner no. 1 is the Secretary, petitioner no.3 Dr. Bachchu Prasad Singh, is the Vice President and petitioner no.6 Dr. Mahesh Kumar is the Treasurer and petitioner no.7 Dr. Sahdeo Rajak, is a member of the Executive Committee. We are not concerned with the different places at which the petitioners are posted, since that is immaterial for the purpose of deciding this case. Previously,

there was no provision for teaching of any Degree Course in any Homeopathic College in the State and the 4-years Diploma Course known as D.H.M.S had always been treated as the requisite qualification for appointment against Class I and Class II posts in the Health service of the State of Bihar - that is the allegation of the petitioners. On the contrary, such doctors as had qualified after having undergone 4-Years Degree Course in Unani Medicines are called degree holders though the Homeopaths having undergone 4-Years indentical course are called as Diploma holders. Be that as it may the fact is admitted that such of doctors on the Unani side of the medicines are Degree holders whereas 4-Years course undergone by Homeopaths are called Diploma-holders. In the year 1971, the State Government decided to have State Homeopathic Dispensaries in the rural areas of the State and for that purpose a large number of posts of Medical Officers (Homeopaths) was created in the same scale as that of Vaidyas and Hakims, i.e. in the pay-scale of Rs. 160-280. Subsequently. the aforesaid pay-scale of Rs. 296-460 and the Homeopathic Medical Officers along with Vaidyas (Ayurvedic doctors) and Hakims (Unani doctors) were placed in the same scale of pay. Thereafter, the Health Department of the State Government by the Resolution contained in Memo no. 1213 dated the 3rd May. 1978, revised the scale of pay of the Vaidyas and Hakims and the Homeopathic Medical Officers whereby the pay-scale of Vaidyas and Hakims was revised from Rs. 296-460 to Rs. 610-1155 the pay-scale of the Homeopathic Medical Officers was fixed from Rs. 296-460 to Rs 400-660 only. A copy of the aforesaid resolution has been annexed and marked Annexure-1 to the writ application. Pursuant to the above resolution, the State Government in the

Health Department again by its resolution contained in memo No. 565 dated 9.12.80, declared the posts of Vaidyas (Ayurvedic doctors) and Hakims (Unani doctors) as gazetted in the Health Services Cadre to the exclusion of the Homeopathic Medical Officers. A copy of the aforementioned resolution is marked annexure-2 to this writ application.Again by an order of the Government in the Department of Health contained in Memo. No. 31 dated 10.1.1981.issued under the signature of the Joint Secretary, the Vaidyas and Hakims were re-designated as Ayurvedic Medical Officers and Unani Medical Officers respectively and as a matter of fact the change in the designation of the Homeopathic Medical Officer was once again also ignored. This resolution has been marked as annexure-3 to the writ application. Fomerly there only a 3-Year Diploma Course for the study of Homeopathy , but later on the period was extended by one year and the Diploma was awarded only after 4-Year Course to the Homeopaths re-designating them as D.H.M.S; whereas the previous nomenclature of D.H.M.S. Course was known as D.M.S. Course According to the petitioners, the Government has always been treating D.H.M.S Course in Homeopathy at par with the Degree in Unani system of medicines as well as Ayruvedic system of medicines and therefore, in the matter of appointment in the service of indigenous medicines under the State Health Services in Bihar the three kinds of Medical Officers were treated on equal footing and were always provided the same avenues in the matters of appointment, promotion and pay-scale. It is further alleged by the petitioners that the Government of India. In the Ministry of Health and Family Welfare has also declared that the D.H.M.S qualification awarded by the Bihar University is equivalent to a

degree of a recognised University and on such declaration by the Health Department of the Government of India, the D.H.M.S. Homeopathic doctors have been provided equal status in matters of employment in all the States of the country as well as under the Central Government in all services to which the Degree of a recognised University is the requisite qualification. What has pinched the petitioners is the impugned difference in the pay-scale of the Unani and Ayurvedic Medical Officers on the one hand and D.H.M.S. Homeopathic Medical Officers on the other. The further allegation of the petitioner is that in the regulation of the Central Council of Homeopathic Education under sub-section (i) (j) (k) of section 3 of Homeopathic Central Council Act, 1973, the qualification prescribed for appointment of Principal Professors and lecturers in Degree College of Homeopathy in the country is either a Degree of Homeopathy or a 4-Year Diploma Course. Pursuant to the above regulation, the Government of Bihar advertised the post of Deputy Director of Homeopathy in the Directorate of Indigenous Medicines and Homeopathy in the services of the Health Department of the State Government which is a class I post and the qualification prescribed was inter alia a 4-Year Diploma Course in Homeopathic Medicines from a recognised Homeopathic College. A copy of the advertisement no.121/88, in this behalf, which was published in a local Daily newspaper 'Aryavarta' has been marked annexure-11 to the writ application. In pursuance of the aforesaid advertisement , one Chakradhar Paswan holding a 4-Year Diploma Course in Homeopathic Medicines has already been appointed as Deputy Director, Homeopathy, in the Directorate of Indigenous Medicines in the Health Service of the Government of Bihar. Thus, the petitioners complain of the discrimination between the persons similarly situate

depriving them from the benefit of the higher pay-scale, status and other privileges, which under the law would have accrued to them. It is, therefore, attacked that the decision of the State Government to place the Vaidyas and Hakims in the pay-scale of Rs. 610-1155 by making their posts gazetted and re-designating them as Ayurvedic Medical Officers and Unani Medical Officers on the one had while placing the Homeopathic Medical Officers as non gazetted in the scale of Rs. 400-660 on the other as is submitted on behalf of the petitioners is absolutely arbitrary, discriminatory and prejudicial to the interest of the petitioners and the Homeopathic Medical Officers similarly situate. It is further said that the decision of the State Government denying the gazetted status and pay-scale to the petitioners was violative of the fundamental rights as enshrined in Articles 14 and 16 of the Constitution.

3. Subsequently, a supplementary affidavit has also been filed by the petitioners merely highlighting the fact that a letter had been issued by the Secretary, Central Council of Homeopathy (C.C.H.) bearing no. 14-14/80 C.C.H. date 17-11-81 addressed to the General Secretary of the State Homeopathic Medical Officers 'Association, Bihar, Patna, a copy of which has been marked annexure-17 to the writ application. In that letter, the Central Council of Homeopathic Medicine have also said that there is no bar in giving pay-scale of Rs. 610-1155 to Diploma- holders in Homeopathy or appointing them as gazetted officers in the services and giving them powers of drawing and disbursing officer. The Council have further stated that the Diploma-holders (D.H.M.S.) and equivalent are appointed in the Central Government Services as Class I

Officers enjoying all privileges and powers of drawing and disbursing officers. The local authorities in the State of Bihar. it is stated, also treated the Diploma in D.H.M.S as equivalent to the Degree Course in Ayurvedic and Unani Medicines and have prescribed the same scale of pay. i.e. the pay-scale of Rs. 610-1155 (unrevised) for Vaidyas, Hakims and Homeopathic Medical Officers also. This fact is also supported by an advertisement issued by the Zila Parishad, Hazaribag, for appointment of Homeopathic Medical Officers under the services of the Parishad and the Qualification Prescribed therein was D.H.M.S. in the pay-scale of Rs. 610-1155. A copy of the advertisement issued in a local English Newspaper 'Indian Nation', dated 17.1.1982 has been marked Annexure- 18 to the writ application and annexed to the supplementary affidavit. It is further alleged that the respondents even after the admission of the writ application of the petitioner on 26.1.81 discriminated between the Homeopathic Medical Officers on the one hand and the Ayurvedic and Unani Medical Officers on the other by issuing further orders declaring the Vaidyas and Hakims as drawing and disbursing officers and depriving the petitioners of the said privileges and benefits.

4. A Counter- Affidavit has been filed on behalf of the State wherein it has been stated that it was decided on the basis of the respective qualifications inasmuch as the Homeopathic Medical Officers were Diploma-holders: whereas Ayurvedic and Unani Medical Officers were Degree-holders. There was no question of any reduction in pay and rank of the petitioners rather their pay has also been increased from Rs. 296-460 to Rs. 660. It has further been stated in the counter-

affidavit that there was only one post of the Deputy Director, Homeopathy, in the scale of pay of Rs. 1250-1850 having basic qualification of Intermediate Science and D.H.M.S. The State Government is governed by the Indian Medicine Central Council Act, 1970, which has recognised the 4-Year Degree Course in Unani equivalent to Degree Course. The posts carrying pay-scale of Rs. 610-1155 has been declared as gazetted and later on designated as Ayurvedic and Unani Medical Officers. The scale of pay given to the Homeopaths was of a non-gazetted rank and as such their posts were excluded from being declared as gazetted ones and consequently, from being re-designated as Homeopathic Medical Officer. At the time of revision of pay of the officers of the Indigenous system of medicines and Homoeopathic system of medicine, the pay-scale of Degree holders as Rs. 400-660. With regard to the reply to the statements made in paragraphs 31 to 37 of the writ application, the deponent has stated and submitted that the respondents had no information about the pay-scale of the Ayurvedic, Unani and Homeopathic doctors in the other States of India, which have been catalogued in paragraphs 31 to 37 of the writ petition. As a matter of fact, I must confess even I am at a loss, as to what courses of studies are adopted elsewhere other than in the State of Bihar with regard to the three respective categories of the Indigenous Medical Officers and as to what are their qualification , nature of duties, importance of work and other such matters. As an instance, it has been given in the counter-affidavit that on the basis of the recommendation of the 4th Pay Revision Committee of the State Government prior to 1.4.1981, the pay-scale of Lady Health Visitors and Staff Nurse, Grade-A,

was Rs. 296-460, but as per the recommendation of the Pay Revision Committee, their pay-scale of Rs. 690-965 for Lady Health Visitors and Rs. 730-1000 for Staff Nurse, Grade A, was fixed. The Homeopathic Doctors' Association, as a matter of fact, represented to the 4th Pay Revision Committee for giving pay-scale to them as was given to the Ayurvedic /Unani Medical Officers. The pay Revision Committee recommended the pay-scales of Rs. 850-1360 for Homeopathic Doctors and Rs. 1000-1820 for Ayruvedic/Unani Medical Officers. Thus it will be seen that the Pay Revision Committee itself presumably found that there was something distinctive about the Ayruvedic/Unani Medical Officer within which category the Homeopathic Medical Officers were not embraced. The object and the nexus were, thus not the same for the purpose of classification. The Central Council of Homeopathy of India is a mere recommending body for this purpose and has no jurisdiction to dictate any State Government for sanctioning specific pay-scale for Homeopathic Doctors. All other facts are either irrelevant or incidental for the purpose of this case.

5. The only question then to be answered is as to whether there has been any prejudice caused to the petitioners, which may be said to be violative of the sanctuary formed and framed by Articles 14 and 16 of the Constitution. In my considered view, there is none. Admittedly, the petitioners are all Diploma-holders, whereas the two other types of Indigenous Doctors namely, the Ayruvedic/Unani Medical Officer are Degree-holders. Admittedly again the 4th Pay Revision Committee itself recommended different pay-scales for the two types of Medical Officers, namely, the Arurvedic/Unani Medical Officers on the

one hand and the Homoeopathic Diploma-holders, on the other. The Members of the 4th Pay Revision Committee must have been at least more aware of the nature of work and duties to be performed by the two classes of Medical Officers. Therefore, it cannot be argued that the principle of similar pay for similar work will be attracted. Furthermore, the recommendations made either by the Pay Revision Committee or by the Central Council of Homeopathy still remain in the realm of recommendations and are not statutory orders to be obeyed and to act as command by any State Government. Having weighed all the pros and cons of the matters, the State Government had taken a decision both in regard to the pay-scale and with regard to their status namely the Gazetted and Non-gazetted posts. No allegation of mala fide-malice in fact or in law- can be said to have been made out in this case. It is a matter of public policy and taking an over-all view of the picture, the State Government passed a resolution/order as incorporated in Annexure-1. The previous pay-scale of all the three types of Indigenous Medical Officers pales into insignificance once their pay-scales and status have been revised. There is nothing in the action of the respondents on which an onslaught of law can be made, much less of any infraction of any constitutional mandate. I am not in the least convinced that the petitioners had similar work as Medical Officers, who have been designated as Ayurvedic or Unani Doctors. The impugned resolution/order of the respondents, therefore, cannot be said to be arbitrary or discriminatory at all. Nothing has been brought on the record to establish that all the three types of Medical Officers are doing similar types of work. It is now too well-established that the

constitutional code of equality and equal opportunity in matters of promotion means an equal promotional opportunity for persons who fall substantially, within the same class. A classification of emplyees can therefore be made for first identifying and then distinguishing members of one class from those of others. Classification on the basis of educational qualifications made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. If persons drawn from different sources are integrated into one class, can they be classified for purposes of promotion on the basis of their educational qualifications ? The answer is obviously yes. Classification must be truly founded on substantial differences which distinguished persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. Judicial scrutiny can therefore extend only to the consideration whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification for were such an enquiry permissible, it would be open to the Courts to substitute their own judgment for that of the legislature or the rule making authority on the need to classify or the desirability of achieving a particular object. [Reference may be made to the case of *The State of Jammu and Kashmir* vs. *Triloki Nath Khose and others* (1)] Differentiation of cadres is not a function of the Court. It can be done either by the legislature or by a rule

(1) (1974) A.I.R. (S.C.) 1.

duly framed under Article 309 or under the executive Powers of the State under Article 162 read with Article 166 of the Constitution. I cannot therefore transgress the limits of my constitutional Jurisdiction.

6. Judging therefore from any point of view I find no merit in this application. It is accordingly, dismissed but, in the circumstances of the case, I shall make no order as to costs.

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

R.D. *Application dismissed*

ELECTION PETITION

Before Ramnandan Prasad,J.

1987
March,10.

*Sidh Nath Rai.**

v.

Sri Sonadhari.

Nomination paper — Scrutiny of — candidates or their proposer not explaining to the Returning Officer the correct part and serial number of proposer in the electoral roll — nomination paper rejected by Returning Officer — validity of.

Where neither the candidates nor their proposers explained to the Returning Officer the correct part and serial number in the electoral roll with respect to the proposers resulting in the Returning Officer getting no assistance in locating the correct part, number and serial number of the proposers and hence the nomination papers of the candidates were rejected by the Returning Officer;

Held, that the election petitioner has failed to prove that the nomination paper of the two candidates were illegally rejected.

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* Election petition No.33 of 1985. In the matter of an application under sections 80, 80-A and 81 of the Representation of People Act.

Held, further that it is not a statutory obligation of the Returning Officer to scrutinise the electoral roll for finding out the identify of the proposer when the Serial number given in the nomination paper terms out to be wrong.

The enquiry made by the Returning Officer or Assistant Returning Officer at the time of the presentation of the nomination papers is only peripheral enquiry and it is on the date of the scrutiny of nomination paper that the nomination papers come up for detailed consideration at the hands of Returning Officer against whom there is no estoppel in regard to the statutory duty of scrutiny.

Case laws discussed.

In the matter of an application under sections 80, 80-A and 81 of the Representation of People Act.

The facts of the case material to this report are set out in the judgement of Ramnandan Prasad,J.

M/s S.N.P. Sharma, Uday Shankar Saran Singh & Amrendra Kumar Singh for the petitioner.

M/s Sheo Narayan Singh, Daya Nand Singh & Subash Chandra Yadav. for the respondent.

RAMNANDAN PRASAD, J. This election petition has been filed for declaring the election of the sole respondent to the Bihar Legislative Assembly from 214- Sandesh Assembly Constituency as void and to set it aside on the ground that the nomination papers of two candidates namely, Ramadhar Singh and Gopal Singh had been improperly rejected by the Returning Officer.

2. The last date for filing the nomination papers for the said election was 6-2-1985 and the date of scrutiny was 7-2-1985. The last date fixed for withdrawal by the candidates was 9-2-1985 and the poll was scheduled to be held on 2-3-1985. The counting was to be done on 5-3-1985. In all 27 candidates had filed nomination papers for this assembly constituency including the petitioner who was the Congress (I) candidate and the respondent, who was a candidate set up by the respondent, who was a candidate set up by the Lok Dal. After scrutiny which was done on 7-2-1985 the Returning Officer accepted the nomination papers of all the candidates as valid, excepting those of Gopal Singh and Ramadhar Singh besides those of Surendra Mishra and Dhananjay Chaudhary. A number of candidates, how ever, withdrew their candidature before the date of withdrawal and after withdrawal fourteen candidates remained in the field. The polling was held on 2-3-1985, but under the orders of the Election Commission repolling was held at some of the booths on 4-3-1985 The counting of votes commenced on 5-3-1985 and final declaration of the result was made on 13-3-1985 declaring the respondent as the duly elected candidate to the Bihar Legislative Assembly from the said Sandesh Assembly Constituency.

3. The case of the petitioner is that two nomination papers were filed on behalf of Gopal Singh. Sri Kant Tiwary and Shri Chandra Kant Tiwary were his proposers in the nomination papers. Both these persons figured as voters in the electoral roll of Part/ Booth no.39 at serial nos. 511 and 519 respectively. But, in both these nomination papers booth/part number was mentioned as 40 instead of 39. It has been stated that this mistake crept in inadvertently, as the nomination papers had been filed at late hours. Ramadhar Singh had filed only one

nomination paper and his proposer was one Kamcheya Singh whose name appeared at serial no-355 in Booth/part no.122, but due to inadvertence Booth/part no. was wrongly mentioned as 36 in the nomination paper which was actually his House number. It has been stated by the petitioner that no objection to the nomination paper filed by these two candidates was taken by the Returning Officer when these nomination papers were filed, rather on being satisfied he allowed these candidates to take their oath. On the date of scrutiny, however, the Returning Officer rejected their nomination papers without giving them an opportunity to remove the defects. It has also been stated that the defects mentioned above were only clerical and technical in nature, and as such the nomination papers should not have been rejected without giving them an opportunity of rectifying the mistake. It has been asserted that three proposers were undoubtedly voters of Sandesh Assembly Constituency and as such there was no substantial defect in the nomination papers. Since the proposers of these two candidates were genuine voters nobody had raised any objection at the time of scrutiny, But even then the Returning Officer rejected their nomination papers on this flimsy ground.

4. The sole respondent has filed written statement which it has been stated that Gopal Singh and Ramadhar Singh had intentionally filed defective nomination papers at the instance of the election petitioner, so that he may take the advantage of the rejection their nomination papers by filing and election petition. It has been stated by his that the name of the father and any particular of the address of the proposers of these two candidate were not mentioned in the nomination paper and as such it was not possible for the Returning Officer to locate their names in the electoral roll when the wrong Part/Booth Number

was mentioned in their nomination papers and the candidate's or their proposes never made any attempt to rectify these mistakes even at the time of scrutiny. It has been stated that no objection was taken at the time of filing of nomination papers, as these nomination papers were filed only a few minutes before the close of the item fixed for filing nomination papers which was 3 P.M. and every body was in haste to complete the formalities. It was under such circumstances that the two candidates were allowed to take oath by the election authority without making any verification with regard to names of the proposers in the electoral roll. In this connection it has also been stated that the Returning Officer of Sandesh Assembly Constituency was also the Returning Officer of five other assembly constituencies and large number of candidates had filed more than one nomination papers. This was another ground why the election authority could not detect the mistake when the nomination papers were filed. At the time of scrutiny, however, the nomination papers came for close scrutiny, by the Returning Officer who detected the mistake pointed out above. After detecting the same he announced that the nomination papers were rejected, as the particular mentioned therein of the proposers did not tally with the electoral roll. Neither all the condidates nor the election petitioner made any attempt to rectify the mistake, rather they allowed the nomination papers to be rejected. In such circumstances, the Returning Offices had no option but to reject the nomination papers when he failed to find out the names of the proposers in the electoral roll. It has also been contended by the respondent that the defects found in the nomination papers were vital and substantial and as such the Returning Officer was quite justified in rejecting the nomination papers.

5 On the pleadings of the parties the following issues have been framed :-

1. Whether the election petition as formed is maintainable

2. Whether the nomination papers of Sri Gopal Singh and Ramadhar Singh were illegally rejected?

3. To what reliefs, if any, is the petitioner entitled?

Findings on Issue no.2:

6. Obviously this is the main issue involved in the present case. Both the parties had led evidence in the case. As many as six witnesses have been examined on behalf of the petitioner and the respondent has examined four witnesses in all.

7. The electoral roll of Sandesh Assembly Constituency has been marked as ext.3 on behalf of the petitioner. The nomination papers of Ramadhar Singh and Gopal Singh have also been exhibited on behalf of the petitioners as Exts. 1, 1/1 and 1/2. The endorsements of rejection on the back of these nomination papers made by the Returning Officer (R.W.1) have been marked as, D/1 and D/2 respectively.

8 The nomination paper of Ramadhar Singh (P.W.1) is as follows:-

6-2-85 प्रारूप 2 ख

2-35 (नियम 4 देखिये)

नाम निर्देशन पत्र

विहार विधान सभा के लिये निर्वाचन

मैं, ... संदेश ... 214 ..... विधानसभा निर्वाचन क्षेत्र से विधान सभा के निर्वाचन के लिए जम्यर्थी के रूप में निम्नलिखित को नामनिर्दिष्ट करता हूं:-

अभ्यर्थी का नाम रामाधार सिंह, पिता का नाम लक्ष्मी सिंह उनका डाक पता ग्राम- बलपुरा टोला सलेमपुर पो०- जांगटा जिला- भोजपुर उनका नाम बड़हरा- 215 में क्रम सं० 117 पर प्रविष्ट है। विधान सभा निर्वाचन क्षेत्र के निर्वाचक नामावलि के भाग-संख्या 192 में क्रम संख्या 117 पर प्रविष्ट है

मेरा नाम कमछैया सिंह है और वह संदेश - 214 विधान सभा निर्वाचन-क्षेत्र को निर्वाचक नामावलि के भाग-संख्या 36 में क्रम संख्या 355 पर प्रविष्ट है।

तारीख 6-2-85 कमछैया सिंह

प्रस्थापक के हस्ताक्षर

मैं, उपरिवर्णित अभ्यर्थी इस नाम निर्देशन के लिये अपनी अनुमति देता हूँ और एतद्द्वारा घोषणा करता हूँ कि :-

(क) मैंने 42 वर्ष की आयु पूरी कर ली है (ख) मैं इस निर्वाचन में निर्दलीय पार्टी द्वारा खाड़ा किया गया हूँ (ग) मैंने जो प्रतीक चुने हैं ये अधिमान क्रम में (1) तीर कमान (2) शेर और (3) घुड़सवार है। (घ) मेरा नाम और पिता का नाम ऊपर हिन्दी देवनागरी में सही रूप से लिखा गया है।

तारीख :- 6-2-85 ह० - रामाधार सिंह

अभ्यर्थी का ह०

The endorsement and rejection have been marked made by the returning officer on its back in the following terms:-

प्रस्ताव का क्रमांक गलत होने से अस्वीकृत।

8.A The nomination papers (Exts 1/1 & 1/2) filed by Gopal Singh read as follows :-

2-52

5-2-85 नाम निर्देशन पत्र

बिहार विधान सभा के लिए निर्वाचन

मैं, 214- संदेश विधान सभा निर्वाचन- क्षेत्र में विधान सभा के निर्वाचन के लिए अभ्यर्थी के रूप में निम्नलिखित को नाम निर्दिष्ट करता हूँ -

अभ्यर्थी का नाम गोपाल सिंह , पिता का नाम हीरा सिंह उनका डाक पता ग्राम-पो॰ - पिपनियाँ, जिला - भोजपुर उनका नाम 214-संदेश विधान सभा निर्वाचन-क्षेत्र को निर्वाचक नामावली के भागसंख्या-40 में क्रम संख्या 25 पर प्रविष्ट है।

मेरा नाम श्री कांत तिवारी है और वह 214- संदेश विधान सभा - क्षेत्र को निर्वाचक नामावली के भाग संख्या -40 में क्रम संख्या 511 पर प्रविष्ट है।

तारीख :- 5-2-1985 श्री कांत तिवारी

(प्रस्थापक के हस्ताक्षर)

मै उपपरिवर्णित अभ्यर्थी इस नाम निर्देशन के लिए अपनी अनुमति लेता हूँ और एतद् द्वारा घोषणा करता हूँ :-

(क) मैंने- 52 वर्ष की आयु पूरी कर ली है,

(ख) मै इस निर्वाचन में निर्दलीय पार्टी द्वारा खड़ा किया गया हूँ,

(ग) मैंने जो प्रतीक चुने है ये अधिमान क्रम में

(1) घुड़सवार (2) रेल इंजन और (3) हाथी है।

(घ) मेरा नाम और मेरा पिता का नाम ऊपर हिन्दी (देवनागरी) (माता का नाम) में सही रूप से लिखा गया है,

तारीख :- 5-2-1985 ह०/- गोपाल सिंह

(अभ्यर्थी के हस्ताक्षर)

The endorsement and the rejection made by the returning

officer are on the same terms, as in the case of Ramadhar Singh

9 Ramadhar Singh (P.W-1), who is one of the candidates whose nomination paper was rejected, has stated that he was a voter of Barhara Assembly Constituency. He has further stated that after receiving his nomination paper for the Sandesh Assembly Constituency the Returning Officer had checked it with reference to the certified copy of the electoral roll of Barhara Assembly Constituency furnished by him and had also seen the name of his proposer in the electrol roll of Sandesh Assembly Constituncy and after checking the same he had asked him to take oath which he did in his presence. He has further stated that he and his proposer were present even at the time of scrutiny. At that time he claimed to have shown the electoral roll of village Dalalganj to which village this proposer Ramcheya Singh belonged , but the Returning Officer told him that the serial number mentioned in his nomination paper was wrong. His evidence, however, gives an impression that he was interested in contesting the election from Barhara Assembly Constituency where from he actually contested the election. He has admitted that he did not make any representation nor filed a petition when his nomination paper for Sandesh Assembly Constituency was rejected. Munni Singh (p.w.4) has supported him to the extent that the Assistant Returning Officer,namely, Sri Ashok Sarkar, had seen the electoral roll when Ramadhar Singh had filed his nomination paper after seeing which he asked him to take oath.He has, however, admitted that he had contested the assembly election of 1965 from Piro Assembly Constituency and had nothing to do with Sandesh Assembly Constituency.

10. Umeshwar Prasad(p.w.5) has also tried to support Ramadhar Singh. His evidence is that he had also filed

nomination for Sandesh Assembly Constituency and had seen Ramadhar Singh filing his nomination paper with reference to the electoral roll. He has also claimed to be present at the time of scrutiny. He has stated that nobody objected to the candidature of any candidate, by the Returning Officer rejected the nomination paper of Gopal Singh and Ramadhar Singh without giving any opportunity to them for rectification of the error in the nomination paper. His evidence is, however, not inspiring, as he could not say as to how many nomination papers out of those filed for Sandesh Assembly Constituency were rejected.

11. Srikant Tiwary (P.w.2) is the proposer of Gopal Singh. He has stated that after receiving the nomination paper the Returning Officer had checked the nomination paper with reference to the electoral roll. He has further stated that he was also present at the time of scrutiny of the nomination papers. His testimony in this regard is that nobody had objected to the nomination papers filed by Gopal Singh, but the Returning Officer rejected both of his nomination papers. He has, however, admitted that on query the Returning Officer had told that there were defects in nomination papers. His statements made in paragraph nos. 8 and 9 of his deposition, however, show his ignorance about the scrutiny of the nomination paper and in this background it is difficult to place implicit reliance on his deposition.

12. Dharichhan Tiwary (P.w.6) has claimed to have filed his nomination papers for contesting the Piro Assembly Constituency seat in 1985. It was, however, suggested to him on behalf of the respondent that he had not filed any nomination paper at all. He has deposed regarding the filing of nomination

papers by Gopal Singh. He has stated that the nomination paper of Gopal Singh were checked by the Returning Officer at the time of presentation with reference to the electoral roll and the officer did not ask him to remove any defect. His evidence however is not inspiring as he has given only evasive answer in cross-examination.

13 Sidh Nath Rai (P.w.3) is the election petitioner himself. He has stated that Ramadhar Singh had filed his nomination paper in his presence and the returning Officer after checking the same had asked him to take oath, he has further stated that he was present at the time of scrutiny of the nomination papers and nobody had objected to any nomination paper filed in respect of sandesh Assembly Constituency. He has gone still further and has stated that the Returning Officer did not put any question to any candidate or proposer before announcing his decision to reject the nomination papers of Ramadhar Singh and Gopal Singh. He has admitted that the total number of votes in the Sandesh Assembly Constituency was over1,38,000 and the electoral roll was split up into different parts and every part started with serial no.1. He has also stated that altogether 27 candidates had filed nomination papers for Sandesh Assembly Constituency.

14 Out of four witnesses examined by the respondent, Basudeo Roy (R.W.1) is the Returning Officer of the Constituency in question and as such he is the most importanct witness in the case. His evidence is that he was not present when the nomination papers were presented and it was the duty of the election supervisor to examine the nomination papers when they were presented. The candidates used to take oath before the Assistant Returning Officer. The scrutiny of the

nomination papers, was, however, done by him. He has stated that he was the Returning Officer of six Assembly Constituencies and the scrutiny of the nomination papers of all these assembly constituencies were done on the same day. There were a large number of candidates ranging from 14 to 29 in respect of all the Constituencies. His evidence is that nomination papers were taken up for scrutiny Constituency-wise and all the nomination papers of the candidates were scrutinised candidate-wise. The name of the candidate was called out when his nomination paper was taken up for scrunity and he used to check up serial number etc. of the proposers as well as the candidates with reference to the electoral roll. When he could not get the name of the proposers Ramadhar Singh and Gopal Singh in the electoral roll at the serial number in the both Part mentioned in their nomination paper, he announced that their nomination papers were rejected for the said defect. Nobody had objected or made any representation with regard to the order pronounced by him. He has further stated that he had made an endorsement about the rejection on the back of the nomination papers and had also noted this fact in the order sheet. He has emphatically stated. That neither of these two candidates nor their proposers had shown any electoral roll to him at that time. Of course he has admitted that he did not mention in his ordersheet that the name of the candidate was called out when scrutiny of his nomination papers was taken up, but this was the practice followed by him.

16. The Returning Officer has been fully supported by Nagendra Prasad(R.W.3) who is a practising advocate at Arrah and claims to be present at the time of scrutiny of the nomination papers for Sandesh Assembly Constituency, as he had to attend

the same in his professional capacity on behalf of his client Ambika Singh who had filed nomination paper for Barhara Assembly Constituency and whose nomination papers were also being scrutinised on that day. He has stated that names of the candidates were called out when the scrutiny of their nomination papers were being taken up and in fact the name of Ramadhar Singh was called on when his nomination paper was to be scrutinised . He has stated that the Returning Officer had pointed out the defect in his nomination paper, but still Ramadhar Singh Kept mum. He has emphatically denied that Ramadhar Singh had shown voter's list to the Returning Officer. He has also stated that Gopal Singh had also kept mum in the same way as Remadhar Singh when the returning officer had pointed out the defect in his nomination papers and it was in this background that the nomination papers of Ramadhar Singh and Gopal Singh were rejected by the Returning Officer.

16. Indeed Gopal Singh (R.W.2) has not disputed the evidence given by the Returning Officer and in fact he supported the case of the respondent. He has clearly stated that the Assistant Returning Officer who had received his nomination papers did not verify the same with reference to the electoral roll. Indeed he admitted that he had filed his nomination papers at the request of others. Then he has further admitted that he was present when the nomination papers were being scrutinised and proposers were not present at that time. He has admitted that his name was called out when his nomination was taken up for scrutiny and he did not make any protest when the Returning Officer told him that his nomination paper were defective. He has further stated that Ramadhar Singh did not make any protest when his nomination paper was rejected. He has also supported the Returning Officer regarding his claim

that the name of the candidate was being called out when his nomination paper were being scrutinised. Of Course an attempt was made on be half of the petitioner to show that he was gained over by the respondent and that he did not support the petitioner as he wanted some consideration for the same. Be that as it may, he was one of candidates himself whose nomination papers were rejected and he seems to have no grievance on that account and in fact he kept mum when the Returning Officer rejected his nomination papers for that defect.

17. Sonadhari(R.W.4)) is the respondent himself who has been declared elected in the election in question. He has stated that the nomination papers filed by Ramadhar Singh and Gopal singh were not verified with reference to the voters list at time of presentation. He has also supported the Returning officer regarding calling out of the names of the candidates whose nomination papers were taken up for scrutiny on the date of scrutiny. He has further stated that the Returning Officer had told Gopal Singh and Ramadhar Singh about the defects in their nomination papers, but they did not make any protest and kept mum.

18. From the above discussion it would appear that in substance the evidence adduced on behalf of the election petitioner consists of two parts, namely ,(i) that the returning officer had verified the names of the proposers of Ramadhar Singh and Gopal Singh at the time of presentation of the nomination papers and it was after verification that he allowed them to take oath and (ii) that nobody had objected to the nomination papers of Ramadhar singh and Gopal Singh on the date of scrutiny and even then the Returning Officer rejected their nomination papers without giving them an opportunity to

speak anything. On the other hand the evidence adduced on behalf of the respondents goes to indicate that the Returning Officer had not made any verification regarding the names of the proposers of these two candidates at the time of presentation of the nomination paper as these nomination papers were filed at late hours and as such the formalities were allowed to be gone through in haste. The evidence adduced on his behalf further goes to show that the Returning officer had pointed out the defects in the nomination papers filed by the two candidates, but nobody objected or made any representation and in the circumstances the Returning Officer rejected their nomination papers.

19 Out of these two candidates, Gopal Singh seems to have absolutely no grievance regarding the rejection of his nomination papers and it is the election petitioner alone who seems to have grievances on that account, obviously to take advantage of the situation. In such circumstances, in face of the evidence of Gopal Singh, it is difficult to accept the case of the petitioner that the nomination papers of Gopal Singh were rejected improperly. In any event, the election petitioner has not adduced sufficient evidence to prove the same.

20. There is not much difference between the evidence adduced on behalf of the election petitioner and that on behalf of the respondent regarding what happened on the date of scrutiny. The difference lies mainly regarding the happenings on the date of presentation of the nomination papers by Ramadhar Singh and Gopal Singh and it is with regard to the question as to whether the Returning Officer had verified the names of the proposer with reference to the electoral roll. In my opinion, the evidence adduced on behalf of the election

petitioner in this regard is far from satisfactory and it is difficult to accept the evidence adduced by him. Undisputedly, the Returning Officer (R.W.1) was not present on the date these two candidates presented their nomination papers and his evidence in this regard has not been challenged on behalf of the election petitioner. In such a situation, the statement of the witnesses examined on behalf of the election petitioner that the Returning officer had verified the names of proposers with reference to the electoral roll cannot be true. It will be significant to point out that none of his witnesses spoken about the Assistant Returning officer, much less about any particular Assistant Returning Officer, Indeed, the evidence of his witnesses is quite vague in this regard and it was difficult for the respondent to disprove the same effectively. The election petitioner has not examined any Assistant Returning Officer or even any person concerned with Election to prove his assertion. Needless to say that the Assistant Returning Officer concerned would have been the most competent witness to speak on the point,but what to speak of examining him, the election petitioner or any of his witness has failed to give out his name or designation and consequently the respondent could not also examine that person to disprove the case of the election petitioner. In any event, it is not possible to accept the evidence of P.w.2 the proposer of Gopal Singh, in face of the evidence of Gopal Singh (R.W.2) himself I have already made my comments regarding the other witnesses examined on behalf of the election petitioner and find myself unable to accept their evidence in this regard. Admittedly, the nomination papers in question were presented only a few minutes before the close of the time fixed for presentation. The nomination papers of Ramadhar Singh was at 2.35P.M and those of Gopal Singh filed at 2.52P.M where

as 3 P.M was the dead line for the presentation thereof this circumstance makes the evidence adduced on behalf of the respondent more probable that the formalities of taking oath etc. were allowed to be gone through for want of time before verifying the names of the proposers and I am inclined to accept the same. I, accordingly, hold that the election petitioner has failed to prove that the name of the proposers of the two candidates in question were verified with reference to the electoral roll before they were allowed to take oath on the date of presentation of the nomination papers.

21. Even if the election petitioner had succeeded in proving the above fact it would not have helped him much, inasmuch the enquiry made by the Returning Officer or Assistant Returning Officer at the time of presentation of the nomination papers is only a peripheral enquiry and is on the date of the scrutiny that the nomination papers come up for more detailed consideration at the hand of the Returning Officer against whom there is no estoppel in regard to the statutory duty of scrutiny. This aspect of the matter has been considered in detail by the Supreme Court in the case of *Brij Mohan Vs. Sat Pa* (1) and their lordships have clarified the legal position in this regard in the following words:-

"********** The candidate and the proposer are always expected to go fully prepared to meet any objection that may be raised by any candidate or even by the Returning Officer himself *suo motu* at the time of the scrutiny and they cannot be expected to go any the least prepared merely because the

(1) (1985) A.I.R. (S.C.) 847.

Returning Officer had received the nomination paper without raising any objection. It is at the time of scrutiny which is done in the presence of all concerned that the nomination papers come up for more detailed consideration at the hands of the Returning Officer against whom there is no estoppel in regard to the statutory duty of scrutiny."

22. Lastly, it was submitted that the Election Commission has itself issued instructions in the Handbook for Returning Officers as to the duties of the Returning Officer at the time of presentation of the nomination papers and the circumstances in which the nomination paper should not be rejected. It was contented that according to these instructions nomination papers should not be rejected in case of an error with regard to the description of electoral roll in the nomination paper . These instructions have been considered by the Supreme Court in the case of Brij Mohan (supra) and in *Lakshmi Charan Sen and others* vs. *Election Commission and others* (1). In the case of *Brij Mohan* (supra) the Supreme Court has observed as follows :-

" The Hand book for Returning Officer, issued by the Election Commission of India, says that the returning Officer and the Specfied returing officer should do as each nomination paper is filed. It says that the returning officer or Specified Assistant Returning Officer is not to hold a formal scrutiny of any nomination paper at this stage. If the candidate is an elector in the constituency concerned the Returning officer or the Specified Assistant Returning Officer should compare the

(1) (1985) A.I.R.(S.C.) 1233

entries in the nomination papers with entries in the electoral roll relating to the serial number and the name of the candidate and the proposer. If he comes from any other constituency, the officer should compare the entries in the nomination paper with the entries relating to the candidates's name in the electoral roll of that constituency or of the relevant part thereof or a certified copy of such entry. The candidate is required by law to produce before the officer such electoral roll or relevant part thereof or a certified copy of the relevant entries thereof as per section 33(5) of the Act. Legally the responsibility for producing documentary evidence of registration as elector in a different constituency rests entirely on the candidate. The instruction reiterates what is contained in the proviso to S. 33(4) of the Act and further states that the point which the Returning Officer or Specified Assistant Returning Officer are required by S.33(4) to be disposed of should be invariably disposed of at the time of the receipt of the nomination paper and that it will be improper for the Officer at the time of scrutiny to reject the nomination paper for defects which could have been cured at the earlier stage of presentation of the nomination paper. It was conceded by Mr. Kacker learned Senior Advocate appearing for the respondent, that the enquiry at the stage of receipt of nomination paper is what he called a peripheral one and that no legal consequence from the omission on the part of the Returning Officer or Specified Assistant Returning Officer to carry out his responsibility at the stage of receipt of the nomination paper.

23. In any event, the instructions issued by the Election Commission in the Handbook are not statutory in character and have no binding effect in law. Indeed, they are mere instructions for the smooth performance of duties by the Returning Officer and no election can be set aside merely for breach of these

instructions. It would be worthwhile to quote the words of the Supreme Court in this connection in the case of *Lakshmi Charan Sen* (supra):-

"There is no provision in either of these Acts which would justify the proposition that the directions given by the Election Commission have the force of law."

Finally the Hon'ble Court concluded that :

"We are of the opinion that the directions issued by the Election Commission, though binding upon the Chief Electoral Officer cannot be treated as if they are law, the violation of which could result in the invalidation of the election either generally or specifically in the case of an individual."

24. So, the real question which arises for determination in this case is as to whether the errors found in the nomination papers of the two candidates were substantial and vital or were mere technical and clerical. If they were merely technical or clerical in nature, the nomination papers could not have been rejected by the Returning Officer.

25. As said above, it is the admitted position that in all the three nomination papers of these two candidates there have been errors with regard to the Booth/part number of the electoral roll. The name of Kamcheya Singh, the proper og Ramadhar Singh appears in booth/part no.122 of the electoral roll, but the Booth/part number mentioned in the nomination paper was 36. Similarly in the nomination paper of Gopal Singh in which P.W. 2 Srikant Tiwary figured as proposer, the Booth/ Part number mentioned was 40 but his name really appeared in Booth/Part no. 39. Same mistake has been committed in the nomination paper of Gopal Singh in which Chandra Kant Tiwari

(sic). It is the undisputed position that the name of persons other than these proposers appear at serial number and the Booth/ Part number mentioned in respect of their proposers in their respective nomination paper. It may be pointed out here that the father's name or any particular with regard to the address of the proposers has not been mentioned in any of these nomination papers, obviously because there is no column meant for these particulars therein. It is the admitted position that there were about 1,38,000 voters in the Sandesh Assembly Constituency and the electoral roll thereof was divided in more than 122 parts. It is also the admitted position that R.W.1 was the returning officer of six Constituencies including Sandesh Assembly Constituency and he had to do scrutiny work of all the nomination papers received in respect of the six constituencies on one and the same day i.e. on 7-1-1985. The number of candidates for these Constituencies ranged from 14 to 29. In Sandesh Assembly Constituency alone there were 27 candidates. Thus it is obvious that a number of nomination papers had to be scrutinised by the Returning Officer on that date, as some of the candidates had filed more than one nomination paper and all these nomination papers were to be scrutinised within the limited time at the disposal of the Returning Officer.

26. Now, it has to be seen whether the errors in rest of Booth/Part number of the electrol roll, as found in the three nomination papers filed by the two candidates in question, were substantial or mere clerical in circumstances of the case. The submission of Mr. S.N.P. Sharma who appeared on behalf of the election petitioner, was that it was a mere clerical or technical error which should have been ignored or at least rectified at the time of scrutiny. In support of this submission he

has placed reliance on the case of *Karnail Singh* Vs. *Election Tribunal, Hissar, others* (1) which is a decision of five judges Bench of the Supreme Court. This decision, however, is not a decision on the point which arises for decision in this case as it appears from the judgment, which is a very short one that the only defect pointed out in the case was that the name of subdivision was not stated therein. It is also apparent from the judgment that from the evidence it was clear that there was no difficulty in identifying the candidates as the candidate himself pointed out to the Returning Officer the entry of his name in the electoral roll. It was under such circumstances that the defect was held to be technical and unsubstantial in character. In the present case , however it is the undisputed position that nobody had pointed out the correct Booth/Part number of the electoral roll to Returning Officer at the time of scrutiny indeed the evidence shows that no body made any protest or even spoke anything when the Returning Officer rejected the nomination papers on account of the said defect.

27. In the next place reliance was placed on behalf of the election petitioner on the decisions of the Supreme Court in the case of *Rangilal Choudhary* v. *Sahu Sao* (2) *Hira Singh Pal* vs. *Madan Lal* (3) *Ram Awadesh Singh* v. *Sumitra Devi* (4) and *Viveka Nand Giri* v. *Nawal Kishore Sahi* (5).

28. In the first case of *Rangilal Choudhary* (Supra) which is a decision of four judges Bench the error was of a different

(1) 10 E.L.R. 189
(2) (1962) A.I.R. (S.C.) 1248
(3) (1968) A.I.R. (S.C.) 1149
(4) (1972) A.I.R. (S.C.) 580
(5) (1984) A.I.R. (S.C.) 856

type. The only mistake in the nomination paper was that the name of constituency was not mentioned, but it was found that this mistake was due to Hindi form not conforming with the prescribed from and it was in this background that the mistake was held to be not of substantial character. This case evidently cannot help the election petitioner in the present case as the defect herein is of a different type altogether.

29. So far the other three cases relied on by the learned counsel for the election petitioner are concerned, they need not be considered here in detail as they have been considered and distinguished at length by their lordships of the Supreme Court in the case of *Brij Mohan* (Supra). After noticing these decisions their lordships of the Supreme Court in the case of *Brij Mohan* (Supra) held that the mistake in respsect of the Booth/Part number of the voters list is a substantial defect and is cannot be described as clerical and technical. Hon'ble Mr. Justice Varadarajan, Who delivered the judgment on behalf of the Bench has explained the circumstances under which such defect would be treated as substantial and in which circumstance it would be treated as non substantial in the following words:

"....It is not possible to say generally and in the abstract that all errors in regard to electoral roll numbers of the candidate and the proposer in the electoral rolls or nomination papers do not constitute defects of a substantial character. They would not be defects of a substantial character only if at the time of scrutiny the Returning Officer either by himself with the material placed before him during the scrutiny or with the assistance of the candidate or his proposer or any other person is able to find out the correct serial number of the candidate and the proposer by

reference to the correct part number of the electoral roll. If that is not the case he would be committing a grave error by accepting the nomination paper without verifying whether the candidate is a voter in that or any other constituency of the State and whether the proposer is a voter in that constituency."

30. This decision has been followed by three judges Bench of the Supreme Court in the case of *Lila Krishna* vs. *Mani Ram Godara and others* (1) it would be worthwhile to quote the relevant extract of the observations made in this decision in this regard :

"....If this had been pointed out and on summary enquiry the Returning officer was satisfied that it was mistake clerical in nature and the identity of Brij Bhushan was not in dispute, there would have been end of the matter. If the correlation has not been made and the Returning Officer has no assistance to fix up the identification it cannot be said to be a defect not of substantial character. We reiterate that it could not be a statutory obligation of the Returning Officer to scrutinise the electoral roll for finding out the identify of the proposer when the serial number turns out to be wrong. But it interested and competent point out to the returning Officer that it is a mistake, it would certainly be his obligation to look into the matter to find out whether the mistake is inconsequential and has therefore either to be permitted to be corrected orto be overlooked."

It has further been observed in paragraph no. 16 of the judgment as follows :-

"As a result of scrutiny, nomination papers are either

(1) (1985) A.I.R. (S.C.) 1073

accepted or rejected. Once a nomination paper is rejected the candidate loses his opportunity to contest and is kept out from the electoral fray. Every genuine candidate is expected to be very much interested in ensuring clearance of his nomination paper at the stage of scrutiny. It is indeed surprising that before scrutiny was done and the nomination papers were accepted by the Returning officer, the two candidates and people interested in them went away from the place of scrutiny and did not remain available to the Returning Officer. In the circumstances, if the nomination papers have been rejected for mistakes in the nomination papers it is the candidates them selves who have to thank their lot and no mistake can be found with the Returning Officer. We may not be understood to say that the mistake of the type of properly clarified would not be unsubstantial in character. But if the Returning Officer is not in a position to correlate and identify the proposer, the mistake would indeed be not one which can be covered by sub.s. (4) of s36 of the Act."

31. In the present case also the candidate as well as their proposers did not speak anything when the Returning Officer pointed out that the nomination papers were being rejected on account of said defect. What to speak of explaining the position or showing the correct part and serial number in the electoral roll, the candidates as well as their proposers kept completely mum and as such the Returning Officer had got no assistance in locating the correct part number of the proposers.

32. It was however contended by Mr. Sharma, learned counsel for the election petitioner that it was the duty of the Returning Officer to see the electoral roll for himself and locate

the correct Part number and serial number of the proposers. This submission has only to be noticed for being rejected, as their Lordships of the Supreme Court have dealt with this point in detail in the aforesaid case of Lila Krishna (supra) and observed as follows:-

" To cast the obligation of verifying the entire electoral roll of a particular part is actually requiring the Returning Officer to do almost an impossible feat. It may not be so if there be a few candidates and it be a case of a by-election but when general election takes place and every Returning Officer is supposed to handle about seven or eight Assembly Constituencies and there may be instances of even 300 candidates contesting from one seat as it happened in the 1985 elections in the Belgaum Constituency of Karnataka State, the Returning Officer would find it physically impossible to grapple with such a situation. The election schedule is a very tight one. Under the law the day following the last day fixed for receipt of nomination papers is the date of scrutiny and soon thereafter follows the date fixed for withdrawal if nomination papers are not scrutenised with due haste and promptness the election schedule may not be operative in the strict manner and distractions are bound to follow".

It has further been observed that it should not be a statutory obligation of the Returning Officer to scrutinise the electoral roll for finding out the identity of the proposer when the serial number turns out to be wrong. The observation of the Court in the case of Lila Krishan (supra) in paragraph no. 13 of the judgment which is quoted below is also relevant in this

connection:-

"indisputably the insistance on disclosure of the serial number in the prescribed column against the proposer is for the purpose of identifying the proposer and ascertaining that he is competent to propose. The scope of scrutiny is obviously to verify the contents of the nomination paper with a view to ascertaining whether the form is in order and what is required to be complied with by the election law has been duly complied with. This Court has repeatedly held that election proceedings are strict in nature and what is required to be performed in a particular manner has to be done as required and substantial compliance has ordinarily no place while dealing with the Act or the Rules made thereunder. That is why an exception has been made by inserting sub-s (4) of s 36 of the Act"

33. Thus I find that the election petitioner has failed to prove that the nomination papers of Ramadhar Singh and Gopal Singh were illegally rejected and issue No. 2 is, accordingly, answered in negative.

34. *Issue No. 1* : No formal defect in the election petition was pointed out and as such issue No. 1 is answered in the affirmative.

35. *Issue No. 3* : In view of the findings arrived at on Issue No. 2 the election petition has got to be dismissed and is, accordingly, dismissed with cost. Hearing fee is assessed at Rs. 2,000/--(two thousand).

R.D. *Petition dismissed.*

CIVIL WRIT JURISDICTION

Before S.B. Sinha, J. *

1987

March, 26

Kushnu Sinku. **

v.

The State of Bihar & 42 others.

Wilkinsons's Rules — Rule 20 —— Provisions of —— all the Panches not nominated by the Agent, i.e. the Deputy Commissioner —— award given by Panches and the decree passed in pursuant thereto, whether without jurisdiction.

Where in a suit was instituted in Kolhan area to which Wilkinson's Rules are applicable and Deputy Commissioner i.e. the Agent, proceeded to dispose of the matter in terms of Rule 20 of the Wilkinson's Rules by appointing Panches but actually Panches were got nominated by the two parties to the suit and the third Panch was nominated by the Deputy Commissioner himself where upon the Panches made award:

Held, that in view of the fact that all the three Panches were not nominated by the agent, i.e., the Deputy Commissioner in accordance with Rule 20 of Wilkinsons Rules, entire proceeding became vitiated in law and award made by the panches was wholly without jurisdiction and as such the decree passed pursuant thereto was set aside.

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* Sitting at Ranchi

** C.W.J.C. No. 192 of 1980(R). In the matter of an application under articles 226 and 227 of the Constitution of India.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are set out in the judgement of S.B.Sinha, J.

Mr. N.K. Prasad and *Mr. Suresh Prasad*, for the petitioner.

Mr. S.K. Chattopadhaya, G.P.I., Mr. T.K. Das and *S.N. Dai*, for the respondents.

S.B.SINHA, J:- This writ application involves a very interesting question of law relating to interpretation of Rule 20 of the Wilkinson's Rule under which the Governor General's agent and his assistants are authorised at their discretion to refer suits for decision to panches. Rule 20 of the Wilkinsons's Rules read as follows:-

> "..... after the plaints had been filed and defendant's answer received. Either at the sadar Station or any other part of the district where the Agent's on the assistant's cutchery may be at the same time. The panchayat to consist of three or five persons to be selected by the agents or assistants from amongst the persons most conversant with the matter at issue. The persons to compose the panchayat shall not be nominated until the plaintiff defendant and witnesses had been assembled. The plaintiff and defendant shall each be permitted to challenge any member of the panchayat and on giving sufficient reason for the challenge or other person or persons shall be selected to supply his or their place. The plaintiff and the defendant or their Agents shall each be called on. On the Governor General's Agent or his assistant determining to refer a suit to a panchayat and before the members of the Panchayat have been nominated to enter into engagement to abide by the decision of a Panchayat to be nominated by the Governor Generals Agent or his assistant

shall immediately direct a Moharrir to attend the Panchayat whose duty it shall be under the direction of the Panchayat to record their proceedings and award. He shall then direct them to proceed forth with to some convenient place in his cutchery or adjoining it to investigate the matter at issue when the pleadings shall have been finished and evidence taken the Panchayat shall direct the (moharrir) the parties to retire consult and decide on their award and when they have come to decision they shall recall the moharrir to record the award, which award having been duly attested with their signature they shall deliver to the Court appointing it by whom a decree in conformity therewith shall be passed which shall not be appealable or set aside unless corruption can be proved against the Panchayat or unless the award shall be contrary to the common law of the country or the rules enacted by the Governor General in Council."

2. In this writ application although the vires of the rule was challenged, but Mr. N.K. Prasad, learned counsel appearing on behalf of the petitioner rightly did not press the same in view of various Division Bench decisions of the Court being A.I.R. 1958 Patna page 366 (*Dulichand Khirwal*-vs-*State of Bihar & ors*) and 1970 P.L.J.R page 108 (*Tagdu HO & ors*-vs-*Mohati HO & Ors).*

3. For the purpose of disposal of this writ applicaiton it is not necessary to notice the facts of the case in great details. Suffice it to say that a suit was instituted by the respondent nos. 3 to 23 as against the petitioner. The said suit was decreed, but the learned Commissioner by an order dated 21.6.68 passed in Title Appeal No. 108 of 1963, remitted the matter back to the Court of Deputy Commissioner for rehearing and disposal of the case in accordance with law. The Deputy Commissioner there after proceeded to dispose of the matter by appointing panches in terms of the aforesaid rule. From the reports of the

panches as contained in Annexures 5 and 6 to the writ application, it appears that one of the panches described himself as a lawyer and panch nominated by plaintiff where as ir Annexure-6, the second panch described himself as the panch nominated by the defendant.

4. From a perusal of Rule 20 of the Wilkinson's Rule as referred to herein before it would be evident that the Panchayat is to constitute of three or five persons to be selected by Agents or the Assistants i.e. by the Deputy Commissioner or Kolhan Superintendents. By virtue of and under the provision of the aforementioned therein the power to be exercised by the aforementioned authorities in the manner as laid down under rule-20, The authorities mentioned therein namely the Agents or the Assistants are to discharge their duties and functions and exercise their powers only in accordance with the Rules conferred upon them under the provisions of the said rule.

5. By reason of the provision of the said rule, the jurisdiction of the Civil Courts has been taken away but the Court of the Agents or the Assistants is although a substitute for a Civil Court. So far as administration of Civil Justice in Kolhan area is concerned. It cannot be said to here the same power as cenferred upon the Civil Courts. Whereas the Civil Courts are to be guided by the Code of Civil Procedure, the same being not applicable. so far as the Courts of Agents or the Assistants are concerned they are to be guided under the provisions of the said Wilkinson's Rule. The Courts under-the Wilkinson's Rule therefore are to exercise their powers within the four corners of the said rule only.

6. Mr. N.K. Prasad learned counsel appearing on behalf of the petitioner has urged various points in support of the writ petition but laid main stress on the question as to whether it was permissible for the respondent no. 3 get to the panches nominated by the two parties of the suit and nominate the third

panch himself. In terms of the aforementioned rule the panchayat which is to consist of three or five persons as the case may be must be selected by the Agents or the Assistants It is further provided therein that such persons who are to be appointed as panches must be from amongst the persons most conversant with the matter at issue. It is evident that the Agents or the Assistants themselves have to apply their minds as to who should be appointed as the panch being the persons most conversant with the matter at issue. The opinion of the concerned authorities with regard to the question as to whether a particular panch is most conversant with the matter at issue or not would be a matter of his objective satisfaction. No other person far less the parties to the lis can either nominate or appoint their respective panches or for the matter are entitled even to make any suggestions to the authorities in relation thereto. It is obvious that the legislature never intended that the persons to be nominated as panches would be done in the same way as provided and or envisaged under the Arbitration Act, 1940.

7. Upon a literal construction of the statute and also taking into consideratiion the object and spirit of the rules it is evident that the authorities named there in only can exercise the Statutory powers vested with in them with regard to nomination or the panches. The authorities referred to in the Wilkinson's Rule are Statutory authorities and it is obvious that they have no plenary powers like that of the Civil Courts.

8. It is well settled principle of law that a statutory authority must act within the four corners of the statute Reference in the connection may be made to A.I.R 1975. Patna Page 241 (*Ram Bahal Singh* and *other* -vs- *Chhote Narain Singh* and *others*). It is also well settled that where a statutory authority is authorised to exercise a power in a particular mode or in particular manner such power has to be exercised only in that particular mode or manner or not at all. If such a power is exercised by the such

authority in a manner other than laid down under the statute wherefrom he derives his jurisdiction must be held that in such event he could be acting wholly without jurisdiction . Reference in this connection may be made to A.I.R. 1976 S.C. Page 789 (*Hukam Chand Shyam Lal* -Vs- *Union of India and others*) and decision of this Court reported in 1980 B.B.C.J. Page 200 (*Hotel Satkar Pvt. Ltd* vs *Bihar State Electricity Board & ors*). In view of the fact that in the instant case all the three panches were not nominated by the Respondent no.3 it must be held that the entire proceeding become vitiated in law and awards made by panches must be held to be wholly without jurisdiction and , as such the decree passed pursuant thereto must also be held to be without jurisdiction thus and liable to be set aside.

9. In the result the writ petition is allowed the suit is remitted back to Respondent no. 3 Singhbhum, Chaibasa for proceeding in accordance with law. There will be no order as to costs.

R.D. *Application allowed.*

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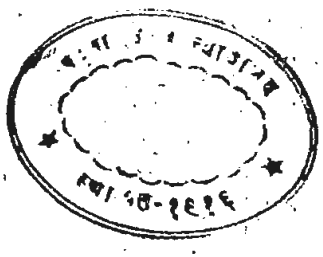
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Assessee --- amount representing Sales Tax not paid by assessee - -- whether to be deemed to be income of the assessee --- entire amount of Rs.3,09,991/= paid by the assessee to its foreign collaborators, whether allowable as revenue expenditure.

Where assessee was following mercantile system of accounting, and the liability to pay had accrued during the assessment year in question but the assessee did not pay Rs.80,688/= representing the sales tax;

Held, that the amount must be deemed to be income of the assessee.

Where the assessee claimed the entire sum of Rs.3,09.991/= paid as royalty to its foreign collaborators to be revenue expenditure but the Income Tax Appellate Tribunal directed that one-third of the payment should be disallowed as representing capital expenditure in hands of the assessee and the balance should be allowed as Revenue expenditure;

Held, that the Income Tax Appellate Tribunal was not justified in bifurcating the expenditure of royalties into two-third revenue expenditure and one-third capital expenditure. The entire sum of Rs.3,09,991/= is allowable as revenue expenditure.

M/s. Tata Robins Frazer Ltd, Jameshedpur V. *The Commissioner of Income Tax*, Bihar,

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Patna (1987) I.L.R. 66 Pat.' 716.

Award by the All India Industrial Tribunal (Bank Disputes) popularly known as Sastry Award being followed by the Bank --- non-application thereof in petitioners' case --- whether amounts to illegal discrimination --- Sastry Award sub-para 3, para 521, --- period of one year in the rule whether reasonable and mandatory --- two parallel proceedings one by a departmental enquiry and another a criminal prosecution, whether can proceed --- departmental proceeding after the period of one year was over and threat of prosecution had disappeared, whether void-- consideration of provisions of clause (c) of paragraph 521 (10) of the Sastry Award by the Labour Court, propriety of.

Held, On an objection raised as to the maintainability of the writ petition on the ground that the Sastry Award (Award of the All India Industrial Tribunal (Bank Disputes) Bombay given in connection with certain industrial disputes), has no statutory force, that, if the Sastry Award is being followed by the respondent Bank, and it is not suggested otherwise, it cannot arbitrarily refuse to do so in the petitioner's case for that would amount to illegal discrimination and as such the writ petition cannot be rejected as not maintainable.

Held, further, that the object for

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mentioning the period of one year in sub-paragraph (3) of paragraph 521 of the Sastry Award after which it is said that the management may deal with an employee departmentally appears to protect an employee from two parallel proceedings at the same time, one by a departmental enquiry and another a criminal prosecution. In many a case, an-employee may in such circumstances be seriously prejudiced in his defence in the criminal case.

The rule, therefore, appears to be reasonable and so while threat of a criminal case is pending, if an employee is called upon to file his show casue in a departmental proceeding, he may justifiably refuse to do so. If the management, in such circumstances, insists to expeditiously close the enquiry, the proceeding may have to be struck down as illegal, but where an employee has no reason to apprahend prejudice or justification for non-co-operating in the departmental proceeding, the position will be different. The relevant portion of paragraph 521 (3) of Sastry Award is not mandatory in nature so as to vitiate the departmental proceeding by itself, even in a case where the servant is not prejudiced by its violation. In the instant case, therefore, after taking part in the enquiry at a point of time when the threat of any criminal prosecution had completely disappeared and the period of one year was over the petitioner is not entitled to challenge the entire proceeding

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in the departmental enquiry as void.

Held, also that the Labour Court was entitled to examine the question of proper punishment in view of the provisions of sub-paragraph 10 (c) of paragraph 521 of Sastry Award.

Sachida Nand Tiwary v. The Chairman. State Bank of India and ors.(1987) I.L.R.66, Pat. 794

Cadre of Sub Deputy Collectors amalgamated with that of Deputy Collectors --- inter Se seniority of the mergees and direct recruits --- direct recruits, whether to be treated as senior --- date of joining the service, whether immaterial for the purpose of inter se seniority --- Rule contained in Notification dated 26-8-1972, rule 3 (vii) --- rule, how far applies to direct recruits --- right of promotion to seniormost officers in Sub- Deputy Collectors' cadre, whether denied --- decision to appoint some direct recruits taken earlier but appointment letters issued later due to certain formalities to be completed --- this technical objection when can be allowed to prevail.

Where the petitioners were initially appointed as Sub Deputy Collectors and in pursuance of a decision amalgamating the cadre of Sub Deputy Collectors with that of Deputy Collectors with effect from 1-4-1974 they became Deputy Collectors and the

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respondents were appointed as Deputy Collectors as direct recruits on 12-3-1974 and the petitioners claimed seniority over the direct recruits.

Held, that the petitioners must be treated to have been substantively appointed with effect from 1-4-1974. This, however cannot entitle the petitioners to their claim of seniority over the direct appointees, unless the latter are shown to have been appointed subsequently. The services of the direct recruits were found satisfactory and they had fulfilled all the conditions for confirmation and accordingly were actually confirmed later. They were, therefore, substantively appointed on and with effect from the 12th of March, 1974, i.e., even before a decision to amalgamate the two cadres was taken by the government and the direct recruits must be treated as senior.

Held, further, that the actual dates of joining the service are immaterial for the purpose of deciding the inte se seniority of the margees and direct recruits.

Even Rule 3 (vii) of the 1972 Rules mentions continuous officiation also as the basis for deciding seniority and does not confine itself to substantive appointment as sole criterion. The direct recruits shall also succeed under the test laid down by the rule with reference to continuous officiation.

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Held, also, that it cannot be said that the petitioners, who were seniormost officers in the Sub Deputy Collectors cadre were being illegally denied their legal right of promotion retrospectively with effect from 1972 and 1973. The possibility of promotion of some of the mergees before the relevant dates, could not have been ruled out and was rightly taken note of while framing the Resolution amalgamating the two cadres in clause (c) of the said Resolution.

On an objection of the petitioners with regard to some direct recruits that the formal appointment letters could not be issued earlier due to certain formalities which were not completed by the candidates themselves;

Held, that the appointment of these direct recruits and that of the other direct recruits were part of one transaction and these direct recruits were placed higher in merit than others, the technical objection should not be allowed to prevail as that will bring about serious anomaly. Besides, there is no justice to be pleaded by the petitioners against these direct recruits as the decision to appoint them was taken earlier and the appointment letters were awaiting compliance of technical formalities. In fact the appointment letters could have been issued on the 12th March, 1974, itself to take effect subject to the fulfilment of the formalities. In substance, that is the position although the appointment letters were issued later. This

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Court, therefore shall not exercise its discretionary jurisdiction in view of the circumstances of the case.

Anil Kumar Sinha and others.v. *The State of Bihar and others* (1987) I.L.R. 66, Pat. 773

Code of Criminal Procedure, 1973 - [- section 125 --- maintenance --- Executive Magistrate, whether can pass order of maintenance --- Chapter IX of the Code --- Scheme of.

An order of maintenance can be passed only by a competent Judicial Magistrate of the 1st class and not by any Executive Magistrate. The scheme as provided in Chapter IX can be enquired into and relief granted only by the Judicial Magistrate of the 1st Class and in the instant case respondent no.3, the Executive Magistrate, Desertion Coll, being not competent, had no lawful and legal power to grant such maintenance.

Held, therefore, that the order passed by the Executive Magistrate, respondent no.3 granting maintenance is wholly without Jurisdiction and void ab initio.

Jagdish Mahto v.*The State of Bihar and others* (1987)I.L.R.66.Pat. 812

Constitution-[- 1- Article 12,14,226 --- Article 14 --- principle of --- whether violated

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--- dismissal of writ- petitioner without holding domestic enquiry, whether violative of the principles of natural justice --- Article 226 --- whether justiciable under --- Article 12 -- M/S instrumentation Ltd, whether an authority within the meaning of Article 12 of the Constitution.

Where the termination of services of the writ-petitioner was for a proved misconduct by rejecting the show cause filed by him, without holding an enquiry into the explanation furnished by him;

Held, that the dismissal of the writ-petitioner from service on alleged misconduct of theft, breach of trust and faith without holding any domestic enquiry but treating the explanation given in the show cause an admission of guilt is arbitrary, capricious and in complete breach of the principles of natural justice and thus violative of Article 14 of the Constitution and is justiciable under Article 226 of the Constitution.

After having realised the price of the scrap wood, imposition of penalty by way of deduction Rs.400/= being the cost of 10 quintals of excess wood and realisation of Rs.100/= for using the truck from the dues of the writ-petitioner, incorporated in order of dismissal, appear to be unreasonable and vindictive.

Held, further, that disengagement brought about by the order of termination of service

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of writ-petitioner being ip-so facto void and non est, it would be deemed that the writ-petitioner continued in service.

Held, also, on a proper assessment of facts in the light of relevent Articles of Association of the company, that it is an authority within the meaning of Article 12 of the Constitution and is, therefore, an intrumentality and agency of the Government

Raj Narayan Singh v. *Presiding officer, Labour Court, Bokaro Steel City and another.* (1987), I.L.R. 66, Pat. 827

-[-2- Article 342 (1) --- Tamarias of Singbhum, whether are Patar-Mundas --- whether they are included in the notification issued by President of India under Article 342 (1) --- inclusion of Tamarias in item no 52 under the heading" backward Class" and in item no.34 under the heading" very backward class" in Annexure-1, --- validity of.

Held, that the Tamarias of Singbhum are Patar-Mundas and they are included in the notification issued by the President of India under Article 342 (1) of the Constitution. Consequently their inclusion in item no.52 under the heading" backward class" and item no.34 under the heading" very backward class" in the decision of State Government contained in Annexure-1 must be struck down.

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*Shyam Sunder Nag and ors.*v. *State of Bihar and ors.* (1987) I.L.R. 66, Pat. 764

Forest (Conservation) Act, 1980 section 2 --- scope and applicability of bar placed on the power of the State Government to make order to dereserve a reserved forest or to order the use of forest land for any non-forest purpose, without prior approval of the Central Government --- nature of --- bar imposed under section 2, whether applicable to cases of renewal of lease.

From the language of section 2 it appears that the bar placed on the power of the State Government to make order to dereserve a reserved forest or to order the use of forest land for any non- forest purpose without prior approval of the Central Government is imperative and mandatory in nature and as such before granting a lease covering any reserved forest or any forest land for use of non-forest purpose which will include mining operation, prior approval of the Central Government is a must. The bar imposed under section 2 shall apply even to cases of renewal of leases. If any part of reserved forest or forest land was part of any lease hold and such reserved forest had been broken or forest had been cleared on the basis of that lease granted prior to coming into force of the Act, no renewal of that lease or fresh grant in respect of that area can be given by the State Government without prior approval of the

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Central Government, because any such renewal or a fresh grant of such area is bound to further deforestation and cannot help reclaiming back the areas where deforestations have taken place.

Held, therefore, that in instant case the lease hold of the petitioner shall be deemed to be valid only in respect of such area which is out side the reserved forest . The grant covering the reserved forest and forest without prior approval of the Central Government shall be deemed to be void and inoperative.

Upendra Jha v. *The State of Bihar and others (1987)I.L.R. 66 Pat.* 817

Industrial Disputes Act, 1947 - [- section 10 (1) scope and applicability of --- refusal to make reference under section 10 (1) dispute whether stands resolved if it at all existed --- reference on a subsequent representation --- validity of --- allegation of misconduct against several workmen --- action taken against one only, whether discriminatory.

Any refusal to make a reference does not mean that the dispute, if it at all existed, stands resolved. If the dispute in the opinion of the authority concerned existed, any reference on a subsequent representation must be valid. The second reference could be made even in the absence of fresh materials. In the instant case the reference was made on the

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basis of a report submitted by the agency of the Government itself which had not been earlier considered. That report was not available earlier and was sent later that is after the Government had refused to make the reference.

Held That, in the instant case it was neither necessary nor obligatory on the part of the Government to give a notice to the management and hear them before making the reference and accordingly the findings arrived by the Labour Court is perfectly justified.

Held, further, that where more than one workmen misconducted but only one of them was proceeded against by the management the Labour Court was completely justified that the proceeding against the workman proceeded against was an action of discrimination.

*M/S Champaran Sugar Company Ltd.*v. *The State of Bihar & others* (1987) I.L.R. 66, Pat. 749

Motor Vehicles Act, 1939 - [- section 95 (4) --- scope and applicability of --- vehicle not a motor cab --- Legislature making provision for payment of compensation with specific reference to carrying capacity of vehicle --- amount of compensation to be awarded --- recourse to clause (4) whether to be taken

When the Legislature made provision for payment of compensation to passengers with

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specific reference to carrying capacity of vehicle, recourse cannot be taken to clause (4), if it is not a motor cab or vehicles other than those specified in clauses (1), (2) and (3). In the instant case since it was vehicle registered to carry not more than 30 passengers, the maximum limit of compensation which could have been paid was Rs.50,000/=.

Held, therefore, that, being the position the maximum compensation that could have been paid because of the accident was Rs.50,000/=.

*National Insurance Co.*v. *Shanim Ahmad and ors.* (1987) I.L.R. 66, Pat. 696

Writ Jurisdiction --- exercise of --- rights and obligation of the parties being statutory and not purely contractual --- writ petition, is maintainable --- reasons for rejecting the representation of the petitioner whether must be assigned --- Indian Electricity Act 1910.

Held, that, the supply of energy by the Bihar State Electricity Board to the petitioner is in discharge of its statutory duty and the parties have their respective rights and obligation as provided in the statutes. It, therefore, cannot be said that the petitioner wanted to enforce a contract qua-contract and in view of the provision of clause VI of the schedule to the Indian Electricity Act, it must be held that the duties and obligation of the

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parties being statutory, the petitioner is entitled to seek relief in writ jurisdiction.

Held, further, that it was incumbent on respondent no.2. to give reasons in his order rejecting the representation of the petitioner so that the court can see whether respondent no.2 acted within the limits of law. Once the reasons are assigned, the court may see whether any extraneous or irrelevant matters were taken into consideration and whether relevant matters were left out. Administrative agencies while disposing of dispute is required to give reasons to see whether there is arbitrary exercise of the power.

M/S Carbon and Graphite Products, Ranchi v. *Bihar State Electricity Board, Vidyut Bhawan, Patna and ors.* (1987) I.L.R. 66, Pat. 702

APPELLATE CIVIL

Before Satyeshwar Roy and Abhiram Singh, JJ.*

1985

March, 13.

*National Insurance Co.***

v.

Shanim Ahmad and ors.

Motor Vehicles Act, 1939 (Act IV of 1939), section 95 (4) --- scope and applicability of --- vehicle not a motor cab --- Legislature making provision for payment of compensation with specific reference to carrying capacity of vehicle --- amount of compensation to be awarded --- recourse to clause (4) whether to be taken.

When the Legislature made provision for payment of compensation to passengers with specific reference to carrying capacity of vehicle, recourse cannot be taken to clause (4), if it is not a motor cab or vehicles

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*Sitting at Ranchi.

**Appeal from Original Decree No.71 of 1979(R).

Against the Judgment and decree dated 31.5.79 and 22.6.79 respectively passed by Sri Anand Pd.Sinha, Judicial Commissioner, Ranchi and Motor Accident Claims Tribunal, Ranchi.

other than those specified in clauses (1), (2) and (3). In the instant case since it was vehicle registered to carry not more than 30 passengers, the maximum limit of compensation which could have been paid was Rs.50,000/=.

Held, therefore, that, being the position the maximum compensation that could have been paid because of the accident was Rs.50,000/=.

Appeal by the Insurance Company.

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

M/s. M.Y.Eqbal and *P.C.Roy* for the appellants

M/s. S.B.Sinha and *S.Anwar Alam* for the respondents

SATYESHWAR ROY & ABHIRAM SINGH JJ., The Insurance Company has challenged the judgment and award of the Motor Vehicles Accident Claims Tribunal which awarded a compansation of Rs.20,000/- to respondent no.1, father of the injured minor boy.

2. Misbahul Haque a boy of about 5-1/2 years old was travelling with his grand father in a bus bearing registration no. B.R.V. 4605 from Lasia to Katra. The bus met with an accident due to the rash and negligent driving by the driver. In the said accident Misbahul Haque was injured and his right hand was fractured. He was admitted in the Rajendra Medical College Hospital where his right hand had to be amputed.

An application for compensation of Rs.50,000/- was filled by his father, respondent no.1. The Tribunal awarded a compensation of Rs.20,000/

3. Mr.Roy, learned counsel appearing on behalf of the appellant, submitted that the maximum liability of the appellant in this case was Rs.5,000/- and the Tribunal, according to him, could not have awarded a compensation of Rs.20,000/- against the Insurance Company. In support of his submission, Mr.Roy relied in section 95 (21) (b) (ii) (4). Of the Motor vehicles Act (the Act).

Mr.Sinha, learned counsel for the respondent no.1, submitted that since it was a vehicle registered to carry not more than 30 passengers, the maximum limit of compensation which could have been paid was Rs.50,000/-. According to him the clause relied upon by Mr.Roy has no application. Mr.Sinha also submitted that the appeal was not maintainable.

4. In order to appreciate the submissions made by the learned counsel for the parties, it is necessary to quote the relevant provision of section 95 of the Act which are as follows:-

"95. ----------

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(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:-

(a) where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle.

(b) Where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of contract of employment,-

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers.-

(1) a limit of fifty thousand rupees in all where the vehicle in registered to carry not more than thirty passengers.

(2) a limit of seventy five thousand rupees in all where the vehicle in registered to carry more than thirty but not more than sixty passengers;

(3) a limit of one lakh rupees in all where the vehicle is registered to carry more than sixty passengers; and

(4) subject to the limits aforesaid, ten thousand rupees for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passenger in any other case; ....."

It will be noticed that specific provision has been made with reference to the goods vehicle and also with regard to some other types of vehicles. For the vehicles registered to carry not more than 30

with regard to some other types of vehicles. For the vehicles registered to carry not more than 30 passengers limit of compensation has been fixed at Rs.50,000/-. In case of vehicles registered to carry more than thirty but less than sixty passengers a limit has been fixed at Rs.75,000/- and vehicles registered to carry more than sixty passengers, a limit has been fixed at Rs.1,00000/-. In clause (4), which has been quoted above, provision has been made for payment of compensation of Rs.10,000/- for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passenger in any other case. According to Mr.Roy, second part of clause (4) will apply in this case as the vehicle in question was not a motor cab. In our opinion there is no substance in this submission. When the Legislature made provision for payment of compensation to passengers with specefic reference to carrying capacity of vehicle, recourse cannot be taken to clause (4) if it is not a motor cab or vehicles other than those specified in clauses (1) (2) and (3). That being the position, we hold that the maximum compensation that could have been paid because of the accident was Rs.50,000/-, the vehicle in question being registered to carry passenger less than thirty.

5. The compensation awarded by the court below was not challenged by Mr.Roy on any other ground.

6. Mr.Sinha urged that the appeal was not maintainable as under section 96(2) of the Act, no provision has been made which will entitle an insurer

to challenge the compensation awarded. In *British India General Insurance Company* vrs. *Itbar Singh* (A.I.R. 1959 S.C. 1331), the Supreme Court held that the insurer cannot take a defence not provided in section 96(2). In view of the same, the appeal is not maintainable.

7. In the result, the appeal is dismissed with cost assessed at Rs.250/-.

By order dated 1.7.81 further proceedings of the certificate case was stayed subject to the condition that in the event the appeal was dismissed, either in whole or in part, the appellant shall pay the amount which it might be found liable to pay with interest at the rate of 12% per annum from the date of award. We are informed that the appellant paid Rs. 5000/- to respondent no.1. In view of the order aforesaid, the appellant shall pay the balance amount of Rs.15,000/- with interest at the rate of 12% per annum from the date of the award.

M.K.C. *Appeal dismissed.*

CIVIL WRIT JURISDICTION

Before Satyeshwar Roy, J.*

1986

January, 21.

*M/s Carbon & Graphite Products, Ranchi.***

v.

Bihar State Electricity Board, Vidyut Bhawan, Patna and ors.

Writ Jurisdiction --- exercise of --- rights and obligation of the parties being statutory and not purely contractual --- writ petition is maintainable --- reasons for rejecting the representation of the petitioner, whether must be assigned --- Indian Electricity Act, 1910 (Central Act IX of 1910).

Held, that, the supply of energy by the Bihar State Electricity Board to the petitioner is in discharge of its statutory duty and the parties have their respective rights and obligation as provided in the statutes. It, therefore, cannot be said that the petitioner wanted to enforce a contract qua-contract and in view of the provision of clause VI of the schedule to the Indian

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**Sitting at Ranchi*

***Civil Writ Jurisdiction Case No.838 of 1985(R). In the matter of an application under Article 226 and 227 of the Constitution of India.

Electricity Act, it must be held that the duties and obligation of the parties being statutory, the petitioner is entitled to seek relief in writ jurisdiction.

M/s Man Industrial Corporation v. *Rajasthan State Electricity Board and others.* (1)-------- relied on.

M/s Radhakrishna Agrawal and others v. *State of Bihar and others.* (2).

K.N.Guruswamy v. State of Mysore (3) --- referred to.

Held, further, that it was incumbent on respondent no.2. to give reasons in his order rejecting the representation of the petitioner so that the court can see whether respondent no.2 acted within the limits of law. Once the reasons are assigned, the court may see whether any extraneous or irrelevant matters were taken into consideration and whether relevant matters were left out. Administrative agencies while disposing of a dispute is required to give reasons to see whether there is arbitrary exercise of the power.

Application by a Consumer of the Bihar State Electricity Board.

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

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(1) (1986) A.I.R. (Raj.) 137.

(2) (1977) A.I.R. (S.C.) 1496.

(3) (1954) A.I.R. (S.C.) 592.

J.

M/s. S.B.Sinha and *P.Shivnath.* for the petitioner

M/s. S.B.Gadodia and *B.Sharan Lal* for the respondents

SATYESHWAR ROY.J., The petitioner, a consumer of the Bihar State Electricity Board, respondent no.1, prayed for quashing annexure 11, letter dated 16.7.1985 by which the petitioner was informed that in view of the fact that respondent no.2 has rejected the claim of the petitioner, the amount which was kept in abeyance together with interest, i.e. Rs.3,18,771.44 up-to May, 1985 was payable by the petitioner. The petitioner was further informed that if that amount was not paid within seven days from the date of issue of the letter, the electric line would be disconnected. The order of respondent no.2 for keeping the dues of the petitioner in abeyance which has been referred in annexure 11 is contained in letter dated 21.11.1983 which is part of annexure 2.

2. The petitioner is a consumer of the Board. In the business premises of the petitioner electric motors of various sizes ranging from 5 H.P. to 25 H.P. are fitted and, therefore, two part tariff meter with graduation from O KVA to 95 KVA with multiplication factor has been installed. The meters have the capacity to read the maximum of 190 KVA only. In the meter KWH and KVAH readings are shown separately and these two readings are used to evaluate the energy consumption and power factor for all practical purpose being taken as O.80 which cannot be more than 1 in any case. Since the year 1979, the meter started recording consumption of more than 190 KVA and

the power factor also recorded more than 1, the petitioner several times brought the matter to the notice of respondent nos. 1 to 3 that the irregular and erratic reading of meter or the wrong recording of the meter reading indicated that either the meter had gone defective or the meter reader had deliberately recorded a wrong reading. On scruitny it was found that the meter was correct and, therefore, the meter reading was incorrect resulting in excessive billing by the Board.

The petitioner filed representation on 22nd October, 1983 for the periods 1978-79 to 1981-82 to respondent no.3 for considering the case and settling its claim. The representation so filed is annexure 1 to the writ petition. Respondent no.3 forwarded the representation with his comment to respondent no.2. The comment of respondent no.3 is contained in annexure 3. Respondent no.2 in his turn by letter dated 21.11.1983 ordered respondent no.3 to inspect the factory premises of the petitioner and submit his report giving all the technical details. Respondent no.2 further ordered that meanwhile the dues of the petitioner would be kept in abeyance and electric line be restored. Respondent no.3 in his turn sent a copy of the letter to respondent no.4 for compliance with regard to the last part of the order of respondent no.2. The order of respondent no.2 given to respondent no.3 is part of annexure 2. The Superintending Engineer inspected the factory premises of the petitioner and submitted his report to respondent no.2 which is annexure 3/A to the writ petition. Respondent no.3 opined that due to the wrong taking of reading of KVAH, the consumer had to pay penalty of low power factor. He recommended that necessary order be passed to regularise the billing of the consumer by adjusting the excessive billing on account of lower power factor.

Respondent no.4 by annexure 8 dated 3.12.1984 also informed respondent no.3 that because of the wrong meter reading by the Assistant Electrical Engineer (respondent no.5) the situation could have arisen. He further informed respondent no.3 that respondent no.5 was being asked to file his show cause. Thereafter annexure 11 was issued. by respondent no.6 by which the petitioner was informed that respondent no.2 has rejected the representation of the petitioner.

3. Counter affidavit has been filed on behalf of the respondents sworn by respondent no.6. It has been stated in the counter affidavit that on a representation filed by the petitioner on 28.4.1980 with regard to the bill for the month of March, 1980, the meter was examined and it was decided that as there could be some mistake in taking the reading a sum of Rupees thirteen thousand and odd was adjusted with the bill of October, 1980. Further representation filed by the petitioner on the ground of excessive billing was examined by the respondent and it was informed that no excess billing was done. By annexure B the petitioner was directed to pay Rs.218261.31, the amount outstanding up-to August, 1983. Inspite of the fact that the earlier representation of the petitioner had been disposed of the petitioner again raised dispute for the period 1978-79 to 1981-82. Respondent no.2 applied his mind to the facts of the fase and on the basis of the report of respondent no.3 and analytical notes of the Deputy Director of Accounts, held that no relief was admissible to the petitioner.

4. An application for amendment of the writ petition was filed by the petitioner on 4.10.1985. In that petition it was stated that at the time of filing of the writ petition the petitioner was not informed

about the exact order passed by respondent no.2 on its representation. The order of respondent no.2 was communicated to the petitioner by the Deputy Director of Accounts by his letter dated 11.7.1985. This was marked as annexure 12/A to the writ petition. The petitioner prayed for quashing annexure 12/A. This writ petition was admitted on 9.10.1985,i.e. after filing of the counter affidavit and the amendment petition.

5. The whole thrust of the submission of the petitioner is that the rejection of the representation of the petitioner by respondent no.2 without assigning any reason cannot be sustained. Respondent no.2 while rejecting the representation of the petitioner held as follows:-

"No relief is admissible and claim of the consumer is rejected. The dues kept in abeyance together with the up-to date dues may be billed for and realised. In view of the crash revenue collection drive and the financial stringency no installment is recommended and grant of installment is left to the Board."

According to the petitioner since it has been fastened with liability under the tariff framed by the Board under sections 46 and 49 of the Electricity (Supply) Act, 1948, it was necessary for respondent no.2 to assign reasons on the basis of which the representation of the petitioner was rejected. It was further contended that in view of the fact that both respondent no.3 and 4 found as fact that the respondent no.6 had wrongly read the meter which resulted in excess billing, respondent no.2 was required to assign reasons, more so, when the report of respondent no.3 as contained in annexures 3 and 3/A stated the grounds on which respondent no.3 was satisfied that the meter

was not correctly read by respondent no.5. On behalf of the respondents it was contanded that as respondent no.2 was not discharging any quashi-judicial function while dealing with the representation of the petitioner, respondent no.2 was not required to assign any reason for rejecting the claim of the petitioner. It was urged on behalf of the respondents that in view of the agreement executed b, the petitioner as contained in annexures C and D under which the petitioner has accepted its liability, the petitioner cannot be allowed to change its position and challenge the decision of respondent no.2.

6. So far the submission made on behalf of the respondents with reference to annexures C and D is concerned it will appear from those two annexures that the petitioner agreed to pay the amount mentioned therein in installment. The dues of the claim of the Board accepted by the petitioner was with regard to fuel surcharge, annual minimum guarantee and energy charge. In both the annexures there is clear stipulation that annexures C and D shall not apply to the dues which were subject matter of dispute pending before respondent no.2. Therefore, this writ petition cannot be thrown out on the ground that the petitioner had executed two agreements accepting its liability.

7. Objection was raised on behalf of the respondents that since the rights and liabilities of the parties are purely contractual and is covered by the

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(1) (1977) A.I.R. (S.C.) 1496

terms of contract; the writ petition was not maintainable. Reliance was placed on *M/s. Radhakrishna Agarwal and others* vrs. *State of Bihar and others* (1) It was contended on behalf of the petitioner that the rights and liabilities flow from the provision of the Indian Electricity Act and Electricity (Supply) Act. The contract, therefore, flows from the statute and if there has been any breach of the same, the petitioner was entitled to the relief. Reliance was placed on *M/s. Man Industrial Corporation* vrs. *Rajasthan State Electricity Board and others* (1) It has been clearly laid down by the Supreme Court in *Radhakrishna Agarwala's case* (supra) relying on *K.N.Guruswamy* vrs. *State of Mysore* (2) that relief could be granted in a case where contract entered into between the persons aggrieved and the State Government is in exercise of the statutory power under certain Act or Rules framed therein and the petitioner alleges breach on the part of the State. According to the petitioner since the Board is claiming the amount in exercise of its power derived under the tariff framed under section 49 of the Electricity (Supply) Act, and as there was statutory contract between the parties in view of the provisions of the Act, it was not a case of enforcement of purely contractual obligation and the petitioner was entitled to claim relief under Article 226 of the Constitution. If, therefore, it is held that the Board was discharging its statutory function and claiming its dues on the basis of the tariff it must be held that the petitioner is entitled to seek

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(1) (1986) A.I.R. (Raj.) 137

(2) (1954) A.I.R. (S.C.) 592

relief in writ jurisdiction from this Court.

8. The Board is a licensee under the Indian Electricity Act and is covered by the provisions of the Electricity (Supply) Act. In terms of section 49 of the Electricity (Supply) Act, the Board fixes the tariff on the basis of which electricity is sold to its consumers. I may refer to the schedule to the Indian Electricity Act. The provisions in the schedule shall be deemed to be incorporated with, and to form part of, every licence under Part II, so far as not added to, varied or excepted by the licence. It has not been shown on behalf of the respondents that the provisions of the schedule have been varied so far the Board is concerned. Clause VI(1) of the schedule, inter alia, provides that if a requisition is made by any owner or occupier of any premises situate within the area of supply requiring the licensee to supply energy for such premises the licensee shall, within one month from the making of the requisition or within such longer period as the Electrical Inspector may allow, supply and save in so far as he is prevented from doing so by cyclone, floods, storms or other occurrances beyond his control continue to supply, energy in accordance with the requisition. The first proviso to this sub-clause provides that the licensee shall not be bound to comply with any such requisition unless and until the person making it within fourteen days after the service on him by the licensee of a notice in writing in this behalf, tenders to the licensee a written contract, in a form approved by the State Government duly executed binding him to the terms

stipulated therein.

It is not in dispute in this case that no written agreement has been entered into by and between the petitioner and the Board. As the petitioner required the Board to supply energy and as this energy was supplied by the Board on the basis of the requisition made by the petitioner, it shall be deemed that energy was supplied by the Board to the petitioner only in pursuance of clause VI and the parties shall be deemed to have entered into a contract as envisaged in the proviso. The supply of energy by the Board to the petitioner is in discharge of its statutory duty and the parties have their respective rights and obligation as provided in the statutes. It, therefore, cannot be said that the petitioner wanted to enforce a contract qua-contract and in view of the provision of clause VI of the schedule to the Indian Electricity Act, it must be held that the duties and obligation of the parties being statutory, the petitioner is entitled to seek relief in writ jurisdiction. This was held in *Man Industrial Corporation's* case (supra).

9. This brings us to the question whether respondent no.2 while disposing of the representation of the petitioner was required to state reasons for rejecting its claim.

10. There is no dispute between the parties that there was nothing wrong with meter. According to the petitioner, the excessive billing was due to the wrong reading of the meter and according to the

respondents It was not so. I have already noticed that on the receipt of the representation of the petitioner contained in annexure 1, respondent no.3 forwarded the same with his comment and that is contained in annexure 3. So far the reading in respect of KWH, KVAH and power factor is concerned, respondent no.3 also dealt with that and that finding is at page 40 of the brief. It concluded as follows:-

> "Now on the observations of the above facts and racommendation of the undersigned as well as Electrical Executive Engineer, Electrical Sub-division Daltonganj (copy enclosed) therein, necessary orders may kindly be passed to regularise the billings of consumer by adjusting the excess billing done on account of low power factor for the following reasons:
>
> (1) Readings were not taken jointly.
>
> (2) Readings taken by the field officers appears to be wrong in most of the months which resulted abnormal M.D and P.F. charges.
>
> The case may kindly be considered favourably and your kind decision be communicated at the earliest to avoid further complications. The consumer is pressing hard as the service connection is lying disconnected due to non-payment of dues. The consumer has been paying the consumption charges every month after deducting DPS and other charges. Order for reconnection of line may be given after perusal and kind orders."

Respondent no.2 after receipt of annexures 1 and 3, referred the matter to respondent no.3 by his

letter which is part as annexure 2. Respondent no.2 was of the opinion that:

> "the facts given by you are not only inadequate but also lack technical details. Please inspect the site of the consumer personally on 28.11.1983 and asess the total and correct installed and simultaneous maximum load installed in the consumer's factory premises and submit your report within a fortnight after inspection and giving therein all the technical details....."

Thereafter respondent no.3 submitted annexure 3/A. The opinion of respondent no.3 that there has been wrong reading by the meter reader is corroborated by annexure 8, the opinion of respondent no.4. It was admitted by the learned counsel for the Board that respondent no.2 did not assign any reason for rejecting the claim of the petitioner but simply observed that no relief was admissible to the petitioner. In the circumstances, the question is whether respondent no. 2 was required to give reasons for rejecting the representation of the petitioner.

There is no dispute that there is no statute which enjoins respondent no.2 to give reasons. But it cannot be disputed in this case that respondent no.2 was liable to realise bill only on the basis of correct reading of meter. Not only a consumer shall not be liable to pay the amount demanded by the Board if the demand is made on the basis of the reading recorded in a defective meter but also if the bill is raised on the basis of wrong reading of meter. The Board is entitled to recover from the petitioner the amount which

he is liable to pay according to the correct reading of the meter and the petitioner has also obligation to pay according to the correct reading of the meter. If in fact the bill was raised on the basis of the wrong reading of meter by respondent no.5, it cannot be held that the bill was raised in accordance with the tariff. The liability of the petitioner is statutory and, therefore, it was incumbent on the respondents to see that the petitioner was not saddled with the liability which it was not liable to pay under the tariff. Even if the respondent no.2 was discharging his administrative duty, he was required to act judicially. When two senior officers of the Board were of the opinion that there has been mis-reading of the meter it was incumbent on respondent no.2 to give reasons so that the Court in its power of review can see whether respondent no.2 acted within the limits of law. Once the reasons are assigned, the Court may see whether any extraneous or irrelevant matters were taken into consideration and whether relevant matters were left out. Administrative agencies while disposing of a dispute is required to give reasons to see whether there is arbitrary exercise of the power. It was, therefore, incumbent on respondent no.3 to assign reason for rejecting the representation of the petitioner.

11. There is controversy between the parties whether there has been misreading of the meter. This Court cannot go into this disputed facts and record any finding whether the contention of the petitioner that there has been any misreading of meter is correct. The appropriate order, therefore, be to remit the matter

to respondent no.2, who shall after giving the petitioner an opportunity of being heard, dispose of the representation by a reasoned order.

12. In the result, this application is allowed, letter dated 16.7.1985 as contained in annexure 11, and letter dated 11.7.1985 as contained in annexure 12/A are quashed and the matter is remitted to respondent no.2 (The General Manager-cum-Chief Engineer, South Bihar & Chotanagpur Area Electricity Board, Ranchi) who shall dispose of the representation of the petitioner keeping in view the observations made above.

S.P.J. *Application allowed*

TAX CASE

Before Uday Sinha and Nazir Ahmad, JJ.

1986

April, 8.

*M/s Tata Robins Frazer Ltd, Jamshedpur.**

v.

The Commissioner of Income-tax, Bihar, Patna.

Assessee --- amount representing Sales Tax not paid *by assessee - -- whether to be deemed to be income of the assessee --- entire amount of Rs.3,09,991/= paid by the assessee to its foreign collaborators, whether allowable as revenue expenditure.*

Where assessee was following mercantile system of accounting, and the liability to pay had accured during the assessment year in question but the assessee did not pay Rs.80,688/= representing the sales tax;

Held, that the amount must be deemed to be income of the assessee.

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*Taxation Case Nos.196 and 197 of 1976. Ref: Statements of case under section 256(1) of the Income-tax Act by the Income Tax Appellate Tribunal, Patna Bench 'A' in the matter of assessment of Income-tax on M/s Tata Robins Frazer Ltd.,Jamshedpur for the assessment year 1971-72.

Where the assessee claimed the entire sum of Rs.3,09,991/= paid as royalty to its foreign collaborators to be revenue expenditure but the Income Tax Appellate Tribunal directed that one-third of the payment should be disallowed as representing capital expenditure in hands of the assessee and the balance should be allowed as Revenue expenditure;

Held, that the Income Tax Appellate Tribunal was not justified in bifurcating the expenditure of royalties into two-third revenue expenditure and one-third capital expenditure. The entire sum of Rs.3,09,991/= is allowable as revenue expenditure.

Case laws discussed.

Statement of case under section 256(1) of the Income Tax Act, 1961.

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

Messrs Dinesh Vyas, V.D.Narayan, S.K.Narayan and *Shambhu Sharan* for the petitioner in Tax Case no.196 of 1976

Messrs B.P.Rajgarhia,(Sr.S.C.,ITD) and S.K. Sharan (Jr.S.C.,I.T.D.) for the opposite party in Tax Case no.196 of 1976

Messrs B.P.Rajgarhia, (Sr.S.C.,ITD) and *S.K. Sharan, (Jr.S.C., I.T.D.)* for the petitioner in Tax Case no.197 of 1976

Messrs Dinesh Vyas, V.D. Narayan, S.K. Narayan and *Shambhu Sharan* for the opposite party in Tax Case no.197 of 1976.

UDAY SINHA,J: These are two references under section 256(1) of the Income-tax Act. Tax Case No.196 of 1976 is at the instance of the assessee and Tax Case No.197 of 1976 is at the instance of the Revenue. In these references we are concerned with assessment year 1971-72. The question referred to us at the instance of the assessee is:

"(1) Whether on the facts and in the circumstances of the case, the royalty of Rs.3,09,991/= paid by the assessee in terms of the agreement with foreign collaborators contains any element of capital nature?

Three questions have been referred at the instance of the Revenue. They are:

"(1) Whether on the facts and in the circumstances of the case, the Tribunal is correct in holding that the amount of Rs.80,688/= representing sales tax could not be treated as assessee's income in view of the fact that the same amount represented the liability of the assessee in mercantile system of accounting?

(2) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in bifurcating the expenditure of royalty into 2/3 revenue expenditure and 1/3 of capital expenditure?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee could withdraw the claim of extra shift allowance before the Income-tax Officer?"

2. The question referred at the instance of the assessee and question No.2 at the instance of the Revenue cover common ground in the sense that the core question to be decided is whether the sum of Rs.3,09,991/= or any part thereof paid by the assessee in terms of the agreement with the foreign collaborators contained any element of capital nature or revenue nature. The Tribunal had directed that one-third of the payment should be disallowed as representing capital expenditure in the hands of the Indian Company and the balance should be allowed as the Revenue expenditure. By this verdict of the Tribunal both the parties are aggrieved. That has led to two references challenging the correctness of the part decided against them.

3. It will be convenient at this stage to dispose of the third question referred at the instance of the Revenue here and now. This question had fallen for consideration before us in another reference of this very assessee which was the subject matter of Tax Case No.82 of 1976 disposed of on 21-11.1985 by us. The assessee had claimed extra shift allowance. That claim had been negatived by the Income-tax Officer (the I.T.O.). The Tribunal had accepted the claim of the assessee. When the reference was taken up for hearing before us, Mr. Dinesh Vyas stated in candid terms that the assessee did not intend to contest the matter and that the assessee accepted the correctness of the I.T.O.'s order. Learned Senior Standing Counsel did not object to the stand of the assessee. That being the attitude of the parties, it

was ordered that the order of the I.T.O. should be considered to be the effective order and assessment order may be passed accordingly. We directed the Tribunal to pass orders accordingly. Without answering the question referred to us, the tax case was disposed of. The same position prevails in these references as well and Mr.Dinesh Vyas for the assessee has not shifted his stand. He sticks to the concession made in the earlier tax case. This question is, therefore, answered against the assessee to the effect that the assessee was not entitled to extra shift allowance. As we refused to answer the question in the earlier tax case in view of the concession of Mr.Dinesh Vyas - which concession has been repeated before us in these references as well - in like manner we refuse to answer the third question referred to us. The order of the I.T.O. shall be effective order and the Tribunal will pass appropriate orders in accordance with the concesion of the assessee. That disposes of question No.3 at the instance of the Commissioner.

4. Question No.1 of the Commissioner relates to the ascertainment of the nature of sales tax received by the assessee. Question is whether it can be treated as income in the assessment year in question. The assessee follows mercantile system of accounting. In course of its trade it realised sales tax on sale of goods. The assessee was liable to deposit the sums in the treasury and in that sense it was certainly liability of the assessee. But the assessee did not deposit the sums in the Government treasury. In the relevant year in question, therefore, it must be held to be income. It will, of course, be entitled to allowance as expenses when it pays into the Government treasury. The liability to pay would arise when the assessment has been made. The nature of such realisations is related to the question whether the assessee follows

cash system of accounting or mercantile system of accounting. Since the assessee was following mercantile system of accounting, the liability to pay had accrued during the assessment year in question and the assessee did not pay it, it must be deemed to be income of the assessee. The view that I have taken is supported by the decision of the Supreme Court in *Sinclair Murray and Company* versus *C.I.T., Calcutta* (1) and our own decision in *C.I.T.,* versus *Motipur Sugar Factory (P) Ltd.*(2)

5. That brings us to the vexed question, question No.2, hotly contested by the parties in regard to the nature of the payments made by the assessee, to its foreign collaborators. According to the assessee, the entire sum of Rs.3,09,991/= paid as royalty was revenue expenditure and allowable as such. According to the Revenue, the whole of it was capital expenditure and not allowable deduction in terms of section 37 of the Income-tax Act.

6. The assessee is an incorporated Company (hereinafter be referred to as'the T.R.F.'). The assessee Company was to establish a plant for the purpose of manufacturing and selling certain "materials handling and processing equipment and components and providing certain engineering services and undertaking the execution on engineered systems contracts". With that object, in December, 1963 it entered into a set of agreements with Hewitt-Robins International

(1) 97 I.T.R 615

(2) 154 I.T.R. 259

(H.R.Int.) and the General Electric Company Ltd. (hereinafter called'the G.E.C.'). This set of agreements may be described as Agreement No.I, the Agreements between T.R.F. and H.H.Int. being Ext. A and with G.E.C. as Ext.B. The object of the agreements was to set up and establish a plant of which H.R.Int. was possessed of technical data and information. The G.E.C. was to execute the electric part and H.R.Int. the mechanical/structrual parts. In terms of these agreements T.R.F. was to make a lump sum payment of Rs.50,000 U.S. to H.R.Int. as well as to G.E.C. *as soon as at least 50 per cent of the issued capital of the T.R.F. had been paid up.* The plant of the T.R.F. was to be set up for manufacturing specified equipments.'Specified Equipment' was defined as follows:

"(a)'Specified Equipment' shall mean equipment to be manufactured by TRF which is listed and described in Appendix I forming part of this Agreement, which is a copy of Appendix I to the Application on Form D submitted by the parties to the Indian Government on 28th November 1961."

Appendix I,to Ext A referred to above, was as follows:

"APPENDIX - I

MATERIALS HANDLING & PROCESSING MACHINES.

Jaw Crushers of various types, including hammer mills, gravity breakers etc.

Vibrating Equipment, mechanical and electrical including screens, feeders, conveyors, shake-outs, bunker vibration; etc.

Mechanical Feeders, such as apron and table feeders Washing Trommels.

Blade Mills.

Log Washers.

Spiral Concentractors.

Ball, Rod and Tube Mills

Concentrating Tables.

Sand and Slurry pumps.

Wagon Tipplers.

Stocking, blending and reclaiming machines.

Drag Scrappers.

Belt Conveyors including idlers, but not including rubber- belting.

Mine Hoists.

Screen Cloth for vibrating screens.

Speed Reducers.

Industrial Chain."

These agreements show that the T.R.F. was to establish factory/plant for T.R.F. who would set up materials handling and processing machines for its own constituents. It is not in controversy that the payments made under these agreements were capital expenses and development allowance and rebate were allowable accordingly, but the said sums were not allowable as business expenditure in terms of section 37 of the Act.

7. Apart from the above set of agreements, there was another set of agreements between the very same parties which may be referred here to as Agreement II. In terms of these agreements H.R.Int. and G.E.C. were to render technical services and technical assistance to T.R.F. for which the latter was to pay to H.R.Int. royalty at the following rates:

"(a) One half percent of the total value of engineered contract sales of TRF less the value of the components and services imported from foreign sources, but including the value of the manufactured product.

(b) One percent of the ex-Works value of all products sold as merchandise by TRF less the value of imported components thereof purchased by TRF."

The royalty payable by the assessee has been claimed as deductible allowance on the footing that it was Revenue expenditure for the purpose of assisting the T.R.F. in manufacturing the material handling and processing plant of third parties. The intitial agreements were entered into in December, 1963. They were amended in February, 1965. Those expired on 3rd December, 1973. Thereafter, it was once again extended

for a period of five years in 1974. This extension was deemed to be effective from 4th December, 1973. The question is whether the royalties payable to the foreign Companies were revenue expenditure or not.

8. The question whether an expenditure is capital expenditure or revenue expenditure has since long been a vexed question. The line of demarcation is very thin, yet from time to time some broad outlines have been set out to distinguish capital from revenue expenditure. Bowen, L.J. in *City of London Contract Corporation* versus *Styles* (1) described capital expenditure as one which "you do not use it for the purpose of your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern". N.H.Bhagwati, J in *Assam Bengal Cement Co.Ltd.* versus *Commissioner of Income-tax, West Bengal* (2) explained that "the expenditure in the acquisition of the concern would be capital expenditure; the expenditure in carrying on the concern would be revenue expenditure". This has been one of the important aspects to be considered in deciding whether an expenditure is capital or revenue in nature. Lord Hanworth, M.R. in *Anglo-Persian Oil Co.* versus *Dale* (3) observed that "the question whether the money paid is provided from the fixed or the circulating capital comes as near to accuracy as can be suggested" for desiding whether the expenditure is capital or revenue. Dixon, J. in *Sun Newspapers Limited and*

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(1) (1887) Tax Case 239 at p.243

(2) (1955) 27 I.T.R. 34

(3) (1932) 1 K.B. 124 at p.138

the Associated Newspapers Limited versus *The Federal Commissioner of Taxation* (1) observed in this behalf as follows:

"But in spite of the entirely different forms, material and immaterial, in which it may be expressed, such sources of income contain or consist in what has been called *a 'profit-yielding subject'*, the phrase of Lord Blackburn in *United Collieries Ltd.*v. *Inland Revenue Commissioners:* (1930) S.C.215 at 220. As general conceptions it may not be difficult to distinguish between the profit yielding subject and the process of operating it. In the same way expenditure and outlay upon establishing, replacing and enlarging the profit-yielding subject may in a general way appear to be of a nature entirely different from the continual flow of working expenses which are or ought to be supplied continually out of the returns of revenue. The latter can be considered, estimated and determined only in relation to a period or interval of time, the former as at a point of time. *For the one concerns the instrument for earning profits and the other the continuous process of its use or employment for that purpose.*"

A rough and ready test has, however, been followed in this country by trying to ascertain whether a particular expenditure brings about "enduring benefit".

In that situation, it would be a capital expenditure. This test leaves many gaps,but has generally been adopted as its answer to the question. This subject cannot be complete without referring to the decision

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(1) 61 Com. L.R. 337 at p. 360

in *Benarsidas Jagannath:* (1) where Mahajan, J, as he then was, laid down the following tests:

"(i) Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment.

(ii) Expenditure may be treated as properly attributable to capital when it is made not *only once and for all,* but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade. If what is got rid of by a lump sum payments is an annual business expense, chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether.

(iii) Where the expenditure incurred was part of the fixed capital of the business, it would be capital expenditure, but if it were part of its circulating capital, it would be revenue expenditure. "Fixed capital" is what the owner turns to profit by keeping it in his own possession.'Circulating capital' is what he makes profit of by parting with it or letting it with change masters."

In Assam Bengal Cement Co.Ltd. vs *C.I.T. (*supra) N.H.Bhagwati, J approved the synthesis of Mahajan, J, as he then was, in the above Full Bench case. Elaborating the matter a little further Bhagwati, J observed that the question which arises for

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(1) (1947) 15 I.T.R. 185

consideration is - where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment whether it could be capital expenditure. And his Lordship answered the question in the following terms:

"Such expenditure can be looked at either from the point of view of what is acquired for from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view of produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner or the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital or the business or part of its circulating capital."

And even after laying down the laws so succinctly, Bhagwati, J observed as follows:

"It has been rightly observed that in the great diversity of human affairs and the complicated nature

of bussiness operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria once after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it could be a deductable allowance under section 10(2)(xv) of the Income-tax Act. The question has all along been considered to be a question of fact to be determined by the Income-tax authorities on an application of the broad principles laid down above and the Courts of law would not ordinarily interfere with such findings of fact if they have been arrived at on a proper application of those principles."

It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations, it is difficult to lay down a test which would apply to all situations. The above principles have universally been adopted in our country. I, therefore, do not consider it necessary to refer to the plethora of decisions in this behalf.

9. The principles laid down by the Supreme Court must now be applied to the facts of our case. In this behalf it would be relevant to state that in terms of the two agreements, the T.R.F. was to set up a factory. The expenses incurred over setting up over a factory would obviously be capital expenditure. This activity would be covered by Agreement No.I. In order to highlight the incident under the two contracts, it would be relevant here to quote some of the features of Agreement No.I. The preamble reads as follows:

> "WHEREAS TRF is an Indian Company specially formed for the *purpose of manufacturing and selling certain materials handling and processing equipment and components*, providing certain engineering services and

undertaking the execution of engineered systems contracts as described in Exhibit "A" hereto

AND WHEREAS G.E.C. is possessed of technical data and information *for the establishment of the plant and acquisition of the machinery and* equipment for the manufacture of the abovementioned products.

AND WHEREAS it has been agreed between the parties hereto that G.E.C. will furnish to TRF the information, drawings, and so forth in order to *enable TRF to establish a plant* and acquire the machinery and equipment for the manufacture of the abovementioned products at Jamshedpur on the terms and conditions hereinafter mentioned."

Further, clause 2 of that Agreement reads as follows:

"2, To enable TRF to establish its plant at Jamshedpur for the manufacture of the specified equipment, G.E.C. shall supply to TRF entirely outside India the following:

(i) The general layout of the *plant to be erected by TRF at Jamshedpur* incorporating upto date improvements and designs to meet a performance guarantee to be mutually agreed to by the parties hereto;

(ii) The necessary drawings and specifications of machinery and plant and the drawings and plans for the arrangement and installation of the machinery and plant in the factory to be established by TRF;

(III) Advice on tenders and placing of orders for the purchase of machinery and equipment and *for the construction of the plant and* factory at Jamshedpur;"

Other several clauses need not be referred to. It is not in controversy that the expenditure for carrying out Exhibit 1 was capital expenditure. I have, however, quoted from the Agreement only to highlight the distinction between Agreement No.I and Agreement No.II.

10. We must now look at the contents of Agreement No.II. In the preamble to this Agreement, it is stated that the TRF is an Indian Company specially formed *for the purpose of manufacturing and selling certain materials handling and processing equipment and components and providing certain engineering services, as described in Exhibit'A'* (Appendix I) to the Agreement. It is also recited in the Preamble that TRF shall manufacture the products mentioned in Annexures (Exhibits 1 and 2). H-R Int. agreed to give to TRF technical aid and active assistence as well as the benefit of their research in the manner and for the consideration mentioned thereafter. The contents of Specified Equipment and Services were spelt out in Clause 1 read with Appendixes I and II of the Agreement. The undertaking by H.R.Int. is contained in clause 2. It is significant to note therein that the steps to be taken by H-R Int. was "to enable TRF to manufacture, sell and provide in India the Specified Equipment and Services. In their behalf it agreed to supply as follows:

> "2. To enable TRF to manufacture, sell and provide in India the Specified Equipment and Services.
>
> (a) H-R Int. shall, as and when required by TRF, supply or furnish the following in such country or countries outside India as may be convenient to the parties at no cost to TRF other then the fees provided in Clause 13 hereof:-

(i) Standard manufacturing drawings, bills of material and material specifications covering the specified equipment.

(ii) Information regarding the manufacturing methods and assembling practices and techniques as known to H-R Int. or its affiliates on the date of this Agreement and relating to the Specified Equipment.

(iii) All other technical data and information regarding sources of supply of all materials requisite or necessary for enabling TRF to manufacture the Specified Equipment in India;

(iv) Technical data and information available to H-R Int. or its affiliates and requisite or necessary for enabling TRF to provide in India the said services;

(v) Such typical layout drawings, data sheets and other design information available to HR Int. or its affiliates as may be necessary to enable TRF to manufacture or render the Specified Equipment and Services.

(b) H.R.Int. shall during the period of this Agreement supply periodically to TRF at no cost other than the fees provided in Clause 13 hereof information available to H-R Int. or its affiliates concerning modifications or improvements in designs and manufacturing and assembling techiques and practices in regard to the said Specified Equipment and Services including the use of all patents or patented processes and inventions.

(c) H.R.Int. grants to TRF the right and licence (including non tranferable and *non-exclusive licence* under all patents owned or controlled by H-R Int. or its affiliates or under which H-R.Int. or its affiliates have power to grant sublicences without payment

of additional royalty to their respective licensors) to make, use, sell and provide the Specified Equipment and Services in India in accordance with the designs, technical data, processes formula and procedures used by H-R Int. or its affiliates for the commercial productions of the Specified Equipment and Services.

It is understood that drawings, data technical services and other technical information which H-R Int.is required to provide under this Clause 2 shall be that which is available to H-R Int.or its affiliates at any given time during the perlod of this Agree-ment including the benefit of all research and development and H-R Int. shall not be required to perform or provide any new or special design or engineering work for TRF."

From the above, it will be seen that Whereas the first Agreement was for setting up a plant at Jamshedpur; the second Agreement was for enabling TRF to manufacture, sell and provide Specified Equipment and Services. The second Agreement provided for activity which may be regarded as profit earning activity. Thus Clause 2 inevitably leads to the inference that the activity covered by the second Agreement would be profit making activity. The expenses on that account would, therefore inevitably be revenue expenditure. Some confusion may arise in regard to the nature of the activity on account of sub-clause (v) of Clause 2(a). This shows that H.R.Int.was to supply some typical layout drawings. The confusion would not sustain, if it is appreciated that these drawings would not be the drawings of the plant of TRF at Jemshedpur, but would be drawings of the projects to be undertaken by TRF for its customers. In fine, by the test of profit earning activity the sums paid as royalties by T.R.F. must be held to be revenue expenditure.

11. Let us test the nature of the payment by the other test, namely, whether the expenditure would result in 'enduring benefit' to the assessee. That is the rough and ready accepted formula for deciding whether expenditure is capital or revenue. This matter can be tested only by appraisal of the terms of the Agreement which as I have described in the judgment as Agreement No.II..The Agreement was for ten years. The royalty was payable for that period. Clause 13 of the Agreement has been quoted earlier in paragraph 7. Clause 19 lays down that the Agreement would be effective and in full force for a period of ten years from the date of the agreement and would continue thereafter, unless terminated by either party by *six months' notice in writing*. The period of Agreement has been extended on two occasions in the past. The last extension - if the word 'extension' could be used - took place on 23rd September, 1976 when the period of Agreement was extended for further five years. Learned Senior Standing Counsel contended that since the Agreement was to remain effective and the benefit to the assessee was for a long duration, the benefit to the assessee must be deemed to be 'enduring benefit' and, therefore, the expenses on account of royalty payments must be deemed to be capital expenditure. It was submitted that not only did the agreement remain valid for ten years, but in effect it remained valid till 1978 by Supplemental Agreement. On account of the length of the Agreement, learned counsel for the Revenue contended that the conclusion is inescapable that the assessee had derived enduring benefit and, therefore, the expenditure must be deemed to be capital expenditure.

12. The submission is fallacious. The number of years for which an Agreement is to remain operative

or for which the expenses have to be incurred are not conclusive index for determining whether the assessee can be said to have obtained enduring benefit. A similar argument was advanced before the Bombay High Court in *ACC-Vickers-Babcock Ltd.* verus *C.I.T.*(1) This submission was rejected with the observation that the duration of the agreement cannot be decisive of the matter. The same view was taken by a Full Bench of the Mysore High Court in *Mysore Kirloskar Ltd.* versus *C.I.T. (2) where user was for fifteen years. The submission urged on behalf of the Revenue was rejected by their Lordships with the observation that the period of agreement by itself is not determinative of the nature of the payments made under it. I am in respectful agreement with the view of Bombay and Mysore High Courts in this behalf. The length of the period of expenditure does not indicate that expenditure is capital in nature.*

13. Learned Senior Standing Counsel drew our attention to some of the clauses of the Agreement (Agreement No.II) to show that a special treatment had been given to the assessee and that was of an'enduring'nature. Reliance was placed upon some of the clauses of the Agreement. Clause 15 of the Agreement provides that H-R Int. would make available to TRF in the United States of America and/or such other country or countries outside India as may be convenient to the parties, the benefits of any agreements, it may have entered into with third parties

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(1) 103 I.T.R. 321

(2) 67 I.T.R. 23

regarding the use of patents and trade marks, the sharing, acquiring or disclosing to each other of any technical information relating to the Specified Equipment and Services or any of them. Special reliance was placed by Learned Senior Standing Counsel on clause 22. I shall, therefore, quote in extenso:

> "22. Even after the termination or determination of this Agreement under Clauses 19 and 21(b) hereof TRF, will be entitled to continue to manufacture sell and provide the Specified Equipment and Services according to H-R Int's patents and other technical information communicated by H-R Int. to TRF or acquired by TRF from H-R Int., *provided however that TRF shall not be entitled to use the trade marks of H-R Int. but will manufacture, sell and provide the Specified Equipment and Services under its own name and trade marks.*"

It was contended on behalf of the Revenue that the above clause brought out clear distinction between the instant case and the case of *Commissioner of Income-tax, Bombay City - I* versus *Ciba of India Ltd.*(1) In terms of clause 22, it was submitted that the assessee would be deriving advantage for know-how supply by H-R Int.for all times. The submission, in my view, is fallacious. The import of clause 22, quoted above, is that even after the contract had been terminated or determined, TRF will continue to manufacture, sell and provide the Specified Equipment and Services according to H-R Int. patents and other technical information which may have been communicated by the former to the assessee or acquired by the assessee from H-R Int. What does it imply? It implies that the

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(1) (1968) 69 I.T.R. 692

assessee shall be free to supply to its constituents Specified Equipment and Services. The entire project of TRF was to indulge in establishment of material handling processes. It necessarily follows that even after the termination or determination of the Agreement, TRF would be carrying on its business of executing material handling projects. Surely, having set up factory for providing material handling projects on turnkey basis, the factory would not be closed down on the termination of the agreement. But what did H-R Int.part with? Not its rights in the patent or the drawing in regard to setting up of the plant or the constituents of the TRF. It only gave TRF the right to use the patent and the technical knowledge acquired by H-R Int. It is true that this Agreement does not provide for return of documents, even so, H-R Int.did not part with any of its assets absolutely for ever. This would be so for two reasons. Firstly, that knowledge cannot be returned back once it has been acquired by TRF, it could not be returned to H-R Int. The conclusion would be the same for still another reason, namely, the knowledge of know-how provided by H-R Int. would pale into obsolescence. After number of years the knowledge imparted to TRF by H-R Int. by the drawings and layouts would become outmoded and of no use to either party. In that view of the matter, the drawings, the ideas, the inventions were not transferred to TRF for all times. In absence of the clause relating to return of documents and layout would not, therefore, make any difference between the Ciba's case (Supra) and the instant case.

14. The relevant aspect to be considered is about the right to use the patents and trade marks. In this behalf, it would be useful to appreciate that H-R Int. clearly prohibited the use of trade marks or patent

of H-R Int. After the determination of the Agreement, TRF would be free to sell and providing Specified Equipment and Services, but under its own name and trade mark and not under the trade mark or patent of TRF. It is obvious, therefore, for the duration of the agreement all that H-R Int. had transferred was the use of its trade marks and patents. Thereafter, the assessee could neither use the patents and trade marks nor would H-R Int. be required to give its fresh knowledge or know-how to the assessee. Mr.Dinesh Vyas, learned counsel for the assessee heavily relied upon the case of *Ciba of India* (Supra) in support of his stand that the royalty payments were revenue expenditure. Learned Senior Standing Counsel, on the other hand, contended that the said case was distinguishable and could not be of any assistance to the assessee. In *Ciba of India Ltd.*(Supra), the Supreme Court held that the royalty payments were revenue expenditure. According to them, the Agreement showed that the secret processes had not been sold by the Swiss Company to the assessee. The conclusion was based for the reasons - (a) the licence was for a period of five years, liable to be terminated in certain eventualities *even before the expiry of the period;* (b) the object of the agreement was to obtain the benefit of the technical assistance for running the business; (c) the licence was granted to the assessee subject to rights actually granted or which may be granted after the date of the agreement to other persons; (d) the assessee was expressly prohibited from divulging confidential information to third parties without the consent of the Swiss company; (e) there was no transfer of the fruits of reasearch once for all; the Swiss company which was continuously carrying on research had agreed to make it available to the assessee; and (f) the stipulated payment was recurrent

dependent upon the sales, and only for the period of the agreement. For those reasons, their Lordships of the Supreme Court held that the royalty payments were revenue expenditure. In this connection, I cannot refrain from quoting the observations of Shah, J:

"The assessee acquired under the agreement merely the right to draw, for the purpose of carrying on its business as a manufacturer and dealer of pharmaceutical products, upon the technical knowledge of the Swiss company for a limited period: by making that technical knowledge available the Swiss company did not part with any asset of its business nor did the assessee acquire any asset or advantage of an enduring nature for the benefit of its business."

It is thus obvious that *Ciba of India Ltd. case* (Supra) was decided in favour of the assessee not on the consideration that the Indian Company had to return the documents to the Swiss company, but upon the footing of the six circumstances enumerated above. It is not necessary for me to refer to the English cases, as *Ciba's* case (supra) has already taken note of them. The assessee in this case, as in *Ciba's* case (Supra), did not under the Agreement become entitled exclusively even for the period of the agreement to the patents and trade marks of the Swiss company. It had merely access to the technical knowledge and experience which H-R Int. commanded. Judged by those standards, the assessee was on that account, in the instant case, - as in *Ciba of India Ltd. case* (Supra) - a mere licensee for a limited period of the technical knowledge of H-R Int. with the right to use the patents and trade marks for a limited period. In my view, *Ciba of India Ltd.* case (Supra) does support the assessee's stand. Learned Senior Standing

Counsel for the Revenue was candid in conceding that if the instant case came within the periphery of *Ciba's case* (Supra), the point at issue must be decided in favour of the assessee. In my view, the ratio in *Ciba's case* (Supra) does support the assessee's case.

15. Further, the point at issue in *Ciba's* case (Supra) was whether the royalty paid to the Swiss company was allowable deduction in terms of section 10(2)(xii) or 10(2)(xv) of the Income-tax Act, 1922 and in that connection, their Lordships laid down that the sums paid were allowable in terms of section 10(2)(xv) and not 10(2)(xii). The return of documents could not have been the index for deciding whether the expenditure was of enduring nature or not, since knowledge once acquired is incapable of being returned back. The decision of the Supreme Court in *Travancore Sugars and Chemicals Ltd.* versus *Commissioner of Income-tax, Kerala* (1) entirely supports the assessee's claim. To conclude matters reference, however, must be made to the Full Bench decisions of the Andhra Pradesh and *Mysore High Courts in Praga Tools Ltd.* versus *Commissioner of Income-tax, Hyderabad* (2) *Mysore Kirloskar Ltd.* versus *Commissioner of Income-tax, Bangalore* (3) and the Division Bench decisions of the Calcutta High Court in *Commissioner of Income-tax (Central), Calcutta* - versus - *Hindusthan General Electrical Corporation Ltd.*(4) *C.I.T.* versus

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(1) (1966) 62 I.T.R. 566

(2) (1980) 123 I.T.R. 773

(3) (1978) 114 I.T.R. 443

(4) (1971) 81 I.T.R. 243

Aluminium Corporation of India Ltd.(1) *Commissioner of Income- tax,Bombay City - I* versus *Tata Engineering and Locomotive Co.Pvt.Ltd.*(2) and *Commissioner of Income-tax* versus *Bajaj Electricals Ltd.*(3) to name only some of the decisions on this point support the stand of the assessee. I am in respectful agreement with the law laid down in those cases. Thus, judged from the test of'enduring benefit' to the assessee, the assessee did not derive the same in terms of the Agreement.

16. Learned Senior Standing Counsel for the Revenue heavily placed reliance on the case of *Scientific Engineering House (P) Ltd.* versus *Commissioner of Income-tax, Andhra Pradesh* (4) The decision apparently appears to support the Revenue. It will, therefore, need consideration in some greater details. The assessee in that case manufactured scientific instruments and apparatus like dumpy levellers, staves, prismatic compass, etc. It entered into two separate collaboration agreements with a Hungarian Trading Company for undertaking the manufacture of miscroscopes and theodolites, in consideration of payment of Rs.1,60,000/= under the two agreements, agreed to supply to the assessee all the technical know-how required for the manufacture of the instruments. The object of both the agreements was

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(1) 92 I.T.R. 563

(2) (1980) 123 I.T.R. 538.

(3) (1984) 148 I.T.R. 83

(4) (1986) 157 I.T.R. 86

to enable the assessee to manufacture the said instruments of certain specifications and the assessee under the agreements acquired the right to manufacture in India under its own trade mark and name the said instruments and the right to sell the same in India. To enable the assessee to manufacture these instruments in India, the foreign collaborator agreed to render "documentation service" by supply to the assessee an up-to-date and correct complete set of each of the five types of documents. The sum of Rs.1,60,000/= was debited by the assessee under the head "Library" as capital expenditure. In the assessment proceedings for 1966-67 (A.Y.), the assessee claimed a sum of Rs.12,000/= by way of depreciation on "Library". Such depreciation was claimed on the ground that the payment of Rs.1,60,000/= had been really for the out-right purchase of designs, drawings charts and other literature which were voluminous occupying almirah-full of storage space and these collectively constituted the pages of the books and the assessee claimed depreciation at the appropriate rate on acquisition of capital. The I.T.O. held that the sum of Rs.1,60,000/= did not represent the value of books purchased by the assessee but represented the price paid for acquiring the technical know-how which amounted to a capital expenditure, but since no tangible or depreciable asset was brought into existence, no depreciation allowance could be claimed. It will thus be seen that it was not disputed in that case that the amount paid was capital expenditure. The question falling for consideration before us or which fell for consideration before the Supreme Court in the case of *Scientific Engineering House (P) Ltd.* (Supra) did not fall for consideration in *Travancore Sugars & Chemicals Ltd.*(Supra). The basic question falling for

consideration was thus entirely different. The question for consideration in *Scientific Engineering House (P) Ltd.*(Supra) was whether the assessee was entitled to claim depreciation allowance in terms of section 43(3) within the definition of "Plant" and that would be measure thereof. It will be relevant here to quote the contention of the assessee as put by the Supreme Court:

"In support of the appeals, counsel for the *assessee accepted the High Court's view that no part of the expenditure* (Rs.80,000 under each of the two agreements) *was on revenue account and the whole of it was of a capital nature.*"

Counsel for the Revenue, on the other hand, had contended before the Supreme Court that the entire expenditure was of a capital nature. It had brought into existence a non-depreciable asset. On these rival contentions the Supreme Court observed as follows:

"Having regard to the rival contentions that were urged before us, it is clear that two questions really arise for determination in the case. The first is whether the 'documentation service' (supply of 5 complete sets of documents) agreed to be and actually rendered by the foreign collaborator to the assessee under the two agreements was incidental to the other services contemplated therein or whether it was the principal service for which mainly the payment of Rs.1,60,000/= was made by the assessee as a result whereof the assessee acquired all the technical know-how requisite for the purpose of manufacturing the instruments in question? And, secondly, whether the said expenditure which was entirely of a capital nature, brought into existence a depraciable asset? The answer to the former

question depends upon the proper interpretation of the terms and conditions of the two agreements while the answer to the latter depends upon whether a capital asset like the technical know-how acquired in the shape of drawings, designs, charts, plans, processing data and other literature which formed the basis for the business of manufacturing the instruments in question would fall within the wide and inclusive definition of 'plant' given in section 43(3) of the Income-tax Act, 1961."

It will be appreciated from the above that the entire question falling for consideration before the Supreme Court in *Scientific Engineering House (P) Ltd.*(Supra) was entirely different from the one before us. The ratio of that case would have no relevance to the case before us.

17. Learned Sernior Standing Counsel for the Revenue made a marathon endeavour to persuade us to hold that the sum paid as royalties to H-R Int. was capital expenditure and relied upon *Fenner Woodroffe and Company Ltd.*versus *Commissioner of Income- tax, Madras* (1) *Additional Commissioner of Income-tax, Madras-II and another* versus *Southern Structrual Ltd.*(2) and *Ram Kumar Pharmaceutical Works* versus *Commissioner of Income-tax* (3) I have no desire to encumber this judgment by attempting to distinguish these cases, as they are distinguishable from the Supreme Court cases. Where they are indistinguishable.

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(1) (1976) 102 I.T.R. 665 (Mad.)

(2) (1977) 110 I.T.R. 890 (Mad.)

(3) (1979) 119 I.T.R. 33 (All.)

they must be deemed to have not laid down the correct law.

18.Thus judged by the test whether the payments were to be made in the process of profit earning transaction, the payments in the instant case must be held to be revenue expenditure. Judged by the standard of enduring benefit, it must be held that the payments were not made for obtaining enduring benefit. Judged by the standard whether the payment was to be made from capital account or from circulating capital, it must be held that it was to be paid from the circulating account because it was to be paid on the basis of (i) one-half percent and (ii) one percent of the ex- Works value of all products sold as merchandise by TRF of the total value of *engineered contract sales of TRF*. Judged by all the three tests, the sum of Rs.3,09,991/= must be held to be revenue expenditure.

19. Learned Senior Standing Counsel for the Revenue raised yet another submission to establish that the payments were capital expenditure on the basis of the terms in the Agreement that they were meant to confer monopoly right on the assessee. This submission also is once again fallacious. It is true that in terms of clause 4 of Agreement No.II, H-R Int. granted to TRF the exclusive right to be a registered user of any trade mark or trade name pertaining to the Specified Equipment and Services owned or controlled which were to be owned or controlled by H-R Int. or its affiliates. In terms of clause 5, TRF was granted non-exclusive right to sell in, or for use in. neighbouring countries the Specified Equipment and Services manufactured by it in India. In terms of clause 6, H-R Int. covenanted with TRF not to sell or supply by itself or through any of its subsidiaries to any

other party in India the technical information and services which it had agreed to supply to TRF. These are not strictly monopoly rights. Further, the Agreement was terminated on six months' notice by either party. That would bring about an end to the monopoly, if any, existed. In this connection, the terms of clause 20 are rather significant which read as under:

> "20. This Agreement is subject to the obtaining of all approvals and consent required by law in India and if the last of such approvals and consents has not been obtained by the 1st day of December 1963. *H-R Int. may terminate the same at its option by giving 30 days' notice in writing to that effect to TRF. In the event of termination as aforesaid, TRF will return to H-R Int. all materials and documents whatsoever furnished to TRF by it prior to the date of such termination and TRF shall not divulge to any other person firm or company any information whatsoever* derived from H-R Int."

From the above, it will be seen that H-R Int. could terminate the Agreement within 30 days' notice and the clause enjoins obligation upon the assessee to return all documents whatsoever furnished to TRF and restrained upon TRF against divulging to any other person firm or company any information whatsoever derived from H-R Int. This clearly shows that there was no monopoly right conferred upon the assessee. In my view, therefore, judged by standard of strict monopoly right the Agreement did not create any monopoly in the assessee. The view that I have taken is on the basis of the decision of the Supreme Court in *C.I.T.* versus *Coalshipments Pvt.Ltd.* : 82 I.T.R. 902 and the Calcutta High Court in *Agarwal Hardware Works P. Ltd.* versus *C.I.T.*: *121 I.T.R. 510.*

20. For all the reasons, stated above, I am clearly of the view that the sum of Rs.3,09,991/- paid to H-R Int. by the assessee was revenue expenditure and was deductible allowance in terms of section 37 of the Income-tax Act. They were not capital expenditure.

21. That leaves another problem to be resolved. The Tribunal bifurcated the sums spent between Revenue and capital expenditure. It estimated 2/3rd of the payment as of revenue nature and 1/3rd attributable to advantage of enduring nature. On that basis the Tribunal directed that 1/3rd of the payment should be disallowed as representing capital expenditure in the hands of the assessee and the balance should be allowed as revenue expenditure. I am unable to appreciate the basis of this bifurcation. If the sum was paid to H-R Int. for the services rendered by it in terms of Agreement No.11, the whole sum should have been allowed as revenue expenditure-allowable as such. Either the whole sum had to be allowed or the whole sum had to be disallowed. There is no basis for the bifurcation. In my view, the entire sum paid by the assessee was revenue expenditure and has to be allowed as such.

22. To sum up, question No.1 referred to us at the instance of the Commissioner must be answered in favour of the Revenue and against the assessee. The Tribunal was not correct in holding that the amount of Rs.80,688/- representing sales tax could not be treated as assessee's income. Question No.2, as a whole, must be answered in favour of the assessee and against the Revenue. The Tribunal was not justified in bifurcating the expenditure of royalties into 2/3rd revenue expenditure and 1/3rd of capital expenditure. The entire sum of Rs.3,09,991/- was allowable as revenue expenditure. Question No.3 we refuse to answers, in view of the concession of Mr.Dinesh Vyas that the order of the I.T.O. was acceptable to the assessee. The references are thus disposed of.

23. Since the references have been decided partly in favour of the assessee and partly is favour of the Revenue, there shall be no order as to costs.

24. Let a copy of this judgment to transmitted to the Income-tax Appellate Tribunal in terms of section 260 of the Income-tax Act, 1961.

Nazir Ahmad,J: I agree.

M.K.C. *Order accordingly*

CIVIL WRIT JURISDICTION

Before Birendra Prasad Sinha, J.

1986

April, 9.

*M/S Champaran Sugar Company Ltd.**

v.

The State of Bihar & others.

Industrial Disputes Act, 1947 (Act XIV of 1947), section 10 (1)- scope and applicability of --- refusal to make reference under section 10 (1)-dispute, whether stands resolved if it at all existed --- reference on a subsequent representation --- validity of --- allegation of misconduct against several workmen --- action taken against one only, whether discriminatory.

Any refusal to make a reference does not mean that the dispute, if it at all existed, stands resolved. If the dispute in the opinion of the authority concerned existed, any reference on a subsequent representation must be valid. The second reference could be made even in the absence of fresh materials. In the instant

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*Civil Writ Jurisdiction Case Nos.426 and 684 of 1981. In the matter of applications under Articles 226 & 227 of the Constitution of India.

C.W.J.C.No.684 of 1984- Mahammad Fazle Haque v. The Presiding Officer, Labour Court, Muzaffarpur and anr.

case the reference was made on the basis of a report submitted by the agency of the Government itself which had not been earlier considered. That report was not available earlier and was sent later that is after the Government had refused to make the reference.

Held, that, in the instant case it was neither necessary nor obligatory on the part of the Government to give a notice to the management and hear them before making the reference and accordingly the findings arrived by the Labour Court is perfectly justified.

Held, further, that where more than one workman misconducted but only one of them was proceeded against by the management, the Labour Court was completely justified that the proceeding against the workman proceeded against was an action of discrimination.

Case Laws reviewed.

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

The facts of the Case material to this reports are set out in the judgment of Birendra Prasad Sinha, J.

Messrs K.N.Gupta and Satyendra Krishna Prasad for the petitioner in C.W.J.C.No.426 of 1981

Mr. G.Narayan, Jr.counsel to Govt. Pleader-I for the State in C.W.J.C.No.426 of 1981

Mr. J.Krishna, Sr. Advocate and *Shivaji Pandey* for respondents no.3 in C.W.J.C.No.426 of 1981

Mr. J.Krishna, Sr. Advocate with *Mr. Shivajee Pandey* for the petitioner in C.W.J.C.No.684 of 1981

Messrs K.N.Gupta and *Satyendra Krishna Prasad* for the respondent in C.W.J.C.No.684 of 1981

Birendra Prasad Sinha,J.-- Both these writ applications have been heard together and are being disposed of by a common judgment. C.W.J.C.No.426 of 1981 has been filed by the Management against the direction given in the award of the Labour Court dated 31-10- 1980, for the reinstatement of respondent no.3 Mohammad Fazle Haque. C.W.J.C.No.684 of 1981 has been filed by the workman Md.Fazle Haque against another part of the award denying him his salary for the period between the date of his dismissal and the date on which the award has been made.

2. The short facts leading to these applications may be summarised thus. The workman Md. Fazle Haque was in the service of Champaran Sugar Company Ltd., Chanpatia in the district of West Champaran as oilman. He was chargesheeted and suspended on 11-1-1970. The allegation against him was that on 10th of January, 1970 he along with Rahat Hussain and about 4 or 5 other workman harassed, pestered, surrounded and intimidated the Chief Chemist Mr. S.K.Bhattacharya demanding from him as to why a chargesheet has been issued to Ekbali Raut. It was alleged that the workman Fazle Haque was armed with an iron rod and Ekbali Raut was armed with a lathi. An explanation was submitted by the workman and the allegations were denied. Thereafter a domestic enquiry was held which found the workman guilty of the charges. The workman was dismissed from service on 28-1-1970. A petition under section 33(2)(b) of

the Industrial Disputes Act (hereinafter referred to as the Act) seems to have been filed by the management for approval of the dismissal of the workman before the Deputy Labour Commissioner. The workman also made a representation on 5-2-1970 to the management against the order of his dismissal and thereafter approached the conciliation machinery. Ultimately conciliation having failed a reference was made under section 10(1) of the Act for adjudication "whether the termination of service of Shri Mohammad Fazle Haque ex-oilman is justified? if not, is he entitled to reinstatement and/or any other relief?" The workman and the management appeared before the Labour Court and filed written statement.

3. Shortly stated the case of the workman was that he had been victimised for his trade union activities inasmuch as he had taken active part in the election of one Birbal Sharma as General Secretary of the Union. His further case is that he had been discriminated against by the management since no proceeding had been drawn up against Rahat Hussain and Ekbali Raut and others who had also alleged to have intimidated the Chief Chemist. On these and other grounds dismissal order was challenged. On the other hand, the case of the management was that the reference to the Labour Commissioner was incompetent and bad in law. According to the management no dispute was raised by the workman with the management nor any demand was made for his reinstatement. Besides that the Government had earlier refused to make any reference against the dispute of this workman for adjudication and as such the present subsequent reference is illegal and bad in law. According to the management the reference had been made without

hearing the management which according to them was necessary because the Government had refused to make a reference earlier. The dismissal of the workman was also supported on other grounds by the management.

4. On a consideration of the facts and materials placed before it the Labour Court came to the following finding. The Labour Court held that (i) the reference was neither incompetent nor illegal nor invalid on any of the grounds alleged by the management; (ii) that the dispute had been raised by the workman with the management giving rise to industrial dispute and a reference under section 10(1) of the Act was competent before that Court; (iii) that the domestic enquiry conducted by the management and misconduct alleged against the workman was proper, valid and fair; (iv) that the charges of misconduct as levelled by the management against the workman had been fully established, and, (v) that the action of the management against the workman in dismissing the workman was not bonafide inasmuch as the other two employees Rahat Hussain and Ekbali Raut had been left out and had not been proceeded against. Thus it was clear case of discrimination amounting to victimisation and unfair labour practice. The dismissal of the workman was, therefore, held to be unjustified and it was held that he was entitled for reinstatement in service. The Labour Court, accordingly, directed reinstatement of the workman but in the facts and circumstances without any back wages for the idle period. The period from the date of dismissal upto the date of reinstatement was ordered to be treated as on leave without pay for the purpose of continuity of service and other benefits.

5. The management has, accordingly, filed the writ application (C.W.J.C.No.426 of 1981) against the order of reinstatement of the workman. The workman has filed the other writ application (C.W.J.C.No.684 of 1981) against the direction that he shall not be paid his wages for the idle period.

6. Learned counsel appearing on behalf of the management in C.W.J.C.No.426 of 1981 submitted that the Government having refused to make a reference once, it was not open for the Government to make a reference and that too without hearing the management. It was also submitted that the act of the management in dismissing the workman could not be held to be discriminatory specially in view of the fact that the Labour Court itself held that the domestic enquiry was proper and that the charges were established. On the other hand, Mr. J.Krishna appearing for the petitioner-workman in C.W.J.C.No.684 of 1981 contended that the reference was proper and according to law and that there was no requirement in law that before making reference management shall be heard. He supported the findings arrived at by the Labour Court on the question of discrimination and submitted that the management had picked up this workman Md. Fazle Haque for his trade union activities and the order of dismissal was a clear case of victimisation.

7. From the letter of the Government to the Management of Champaran Sugar Company Ltd. dated 19-6-1976, which is Annexure-4 in C.W.J.C.No.426 of

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(1) (1979) A.I.R. (S.C.) 170 = (1979) 1 L.L.J. 1 = (1979) L.I.C. 1

1981, it will appeal that the Government refused to make a reference of the dispute and communicated its decision under section 12(5) of the Act. It may be mentioned here that the Joint Labour Commissioner, Bihar had intimated about the matter of dismissal of the workman on 15-6-1976 to the Assistant Labour Commissioner. This was after the letter dated 19-5-1976 by which reference had been refused by the Government. From two other letters dated 10-12-1977 Ext. E/17) of the Assistant Labour Commissioner to the Labour Commissioner and the other dated 3-12-1977 (Ext. E/18) and 11-1-1977 (Ext. E/19) clearly indicated that the Government had sent its decision under section 12(5) of the Act referred to above on 19-6-1976 without waiting for any report as called for by it earlier i.e. by a letter dated 19-3/5-1976. The Government had asked the Assistant Labour Commissioner, Muzaffarpur to enquire into the matter of dismissal of the workman and accordingly a conciliation had been held. The report of the conciliation dated 12-5-1976 had been sent inasmuch as the Government's decision under section 12(5) of the Act had been received prior to sending of the report. After the reports were received it appears that Government decided to make a reference of the dispute under section 10(1) of the Acts on 20-3-1971. The Labour Court has found that the Government had taken this step on the report of its own agency and had reconsidered its earlier decision while making the reference. The Labour Court has further found that there was no question of hearing the management prior to making the reference as the same was neither essential or obligatory on the part of the Government.

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(1) (1970) A.I.R. (S.C.) 1205

8. On this question learned counsels appearing on behalf of both the parties have placed reliance on a decision of the Supreme Court in *M/S Avon Services Production Agencies (P) Ltd.*v. *Industrial Tribunal, Haryana and others* (1) In this case it was held:

"The only requirement for taking action under section 10(1) is that there must be some material before the Government which will enable the appropirate Government to form an opinion that an industrial dispute exists or is apprehended. This is an administrative function of the Government as the expression is understood in contradistinction to judicial or quasi-judicial function. Merely because the Government rejects a request for a reference or declines to make a reference, it cannot be said that the industiral dispute has ceased to exist, nor could it be said to be a review of any judicial or quasi-judicial order or determination. The industrial dispute may nonetheless continue to remain in existence and if at a subsequent stage the appropriate Government is satisfied that in the interest of industrial peace and for promoting industrial harmony it is desirable to make a reference, the appropriate Government does not lack power to do so under section 10(1), nor it is precluded from making the reference on the only ground that on an earlier occasion it had declined to make the reference. The expression "at any time" in section 10(1) will clearly negative the contention that once the Government declines to make a reference the power to make a reference under section 10(1) in respect of the same dispute gets exhausted. Such a construction would denued a very vital power conferred on the Government in the interest of industrial peace and harmony and it need not be whittled down by interpretative process."

The following observation of the Supreme Court in the case of *Western India Match Co.Ltd.*v. *Western India Match Co.Workers Union* (1) deciding an identical question was quoted in the above case:

"In the light of the nature of the function of the Government and the object for which the power is conferred on it, it would be difficult to hold that once the Government has refused to refer, it cannot change its mind on a reconsideration of the matter either because new facts have come to light or because it had misunder-stood the existing facts or for any other relevant consideration and decide to make the reference. But where it reconsiders its earlier decision it can make the reference only if the dispute is an industrial one and either exists at that stage or is apprehended and the reference it makes must be with regard to that and no other industrial dispute."

After considering all the facts and circumstances it was further held that the Government did not lack the power to make the reference in respect of the same dispute which it once declined to make. It was observed that refusal of an appropriate Government to make reference was not indicative of an exercise of power under section 10(1) since the exercise of power would a positive act of making a reference. Therefore, when the Government declines to make a reference the source of power is neither dried up nor exhausted. It only indicated that the Government for the time being refused to exercise the power but that did not denued the power and the power could

(1) (1980) 1 L.I.C. 475

be exercised if the material and relevant consideration for exercise of power were available, they being the continued existence of the dispute and the wisdom of referring it in the larger interest of industrial peace and harmony. The contention that once the Government had refused to make a reference on an earlier occasion it cannot make a reference unless it was shown that there were some fresh or additional material was also negatived. Learned counsel appearing for the management submitted that a decision of the Supreme Court in the *Avon's* case came to be considered by a Full Bench of the Madras High Court in *G.Muthukrishnan* Vs. *New Horizon Sugar Mills Pvt.Ltd.*(1) and their Lordships of the Madras High Court held that where the State Government had refused to refer a dispute about the non-employment of the workman in the first instance but on subsequent representation made by the workman the Government exercised its statutory power under section 10 of the Act and made such reference without hearing the employer of the Mill and without giving any notice, the Government did not act fairly and the award passed by the Labour Court pursuant to such reference was a nullity. With great respect to the learned Judges of the Madras High Court it is not possible for me to agree with the view taken by them. To say that principle of natural justice require that the employer should be heard before making reference on a subsequent representation will be introducing something which is not required by the provisions contained in Section 10(1) of the Act. In the *Avon's* case the Supreme Court has categorically stated that the power could be exercised if the material and relevant consideration for exercise of power were available they being continued existence of the dispute and the wisdom of referring it in the larger interest of industrial peace

and harmony. The question is if giving an opportunity of hearing becomes necessary on a subsequent representation by the workman then why the same principle will not apply at the initial stage. Any refusal to make a reference does not mean that the dispute, if it at all existed, stands resolved. Therefore, if the dispute in the opinion of the authority concerned existed, any reference on a subsequent representation must be held to be valid. According to the Supreme Court, second reference could be made even in the absence of fresh materials. So far the present case is concerned it will appear that the reference was made on the basis of a report submitted by the agency of the Government itself which had not been earlier considered. That report was not available earlier and was sent later that is to say after the Government had refused to make the reference. In my opinion, therefore, it was neither necessary nor obligatory on the part of the Government to give a notice to the management and hear them before making the reference in this case. The findings arrived by the Labour Court on this question is perfectly justified and I do not see any reason to interfere with that finding.

9. The next question urged by learned counsel for the management is that there was no question of discrimination and the finding arrived at by the Labour Court are not correct. The admitted position is that no action was taken against Rahat Hussain or Ekbali Raut the two persons who are alleged to have accompanied Md.Fazle Haque the workman and had taken active part in threatening and intimidating Shri S.K.Bhattacharya the Chief Chemist. It is stated that Ekabli Raut was also armed with a lathi. The case of the workman was that he used to take leading part in trade union activities and had also taken leading

part in getting one Birbal Sharma a member of C.P.I. to be elected in the election. It was only after that he had become the eye-sore of the management. According to the management the action against Md.Fazle Haque become necessary because he was armed with an iron rod whereas Ekbali Raut was armed with a lathi. However, on that ground there could be no discrimination inasmuch as both Ekbali Raut and Fazle Haque along with others were members of the unlawful assembly as one carrying an iron rod and the other carrying a lathi. Both of them had misconducted themselves and one could not be left out only because he was carrying a lathi. The Labour Court found that according to the evidence of the management witnesses during the enquiry proceeding it was clear that Rahat Hussain and Ekbali Raut were also members of the unruly mob. The evidence of Shri S.K.Bhattarchary, the Chief Chemist also clearly indicated that Rahat Hussain and Ekbali Raut were the main figures among the members of the mob which had surrounded him. In any case the charges against Rahat Hussain and Ekbali Raut were not less serious. In such a situation if those two persons namely, Rahat Hussain and Ekbali Raut were not proceeded against by the management the Labour Court was completely justified in coming to the conclusion that the proceeding against Fazle Haque was an action of discrimination and unfair labour practice for his taking part in the trade union activities. There was evidence in the case that the management was annoyed with the activities of Birbal Sharma who was the General Secretary of the Union and in whose election this workman had

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(1) (1979) A.I.R. (S.C.) 75

taken an active part. It is not possible to disagree with the view taken by the Labour Court on this point. The Labour Court has discussed all the materials brought before it on this question and rightly held that termination of service of Md.Fazle Haque was an act of discrimination amounting to victimisation and unfair labour practice.

10. No other question has been raised on behalf of the management and I do not find any merit in their writ application (C.W.J.C.No.426 of 1981)

11. On behalf of the workman Mr.J.Krishna, Advocate submitted that once the order of dismissal had been set aside and it had been found that it was an act of discrimination and victimisation, the Labour Court should have directed for reinstatement with full back wages. The Labour Court has set aside the order of termination and has ordered for reinstatement of Md.Fazle Haque but without any back wages for the idle period. It has been made clear that the period from the date of dismissal upto the date of reinstatement shall be treated on leave but without pay for the purpose of continuity of service and for other benefits.

12. It may be stated here that the Labour Court had found that the workman Fazle Haque was guilty of misconduct as alleged by the management. He had exhibited threatening posters by pressing his iron rod which amounted to intimidation and threat to Shri Bhattacharya. There was sufficient material on this point. It is not a part of trade union activity for any workman to behave in this manner. The workman must thank himself that the order of his dismissal from service has been set aside by the Labour Court on another ground. Serious view must be taken to such unruly and indisciplined conduct of the workman.

Mr.J.Krishna referred to a decision of the Supreme Court in *M/S Hindustan Tin Works Pvt.Ltd.* vs. *The Employees of M/S Hindustan Tin Works Pvt.Ltd.*(1) and submitted that a workman whose service had been illegally terminated should be entitled to full back wages if he was not gainfully employed during the period. In the above case the Supreme Court observed that ordinarily a workman whose service had been illegally terminated by dismissal, discharge or retrenchment will be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. However, it was further observed that there cannot be a strait jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. It was observed that it was in the discretion of the Tribunal to award full back wages and in the event of any departure from this normal rule to indicate the circumstances. The Tribunal has to exercise its discretion keeping in view all the relevant circumstances. The discretion has to be exercised in a judicial and judicious manner. So far the present case in concerned I find that the Labour Court had exercised this discretion against the workman by not awarding the full back wages for the idle period for good reason. The workman had no business to use force against the Chief Chemist. If he had any grievance the same could be ventilated in accordance with law. I do not think this is a case in which the workman should be held to be entitled to the backwages. He should satisfy himself with reinstatement only. Mr.J.Krishna then submitted that the payment of half wages to the workman according to the direction of this Court dated 15-4-1981 should be adjusted for the idle period i.e. from the date of dismissal to the date of reinstatement. I do not feel inclined to give any such direction. I do not find any merit in the

writ application (C.W.J.C.No.684 of 1981) filed by the workman.

13. The result is that both the writ applications fail and are dismissed. The parties shall bear their own costs.

M.K.C. *Application dismissed*

CIVIL WRIT JURISDICTION

Before Satyeshwar Roy and L.P.N.Shahdeo, JJ.*

1987.

January, 6.

*Shyam Sunder Nag and others.***

v.

State of Bihar and others.

Constitution --- Article 342 (1) --- Tamarias of Singbhum, whether are Patar-Mundas --- whether they are included in the notification issued by President of India under Article 342 (1) - -- inclusion of Tamarias in item no. 52 under the heading" backward class" and in item no.34 under the heading" very backward class" in Annexure-1, --- validity of.

Held, that the Tamarias of Singbhum are Patar-Mundas and they are included in the notification issued by the President of India under Article 342 (1) of the Constitution. Consequently their inclusion in item no.52 under the heading" backward class" and item no.34 under the heading" very backward class" in the decision of State Government contained in

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*Sitting at Ranchi-

**Civil Writ Jurisdiction Case No.513 of 1986(R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

Annexure-1 must be struck down.

Bhaiya Ram Munda v. *Anirudh Patar* (1) --- followed.

B.Basavalingappa v. *Munichinnapa and ors.* (2)

Bhaiya Lal v. *Harikishan Singh and ors.* (3) --- referred to.

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 Satyeshwar Roy, J.

M/s Thakur Prasad and *R.K.Choudhary* for the petitioners

M/s S.K.Chattopadhyaya, G.P.I and *Shekhar Sinha, J.C.to G.P.I* for Respondent no.1,2 and 4 to 6

Mr.Debi Prasad, Standing Counsel to Central Government for respondent no.3.

SATYESHWAR ROY,J. Are the Tamarias who are original inhabitants of Tamar in the district of Ranchi and have settled in the district of Singbhum Mundas?

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(1) (1971) A.I.R. (S.C.) 2533

(2) (1965) A.I.R. (S.C.) 1369

(3) (1965) A.I.R. (S.C.) 1557

According to the petitioners they are, and according to the respondents they are not.

2. It appears that the State Government constituted a Commission known as Backward Class Commission to advise the Government whether there is sufficient reservation of posts in Government services for the socially and educationally backward classes of citizens. The Commission gave its advise. The State Government thereafter took decision for reservation of posts for those classes of citizens. The decision of the State Government as well as the classes of citizens who, according to the State Government, are socially and educationally backward and for whom reservation of posts should be made are contained in Annexure-1 to the writ petition. In that annexure in the list of socially and educationally backward classes Tamaria has been shown in serial no.52. Tamaria has also been shown in serial no.34 as very backward class. The petitioners have challenged this notification on the ground that Tamaria being *Patar-Munda* could not have been included in the list of backward classes and very backward classes.

3. According to the petitioners, thousands of people belonging to Munda tribe migrated from Tamar in the district of Ranchi to the district of Singhbhum. In the district of Singhbhum, they are called Tamaria as they migrated from Tamar. Although they are called Tamaria in the district of Singhbhum, they are in fact Munda, a Scheduled Tribe. The factum of migration of Mundas from Tamar to the district of Singhbhum has not been controverted in the counter affidavit filed on behalf of respondent no.6. The assertion that Tamarias belong to Patar-Munda Community has also not been denied in the counter affidavit. According

to the counter affidavit, since Tamaria has not been recognised as Scheduled Tribes in the State of Bihar under the Constitution (Scheduled Tribes) Order, 1950, they cannot be held to be the members of Scheduled Tribes.

4. In exercise of the powers conferred by clause (1) of Article 342 of the Constitution, the President made an Order known as the Constitution (Scheduled Tribes) Order, 1950. The tribes or tribal communities or parts of or groups within the tribes or tribal communities are specified in that order. In the State of Bihar amongst others, Munda is one of the tribes, enumerated in the schedule. It is common case of both the parties that Munda is a Scheduled Tribe. According to the respondents since Tamaria has not been included as one of the tribes in the schedule to that Order made by the President, Tamarias cannot be said to be members of a Scheduled Tribe.

5. Under Article 342(1) of the Constitution, the President by public notification is empowered to specify the tribes or tribal communities or parts of or groups within the tribes or tribal communities which shall for the purpose of the Constitution be deemed to be Scheduled Tribes in relation to a State or Union territory. Under Article 342(2) Parliament may by law include in or exclude from the list of the Scheduled Tribes so notified under Article 342(1) any tribe or tribal community or part of or group within any tribe or tribal community. As noticed above, Tamaria does not find place in the notification issued under Article 342(1) nor Parliament by law has included Tamaria in that notification in exercise of powers conferred under Article 342(2).

6. Objection was raised on behalf of the respondents with regard to the maintainability of the writ petition on the ground that as Tamaria does not find place as one of the tribes in the notification made by the President under Article 342(1) of the Constitution, this Court cannot add any tribe to the schedule. Objection regarding the maintainability of the writ petition was also taken on behalf of the respondents on the ground that since the State Government decided that the Tamarias are members of backward classes and very backward classes, this Court cannot alter that.

7. So far the second objection reised by the respondents is concerned, it is necessary to notice Annexure-1. It is settled that the State Government for the purpose of Article 15(4) of the Constitution may appoint a committee or commission to advise it to locate socially and educationally backward classes of citizens in the State. The appointment of said commission or committee is permissible, notwithstanding Article 340 which empowers the President to appoint a commission to investigate the conditions of backward classes with a view to taking steps to remove the difficulties under which such socially and educationally backward classes labour and to improve their condition. Reference may be made to *M.R.Balaji and ors.*vrs. *State of Mysore and ors* (1) The decision of the State Government as contained in Annexure-1 is to give effect to Article 15(4). This also appears on the face of Annexure-1. This, therefore, has nothing to do with the notifications issued under Articles 341(1) and 342(1) of the Constitution.

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(1) (1972) A.I.R. (S.C.) 1375.

8. So far the first objection of the respondents is concerned, Mr.Thakur Prasad, learned counsel for the petitioners contended that since Tamaria is in fact a Munda, this Court can strike down Annexure-1 so far Tamaria is concerned. Mr.Thakur Prasad relied in *Bhaiya Ram Munda* vrs. *Anirudh Patar* (1)

Two decisions of the Supreme Court are required to be noticed, one is the case of *B.Basavalingappa* vrs. *Munichinnapa and ors* (2) and the other is of *Bhaiya Lal* vrs. *Harikishan Singh and ors.* (3) In both the cases, the Presidential notification was under Article 341(1) that is the Constitution (Scheduled Castes) Order, 1950. The only distinction between Articles 341 and 342 is that the former is in relation to Scheduled Castes and the latter is in relation to Scheduled Tribes. In *Basavalingappa's* case (supra) the Supreme Court observed that:

"It may be accepted that it is not open to make any modification of the Order by producing evidence to show (for example) that though caste A alone is mentioned in the Order, caste B is also part of caste A and, therefore, must be deemed to be included in caste A."

In spite of this observation, the Supreme Court in the peculiar circumstances of that case, allowed evidence to be led to ascertain the caste specified

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(1) (1971) A.I.R. (S.C.) 2533.

(2) (1965) A.I.R. (S.C.) 1369.

(3) (1965) A.I.R. (S.C.) 1557.

in the Order. From the report of *Bhaiya Ram's* case (Supra), it appears that it was contended in that case that Dohar Caste is a sub-caste of Chamar Caste. It was held that the contention that Dohar Caste is a sub-caste of Chamar Caste cannot be entertained in view of the Constitution (Scheduled Castes) Order, 1950. The Supreme Court observed with reference to Article 341(1):-

"It is thus clear that in order to determine whether or not a particular caste is a Scheduled Caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf....."

The case of *Basavalingappa* (Supra) was relied upon in *Bhaiya Lal's* case (Supra).

9. The cases of *B.Basavalingappa* and *Bhaiya Lal* (Supra) were noticed by the Supreme Court in *Bhaiya Ram Munda's* case (Supra). In that case, the election of Anirudh from an Assembly Constituency reserved for Scheduled Tribes were challenged by Bhaiya Ram Munda. According to Bhaiya Ram Anirudh Patar was not a Munda and, therefore, was not entitled to contest from the reserved Constituency. The Supreme Court looked into the evidence adduced by the parties before Election Tribunal. It also looked into the books written by Sociologists and Anthropologists. With reference to the case of *B.Basavalingappa* the Supreme Court observed that:

"The decision in this case lends no support to the contention that evidence is inadmissible for the purpose of showing what an entry in the Presidential Order was intended to mean."

With reference to the case of *Bhaiya Lal* (Supra), it observed that:

"It was held by this Court that the plea that the appellant is not a Chamar, and as such, he could not claim the status of a Chamar claiming that he belonged to Dohar Caste and that an enquiry which is a sub-caste of the Chamar Caste of the kind would not be permissible having regard to the provision contained in Article 341 of the Constitution.

The Court declined to allow a plea to be raised that Dohars were in some areas recognised as a sub-caste of Chamars. The contention was plainly futile, once it was held that the candidate was not a Chamar in the Constituency to which the Order related and Dohars were not a Scheduled Caste."

It may be noticed that in *Bhaiya Ram Munda's case* (Supra), the Assembly Constituency was from Tamar.

10. It has already been noticed that the assertion of the petitioners that thousands of people belonging to Munda Tribe migrated from Tamar region of the district of Ranchi to Singhbhum, who are commonly called Tamarias by the people of Singhbhum and that the Tamaria belonged to the Patar-Munda community, have not been denied by the respondents. As in the case of *Bhaiya Ram Munda* (Supra), in this case also

"it is not the contention of the first respondent that he was a Patar member of a Tribe which is not Munda, but he was recognised as a Munda. His case is that in his Tribe, he was a Munda Patar. (Para 35 of A.I.R.)."

In view of the pleadings of the petitioners which have not been denied by the respondents, the case of *Bhaiya Ram Munda* (Supra) shall apply. It must, therefore, be held that Tamarias are Patar- Mundas.

11. In the result, it is held that the Tamarias of Singhbhum are Patar-Mundas and they are included in the notification issued by the President under Article 342(1) of the Constitution. Consequently, their inclusion in item no.52 under the heading" backward class" and item no.34 under the heading" very backward class" in Annexure-1 to the writ petition must be struck down. It may be noticed that except the question of maintainability of the writ petition, no other argument was advanced on behalf of the respondents.

12. Let a writ be accordingly issued. There shall be no order as to costs.

L.P.N.Shahdeo, J: I agree.

R.D. *Application allowed*

CIVIL WRIT JURISDICTION

Before Lalit Mohan Sharma, J.

1987

February, 7.

*Anil Kumar Sinha and others.**

v.

The State of Bihar and others.

Cadre of Sub Deputy Collectors amalgamated with that of Deputy Collectors --- inter Se seniority of the mergees and direct recruits --- direct recruits, whether to be treated as senior --- date of joining the service, whether immaterial for the purpose of inter se seniority --- Rule contained in Notification dated 26-8-1972, rule 3 (vii) --- rule, how far applies to direct recruits --- right of promotion to seniormost officers in Sub- Deputy Collectors' cadre, whether denied --- decision to appoint some direct recruits taken earlier but appointment letters issued later due to certain formalities to be completed --- this technical objection when can be allowed to prevail.

Where the petitioners were initially appointed as Sub Deputy Collectors and in pursuance of a decision amalgamating the cadre of Sub Deputy Collectors with

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*Civil Writ Jurisdiction Case No.3409 of 1981. In the matter of an application under Articles 226 and 227 of the Constitution of India.

that of Deputy Collectors with effect from 1-4-1974 they became Deputy Collectors and the respondents were appointed as Deputy Collectors as direct recruits on 12-3-1974 and the petitioners claimed seniority over the direct recruits;

Held, that the petitioners must be treated to have been substantively appointed with effect from 1-4-1974. This, however cannot entitle the petitioners to their claim of seniority over the direct appointees, unless the latter are shown to have been appointed subsequently. The services of the direct recruits were found satisfactory and they had fulfilled all the conditions for confirmation and accordingly were actually confirmed later. They were, therefore, substantively appointed on and with effect from the 12th of March, 1974, i.e., even before a decision to amalgamate the two cadres was taken by the government and the direct recruits must be treated as senior.

Kartik Charan Jha & ors v. *State of Bihar* (1)

Taraka Nath Sharma v. *State of Bihar* (2) --- relied on.

Held, further, that the actual dates of joining the service are immaterial for the purpose of deciding the inter se seniority of the margees and direct recruits.

Even Rule 3 (vii) of the 1972 Rules mentions

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(1) (1986) P.L.J.R. 992

(2) (1985) P.L.J.R. 829

continuous officiation also as the basis for deciding seniority and dues not confine itself to substantive appointment as sole criterion. The direct recruits shall also succeed under the test laid down by the rule with reference to continuous officiation.

Held, also, that it cannot be said that the petitioners, who were seniormost officers in the Sub Deputy Collectors' cadre were being illegally denied their legal right of promotion retrospectively with effect from 1972 and 1973. The possibility of promotion of some of the mergees before the relevant dates, could not have been ruled out and was rightly taken note of while framing the Resolution amalgamating the two cadres in clause (c) of the said Resolution.

On an objection of the petitioners with regard to some direct recruits that the formal appointment letters could not be issued earlier due to certain formalities which were not completed by the candidates themselves;

Held, that the appointment of these direct recruits and that of the other direct recruits were part of one transaction and these direct recruits were placed higher in merit than others, the technical objection should not be allowed to preveail as that will bring about serious anomaly. Besides, there is no justice to be pleaded by the petitioners against these direct recruits as the decision to appoint them was taken earlier and the appointment letters were awaiting compliance of technical formalities. In fact the appointment letters could have been issued on the 12th March, 1974, itself to take effect subject to the fulfilment of the formalities. In substance, that is the position although the appointment letters were issued later. This Court,

therefore shall not exercise its discretionary jurisdiction in view of the circumstances of the case.

Applications by the mergees.

The facts of the case material to this report are set out in the judgment of Lalit Mohan Sharma, J.

M/s Basudeva Prasad, Radha Mohan Prasad, Anil Kumar, Shailendra Kumar Sinha, Ranjit Kumar Verma and Sunil Kumar for the petitioners

Mr. J.N.Pandey, Govt. Pleader no.2 Mrs.Asha Verma, J.C. to G.P. 2

M/s Sarojendu Mukharjee, S.J.Mukhopadhaya, Shivendra Kishore, Nagendra Rai, P.K.Sahi and Shyama Prasad Mukherji for the Respondents

LALIT MOHAN SHARMA,J. The main question involved in this case relates to the inter se seniority of the petitioners and the respondents 7 to 51. The petitioners and the intervenor respondent no.51 were initially appointed as Sub Deputy Collectors and in pursuance of a decision as contained in Annexure 1/1 (Page 381) amalgamating the cadre of Sub Deputy Collectors with that of Deputy Collectors with effect from 1.4.1974 they became Deputy Collectors. The respondents 7 to 50 were appointed as Deputy Collectors as direct recruits. The petitioners claim seniority over the direct recruits. During the pendency of the application, the civil list, a portion where of is Annexure 18 in the present case, was published showing the petitioners as junior. By an amendment petition they have prayed for quashing it.

2. A decision to amalgamate the two cadre was taken on the 24th of March, 1974, by a Resolution as contained in Annexure-1 to the original writ petition. Since the annexure did not contain a correct copy of the Resolution, the petitioners filed a supplementary affidavit along with a correct copy which is marked as Annexure 1/1. The arguments by the learned counsel have been addressed with reference to the latter document. In pursuance of this Resolution an order as contained in annexure-2 was passed on 19.8.1974, appointing the petitioners as Deputy Collectors with effect from 1.4.1974. This order could not be passed earlier as there was no available posts. The last paragraph of Annexure-2 states that the necessary posts were created by the letter no.12888 dated 2.7.1974. The direct recruits (excepting respondents no.20,32,33,41 and 43) were appointed on 12.3.1974. There is a serious dispute as to the date or dates on which they must be deemed to have joined their posts.

3. The Government's decision in Annexure 1/1 also applied to several other departments under the State Government including the Finance Department and a similar case came to this Court which was disposed of by the judgment reported in 1986 P.L.J.R., 992: *Kartik Charan Jha & ors.*vs. *State of Bihar.* The members of the subordinate service who came to the higher service as a result of the amalgamation were referred to as "mergees" in that case and the learned counsel in the present case also have adopted the same expression for the petitioners and the respondent no 51. According to Mr.Basudeva Prasad, appearing in support of the writ application, the petitioners are entitled to the seniority claimed by them in view of

the said decision. It has been contended that the mergees must be held to have been appointed on substantive basis as Deputy Collectors on 1.4.1974 while the direct recruits later. The direct recruits, therefore, must be treated as junior. Mr.Basudeva Prasad has further urged that the question of seniority on amalgamation has to be settled in the light of the provisions of Rule 3(vii) of the Rules as contained in the Notification 3/R1-106/72-P-15784 dated 26.8.1972 which reads as follows:-

"In the event of amalgamation of cadres seniority is determined with reference to the date of appointment in the particular grade on substantive or continuous officiating basis, whichever is earlier but inter se seniority of incumbents in any group of posts as amongst themselves is not to be disturbed in the process of amalgamation" (The underlined words appear in the Rules in Italics)".

It is claimed that as a result of the provisions of Annexure 1/1 as also the language of Annexure 2 whereunder the petitioners were appointed to the higher grade, they must be treated to have been substantively appointed within the meaning of aforementioned Rule 3(vii) with effect from 1.4.1974. So far the direct recruit-respondents are concerned, it is said that since they were placed on probation for two years they must be treated to have been substantively appointed only in 1976 as correctly mentioned in the civil list. Reference was made to Rules 22 and 23 of the Departmental Examination Rules originally framed on the 18th or June, 1923 and subsequently published after revision on the 11th of October, 1961 in the following terms:-

"22. Confirmation - An officer of the Bihar Civil Service (Executive Branch) will be confirmed in the service after -

(a) he has rendered two years of continuous services as a Deputy Collector.

(b) he has passed the departmental Examination completely by the higher standard, and

(c) Government consider the Officer as suitable in all respects for confirmation in the service.

23. An Officer of the Bihar Junior Civil Service appointed on a period of probation of two/four years will be confirmed in the service after -

(a) he has rendered two/four years of continuous service as a Sub Deputy Collector,

(b) he has passed the Departmental Examination in Law (Parts I and II) and Hindi by the Lower Standard and in Accounts and Development, and

(c) Government consider the officer as suitable in all respects for confirmation in the Bihar Junior Civil Service."

The argument is that the direct appointees have to be confirmed only after successful completion of the period of probation and passing of the Departmental Examination but in the case of the mergees no further examination was prescribed after promotion. The learned counsel strenuously urged that recruitment cannot be equated with appointment. Something also is needed, as was pointed out in *Basant Lal Malhotra*

vs. *State of Punjab* (1) Alternatively, it was contended that in view of the statutory Rules the mergees were entitled to be promoted much before 1.4.1974 but erroneously no such orders were passed in time. To remedy this wrong the Resolution Annexure 1/1 provided for promotion on priority basis and, therefore although the petitioners came to the higher cadre as mergees, they must be treated senior in view of their right to be promoted earlier.

4. This writ application was filed on 23.9.1981 and was admitted on 11.11.1981. The prayer for interim relief was not granted but it was observed that if during the pendency of the case any promotion orders were passed, they would be subject to the final result in the case. It has been stated that several such orders in favour of some of the respondents have been passed to the prejudice of the petitioners. An application was filed in December, 1986 for the production of a file by the State Government and on 2.1.1987 the State counsel was directed to keep the file in his custody so that it could be produced without delay if so required. I, however, do not feel the necessity of examining the same.

5. The learned counsel for the respondent no.51 moved an intervention application which was allowed and the intervenor was joined as the 51st respondent. As mentioned earlier, he is in the same category as the petitioners and has supported their case. Another application on behalf of four intervenors namely, Devakinandan Jha, Gouri Shankar Prasad, Madan

(1) (1969) A.I.R. (Punj.) 178, at p. 181

Mohan Srivastava and Ratikant Mishra was also filed but no orders thereupon were passed as it was never pressed. During the hearing, Mr.Radha Mohan Prasad stated that he was representing these intervenors and their case also is similar to that of the petitioners and if the petitioners succeed in the writ application, the intervenors should be allowed to share the success.

6. The main argument on behalf of the respondents was addressed by Mr.Sarojendu Mukherji. Mr.Nagendra Rai, appearing on behalf of the respondent no.37, Mr.Mukhopadhaya representing the respondent no.15 and Mr.Government Pleader no.2 on behalf of the State made supplementary arguments.

7. Mr. Mukherji has contended that the direct recruits must be held to have been appointed substantively (except respondents no.20,32,33,41 and 43 whose cases will be separately considered hereafter) on 12.3.1974 i.e. even before a decision to merge the two cadres was taken. Further, the petitioners were as a matter of fact Sub Deputy Collectors on that date and so continued till 19.8.1974 when the order in Annexure-2 was passed in their favour. He emphasised the fact that there were no posts in existence at all before July, and the petitioners, therefore, cannot be even fictionally treated to have been included in the cadre earlier as a result of the Resolution Annexure 1/1. The said Resolution by fixing three dates, namely, 1.4.1974, 1.4.1975 and 1.4.1976 on which the Sub Deputy Collectors were to join the new cadre in instalments itself indicates that there was no automatic appointment of the Sub Deputy Collectors as Deputy Collectors on the strength of Annexure-1/1. By the time necessary orders were

passed (by creation of posts by the letter no.12888 dated 2.7.1974 and order of appointment, Annexure 2, on 19.8.1984) to effectively transfer the petitioners to the higher cadre, the direct recruits had already been appointed and had joined their posts. The attempt to give retrospective effect to the appointments of the petitioners has been challenged as illegal on the strength of a Full Bench decesion of this Court in *N.P.Mathur and others* vs. *The State of Bihar and others* (1) Relying on the observation in paragraph 59 of the judgment that the State Government was empowered to make appointment with retrospective effect, only if it did not affect adversely the right of anybody else, it has been argued before me that if on the strength of the retrospective part of the order the direct recruits who were already in service and were, therefore, senior to the petitioners were going to be pushed down, the provision had to be struck down as vitiated in law. Alternatively, the learned counsel urged that the contesting respondents cannot be treated as later appointees in any view of the matter.

8. Mr. Basudeva Prasad referred to the order of appointment of some of the respondents as contained in Annexure 3 dated 12.3.1974 as probationers and to paragraph 6 thereof stating that the training of the candidates would be for four months and the session for the purpose of training would commence on 2.4.1974. It in said that no appointment can be treated to be effective unless the appointee is posted; and Annexure 3 indicates that those respondents who were

(1) (1971) 1 S.L.R. 335.

covered by it were actually posted for the first time on 2.4.1974 i.e. a day later than the petitioners. This was done so as to permit the petitioners to become senior. It may at this stage be mentioned that a number of contesting respondents were appointed by Annexure-3 dated 12.3.74 prospectively and on this agreement will have to be treated as senior not only to the other direct recruits in violation of the recommendation of the Public Service Commission but also to the petitioners.

9. Let me first consider the nature of the appointment of the petitioners. Mr.Mukherji strenuously contended that the appointment cannot be treated to be substantive in view of the criteria mentioned in paragraph 14 of the judgment in the Full Bench case of *Bishundeo* vs. *A.P.N.Singh & ors* (1) He has emphasised the fact that the petitioners were taken in the superior cadre without the opinion of the Public Service Commission on the question of their suitability and fitness. The benefit flowed to them on account of a policy decision of amalgamation of the two cadres. The civil list also indicates that the petitioners were confirmed in the superior service with effect from 1.4.1976 i.e. after a period of two years. However, in view of what has been observed in *K.C.Jha's* case, (2) I will assume in favour of the petitioners that they must be treated to have been substantively appointed with effect from 1.4.1974. In that case also the same

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(1) (1982) B.B.C.J. 45 F.B.

(2) (1986) P.L.J.R. 992.

Resolution as mentioned in Annexure-1/1 in the present writ petition was relied upon on behalf of the mergees. Towards the end of paragraph 13 of the judgment it was stated thus:-

"In my concluded opinion, therefore, the mergees must be deemed to have been appointed substantively (not promoted) from the date of their merger."

This, however, cannot entitle the petitioners to their claim of seniority over the direct appointees, unless the latter are shown to have been appointed subsequently. Great emphasis was laid by Mr.Basudeva Prasad on the fact that the direct recruits were on probation for a period of two years. The argument is that direct appointment can be divided into three groups; namely, substantive appointment, officiating appointment and appointment on probation. Reference was made by the learned counsel to the observation in *P.L.Dhingra* vs. *Union of India* (1) In this back-ground can it be said that the appointment of the direct recruits became substantive in nature only on the successful completion of the probationary period ? I do not think that this point again should detain me for long in view of another Division Bench decision of this Court in *Taraka Nath Sharma* vs. *State of Bihar* (2) The quality of service of a probationer who has later been

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(1) (1986) P.L.J.R. 992.

(2) (1958) A.I.R. (S.C.) 36

confirmed was examined by the Division Bench and ultimately the conclusion which was reached, is to be found in the concluding sentence of paragraph-10 of the judgment which reads as follows:-

"In view of the aforesaid judgments of the Supreme Court now it is too late to urge that a person is appointed on substantive basis only with effect from the date of his confirmation in the service, if he has been appointed either on temporary basis or on probation."

The learned Judge who delivered the judgment examined the cases relied upon on behalf of the parties including the judgment of the Supreme Court in *Baleshwar Das and others* vs. *State of Uttar Pradesh and others* (2) and finally held as follows:-

"Any way, once it is held that the date of substantive appointment has not to be determined only with reference to the date of confirmation then, in my opinion, it shall be only just and proper that when temporary appointees or probationers are confirmedin the same rank having fulfilled the conditions for confirmation then they shall be deemed to have been substantively appointed maintaining their *inter se* seniority of the initial appointment. " (Emphasis added).

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(1) (1985) P.L.J.R. 829

(2) (1981) A.I.R. (S.C.) 41

10. Mr. Prasad urged that the decision is not applicable as the Court in that case was not called upon to decide the issue of seniority between a direct recruit and a mergee. The parties litigating there belonged to the same category. I do not think the case can be distinguished on that ground. The nature of service of a probationer cannot differ in quality from case to case and must be the same whether his right is being challenged by another probationer, or a promotee or a mergee. It is not in dispute that the services of the direct recruits were found satisfactory and they had fulfilled all the conditions for confirmation and accordingly were actually confirmed later. I, therefore, hold that they were substantively appointed on and with effect from the 12th of March, 1974, i.e. even before a decision to amalgamate the two cadres was taken by the Government. They must, therefore, be treated as senior.

11. On the question as to when the direct recruits actually joined the service, the learned counsel for the petitioners relied on paragraph 6 of Annexure 3, which stated that the training of the candidates would commence on the 2nd April, 1974. Before I proceed to deal with the arguments of the learned counsel I should point out that the actual date of joining again is not material as was stated in paragraph 13 of the judgment in the case of *Taraka Nath Sharma* (*supra*). The following passage which has been relied upon on behalf of the respondents reads as follows:-

"I have not been able to appreciate as to how the respondent- State have been confirming its employees calculating the period of two years of probation with effect from the date of their joining

the posts. It is well known that under the exigency of situation like accident, death in the family, not being immediately relieved from other service etc. a person, who is first in the merit list may not join the same day the notification is made or immediately thereafter, and a person, who is lower in the merit list, may join either on the date of notification itself or immediately thereafter. Now merely on the basis of the date of joining, the merit and seniority has (sic) to be ignored? In such cases, also, period of two years of the probation may be calculated from the date of joining, but after completion of a period of probation the inter se seniority or the merit list, as originally fixed should not be disturbed."

I am conscious of the fact that these observations were, as repeatedly pointed out by Mr. Basudeva Prasad, made while deciding a dispute between two direct appointees, but the ratio cannot be held to be inapplicable to other cases. Even on the argument of Mr. Prasad, the decision will atleast apply to the respondents 7 to 50 when a question of inter se seniority arises amongst them. As has been mentioned earlier, all these respondents were posted for training which was to commence on 2.4.74. More than a dozen of the contesting respondents were appointed by Annexure-4 dated 12.3.74 with immediate effect, and both Annexures 3 and 4 stated that their inter se seniority would be according to their merit determined by the Public Service Commission in its recommendation. If the argument of the petitioners is accepted, the respondents appointed under Annexure 4 shall have to be considered senior to those appointed under Annexure-3 irrespective of their merits. I do not accept the Petitioner's interpretation of the judgment

in *Taraka Nath Sharma's* case as correct. The principle laid down is of general nature and has to be followed except where there is another relevant rule negativing the principle explicitly or impliedly and it has not been suggested that there is any such rule. Accordingly, I hold that there is no reason in the present case to depart from the general principle as laid down.

12. Even on the question as to when the respondents must be deemed to have actually joined the service I think that their case as presented by Mr. Mukherji has to be accepted. It was argued that paragraph 5 of Annexure-3 requested the candidates to join the service immediately and 2.4.1974 is mentioned in paragraph 6 not as the date on which the service commenced but when that training was scheduled to start. In the opening sentence of Annexure-3 two expressions have been used; namely, appointment and deputed. The latter expression has been used with reference to the candidates joining Ranchi Training Institute for the purpose of training. The expression'Appointment' and'Deputation' must, therefore, be appreciated in the contra-distinction with each other and cannot mean the same thing as pointed out on behalf of the petitioners. Mr.Basudeva Prasad urged that the date 2nd April, 1974, was mentioned as the date for commencement of the training with the sole object of making the direct recruits junior to the mergees. This submission was solely based on the fact that under Annexure-1/1 the merger was to take place with effect from 1.4.1974. I do not think it is permissible to draw the aforesaid inference because by the 12th of March, 1974, i.e., the date on which Annexure-3 was issued, a decision in regard to the amalgamation of the two services had not been taken

at all, and more then a dozen of the contesting respondents had joined the service in March, 1974, as is apparent by the order in Annexure-4 and the Civil List, Annexure-18. The inter se seniority amongst the direct recruits was already determined in order of their merit and the respondent no.50 who was last in the merit list had joined on the 31st of March, 1974. I would close this chapter by restating that the dates on which the parties actually joined are immaterial for the purposes of the disputed issue.

13. The learned advocates for the respondents relied on the decisions in *S.B.Patwardhan* vs. *State of Maharashtra* (1) *Baleshwar Das* vs. *State of* Uttar Pradesh (2) and *Bishundeo* vs. *A.P.N.Singh & ors.*(3) as also on the Rules framed in 1934 and referred to in *Bishundeo Mahto's* case and many other cases of this Court as 1934 Rules. On behalf of the petitioners it was said that the case is governed solely by Rule 3(vii) of the 1972 Rules quoted in paragraph 3 above and any other consideration is irrelevant. In view of my finding earlier, it is not necessary to decide this controversy but I would like to point out that even Rule 3(vii) mentions continuous officiation also as the basis for deciding seniority and does not confine itself to substantive appointment as sole criterion. If the respective appointments of the parties are assumed to be not substantive before the expiry of a period

(1) (1977) A.I.R. (S.C.) 2051

(2) (1981) A.I.R. (S.C.) 41

(3) (1982) B.B.C.J. 45

of two years of their initial appointments, the contesting respondents shall again succeed under the test laid down by the rule with reference to continuous officiation.

14.The alternative argument addressed on behalf of the petitioners is based upon a right of promotion as spelled out in Rule 3 of the Bihar Civil Service (Executive Branch) and the Bihar Junior Civil Service (Recruitment) Rules, 1951, which is mentioned below:

"3.- The Governor shall decide in each year the number of vacancies in each of the services to be filled in that year by direct recruitment and/or by promotion, respectively;

Provided that the number of vacancies to be filled by promotion in the Bihar Civil Service (Excutive Branch) in any one year shall not, unless the Governor is satisfied that there is not a sufficient number of officers fit for promotion, be less than half the total number of vacancies to be filled in any such year."

It has been contended that since half the number of the vacancies each year ought to have been filled up by promotion which was not done with respect to the vacancies in 1972, 1973 and 1974 the petitioners who were seniormost officers in the Sub Depty Collectors' cadre were being illegally denied their legal right. This was appreciated at the time of the making of the Resolution Annexure 1/1 and by clause (G)in paragraph 1, this wrong was remedied. The document is in Hindi and its English translation was quoted in paragraph 5 of the judgment in Kartik Charan Jha's case. The relevant clause reads as follows:-

"(c)-Leaving aside such of those officers, who will be promoted to the Senior branch of the Service in accordance with the available vacancies on 1.4.1974,the other officers shall be merged serially within three years. One-third officers of the Junior branch shall be merged in order of seniority with effect from 1974; the next one-third from1975 and the rest one-third in 1976."

It will be observed that there is no direction or provision in posetive terms for any promotion to be made in the Senior branch and the main provision of the clause merely takes into account a possibility of such promotion. Can it, therefore, be said that on the strength of clause (c) the petitioners can claim promotion retrospectively with effect from 1972 and 1973. Actually they were never promoted and this aspect was emphasised in paragraph 13 of K.C.Jha's judgment as quoted above. If the petitioners were really entitled to be promoted earlier, they ought to have pressed their claim before the authorities, which was never done at any point of time.It would be remembered that the petitioners and the other Sub Deputy Collectors were to be merged in the Superior Service in three instalments from 1.4.1974 to 1.4.1976. The order in favour of the first instalment of officers also was not passed before the 19th of August,1974. The possibility of promotion of some of the mergees before the relevant dates, therefore, could not have been ruled out and was rightly taken note of while framing the Resolution. Besides, the petitioners were satisfied to have been merged in the higher service without undergoing the suitability test for promotion. The right of promotion was not unconditional. It was dependant on the fitness

of the officers in this regard as was mentioned in the proviso to Rule 3. How can it, therefore, be assumed now that they were fit to be promoted earlier and consequently were clothed with seniority over other appointnees who had already entered the service before them?

15. There was a lot of controversy during the arguments about the number of vacancies available and the learned counsel for the parties relied on several statements included in the affidavits, the stand of the respondents being that the claim of promotion of the petitioners was otherwise also not well founded. I do not think it necessary to go into those details.

16. Before I take up the cases of the respondents 20, 32, 33, 41, and 43 I should mention that the judgment in K.C. Jha's case has not been relied upon by Mr. Prasad for any purpose other than that discussed above.The respondents pointed out that in that case the mergees had actually joined the service before the appointment of the direct recruits.

17.The respondent no.20 was included in the order of appointment issued on the 12th of March, 1974 but later another appointment order was issued as contained in Annexure 8 dated 19.11.1974. The respondents 32 and 41 were appointed by Annexure 5 dated 3.4.1974; respondent no.33 by Annexure 6 dated 1.5.1974 and respondent no.43 by the order in Annexure 7 dated 29.7.1974. It was, threrfore, contended by Mr. Prasad that even in accordance to the basis which I have adopted for deciding the case, as mentioned above, these respondents must go down below the petitioners. I am afraid,in view of the circumstances of the case, it is not possible to do so. (It may be stated here that so far respondent no.33 is concerned he is not in service at all and is not in controversy now).The respondents in questions were recommended for appointment along with the other direct recruit respondents and in order of merit they were placed higher then several other respondents

including the respondent no.50. They, however, could not join the service on account of reasons mentioned in paragraph 5 of the reply affidavit on behalf of the respondent no.7 (at page 361; the affidavit wrongly mentions as having been filed on behalf of the respondents 7 to 50), read with Annexure-B to the State counter-affidavit. The objection of the petitioners is that the formal appointment letters could not be issued earlier not on account of any error on the part of the State and its authorities but due to certain formalities which were not completed by the candidates themselves. It is true that technically the petitioners can say that they joined the service earlier but in view of the fact that the appointment of these respondents and that of the other respondents who are going to succeed in this case were part of one transaction and these respondents were placed higher in merit than others, the technical objection should not be allowed to prevail as that will bring about serious anomaly. Besides, there is no justice to be pleaded by the petitioners against these respondents as the decision to appoint them was taken earlier and the appointment letters were awaiting compliance of technical formalities. In fact the appointment letters could have been issued on the 12th March itself to take effect subject to the fulfilment of the formalities. In substance, that is the position although the appointment letters were issued later. Even if it is assumed that technically the petitioners have a point against these respondents, this Court shall not exercise its discretionary jurisdiction in view of the circumstances of the case.

18. For the reasons mentioned above, the writ application fails and is dismissed but without costs.

S.P.J. *Application dismissed*

CIVIL WRIT JURISDICTION

Before Lalit Mohan Sharma, J.

1987

March, 24.

*Sachida Nand Tiwary.**

v.

The Chairman, State Bank of India and others.

Award by the All India Industrial Tribunal (Bank Disputes) popularly known as Sastry Award being followed by the Bank --- non-application thereof in petitioners' case --- whether amounts to illegal discrimination --- Sastry Award, sub-para 3, para 521, --- period of one year in the rule, whether reasonable and mandatory --- two parallel proceedings one by a departmental enquiry and another a criminal prosecution, whether can proceed - -- departmental

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*Civil Writ Jurisdiction Case Nos.3425 of 1981. 5771 of 1983 and 2647 of 1984. In the matter of applications under Articles 226 and 227 of the Constitution of India.

C.W.J.C. 5771... State Bank of India & ors v. Atulya Chandra Verma.

C.W.J.C. 2647... Atulya Chandra Verma v. State Bank of India & ors.

proceeding after the period of one year was over and threat of prosecution had disappeared, whether void-consideration of provisions of clause (c) of paragraph 521 (10) of Sastry Award by the Labour Court, propriety of.

Held, on an objection raised as to the maintainability of the writ petition on the ground that the Sastry Award (Award of the All India Industrial Tribunal (Bank Disputes) Bombay given in connection with certain industrial disputes), has no statutory force, that, if the Sastry Award is being followed by the respondent Bank, and it is not suggested otherwise, it cannot arbitrarily refuse to do so in the petitioner's case, for that would amount to illegal discrimination and as such the writ petition cannot be rejected as not maintainable.

Ramana Dayaram Shetty v. *International Airport Authority.* (1)

B.S.Minhas v. Indian Statistical Institute *& ors (2) relied on.*

Held, further, that the object for mentioning the period of one year in sub-paragraph (3) of paragraph 521 of the Sastry Award after which it is said that the management may deal with an employee departmentally appears to protect an employee from two parallel proceedings at the same time, one by a departmental enquiry and another a criminal

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(1) (1979) 3 S.C.C. 489.

(2) (1983) (4) S.C.C. 582.

prosecution. In many a case, an employee may in such circumstances be seriously prejudiced in his defence in the criminal case. The rule, therefore, appears to be reasonable, and so while threat of a criminal case is pending, if an employee is called upon to file his show cause in a departmental proceeding, he may justifiably refuse to do so. If the management, in such circumstances, insists to expenditiously close the enquiry, the proceeding may have to be struck down as illegal, but where an employee has no reason to apprahend prejudice or justification for non-co-operating in the departmental proceeding, the position will be different. The relevant portion of paragraph 521(3) of Sastry Award is not mandatory in nature so as to vitiate the departmental proceeding by itself, even in a case where the servant is not prejudiced by its violation. In the instant case, therefore, after taking part in the enquiry at a point of time when the threat of any criminal prosecution had completely disappeared and the period of one year was over the petitioner is not entitled to challenge the entire proceeding in the departmental enquiry as void.

Held, also, that the Labour Court was entitled to examine the question of proper punishment in view of the provisions of sub- paragraph 10(c) of paragraph 521 of Sastry Award.

Application by the employees of the State Bank of India and the Bank.

The facts of the case material to this report are set out in the judgment of L.M.Sharma, J.

M/s K.P.Verma and *R.P.Sinha Rajesh* for the

petitioner in C.W.J.C. 3425.

M/s Basudeva Prasad and *S.K.Sinha* for the respondents in C.W.J.C. 3425.

M/s Basudeva Prasad and *S.K.Sinha* for the petitioners in C.W.J.C. 5771.

M/s Tara Kishore Prasad and *Yugal Kishore* for the respondents in C.W.J.C. 5771.

M/s Tara kishore Prasad and *Jugal Kishore* for the petitioners in C.W.J.C. 2647.

M/s Basudeva Prasad and *S.K.Sinha* for the respondents in C.W.J.C. 2647.

LALIT MOHAN SHARMA,J. The petitioner in C.W.J.C.3425 of 1981 Sachidanand Tiwary as also the petitioner in C.W.J.C.2647 of 1984 Atul Chandra Verma, who were employed under the State Bank of India, were dismissed from service on the basis of certain charges framed against them on common facts. Sachidanand Tiwary has challenged the order of his dismissal directly before this Court under Article 226 of the Constitution. Atul Chandra Verma moved the Labour Court, Patna, by an application under section 26(2) of the Bihar Shops and Establishment Act, 1953, which was allowed by the order in Annexure-1 in C.W.J.C.5771 of 1983, setting aside the dismissal order and substituting it by a lighter punishment. The State Bank and its authorities have challenged Annexure-1 by filing C.W.J.C.5771 of 1983. Atulya Chandra Verma has by the writ petition in C.W.J.C.2647 of 1984

challenged that part of Annexure-1 which is against him. Since the basic facts are common, these three writ applications have been heard together and are being disposed of by this judgment. C.W.J.C.3425 of 1981 was treated as the leading case and unless otherwise indicated, a reference to the records will imply reference to the records of that case.

2. A sub-branch of the State Bank was functioning at Barhait Bazar under the Sahebganj branch of the Bank and A.C.Verma was the Official Incharge of the sub-branch employing only two officers, the other being Sachidanand Tiwary, the Cashier Incharge. The charge against Sachidanand Tiwary is of criminal misappropriation of the bank money and the allegation against A.C.Verma is that he connived with S.N.Tiwary. Both A.C.Verma and S.N.Tiwary were joint custodians of the cash which was kept in a safe vault operated by a pair of keys, each of the officers being in custody of one of them. The procedure was that after the safe vault was opened during the working hours of the sub-branch, the cash was dealt with by the cashier, but at the end of the day it was the duty of Shri Verma to verify the cash before putting his signature on the cash-balance register. The safe vault was thereafter locked jointly by both of them. It appears that the cashier, after he left the bank premises on 14.5.1977 did not report for duty for several days. On 17.5.1977 the cash was verified by a higher officer who had to come from Sahebganj and a shortage of Rs.18028/- was discovered. On 20.5.1977 an information was sent, as evidenced by Annexure-1,

by the Branch Manager of the Sahebganj branch in the police station, Barhait. On the same date the cashier was suspended. He, however, deposited the short amount later and, according to his case, he did it in view of a Bank Circular. The Departmental proceedings were thereafter started against both the employees and they were found guilty and were dismissed.

C.W.J.C.3425 of 1981

3. The cashier petitioner has been represented by Mr.K.P.Verma who challenged the dismissal order on several grounds. It was contended that the petitioner is covered by the Award of Shri S.Panchapagesa Sastry Shri M.L.Tannan and Shri V.L.D' souza of the All India Industrial Tribunal (Bank Disputes) Bombay given in connection with certain industrial disputes and popularly known as Sastry Award; and the order of punishment is vitiated in law on account of certain provisions thereof. It was also urged that the finding of defalcation recorded by the Enquiring Officer against the cashier was illegal since there was no such charge framed against him. The further argument is that the document Annexure-B to the counter affidavit was not produced in the enquiry proceeding and the same should be treated as forged. Lastly, Mr.Verma argued that in view of the circumstances of the case, the punishment of dismissal is too harsh and this Court should, in any event, convert it into a lighter punishment.

4. Mr. Basudeva Prasad, representing the Bank,

took a preliminary objection to the maintainability of the aforesaid petition. He contended that the Sastry Award has no statutory force and an application under Article 226 of the Constitution is not maintainable on the basis of a ground founded on it. I do not find any merit in the argument. It has been firmly settled as a rule of administrative law that an executive authority must be held to the standards by which it professes its actions to be judged and it must observe those standards (see the observations in paragraph 10 of the judgment in *Ramana Dayaram Shetty* vs. *International Airport Authority.* (1). In *B.S.Minhas* vs. *Indian Statistical Institute & ors*:(2) a point in support of the writ application was founded on a bye-law, and in reply thereto, it was argued on behalf of the respondents the since the bye-law had no force of statute, non-compliance with its requirement is immaterial. The Supreme Court rejected the stand taken by the respondents in view of the pronouncement in Ramana's case (supra) and held that since the bye-law had been framed for the conduct of the affairs of the respondent-institution, it was obligatory on its part to follow it to avoid arbitrariness. The observations are fully applicable in the present case. If the Sastry Award is being followed by the respondent-Bank, and it is not suggested otherwise, it cannot arbitrarily refuse

(1) (1979) 3 S.C.C. 489

(2) (1983) 4 S.C.C. 582

to do so in the petitioner's case, for, that would amount to illegal discrimination. I, therefore, hold that the writ petition cannot be rejected as not maintainable.

5. Before coming to the main point urged by Mr.Verma, I propose to deal with the other two grounds faintly urged by him. It was suggested that since there was no charge of defalcation in the chargesheet (Annexure-2), the finding to that effect must be held to be illegal. I do not find any merit in this plea inasmuch as the very first charge in Annexure-2 categorically states that the petitioner, with ulterior motive to misappropriate the bank money, had removed a sum of Rs.18028/- from the sub-branch on the 14th May, 1977 and had then left the office. So far Annexure-B is concerned, the statement in paragraph 15 of the counter affidavit that the petitioner had admitted his guilt in his letter, addressed to the Regional Manager of the State Bank of India, Head Office Patna was made before this Court only by way of a reply to the assertion of innocence made in the writ petition. (The charge against the petitioner does not rest on the alleged admission and has been fully established by the evidence available in the departmental proceeding). The departmental proceeding cannot, therefore, be held to be vitiated on that account.

6. The main argument pressed by Mr.Verma is based upon his interpretation of paragraph 521 of the Sastry Award. The procedure for taking disciplinary action against a Bank employee has been dealt with in Section III of Chapter XXV containing paragraphs

520 and 521. Sub-paragraph (2) read with sub-paragraph (1) of paragraph 521 states that when, in the opinion of the Management, an employee has committed an offence involving moral turpitude for which he is liable to conviction and sentence under any provision of law, the Bank may take steps to prosecute him or get him prosecuted (unless he be otherwise prosecuted) and in such a case he may also be suspended. If he be convicted, he may be dismissed with effect from the date of his conviction, and if he be acquitted, it shall be open to the Management to proceed against him departmentally, as detailed therein. The provisions of sub-paragraph (3) quoted below (in part) are relevant for the point taken on behalf of the petitioner and the learned counsel for the parties have serious difference about their meaning:-

> "If after steps have been taken to prosecute an employee, or to get him prosecuted, for an offence he is not put on trial within a year of the commission of the offence, the Management may then deal with him as if he had committed an act of'gross misconduct' or of'minor misconduct' as defined below; provided that if the authority which was to start prosecution proceedings refuses to do so or comes to the conclusion that there is no case for prosecution it shall be open to the Management to proceed against the employee under the provisions set out below in....."

It is urged that since on 20.5.1977 steps for prosecution were taken on behalf of the Bank, the authority should have waited for one full year and only if the petitioner was not put on trial within this

period the departmental proceeding could have been initiated against him. If this was not done, the entire proceeding including the order of punishment must be quashed as vitiated in law.

7. Mr. Basudeva Prasad, the learned counsel for the respondent- Bank, attempted several answers to the plea pressed on behalf of the petitioner. He said that in the present case no step was taken to prosecute the petitioner or to get him prosecuted at all and sub-para 3 therefore has no application. The letter, Annexure-1, has been interpreted as a mere information (without a prayer for prosecution of the petitioner) not amounting to a First Information Report within the meaning of the Criminal Procedure Code. It can be, at best, treated as what is popularly known as a Sanha. The letter, written by the Branch Manager to the Officer-in-charge, states that the petitioner "has been absconding from the evening of the 16th May, 1977 along with the keys of cash safe" and that a verification of cash which was going on since the 17th May, 1977 had tentatively revealed a shortage in the cash balance to the extent of Rs.18028/-. The letter proceeded to say that further verification was going on and the final position could be known only after the verification was complete. The letter thus merely disclosed the state of affairs as obtaining on 20.5.1977 without accusing the petitioner of defalcation. The charge was confined to "absconding." It is true that on the basis of this information, the police considered it desirable to pursue the matter further and ultimately the Deputy Superintendent of Police in his supervisions note, as contained in Annexure-3, observed that the petitioner had not committed any crime and, accordingly, a Final Form was submitted by the police. Mr. Prasad proceeded to say that in whatever light the police might have treated the

information in Annexure-1, the Bank cannot be held to have taken any step to prosecute the petitioner within the meaning of sub-para 2 of paragraph 521 so as to attract the application of sub-para 3. This is corroborated by the subsequent conduct of the Bank in not filling a protest petition or moving any court for securing the prosecution. Alternatively, it has been argued that the provision in sub-para 3 relating to the period of one year is directory in nature.

8. The object for mentioning the period of one year in sub-para 3 after which it is said that the management may deal with an employee departmentally appears to protect an employee from two parallel proceedings at the same time, one by a departmental enquiry and another a criminal prosecution. In many a case, an employee may in such circumstances be seriously prejudiced in his defence in the criminal case. The rule, therefore, appears to be reasonable; and so while threat of a criminal case is pending, if an employee is called upon to file his show cause in a departmental proceeding, he may justifiably refuse to do so. If the management, in such circumstances, insists to expeditiously close the enquiry, the proceeding may have to be struck down as illegal; but, where an employee has no reason to apprehand prejudice or justification for non-cooperating in the departmental proceeding, the position will be different. Further, the purpose of the rule will be fully served if the enquiry after its initiation is deferred to a later date and the delinquent servant is called upon to disclose his defence and place his cards on the table only after the criminal matter is concluded. I do not

find any reason and none was suggested on behalf of the petitioner before me to hold that in every case a disciplinary proceeding must be struck down as ultra vires on the sole ground that it was technically commenced before the expiry of the period mentioned in the rule. My conclusion is that the relevant portion of paragraph 521(3) of Sastry Award relied upon by the petitioner is not mandatory in nature so as to vitiate the departmental proceeding by itself, even in a case where the servant is not prejudiced by its violation. In the present case, although the charges were framed within the period on 19.12.1977, the petitioner was asked to appear and take part in the proceeding on the 31st July, 1978 by the letter, Annexure-5. It may be noted that the supervision note of the Deputy Superintendent of Police had already been submitted in June and Final Form was filed on the 12th of July, 1978 on the basis of which orders were passed by the Subdivisional Judicial Magistrate a fortnight earlier of the date fixed in the proceeding. No fresh petition had been filed by the Bank and the matter had come to a close and there could not be any reason for the petitioner to feel embarrassed in taking part in the proceeding; and as a matter of fact, the petitioner understood the position correctly and defended himself in the proceeding. A second show cause notice was later served on the petitioner and he again availed of the second opportunity. A Written argument also was submitted through counsel. After taking part in the enquiry at a point of time when the threat of any criminal prosecution had

completely disappeared, the petitioner is not entitled to challenge the entire proceeding as void on the ground urged. In view of the circumstances of the case, I further hold that for the purpose of paragraph 521(3) of the Sastry Award, the disciplinary proceeding must be treated to have commenced not on 19.12.1977, the date on which the chargesheet, Annexure-2, was drawn up, but later after the period of one year was over and the threat of prosecution of the petitioner had finally disappeared.

9. I do not considered it necessary to deal with the other grounds urged by Mr. Prasad except in regard to the discretion to be exercised under Article 226 of the Constitution. From the writ petition and the annexures attached thereto, and the counter affidavit of the respondent Bank, it is fully established that the petitioner was given adequate and full opportunity to defend himself and further that the finding of the Enquiry Officer has been correctly recorded. It is, therefore, not a proper case in which the High Court should interfere in its writ jurisdiction even if the petitioner is assumed to have made out a technical point.

10. Mr. Verma lastly pleaded for clemency on the ground that the entire money was deposited by the petitioner within a few days. He said that the circumstances of the case clearly indicate that the order of dismissal was too severe and this Court should, in the interest of justice, substitute the impugned order of dismissal by a lighter punishment, even if the other

points are rejected. At one stage, I was greatly impressed by the argument and I had adjourned the case on more than one occasion for the purpose of a sympathetic consideration by the Bank authorities for reinstatement of the petitioner in service. The learned counsel for both sides subsequently jointly prayed for several adjournments on the ground that the authorities were seriously considering the matter and the question was being examined at the head office. However, ultimately, it was stated on behalf of the Bank that the shortage of cash was considered to be a very serious matter and in spite of all sympathy for the petitioner, the authorities could not as a matter of principle take him back in service. The further argument in the case was thereafter concluded.

11. Mr. Prasad challenged this Court's power to modify the punishment and urged that the High Court cannot sit in appeal over the decision of the authorities on the question of punishment. I have given my most anxious consideration to the whole matter and although I feel that the petitioner deserves sympathy, I do not think that any relief can be given to him. There is no manner of doubt that a large amount of money had disappeared from the Bank vault. The petitioner was the cashier and incharge of the cash, and was not entitled to put it to his private use, even for a temporary period. The Banks are trustees for the public, the very heart of the economy of the nation and the main stay for the industry of the country and, as such, they have to maintain a very high order of efficient management, strict discipline

and unquestionable integrity in dealing with cash. The disappearance of cash from the Bank vaults is a very serious matter and has to be dealt with srtictly even at the cost of hardship to a delinquent officer. The punishment awarded by the Bank, therefore, does not call for any modification.C.W.J.C. 5771/83 AND C.W.J.C. 2647/84

12. As stated earlier, Shri Verma also was dismissed by the Bank.

He challenged the order by an application under section 26 of the Bihar Shops and Establishment Act, 1953. The Labour Court held that the petitioner was guilty of gross misconduct by putting his signature on the Cash Balance Register without making and actual verification. He was, therefore, liable to punishment in accordance with paragraph 521 of the Sastry Award. The Labour Court, however, was of the view that the ends of justice would be served if the petitioner was denied the increment of pay during the period June, 1979 to November, 1983 (when the case was decided by the Labour Court) and was deprived of his wages for that period. The petitioner was accordingly reinstated in service but subject to the aforesaid punishment. The Bank has challenged the decision setting aside the dismissal order in C.W.J.C. 5771 of 1983 and Shri Verma has challenged the substituted order of punishment by the writ petition in C.W.J.C. 2647 of 1984.

13. Mr. Tara Kishore Prasad, the learned counsel

for the workman, went through the facts, circumstances and evidence in the case in some detail and placed the judgment of the Labour Court, Annexure-1 in C.W.J.C. 5771 of 1983, in extenso and argued that all the observations made by the Labour Court are not quite consistent with each other and, consequently, the finding of gross misconduct against the writ petitioner should be set aside. I do not think, there is any merit in the argument. The admitted facts themselves conclusively establish the charge of "gross misconduct" as defined in paragraph 521(4)(j) of the Sastry Award. It is, therefore, not possible to hold that the writ petitioner was not guilty. Mr. Tara Kishore Prasad next contended that payment of back wages must follow as a rule in every case of reinstatement in service. I am again not in a position to agree with him. In substance, the argument is that although guilty, the petitioner should not be punished. The judgment of the Presiding Officer of the Labour Court indicates that it has considered all the relevant circumstances and has rather taken a compassionate view in awarding the punishment as mentioned above. The approach is clearly fair and does not call for any interference.

14. Mr. Basudeva Prasad, appearing on behalf of the Bank, argued that there was no provision in the shops Act similar to those of section 11A of the Industrial Disputes Act and the Labour Court was, therefore, in gross error in re-evaluating the evidence and holding that the Bank had failed to establish that the workman had deliberately allowed the cashier to misappropriate the amount or that he had even connived

with him in the commission of misappropriation. There does not appear to be any merit in this argument. The Labour Court has not weighed the evidence for examining the correctness of the finding, but has considered the matter from an angle which is perfectly legal for it to do. In paragraph 9 of its order, it has pointed out that there is no evidence on the record to prove knowledge on the part of Shri Verma of the evil design of the cashier and the evidence merely indicated serious negligence on his part in omitting to verify the cash balance before putting his signature on the register. The challenge of the finding must, therefore, be rejected.

15. It was next strenuously contended that the Labour Court was not entitled to substitute its own views on the question of punishment. If the finding of gross misconduct was established, the Court should have rejected the application altogether. The power in this regard was analogous to the authority under the Industrial Disputes Act before the inclusion of section 11A.

16. The Labour Court has pointed out that clause (c) of paragraph 521(10) of Sastry Award directs to consider while awarding punishment the previous record of the employee and the aggravating or extenuating circumstances that may exist, besides the gravity of the misconduct. The workman had served the Bank for 30 years without any blemish and was guilty of "gross misconduct" as a result of being misguided by a sense of mutual trust. His fault was his faith in his co-worker. In view of the provisions of

sub-paragraph 10(c), these factors were relevant. The extreme punishment of dismissal had been passed by the management on an assumption that the workman had deliberately permitted the cashier to run away with the money or atleast he had so connived. When this part of the case was rejected by the Labour Court, it was certainly entitled to examine the question of proper punishment. The discussion in the judgment, Annexure-1, discloses a reasonable and balanced view taken by the Presiding Officer and I do not think any legitimate objection can be taken to it.

17. In the result, all the three writ applications are dismissed, but in the circumstances without costs.

S.P.J. Applications dismissed

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CRIMINAL WRIT JURISDICTION

Before L.P.N.Shahdeo, J.*

1987.

April, 10.

*Jagdish Mahto.***

v.

The State of Bihar and others.

Code of Criminal Procedure, 1973 (Act 2 of 1974), section 125 --- maintenance --- Executive Magistrate, whether can pass order of maintenance --- Chapter IX of the Code --- Scheme of.

An order of maintenance can be passed only by a competent Judicial Magistrate of the Ist class and not by any Executive Magistrate. The scheme as provided in chapter IX can be enquired into and relief granted only by the Judicial Magistrate of the Ist Class and in the instant case respondent no.3, the Executive Magistrate, Desertion Cell,being not competent, had no lawful and legal power to grant such maintenance.

Held, therefore, that the order passed by the

**Sitting at Ranchi*

***Criminal Writ Jurisdiction Case No:174 of 1986(R) In the matter of an application under Articles 226 and 227 of the Constitution of India.

Executive Magistrate, respondent no.3 granting maintenance is wholly without Jurisdiction and void abinitio.

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

The facts of the case material to this report are set out in the judgment of L.P.N.Shahdeo, J.

Mr. A.N.Deo for the petitioner

Mr. S.B.Gadodia, S.C. & Mr. A.B.Kr. for the respondents

L.P.N.SHAHDEO,J. This writ application under Articles 226 and 227 of the Constitution of India has been filed for quashing the order dated 9-5-1986 passed in Misc. Case No.8/84 by the Executive Magistrate, Desertion Cell, Dhanbad, respondent no.3, as contained in annexure-1 to the writ petition granting maintenance at the rate of Rs.200/- per month to respondent no.2, Chhabila Devi.

2. The only point to be considered in this application is whether the Executive Magistrate is competent or has legal authority to pass the order of maintenance.

3. From a perusal of the impugned order (annexure-1) it appears that it is a very cryptic order. It has been stated therein that on perusal of the report of the Mukhia of the Gram Panchayat, it appears that respondent no.2 was deserted by the petitioner and maintenance allowance at the rate of Rs.200/- per month was allowed and a direction has been issued by the said Executive Magistrate to deduct this amount

from the salary of the petitioner.

4. It appears that, thereafter, a revision was preferred before the Sessions Judge being Cr.Revision no.129/86 in which the Session Judge has found that the order was an executive order and, as such, no revision was maintainable under section 397 of the Code of Criminal Procedure.

5. It was submitted by the learned counsel for the petitioner that sections 125 of the Code of Criminal Procedure lay down the procedures to be adopted for grant of maintenance. Specific procedures have been provided under section 126 of the Code. Section 128 of the Code provides that in what way the order of granting maintenance can be implemented and by whom.

6. In this connection section 3(c)(1) of the Code is relevant which says that whenever a Magistrate of the Ist Class has been referred to, shall be construed as a Judicial Magistrate of the Ist Class in that area. Section 3(a) also, says that any rerefence made for a Magistrate of the Ist Class shall be construed as reference to a Judicial Magistrate of the Ist Class. Section 3(4)(a) & (b) of the Code lays down as follows:

> "(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters:-
>
> (a) Which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, they shall, subject to the provisions

of the Code, be exercisable by a Judicial Magistrate; or

(b) Which are administrative or executive in nature, such as, the granting of a licence the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate."

7. From the scheme of chapter IX and the construction provided for interpretation of such word, it is amply clear and no doubt left that an order of maintenance can be passed only by a competent Judicial Magistrate of the Ist Class and not by any Executive Magistrate.

8. Admittedly, in this case the learned Executive Magistrate had no power to grant maintenance even though he was functioning as incharge of the Desertion (I for benevolent scheme for providing some subsistence allowance to a deserted lady but a scheme of this nature does not become relevant in this case. The only matter that has to be seen and determined is as to who is competent to execute that benevolent scheme. Such scheme as provided in chapter IX can be enquired into and relief granted only by the Judicial Magistrate of the Ist Class and the respondent no.3, the Executive Magistrate, Desertion Cell, being not competent, had no lawful and legal power to grant such maintenance and, therefore, he could not and should not have granted the maintenance. Therefore, the order passed by him granting maintenance is wholly without jurisdiction, void ab initio.

9. Mr. Deo, learned counsel for the petitioner has submitted that under Article 300A of the

Constitution, any person can be deprived of his property only under the authority of law. Article 300A which deals with 'right to property' lays down that no person shall be deprived of his property save by authority of law. In this case the Executive Magistrate has passed the order for the deduction of the salary of the petitioner for payment to his wife. Admittedly, that Executive Magistrate has no authority of law to pass order of such nature. This fact has also been admitted in paragraph 14 of the counter affidavit filed by the respondents in which it has been stated that the impugned order has been passed by the Executive Magistrate for the welfare of respondent no.2. This is a clear admission that the order has been passed not under any authority of law and it has already been settled that salary is also property within the meaning of Article 300A of the Constitution of India.

10. In this background if the order of the learned Magistrate is viewed from any angle, it does not stand justifiable, rather, appears, as held above, void ab initio and, therefore, it cannot sustain.

11. In the result, this writ application is allowed and the impugned order as contained in annexure-1 is hereby quashed.

M.K.C. *Application allowed*

CIVIL WRIT JURISDICTION

Before N.P.Singh and B.P.Singh, JJ.*

1987.

April, 16.

*Upendra Jha.***

v.

The State of Bihar and others.

Forest (Conservation) Act, 1980 (Act 69 of 1980) section 2 --- scope and applicability of-bar placed on the power of the State Government to make order to dereserve a reserved forest or to orde. the use of forest land for any non-forest purpose without prior approval of the Central Government --- nature of --- bar imposed under section 2, whether applicable to cases of renewal of lease.

From the language of section 2 it appears that the bar placed on the power of the State Government to make order to dereserve a reserved forest or to order the use of forest land for any non- forest purpose without prior approval of the Central Government is imperative and mandatory in nature and as such before

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*Sitting at Ranchi.

**Civil Writ Jurisdiction Case No.775 of 1984(R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

granting a lease covering any reserved forest or any forest land for use of non-forest purpose which will include mining operation, prior approval of the Central Government is a must. The bar imposed under section 2 shall apply even to cases of renewal of leases. If any part of reserved forest or forest land was part of any lease hold and such reserved forest had been broken or forest had been cleared on the basis of that lease granted prior to coming into force of the Act, no renewal of that lease or fresh grant in respect of that area can be given by the State Government without prior approval of the Central Government, because any such renewal or a fresh grant of such area is bound to further deforestation and cannot help reclaiming back the areas where deforestations have taken place.

Held, therefore, that in instant case the lease hold of the petitioner shall be deemed to be valid only in respect of such area which is out side the reserved forest and forest and the grant covering the reserved forest and forest without prior approval of the Central Government shall be deemed to be void and inoperative.

Case laws reviewed.

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

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

Messrs S.B.Gadodia and *Pradeep Modi* for the petitioner

Messrs S.K.Chattopadhaya, G.P.I and *Ashok*

Kumar Sinha, J.C. to G.P.I. for the respondents

N.P.SINGH,J. This application has been filed for a writ of mandamus, directing the respondent-Divisional Forest Officer, not to interfere with the mining operation carried on by the petitioners in the area which is part and parcel of his lease hold.

2. It is the case of the petitioner that a mining lease in respect of the area in question had been granted previously to M/S India Fire Bricks and Insulation Company Private Limited. On the basis of that lease, the aforesaid company did mining operation in the aforesaid area for a number of years. Thereafter the lease in their favour was terminated and fresh advertisement was made for grant of the mining lease. The petitioner applied for the grant of a lease covering a total area of 415.15 acres of land.

The State of Bihar sanctioned the grant of the lease, by its order dated 18.5.1983, for a period of 20 years, for mining Fire Clay in the said area. The Deputy Commissioner, Hazaribagh executed a deed of lease on 25th July, 1983, in favour of the petitioner. The District Mining Officer, Hazaribagh is said to have demarcated the aforesaid area of 415.45 acres and delivered possession to the petitioner on 30.9.1983. the petitioner claims to have started mining operation. However, the Divisional Forest Officer started interfering with the mining operation carried on by the petitioner and threataned to take coorcive action. The Divisional Forest Officer issued letter dated 14.1.1984 to all the Forest Range Officers under him directing them not to allow the petitioner to carry on the mining operation in the areas leased to the petitioner by the State Government, which was within reserved forest.

3. The stand of the respondent-Divisional Forest Officer appears to be that after the promulgation of the Forest (Conservation) Ordinance, 1980 with effect from 25.10.1980 which was replaced by the Forest (Conservation) Act, 1980 (hereinafter referred to as 'the Act'), any forest land cannot be used for non-forest purpose, except with the prior approval of the Central Government. As the lease in question had been granted to the petitioner covering even the reserved forest, without the prior approval of the Central Government, the petitioner was not entitled to carry on any mining operation in that portion of the lease hold, which is part of the reserved forest area.

4. Section 2 of the Act is as follows:-

"2. Restriction on the dereservation of forests or use of forest land for non-forest purpose.- Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing -

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved:

(ii) that any forest land or any portion thereof may be used for any non-forest purpose.

Explanation.- For the purposes of this section "non-forest purpose" means breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation."

In view of the clear and unambiguous provisions contained in section 2 read with Explanation thereof, without prior approval of the Central Government, State Government or any other authority cannot direct that any forest or any portion thereof may be used for any non- forest purpose. From the statement of object and reasons of the Act it appears that with a view to checking further deforestation which causes ecological imbalance and leads to environmental deterioration, it was decided to frame the Act in question making encumbent on the State Government to seek prior approval from the Central Government for dereservation of reserved forest and for use of forest land for non-forest purpose.

5. From the language of section 2 of the Act it appears that the bar placed on the power of the State Government to make order to dereserve a reserved forest or to order the use of forest land for any non-forest purpose, without prior approval of the Central Government, is imperative and mandatory in nature. As such before granting a lease covering any reserved forest or any forest land for use of non-forest purpose which will include mining operation, prior approval of the Central Government is a must. The counsel appearing for the petitioner did not and could not contest the legal position about the mandatory requirement of prior approval of the Central Government, but according to him, the requirement of section 2 is not applicable to the area in question because before the lease was granted in favour of the petitioner it was in the lease hold of aforesaid M/S India Fire Bricks and Insulation Company Private Limited which had carried on mining operation in the area. According to the petitioner, the restriction and bar imposed on the power of the State Government

in respect of reserved forest or forest land shall not operate in respect of areas where mining operations have already been carried on at one stage or the other. In support of this contention reliance was placed on the judgment of the Supreme Court in the case of *State of Bihar* v. *Banshi Ram* (1) where it was observed that if the permission for breaking up of the forest land or for clearing of forest on any such land has been accorded before the coming into force of the Act and the forest land has been broken up or cleared, then obviously section 2 shall not be applicable.

6. In the instant case, admittedly the order sanctioning the grant of the lease in favour of the petitioner has been passed by the State Government after coming into force of the Act without prior approval of the Central Government. The aforesaid judgment of the Supreme Court in the case of State of Bihar v. Banshi Ram (Supra) has been explained and distinguished later by the Supreme Court itself in the case of *Ambica Quarry Works* v. *State of Gujarat* (2) About the aforesaid observation of the Supreme Court regarding the land having been broken earlier or cleared it was observed as follows:-

"It is true that this Court held that if the permission had been granted before the coming into operation of the 1980 Act and the forest land has been broken up or cleared, clause (ii) of Section 2 of 1980 Act

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(1) (1985) A.I.R. (S.C.) 814

(1) (1987) 1 S.C.C. 213

would not apply in such a case. But that decision was rendered in the background of the facts of that case. The ratio of any decision must be understood in the back-ground of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in in *Quinn v. Leathem).* But in view of the mandate of Article 141 that the ratio of the decision of this Court is a law of the land, Shri Gobind Das submitted that the ratio of a decision must be found out from finding out if the converse was not correct. But this Court, however, was cautious in expressing the reasons for the said decision in *State of Bihar* v. *Banshi Ram Modi.* This Court observed in that decision that the result of taking the contrary view would be (See p.648,para 10) that while the digging for purposes of winning mica can go on, the lesses would be deprived of collecting felspar or quartz which be may come across while he is carrying on mining operations for winning mica. That would lead to an unreasonable result which would not in any way subserve the object of the Act. There was an existing lease where mining operation was being carried on and what was due by incorporation of a new term was that while mining operations were being carried on some other minerals were available, he was given right to collect those. The new lease only permitted utilisation or collection of the said other minerals."

It was then pointed out in respect of the position regarding renewal of quarry lesses in the following words:-

"The appellants are asking for a renewal of the quarry lesses. It will lead to further deforestation

or at least it will not help reclaiming back the areas where deforestations have been taken place. In that view of the matter, in the facts and circumstances of the case, in our opinion, the ratio of the said decision cannot be made applicable to support the appellants' demands in these cases because the facts are entirely different here. The primary purpose of the Act which must subserve the interpretation in order to implement the Act is to prevent further deforestation. The Central Government has not granted approval. If the State Government is of the opinion that it is not a case where the State Government should seek approval of the Central Government, the State Government cannot apparently seek such approval in a matter in respect of which, in our opinion, it has come to the conclusion that no renewal should be granted."

7. On the basis of the view expressed in the case of *Ambica Querry Works* v. *State of Gujarat* (Supra), it has to be held that the bar imposed under section 2 shall apply even to cases of renewal of leases because the Supreme Court pointed out that such renewal "will lead to further deforestation or at least it will not help reclaiming back the areas where deforestations have taken place". Now even if any part of reserved forest or forest land was part of any lease hold and such reserved forest had been broken or forest had been cleared on the basis of that lease granted prior to coming into force of the Act, no renewal of that lease or fresh grant in respect of that area can be given by the State Government without prior approval of the Central Government, because any such renewal or a fresh grant of such area is bound to lead to further deforestation and cannot help reclaiming back the areas where deforestation have taken place.

8. It is unfortunate that the Deputy Secretary of the Department of Mines and Minerals has issued a letter dated 21.1.1982 to all the officers concerned that in spite of coming into force of the Act aforesaid, no prior approval of the Central Government was required where there is question of renewing a lease or for grant of a fresh lease where mining operation had been carried in past. Rightly the Central Government has lodged a protest, by its letter dated 27.11.1982, saying that the direction was against the provisions of the Act in question and prior approval is necessary even in case of renewal of mining leases granted prior to the coming into force of the Act. A copy of that letter has been annexed to the counter affidavit filed on behalf of the Divisional Forest Officer.

9. The learned counsel appearing for the petitioner referred to a Bench decision of this Court in the case of *Mahabir Prasad Jhanjhari* v. *The State of Bihar and others* (C.W.J.C. No. 492 of 1981(R)) disposed of on 24.7.1981 allowing the petitioner of that writ application to continue mining operation within the portion specified. Apart from the fact that the lease in that case had been granted prior to the coming into force of the Act, the aforesaid judgment was delivered before the authoratative pronouncement of the Supreme Court in the case of *Ambica Quarry Works* v. *State of Gujarat* (Supra).

10. From the letter dated 14.1.1984 addressed by the Divisional Forest Officer which has been annexed by the petitioner himself it appears that the lands falling within the lease hold of the petitioner which are outside reserved forest and forest have already been demarcated. The lease hold of the petitioner shall be deemed to be valid only in respect of such

area which is outside the reserved forest and forest. The grant covering the reserved forest and forest without prior approval of the Central Government shall be deemed to be void and inoperative. As the petitioner has acquired no right to carry on mining operation in those area, it is not possible for the Court to issue any writ of mandamus directing the Divisional Forest Officer not to interfere with the mining operation alleged to be carried on by the petitioner over any part of the reserved forest or forest area. The writ application for the relief aforesaid is, accordingly, dismissed. But, in the circumstances of the case, there will be no order as to costs.

B.P.Singh,J. I agree.

M.K.C. *Application dismissed*

CIVIL WRIT JURISDICTION

Before Satya Brata Sanyal, J.

1986.

May, 13.

*Raj Narayan Singh.**

v.

Presiding Officer, Labour Court, Bokaro Steel City and another.

Constitution, Articles 12,14,226 --- Article 14 --- principle of whether violated --- dismissal of writ-petitioner without holding domestic enquiry, whether violative of the principles of natural justice --- Article 226 --- whether justiciable under --- Article 12 --- M/s Instrumentltion Ltd, whether an authority within the meaning of Article 12 of the Constitution.

Where the termination of services of the writ-petitioner was for a proved misconduct by rejecting the show cause filed by him, without holding an enquiry into the explanation furnished by him;

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*Civil Writ Jurisdiction Case No.121 of 1979(R). In the matter of an application under Articles 226 and 227 of the Constitution of India.

Held, that the dismissal of the writ-petitioner from service on alleged misconduct of theft, breach of trust and faith without holding any domestic enquiry but treating the explanation given in the show cause an admission of guilt is arbitrary, capricious and in complete breach of the principles of natural justice and thus violative of Article 14 of the Constitution and is justiciable under Article 226 of the Constitution.

After having realised the price of the scrap wood, imposition of penalty by way of deduction Rs.400/= being the costs of 0 quintals of excess wood and realisation of Rs.100/= for using the truck from the dues of the writ-petitioner, incorporated in order of dismissal, appear to be unreasonable and vindictive.

Held, further, that disengagement brought about by the order of termination of service of writ-petitioner being ip so facto void and non est, it would be deemed that the writ-petitioner continued in service.

Held, also, on a proper assessment of facts in the light of relevent Articles of Association of the company, that it is an authority within the meaning of Article 12 of the Constitution and is, therefore, an intrumentality and agency of the Government.

Case laws discussed.

Application under Article 226 and 227 of the Constitution.

The facts of the case material to this report

are set out in the judgment of S.B.Sanyal, J.

Messrs Jaya Narayan, Abhay Kumar Singh No.1 and *Mithilesh Kumar Singh.* for the petitioner

Messrs Ranen Roy and *Shivaji Pandey.* for the respondents

SATYA BRATA SANYAL,J. In this writ application the petitioner seeks quashing of Annexure-1 by which his services were terminated by respondent no.2, M/s Instrumentation Ltd., Bokaro Steel City, a public sector undertaking, as well as Annexure-4 by which the Presiding Officer, Labour Court, dismissed the complaint filed under section 26 of the Bihar Shops and Establishments Act, both on merits as well as on the ground of non-maintainablity and also for reinstating the petitioner with all back wages treating him on duty and in continuous service with effect from the date on which the petitioner was put under suspension.

2. *FACTS:* The petitioner was appointed as a driver in the year 1971. Under Receipt No.412 dated 16.7.1974 the petitioner deposited a sum of Rs.10/- for two quintals of scrap wood and under Receipt No.456 dated 27.9.74 be deposited the price of 10 quintals of the same for his taking out 12 quintals of scrap wood under Gate Pass No.6173 dated 26.9.74. On 7.10.74 he was served with a chargesheet, namely, (1) under what circumstances the petitioner had taken out 12 quintals of scrap wood without prior sanction of the competent authority; (2) the circumstances under

which the petitioner used Company's truck without advance and written approval of the competent authority; and (3) charge of dishonesty theft, breach of trust and faith and misutilisation of Company's vehicle without proper authorisation and as to why the petitioner should not be removed from the service of the Company. The petitioner submitted show cause on 9.10.74 which reads as boder under:

"To

The Manager (Projects),

Instrumentation Ltd., B.S.City.

Dear Sir,

With reference to your letter no.BOK/01/74 at 7.10.74, I beg to state the following points in support of your confidential Office Order.

(1) I had paid a sum of Rs.10/- for 2 Qlts. as per receipt no.412. But when the scrap wood was weighed by the Security Guards it was found to be 12 Qlts.

(2) The reason for excess scrap wood is that there is no weighing machine in our Company for which reason this discrepancy.

(3) When I was informed by the Management that I should pay another Rs.50/- for 10 Qlts. I did the same vide receipt no.456.

(4) Permission for use of vehicle No.BRX 5104 was given to me by Sri Ved Prakash, Sr. Engineer.

Thanking you.

Date 9.10.74.

Yours faithfully,

Sd. R.N.Singh

Driver."

On that very date without any enquiry whatsoever the letter of termination (Annexure-1) was issued holding the petitioner guilty of theft, breach of trust and faith as also imposing penalty and ordering deduction of the penal amount of Rs.400/- being the cost of 10 quintals of excess wood taken by him without any authorisation and Rs.100/- being the penalty for using the Company's truck from the sums due to the petitioner. The petitioner filed his representation before the higher authorities with a copy to the Deputy Labour Commissioner. In spite of several requests by the Deputy Labour Commissioner for conciliation of the dispute on various dates the management did not participate in the said conciliation whereupon the Deputy Labour Commissioner asked the petitioner vide letter no.6207 dated 26.12.74 to file a complaint under the provisions of the Bihar Shops and Establishments Act, hereinafter referred to as "the Act", before the Labour Court, Bokaro Steel City. The petitioner thereafter filed a complaint under section 26(1) of the Act which was registered as B.S.F. Case No.1 of 1975. In his complaint the petitioner averred that there was no reasonable cause for dispensing with the service of the petitioner nor the petitioner was given notice as required under section 26(1) of the Act. In the written statement filed by the respondent Company the plea taken was that the petitioner was governed by the provisions of the Provincial Motor Transport Workmen Act. As such, no notice was required to be served under section

26 of the Act. The petitioner did commit an act of misconduct and was so found. The charges framed and levelled against the petitioner are just, true and proper. The dismissal order was passed on perusal of the show cause where the petitioner did not raise any controversy or objection to the charges instead admitted his guilt. The imposition of penalty was sought to be justified as Rs.5/- per quintal is allowed to the employees as a special case with the specific permission of the competent authority. The higher price charged by way of penalty is just and proper. 2A The Labour Court held that the applicant being a driver was a motor transport worker within meaning of section 2(h) of the Motor Transport Workers Act which precludes him from invoking the provisions of Act, and, therefore, the petition is not maintainable. It further held that even if the Act applied, merely because there was no full-fledged domestic enquiry before termination of the service of the petitioner, it did not vitiate the order because "the allegations have almost been admitted by the applicant with the only qualification that he carried 12 quintals of wood on 26.9.74 against a money receipt and a gate pass for only 2 quintals unknowingly", and this plea of the petitioner was disbelieved. Thus there was a reasonable cause before the management for ordering his dismissal.

3. Mr. Jaya Narayan, learned counsel for the petitioner, submitted that once the Labour Court held that the petitioner was covered by the Motor Transport Workers Act and, therefore, the complaint petition under section 26(1) of the Act was not maintainable, it had no jurisdiction to further probe into the matter and dismiss the case on merits. He further submitted that respondent no.2 Instrumentation Ltd., is a State which would be evident from the Articles of Association. The

impugned order terminating the petitioner's service on the ground of misconduct without conforming to the principles of natural justice is wholly arbitrary and violative of Article 14 of the Constitution of India. He also submitted that even on merits the decision of the Labour Court is vitiated by errors of law apparent on the face of the record. It may be stated here that a supplementary affidavit was filed stating that respondent Instrumentation Ltd. is a public undertaking wholly owned and controlled by the Government of India and is an agency and instrumentality of the Government and is thus amenable to writ jurisdiction of this Court.

4. Mr. Ranen Roy, on the other hand, contended that the Labour Court was wholly justified to hold, in view of the two decisions of this Court in *Bihar State Road Transport Corporation* v. *Orang Bahadur and another* (1) and *Amarnath Singh* v. *Presiding Officer, Industrial Tribunal, Bihar and others* (2) that the complaint petition was not at all maintainable. The remedy of the workman, therefore, is to raise an industrial dispute afresh and he can obtain no relief from this Court whatsoever. He also submitted that an enquiry prior to dismissal was not at all necessary since the order of dismissal was founded upon admission of guilt. As to whether respondent Instrumentation Ltd., is an agency and instrumentality of the Government, learned counsel drew my attention to the counter-affidavit and submitted that even though

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(1) (1968) A.I.R. (Pat.) 200

(2) (1970) A.I.R. (Pat.) 269 F.B.

respondent no.2 is a public undertaking it is neither wholly owned nor controlled by the Government of India. In the Articles of Association there is no provision empowering the Central Government to exercise any control over the affairs of the Company. It is true that the President of India has been given some powers of superintendence over the affairs of the Company but he is so entitled not by virtue of being the President of India and powers given to him by the Constitution. He does so under the Articles of Association although he happens to be the executive head of the Central Government under the Constitution.

5. I am bound by the Full Bench decision of this Court in Amarnath Singh's case (supra) and sitting singly I have to abide by that decision. In that view of the matter, the Labour Court was wholly justified to hold that the complaint under section 26(1) of the Act was not maintainable. Once the Labour Court expressed its inability to entertain the complaint petition, its decision on merit is not binding on the parties and is really *non est*.

6. The question, therefore, arises whether the petitioner is entitled at all to any relief from this Court in its writ jurisdiction. The petitioner did raise an industrial dispute immediately on the termination of his service. He was misdirected by the State Labour agency to file a complaint. Pursuant to the direction he filed a complaint as far back as 1975. After eleven years of waiting before the Labour Court and this Court would it be justified to direct him to raise an industrial dispute once agains for the redressal of his grievances? In my view if the petitioner is entitled to question the justiciability of the order of his termination of service under writ jurisdiction legally,

the writ petition cannot be thrown away on the ground of availability of an alternative remedy. Further the petitioner did exhaust his alternative remedy by challenging the order of termination before moving this Court. It, however, turned futile. It would be, in my view, massacring justice to throw away the writ petition, if otherwise maintainable, either on the ground of alternative remedy or on the ground of delay in questioning the order of termination. The question, therefore, boils down (a) whether Instrumentation Ltd.is an instrumentality and agency of the Government, (b) whether the order of termination on the ground of misconduct without holding any enquiry is violative of Article 14 of the Constitution of India and (c) whether the show cause filed by the petitioner is an admission of his guilt.

7. The Articles of Association of respondent Instrumentation Ltd. has been brought on record at the instance of the respondents themselves. Mr. Jaya Narayan has drawn my attention to the definition of the word "President" in the Articles of Association which means the President of India. He has also drawn my attention to Article 31 showing only with the approval of the President the Directors may increase the share capital, or, as under Article 35, decrease the share capital. Under Article 36 the subdivision and consoliation of shares can also be subject to the approval of the President as also the different classes of shares to be floated as required under Article 37. The power of borrowing of the Company is subjected to the approval of the President by floating debenture stock, bonds or other securities as envisaged under Articles 38 and 41 of the Articles of Association. The President is empowered to nominate persons to represent him in the Board (Article 50), to determine

the number of Directors (Article 72), the emoluments to be paid to a Director or Directors (Article 75), power to issue directives from time to time as to how the Company to be managed by the Directors (Article 74), capital expenditure exceeding Rs.50 lakhs must be with the approval of the President except where detailed project reports with estimates have been prepared earlier and *approved by the Central Government* [Article 75 (1A)], with the approval of the President to give any person employed by the Company a commission on the profits of any particular business, transaction or a such share in the general profits of the Company.

[Article 75 (13)], the President may empower the Chairman nominated to exercise the functions of the Managing Director or appoint one of the Directors to be the Managing Director who will be the Chief Executive Officer of the Company (Article 76), the President may from time to time entrust to and confer upon the Chairman, a Managing Director, a Resident Director such powers as he may think fit and may confer such powers for such time and to be exercised for such objects and purposes upon such terms and conditions and with such restrictions as he may think expedient, and he may confer such powers either collaterally with or to the exclusion of and in substitution for all or any of the powers of the Directors in that behalf and may from time to time revoke, withdraw, alter or vary all or any of such powers (Article 80), the Chairman shall reserve for the decision of the President any matter which in his opinion should be so reserved. No action shall be taken by the Company in respect of any proposal or decision of the Board reserved for the approval of the President until the President's approval to the same has been obtained

(Article 90), the Auditor of the Company shall be appointed or reappointed by the Central Government on the advice of the Comptroller and Auditor General of India (Article 120). Thereafter Article 124 provides as hereunder:

> "(1) Notwithstanding anything contained in any of the Articles, the President may, from time to time, issue such directives or instructions as may be considered necessary in regard to the finance, conduct of business and affairs of the Company or directives thereof and in like manner may very or annul them. The Directors shall give immediate effect to the directives or instructions so issued.
>
> (2) The President shall have the right to call for such returns, accounts and other information with respect to properties and activities of the Company as may be required from time to time.
>
> (3) The President shall have the powers to give directions to the Company in writing as to the exercise and performance of its functions in matters involving the National security or substantial *public interest* and to ensure that the Company gives effect to such directions."

8. Learned counsel for the petitioner contends, after having referred to the said Articles of Association, that the President's power is all pervasive both with respect to finance, conduct of business, control over the Directors, their appointments the remuneration payable to them and to run the business for substantial public interest. Mr. Roy, on the other hand, contended that the President of India has only 97 shares and three other shares have been allotted to Joint Secretary, Ministry of Finance, Officer on Special Duty, Ministry

of Industry and Deputy Secretary, Ministry of Industry even though the authorised capital of the Company is divided into 70,000 equity shares of Rs.1,000/- each. By reference to Articles 4 and 7 he contended that the shares are under the control of the Directors who may allot or otherwise dispose of the same to such persons on such terms and conditions as they think fit. He submitted that the Company is required to be run under the Companies Act read along with the Articles of Association. The President of India in his personal capacity has been given some extra powers but that does not change the character of the Company and, therefore, it cannot be held to be an instrumentality and agency of the Government. He has relied mainly on Articles 32, 35, 36, 37, 38, 41 and 50 of the Articles of Association. Merely because, according to Mr. Roy, the Managing Director and/or the Chairman has to be appointed by the President of India, that is of no consequence. He relied strongly upon a Bench decision of this Court in *Harender Narain Banker* v. *State of Bihar* (1) where this Court held that Bihar State Co- operative Marketing Union Ltd.,a society registered under the Bihar and Orissa Co-operative Societies Act, 1935, did not satisfy that six tests laid down by the Supreme Court in *Ajay Hasia etc.*v. *Khalid Mujib Sehravardi and others etc.*(2) to constitute State and/or instrumentality thereof under Article. 12 of the Constitution of India. Their Lordships at the very outset highlighted the fact that so far as Bihar State

(1) (1985) P.L.J.R. 1078

(2) (1981) A.I.R. (S.C.) 487

Co-operative Marketing Union is concerned, it is not enjoying any finical kind of State control which is adequate to satisfy the stringent requirements for establishing that a body is an instrumentality of the State or an agency thereof. Their Lordships thereafter referred to six tests which were summarised in Ajay Hasia's case (supra), namely, whether the entire share capital is held by the Government, the financial assistants is so much as to meet almost entire expenditure of the corporation, whether the corporation enjoys monopoly status which is State protected, existence of deep and pervasive State control, if the functions of the corporation of public importance are closely related to governmental functions and specifically if a department of Government is transferred to a corporation. It was held that the Co-operative Marketing Union did not fulfil any one of those requirements. Their Lordships referred to by-law 17 of the Bye-Laws of the Co-operative Marketing Union which stated. "The supreme authority of the Union shall be vested in the General Meeting". They referred to bye-laws 22, 26 and 28 and held that the management of the registered society wholly vested in the Managing Committee constituted in accordance with the bye-laws and even though there were ex-officio Directors nominated by the State, they had only 1/5th of the total voting power in the Board of Directors in which again the elected chairman would have the casting vote and the voting is by a plain majority with no exceptional right to the State nominees. The case of Harender Narain Banker (supra) is clearly distinguishable and is an authority so far as the case is decided. In the instant case from the Articles of Association, referred to above, it is clear that it is a Central Government Company and all pervasive power

vests in the President of India. It is more in the nature of Bharat Petroleum Corporation Ltd.- See *Om Prakash* versus *Union of India* (1) The holding of shares referred to by Mr. Roy as 97 to the President of India and three each to the different officers of the Ministry of the Central Government manifests that the Company was floated with hundred shares and 97 per cent of the shares belongs to the President of India. Without the President's approval on important matters the Company cannot function properly. Only day to day matters are left to be managed by the Board of Directors and that too when a decision as to important matters is taken that must have prior approval of the President. It is true that the Company has not been constituted under a separate Act - See *U.P. Ware-housing Corporation* v. *Vijay Narayan Vajpayee* (2) nor like in *B.S.Minhas* v. *Indian Statistical Institute* (3) where these Institutes were held to be departments of Government. On a proper assessment of facts in the light of the relevant Articles of Association I find that it is an authority within the meaning of Article 12 of the Constitution and is, therefore, an instrumentality and agency of the Government - See *A.L.Kaira* v. Project and *Equipment Corporation of India Ltd.* (4) and *Om Prakash's case* (supra). The undertaking has to be run in Public interest and it has to give effect to

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(1) (1981) A.I.R. (S.C.) 212

(2) (1980) A.I.R. (S.C.) 840

(3) (1984) Lab. and Ind. Cases 15 (S.C.)

(4) (1984) 2 L.L.J. 186

the directions in this regard in the matter of conduct of its business and other affairs, which is an immense indication as to its being an authority and/or an agency/instrumentality of the Government under Article 12 of the Constitution of India. I do not accept the submission of Mr. Roy, that the President of India's power of superintendence is not by virtue of his office as President of India under the Constitution of India. Central Government also exercises certain important powers as envisaged by Article 75 (1A) of the Articles of Association.

9. The impugned order of termination, therefore, has to be tested with the touchstone of Article 14 of the Constitution. The petitioner has been removed on the allegations of theft, breach of trust and faith under Model Standing Orders. This conclusion has been arrived at by giving three reasons in Annexure-1, the letter of termination, which read as follows:

> "(1) Even if the weighing machine was not available in the company there cannot be a difference of 6 times in the weight.
>
> (2) You are not authorised to drive Company's truck, which was done voluntarily by you.
>
> (3) No permission for using truck for transporting the wood was given to you by the Company's authorised representative."

The termination was, therefore, for a proved misconduct by rejecting the show cause filed by the petitioner without, however, holding an enquiry into the explanation furnished by the petitioner. Apart from the fact that the petitioner was never charged for

the second ground aforesaid, according to the petitioner, Mr. Ved Prakash, Senior Engineer, under whom he was working had authorised him to use the truck for transporting the wood. It is not known as to who is the competent authority for such authorisation and whether that was made known to its employees. These are matters which require to be enquired into by a participatory proceeding. Further the management permitted the petitioner to take away 12 quintals of scrap wood and the price thereof was realised from him. The excess amount payable was demanded from the petitioner by the management which was paid under a receipt granted by the Company. A plausible reason has also been offered for the excess loading. The reality and correctness of this matter could have only been arrived at by a departmental enquiry as has been envisaged under the Model Standing Orders. Mr.Roy wants to wriggle out of the situation and takes the same plea as was given by the Labour Court that the petitioner has admitted his guilt. It is settled law that admission has to be taken as a whole and not excerpt therefrom. I do not find there in an admission of guilt. On the contrary, it explains the circumstances under which the petitioner took out 12 quintals of scrap wood on payment of the price as demanded by the management. Payment of consideration can be a deferred one also. I am, therefore, of the opinion that the dismissal of the petitioner from service on the alleged misconduct of theft, breach of trust and faith without holding any domestic enquiry but treating the explanation given in the show cause as an admission of guilt is arbitrary, capricious and in complete breach of the principles of natural justice and thus violative of Article 14 of the Constitution of India and is justiciable under Article 226 of the Constitution of India. Further,

as indicated above, the petitioner was not at all charged for being "not authorised to drive Company's truck, which was done voluntarily by" him. Mr. Roy is not correct in his submission that the departmental enquiry would have been an empty formality in this case and his reliance on the case of *Burn & Co.*v. *Their Employees* (1) is wholly misplaced. This case has no applicability *so far as the facts and circumstances of the present case are concerned. That was a case where the petitioners' services were terminated for their being absent from duty and it was admitted that they were in jail custody during those days. Therefore, absence* from duty was proved which brought about their termination under their respective Standing Orders.

10. Similarly after having realised the price of the scrap wood, the imposition of penalty by way of deduction of Rs.400/- being the cost of 10 quintals of excess wood and realisation of Rs.100/- for using the truck from the dues of the petitioner, incorporated in the order of dismissal, appear to be unreasonable and vindictive.

11. Lastly, the submission of Mr. Roy is that the respondent Company has lost confidence and, therefore, the letter of termination be treated as such does not appeal to me because loss of confidence is also a stigma as has been held by the Supreme Court in *Chandu Lal* v. *The Management of M/s Pan American World Airways Inc.* (2)

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(1) (1957) A.I.R. (S.C.) 38

(2) (1985) A.I.R. (S.C.) 1128

12. I, therefore, quash Annexure-1, the letter of termination, as being violative of Article 14 of the Constitution of India and the principles of natural justice as well as that part of Annexure-4 by which the Presiding Officer of the Labour Court has rendered judgment on the merits of the case even though it held that the complaint before the him was not maintainable as a matter of law.

13. The next question is what relief the petitioner is entitled to. Disengagement brought about by Annexure-1 being *ipso facto void* and *non est*, it would be deemed that the petitioner continued in service irrespective of Annexure-1. I, therefore, issue a direction that the petitioner be treated as in continuous service till date and to pay him all his arrears of wages and other benefits to which he would have been entitled to by his having continued in service. There is no averment by the management as to mitigation of damages by acceptance of any other employment by the petitioner. It is true that a public undertaking has been put to loss but that is so because the management acted in an illegal manner in dispensing with the services of the petitioner.

14. The writ application is accordingly allowed. Hearing fee is determined at Rs.1000/-.

R.D. *Application allowed*

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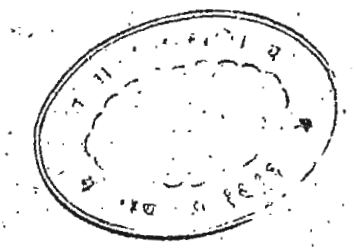
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Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 -[- section 45B, interpretation of --- power under --- when can be exercised.

Per L.M.Sharma and B.P.Jha, JJ (S.S.Sandhawalia, C.J. holding the reference to be infructuous):-

Section 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, on its face has vested the authorities with wide jurisdiction to reopen any closed proceeding and the only limitation mentioned is that the power may be exercised "if it thinks fit". It means that the authority concerned is not to act without sufficient cause. The proceeding cannot therefore be reopened for merely making a fishing enquiry to test the correctness of the earlier order.

If fresh material relevant to the question is discovered which, if considered along with the existing materials on the record, is likely to lead to a different conclusion, the proceeding can certainly be re-opened. Further, if any material or matter on the records of a case has been omitted from consideration which may be so substantial as to lead to a different conculusion, the power under section 45B may be exercised. The observations in *Yamuna Rai and others* v. *The State of Bihar and others* are consistent with this view and that case

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did not lay down the discovery of some fresh material, which was not on the records, as a necessary condition for exercise of power.

Praveen Shankar Singh and others v. *The State of Bihar and others* (1987) I.L.R. 66, Pat. 883

Bihar Service Code, 1952, *Rule 84 --- provisions of --- whether a bar to crossing of efficiency bar if writ-petitioner has been promoted to higher post --- Government of Bihar memo no. 3014 dated 31.7.1980 --- effect of --- writ-petitioner, whether entitled to interest at the rate of 12% on all his, dues.*

Rule 84 of the Bihar Service Code cannot stand in the way of a person in his crossing efficiency bar if he has been promoted to a higher post bearing higher salary. Such cases will be governed by Government of Bihar memo no.3014 dated 31st July, 1980.

Held, that all actions against the writ-petitioner having failed and the writ-petitioner having obtained a promotion to a higher post while he was stuck at the efficiency bar, such and order of promotion itself will be deemed to be an order impliedly sanctioning the crossing of the Efficiency bar.

Where the writ-petitioner till the date of his retirement took all possible steps to obtain the benefits of crossing the Efficiency Bar but to no effect and even his representations to

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this effect has not even been replied to;

Held, that the inaction on the part of the respondents in the instant case is most deplorable, illegal and unjustified. The writ-petitioner shall be entitled to interest on all his dues at the rate of 12% per annum till the payment is made.

R.C. Kaul, Development Officer, Department of Industries, Govt. of Bihar, Patna v. *The State of Bihar and ors.* 1038

Bihar and Orissa Co-operative Societies Act, 1935, *section 65A -- - provisions of --- whether suffer from the vice of arbitrariness providing no limitation or guideline --- whether reasonable and infract Article 14 of the Constitution of India --- whether liable to be struck down.*

Held, that, the wide-ranging, unguided and uncanalised powers conferred by section 65 A of the Bihar and Orissa Co-operative Societies Act, 1935 on the State Government to call for any and every proceedings before the Registrar or his subordinates or any other person and decide them as it may deem fit, plainly suffer from the vice of arbitrariness and consequently infract Article 14 of the Constitution and section 65A, therefore, is liable to be struck down.

The Registrar or any person exercising his powers under section 48 of the Bihar and

Orissa Co-operative Societies Act, 1935, is a court and the proceedings before him are judicial in nature. Section 65A does not merely confer a power on the State Government to revise matters decided by the Registrar or by officials exercising such power but it extends to any and every matter which may as yet be merely pending before the Registrar or any one of his subordinates or any other person acting under his authority. The State Government is empowered to call for any such record and pass such orders as it may deem fit. In essence, the Minister would then be performing not merely the statutory functions of the Registrar but his purely judicial functions as well and constitute himself as a Judge or a Court of Law. Further, section 65A is devoid of any limitation or of any guideline and it confers the power in naked arbitrariness for deciding the matter as the Minster deems fit de hors any law or rule. Therefore, such power under section 65A authorising interference in such purely judicial field would be plainly arbitrary, irrational and unconstitutional.

It is not only over the specific heads covered by section 65A which are otherwise provided in the greatest detail by the statute that a blanket unguided power is sought to be given to the Minister. Apart from the enumerated matters, the State Government is entitled to call for "any other matter concerning the working of the Society". Not only that, the power is yet again vested "to call for any record of inspection or inquiry made under

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this Act or proceedings of any matter". In essence, section 65A thus creates a Frankenstein monster whose shadow pervades every provision of statute and every niche and corner of Co-operative work upon which he may at any time choose to lay his hand and dispose of the same by passing such orders as deemed fit. It is an executive repeal of all earlier statutory provisions and vesting the whole gemut of the powers in the hands of the State Government and its Minister without let or hindrance. Section 65A. therefore, cannot withstand the test of reasonableness under Article 14 of the Constitution.

No rationale or reason is indicated in the Objects and Purposes of the amending Act 21 of 1976 for the addition of a provision of the nature of section 65A. The provision is not merely an ultimate repository of a revisional power but a blanket power to decide all matters in the original stage itself by the State Government.

Chandeshwar Prasad and others v. *The State of Bihar and others* (1987) I.L.R. LXVI Pat. 895

Central Sales Tax Act, 1956 *-[- Sections 14 (ia) and 15(a) --- Scope and applicability of --- manufacturing briquettes by mixing coal dust with soil and molasses --- whether a product of coal or coke to be treated as goods specified in section 14(ia).*

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If the words "coal, including coke in all its forms", have to be given a wide meaning. then any product directly connected with coal or coke, has to be held as a product of coal, or coke. in whatever form it may be. In the instant case, when the respondants. have admitted that the petit·oners are preparing briquettes for domestic consumption by mixing coal dust with soil and molasses, the briquettes so prepared have direct connection with coal or coke, especially when coal dust is the main ingredient of the product. Once the briquettes prepared by the petitioners are held to be a form of coke then they are entitled to the protection of section 15 of the Act.

Held, therefore, that in the instant cases the communication issued by the Deputy Commissioner, Commercial Taxes, on the basis of the decision taken by the State Government that briquettes prepared from the coal dust be treated as unspecified goods must be quashed and the coke briquettes prepared by mixing coal dust, soil and molasses should be treated as goods specified in the entry 14(ia), being a form of coke during the assessment proceeding.

Bajrangbali Coke Briquetting Industries v. *The State of Bihar and ors*. (1987) I.L.R.66, Pat. 1007

Code of Civil Procedure, 1908. -[- Section 2 (11), and Order XXII Rules 3 and 4, -[·scope and applicability of -- - legal guardian of a

minor in possession of his property --- whether a legal representative on the minor's death --- father- guardian being on the record already --- other heir or heirs not substituted --- question of abatement, whether would arises --- requirement in Rules 3 and 4 of order XXII, whether of being a legal representative and not of the heirs or the heirs in Class I or class II under section 8 of the Hindu Succession Act --- Hindu Succession Act, 1956 section 8. Per S.S.Sandhawalia, C.J. and S.Ali Ahmad, J (Lalit Mohan Sharma, J.Contra):-

Held, that the legal guardian of a minor in possession of his property who is himself a party to the suit along with such minor, would, on the latter's death, undoubtedly come within the sweep of the phrase 'any person who intermeddles with the estate of the deceased" and become a legal representative within the inclusive definition of section 2 (11) of the Code of Civil Procedure. Once that is so, it is plain that if he is already on the record of the case, the mere absence of one or the other heirs would not result in the abatement.

The definition of "legal representative" in section 2 (11) of the Code of Civil Procedure is a wide and inclusive one and conceives of two distinct categories. Firstly, the heirs or persons who in law represent the estate of the deceased person. However, at per with them and in a Class by itself is any person who intermeddler with the estate of the

deceased. Such a person is equally a legal representative. An intermeddler (who is on the same footing as an *executor de son tort* in English law) is one who in any way whatsoever dabbles with or comes in touch with the estate of the deceased. The wide sweep of the phrase *intermeddler with the estate*, as a term of art, and the intention of the legislature in expressly including an intermeddler in the definition of legal representative under section 2(11) of the Code of Civil Procedure, is thus not in doubt. Once that is so, a legal guardian in possession of the estate would, in the event of the death of the minor, come squarely within the ambit of an intermeddler with the estate in the eye of law, even if he himself does not happen to be a class I heir thereto.

It can hardly be disputed that a legal guardian during the life time of the minor is legally and factually in possession of his ward's estate. In the event of the minor dying, the factum of the actual or notional possession of the estate of the legal guardian does not evaporate in the thin air. No such fiction can be exercised. There is a settled general rule that if a person is specifically found in possession of an estate at a prior date there is a presumption of continuity of such possession till the contrary is established. With regard to a legal guardian in possession of the estate of the minor, there would be a presumption of the continuity of possession after the death of the minor till it has been shown otherwise that he was dispossessed

thereof. Once it is so, the former legal guardian would be in possession of the estate either lawfully or unlawfully. To be an intermeddler, the legality or the entitlement is irrelevant.

Held, therefore, that the father of the deceased minor was an intermeddler with his estate and consequently his legal representative. Therefore, the father being on the record already, as the legal representative, no question of abatement would arise.

Held, further that the language employed in Rules 3 and 4 of Order XXII of the Code of Civil Procedure is not that the heirs or the heirs in Class I or class II under section 8 of the Hindu Succession Act must be made a party in the event of the death of the original party, but only that the legal representatives of the deceased should be so made.

Per Lalit Mohan Sharma, J.:-

A general proposition cannot be laid down for universal application that on the death of a minor his guardian must be held to be an intermeddler and therefore his legal representative.

The question whether a person is an intermeddler so as to be the legal representative of a deceased party in a given case is dependent on the relevant facts, which facts have to be alleged by somebody. The question remains one dependent on fact to be alleged. If

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necessary assertion is made by a party. the other side will be entitled to an opportunity to deny the same, and the court will have to decide the issue only after ascertaining the factual aspect. If one of the parties in a particular case so alleges the question whether the guardian is an intermeddler does not arise for decision and he cannot be presumed to be so as a matter of law.

Held, further, that, in the present case, the plea which is dependent on facts cannot now in the present letters patent appeal be entertained specially when the consistent stand of the respondents has been otherwise. On the death of the minor. Leaving behind his mother as the sole heir during the pendency of the appeal in the court below, nobody alleged that the guardian was an intermeddler. On the other hand, there was no dispute between the parties that the estate was represented by the mother of the minor and the only question debated by the parties was whether there was sufficient cause for condoning the delay in filing the application for her substitution after setting aside abatement.

Held, also, that as admittedly the minor's mother, who was class I heir under section 8 of the Hindu Succession Act exclusively inherited the estate, the presence of the father and the other relations, who were Class II heirs, on the records is wholly immaterial and wholly irrelevant for deciding the present question.

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Sudama Devi and others v. *Jogendra Choudhary and others.* (1987) I.L.R. 66, Pat. 845

Code of Criminal Procedure, 1973 *-[-section 294(3) --- Scope and applicability of --- postmortem report --- non-examination of the doctor to prove the postmortem report --- effect of --- an injury report or postmortem report, whether and when covered under section 294(3) of the Code --- such document, whether to be taken as substantive evidence.*

Sub-section (3) of section 294 of the Code of Criminal Procedure, 1973 contemplates only genuineness of the documents to be and not that of the document or contents thereof. An injury report or postmortem report is fully covered under this new provision if the genuineness of the document is not challenged or nbt disputed.

Held, therefore, that in the instant case the postmortem report (Ext.3) whose genuineness was not denied or challenged by the appellant has to be taken into consideration under sub-section (3) of section 294 of the Code of Criminal Procedure, 1973.

Taiyab Gowala v. *The State of Bihar* (1987), I.L.R.66, Pat. 1025

Court Fees Act, 1870 *-[- section 7, Clause (iv) --- suits falling under section 7 (iv) --- estimation of the relief by the plaintiff, whether to be ordinarily accepted --- plaintiff, whether*

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given absolute right or option to place any valuation whatever on such relief --- court, whether has jurisdiction to interfere where plaintiff manifestly and deliberately undervalues and underestimates the same --- objection regarding insufficiency or otherwise of the valuation whether can be raised --- mandate at the end of clause (iv) of section 7 that the plaintiff shall value the relief sought --- whether governs each of the proceeding sub-clauses (a) to (f) equally.

Held, that, in suits falling under clause (iv) of section 7 of the Court Fees Act, irrespective of the various sub clauses thereof, the estimation of the relief by the plaintiff has to be ordinarily accepted. Nevertheless, (i) the plaintiff has not been given any absolute right or option to place any valuation whatever on such relief and (ii) where he manifestly and deliberately undervalues and undrestimates the same, the court is not a silent and impotent spectator thereof and has clear jurisdiction to interfere, (iii) the sufficiency or otherwise of the relief estimated by the plaintiff is now no longer in question and finical objections about the insufficiency of such estimation should not any longer be permitted to be raised by the trial courts, (iv) no difference or line of distinction can be drawn qua the individual sub-clauses (a) to (f) of clause (iv) of Section 7 of the Court Fees Act. The mandate at the end of clause (iv) of section 7 applies equally and evenly to each of the sub- clauses (a) to (f).

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Md. Alam v. *Gopal Singh and others* (1987), I.L.R. 66. Pat. 926

Criminal Trial --- *exculpatory Statement --- effect of --- Suspicion --- whether to take the place of proof --- conviction, when to be maintained.*

Held, that an exculpatory statement made by an accused cannot be used as confession in legal sense and therefore, it cannot be used against the accused as his confession.

Held, further, that a suspicion, howsoever, strong cannot take the place of proof. One has to travel up to the point of proof for conclusion in a Criminal trial. Untill and unless, the guilt is proved beyond all doubts, conviction cannot be maintained.

Yogendra Rajbhar v. *The State of Bihar* (1987), I.L.R.66. Pat. 981

Income-Tax -*[- expenses incurred by the assessee for securing advantage of an enduring nature --- whether capital expenditure.*

Where the assessee claimed that the work done in its Mica Mines were in the nature of concreting the walls and roof underground and were carried out under the orders of the Chief Inspector of Mines, Government of India and were in the nature of revenue expenditure:

Held, that the expenses were incurred for all for securing the advantage of an enduring

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nature and were in the nature of capital expenditure and not revenue expenditure.

Commissioner of Income-tax Bihar II, Patna v. *M/s Karuna Mica Co., Giridih* (1987), I.L.R. 66, Pat. 957

-[- 2. *gross profit, computation of --- amount of Central and State sales-tax debited in the profit and loss account, whether has to be deducted.*

Where the gross profits in the trading account were artificially inflated by the assessee by debiting the Central and State sales- tax in the profit and loss account;

Held, that to find out the real gross profit, the actual amount of Central and State sales-tax debited in the profit and loss account both from the turnover as well as gross profit shown has to be deducted. The application of gross profit on the amount of sales-tax collections or the sales-tax paid, in law, is not correct and the same should be taken as income or expenditure.

Held, further, that, in law, the rate of net sales should be after excluding the amount of sales-tax and there is no justification. in law. for exclusion of the sales-tax amount as part of the profits of the business. The gross profit. in law, is not cost plus profit plus sales-tax but cost plus profit alone.

Commissioner or Income-tax Bihar II.

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Patna. v. *M/s Pareck Brothers, Main Road, Ranchi,* (1987) I.L.R.66, Pat. 990

Income-tax Act, 1961 --- *individual assessee governed by Hindu Law --- status, whether would change to that of a Hindu Undivided Family merely on his marriage.*

Where, after a partial partition in the earlier Hindu joint family, the assessee held his share as his separate individual property and filed the returns for nearly a decade in the status of an individual and was assessed as such and after his marriage filed return in the status of a Hindu undivided family;

Held, that the status of an individual assessee governed by Hindu Law would not change to that of a Hindu undivided family under the Income-tax Act automatically on his marriage. The Tribunal, therefore, was not correct in law in holding that the status of the assessee after marriage was that of an HUF and not that of an individual.

Commissioner of Income tax, Bihar Patna v. *Sri Shankarlal Budhia, Ranchi* (1987), I.L.R. 66, Pat. 873

Service --- *writ-petitioners designated as Associate Professors of Medical Colleges, management of which had been taken over by State under Bihar Private Medical College (Taking Over of Management) Ordinance, 1977 for obtaining recognition by Medical Council*

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of India --- conduct of State Government, whether would amount to implied approval to the appointment and promotion --- Estoppel principles of --- action of State Government. whether would amount to acquiescence and waiver of requirement of prior approval in the matter of appointment and promotion.

When the writ-petitioners were designated as Associate Professors they were appointed to that particular post in order to obtain recognition of the Medical College by the Medical Council of India and consequent recognition of the University by the Central Government.

The conduct of the State Government in the facts and circumstances of the case, would amount to implied approval of the petitioner's appointment and/or promotion made by the Board of Control constituted under Bihar Private Medical College (Taking Over of Management) Ordinance, 1977, hereinafter called the Ordinance as Associate Professors. It is well established that under certain conditions silence or inaction constitute a representation as much as positive language or conduct for the purpose of Estoppel. It was the legal duty of the State to take steps or to disclose to the Medical Council of India or to the petitioners that these promotions have not their approval and, therefore, invalid. On the other hand, the State by their conduct by reaping the benifit of such promotions, led everybody to believe that no such fact, exists

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or that there is nothing so abnormal or peculier in the nature of the transaction or in the circumstances of the case as to give rise to any duty of disclosure and to shape Medical Counsil's course of action on that assumption.

Held, that in any event, it will amount acquiescence and waiver of the requirement of prior approval in the matter of appointment and promotion and/or implied approval of the State to the appointment and promotion.

Held, further, that the appointments as Assistant Professors had the prior approval of the Medical Council of India of which the State had full knowledge. It was, therefore, that the state did not take any action under section 16 of the Ordinance which can safely be assumed to be State's tacit approval of the action taken by the Board of Control in the best interest of the Medical Colleges.

Held, further that the plea of the Government raised on the basis of the letter of the Joint Director of the Health Department that the temporary designation of the writ-petitioners as Associate Professors was accorded without prior approval of the State Government is rejected and overruled.

Held, also, that writ-petitioners' appointment as Associate Professor was validly made and the Government was directed to treat the writ-petitioners, to have been validly appointed as Associate Professors from the date they have been so designated and give all consequential benefit flowing therefrom. Any

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teaching experience gained as being temporarily designated on a particular post should also enure to the benefit of the writ-petitioners. The State was directed to consider the cases of the writ-petitioners along with other eligible candidates if they have the requisite experience and qualification for being appointed as Professors as laid down by Medical Council guidelines for promotion as Professors.

Mahendra Narain v. *The State of Bihar and ors.* (1987) I.L.R.66, Pat. 1046

FULL BENCH

Before S.S.Sandhawalia,C.J.,Lalit Mohan Sharma & S.Ali Ahmad, JJ.

1986.

September, 29

*Sudama Devi and others**

v.

Jogendra Choudhary and others.

Code of Civil Procedure, 1908, (Central Act V of 1908), section 2 (11), and Order XXII Rules 3 and 4, scope and applicability of -- - legal guardian of a minor in possession of his property --- whether a legal representative on the minor's death --- father-guardian being on the record already --- other heir or heirs not substituted --- question of abatement, whether would arise --- requirement in Rules 3 and 4 of order XXII, whether of being a legal representative and not of the heirs or the heirs in Class I or class II under section 8 of the Hindu Succession Act --- Hindu Succession Act, 1956 (Central Act XXX of 1956)

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*Letters Patent Appeal Nos.42 of 1982. In the matter of an appeal under Clause 10 of the Letters Patent of the Patna High Court, against a judgment dated the 6th August, 1982, of the Hon'ble Mr. Justice B.P.Jha, in M.A.No.256 of 1978.

section 8. Per S.S.Sandhawalia,C.J. and S.Ali Ahmad, J (Lalit Mohan Sharma, J.Contra):-

Held, that the legal guardian of a minor in possession of his property who is himself a party to the suit along with such minor, would, on the latter's death, undoubtedly come within the sweep of the phrase "any person who intermeddles with the estate of the deceased" and become a legal representative within the inclusive definition of section 2 (11) of the Code of Civil Procedure. Once that is so, it is plain that if he is already on the record of the case, the mere absence of one or the other heirs would not result in the abatement.

The definition of "legal representative" in section 2 (11) of the Code of Civil Procedure is a wide and inclusive one and conceives of two distinct categories. Firstly, the heirs or persons who in law represent the estate of the deceased person. However, at per with them and in a Class by itself is any person who intermeddles with the estate of the deceased. Such a person is equally a legal representative. An intermeddler (who is on the same footing as an *executor de son tort* in English law) is one who in any way whatsoever dabbles with or comes in touch with the estate of the deceased. The wide sweep of the phrase *intermeddler with the estate*, as a term of art, and the intention of the legislature in expressly including an intermeddler in the definition of legal representative under section 2(11) of the Code of Civil Procedure, is thus not in doubt. Once that is so, a legal guardian in possession of the estate would, in the event of the death of the minor, come squarely within the ambit of an intermeddler with the estate in the eye of law even if he himself does not happen to be a class

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Held, therefore, that the father of the deceased minor was an intermeddler with his estate and consequently his legal representative. Therefore, the father being on the record already, as the legal representative, no question of abatement would arise.

Prahlad Jha and others v. *Sonelal Mahto and others* (1)

Jiba Devi and others v. *Satyanand Roy and others* (2) --- overruled.

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(1) (1974) A I R (Pat) 338

(2) (1982) A I R (Pat) 177.

Held, further that the language employed in Rules 3 and 4 of Order XXII of the Code of Civil Procedure is not that the heirs or the heirs in Class I or class II under section 8 of the Hindu Succession Act must be made a party in the event of the death of the original party. but only that the legal representatives of the deceased should be so made.

PER Lalit Mohan Sharma, J.:-

A general proposition cannot be laid down for universal application that on the death of a minor his guardian must be held to be an intermeddler and, therefore, his legal representative.

The question whether a person is an intermeddler so as to be the legal representative of a deceased party in a given case is dependent on the relevant facts. which facts have to be alleged by somebody. The question remains one dependent on fact to be alleged. If necessary assertion is made by a party, the other side will be entitled to an opportunity to deny the same, and the court will have to decide the issue only after ascertaining the factual aspect. If none of the parties in a particular case so alleges the question whether the guardian is an intermeddler does not arise for decision and he cannot be presumed to be so as a matter of law.

Held, further, that, in the present case. the plea which is dependent on facts cannot now in the present letters patent appeal be entertained specially when the consistent stand of the respondents has been otherwise. On the death of the minor, leaving behind his mother as the sole heir during the pendency of the appeal in the court below, nobody alleged that

the guardian was an intermeddler. On the other hand, there was no dispute between the parties that the estate was represented by the mother of the minor and the only question debated by the parties was whether there was sufficient cause for condoning the delay in filing the application for her substitution after setting aside abatement.

Held, also, that as admittedly the minor's mother, who was class I heir under section 8 of the Hindu Succession Act exclusively inherited the estate, the presence of the father and the other relations, who were Class II heirs, on the records is wholly immaterial and wholly irrelevant for deciding the present question.

Appeal under the Letters Patent by the plaintiffs.

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

The letters patent appeal originally came up for hearing before a Division Bench, which referred the appeal to a larger Bench for an authoritative decision.

On this reference.

M/s.Braj Kishore Narain, Rakesh Kr.Srivastva and Deepak Dayal for the appellants.

M/s.S.B.N.Singh. Samarendra Kr.Singh, Vijayendra Nath, Deepak Kr.Singh and Naresh Kr.Singh for Minors 6,11 and 13 for the respondents.

S.S.SANDHAWALIA, C.J. -- Whether the legal guardian of a minor in possession of his property,

who is himself a party to the suit along with such minor, would, on the latter's death, become his legal representative as an intermeddler with the state under Section 2(11) of the Code of Civil Procedure, is the somewhat significant and ticklish question necessitating this reference to a Full Bench.

2. The facts are not in serious dispute. The deceased, Dinesh Paswan, along with his father, Parmeshwar Paswan, and others, had brought the suit for partition of the two-fifth share of the plaintiffs in the suit property and also for a declaration that the deed of sale executed by Raghuni Paswan in favour of Defendant No.17, Hari Jha, was collusive, without consideration and inoperative. The said suit was decreed on the 29th July, 1975. The defendants preferred Title Appeal No.25/10 of 1975/77, which was allocated to the First Additional District Judge, Darbhanga.

3. During the pendency of the appeal, Dinesh Paswan, aforesaid, died on the 30th June, 1976, leaving behind his mother Buchi Devi and his father, Parmeshwar Paswan. Admittedly, the mother, who was Class I heir under Section 8 of the Hindu Succession Act, was not brought on the record as a legal representative within the period of limitation. An objection petition was preferred on behalf of the respondents, raising the plea that the whole appeal had abated because of the failure to substitute the Class I legal representative of the deceased minor Dinesh Paswan. In the circumstance, an application under Section 5 of the Limitation Act was also preferred for condoning the delay in filing the petition for setting aside the abatement of the appeal on the ground that there was sufficient cause therefor as the appellants

were not aware of the death of the respondent and his legal heirs. The learned Additional District Judge, in an elaborate order dated the 26th September. 1978, rejected the stand of the appellants before him and held that there was no sufficient ground for condonation of delay and that the appeal abated as a whole.

4. On appeal. the learned Single Judge, apparently first dismissed the same, However, on the basis of an application filed by the respondents therein, the matter was re-heard. By the judgment under appeal, the learned Single Judge came to the view that if the legal heir of any class, irrespective of the fact whether he is of Class I or Class II, under Section 8 of the Hindu Succession Act, is on the record, no question of abatement would arise. Consequently, he reviewed his earlier order and remitted the case back to the learned Additional District Judge, with a direction that he should add the mother of the deceased Dinesh Paswan as a respondent also and thereafter dispose of the appeal in accordance with law.

5. This letters patent appeal originally came up before a Division Bench,where the firm stand taken on behalf of the Respondents was that the legal guardian of a minor in possession of the latter's estate must at least be deemed as an intermeddler with the said estate on the death of the minor and, therefore, would represent the same under Section 2(11) of the Code of Civil Procedure. On behalf of the appellants however, reliance was placed on *Jiba Devi* -vs- *Satyanand Roy (1)* Expressing some doubt with regard to the passing observations in the later judgment, the appeal has

(1) (1982) A.I.R. (Pat.) 177.

been referred to a larger Bench for an authoritative decision.

6. As before the Division Bench, so before us, the learned Counsel for the respondents did not attempt to support the judgment under appeal on the basic ground therein that even if a Class II legal heir under Section 8 of the Hindu Succession Act is on the record, despite the exclusion of the Class I heirs, no question of abatement would arise. Instead he took the alternative stand that the legal guardian of the minor being in possession of the latter's estate would, on his death, be, in the eye of law, the intermeddler with the said estate, and, consequently, within the ambit of Section 2(11) of the the Code of Civil Procedure. This stand was, however, stoutly opposed by the learned Counsel for the appellants, and, inevitably, he relied on and commended for the acceptance of the view in *Jiba Devi* -vs- *Satyanand Roy* (supra).

7. From the rival stands noticed above, it is somewhat obvious that the core question herein, which indeed has been solely debated before us, is whether the legal guardian of a minor in possession of an estate would, on the death of such a minor, be an intermeddler with the estate within the meaning of Section 2(11) of the Code of Civil Procedure. This question cannot today be viewed in isolation of authoritative precedent, and the answer thereto would consequently depend on the true approach to the problem herein. Now there is a positive shift away from the earlier technicalities of abatement and the refreshing trend to opt for a decision on merits instead. This precedential trend of the Final Court itself, which is now unbroken, extends over a period of more than two decades by now. Apparently, the first straw in

the wind in this context are the observations in *Daya Ram and others* -vs- *Shyam Sundari and others* (1) holding that where the plaintiff or the appellant, after a diligent and bonafide inquiry ascertained the legal representatives of a deceased defendant or respondent and brings them on record within time, there would be no abatement even though some of the legal representatives may have been left out. Two years later, in *Dolai Maliko and others* -vs- *Krishna Chandra Patnaik and others* (2) their Lordships reiterated the earlier departure from the fossilised trend of legalism which short-circuited meaningful issues on paltry technicalities of abatement, with the following observations:-

> "We are of opinion that these cases have been correctly decided and even where the plaintiff or the appellant has died and all his heirs have not been brought on the record because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there are circumstances like fraud or collusion to which we have already referred above."

The aforesaid trend was further expanded in *Mahabir Prasad* -vs- *Jage Ram and others* (3) in the following words:-

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(1) (1965) A.I.R. (S.C.) 1049.

(2) (1967) A.I.R. (S.C.) 49.

(3) (1971) A.I.R. (S.C.) 742.

"Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate."

Thereafter, acknowledgedly, in *Harihar Prasad Singh and others* - vs- *Balmiki Prasad Singh and others* (1) and *N.Jayaram Reddi and another* -vs- *The Revenue Divisional Officer and others* (2) the shift away from technical abatement stands further buttressed.

8. In the light of the aforesaid catena of binding precedent, Mr.S.B.N.singh, learned Counsel for the respondents, pin pointed himself particularly on the aforequated observations in *Mahabir Prasad* -vs- *Jage Ram and others* (supra). It was contended that the father of the minor. in his capacity as his legal guardian, was already on the record and further was so individually in his own right as well in the suit for partition. After the death of the minor, even if that capacity of legal guardianship inevitably changes, the factum of his being on the record in another capacity remains undisputed. He, therefore,' contended that herein the father, who earlier represented the minor as being legally and

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(1) (1975) A.I.R. (S.C.) 733.

(2) (1979) A.I.R. (S.C.) 1393.

factually in possession of his estate, would continue to represent that estate, in any case, as an intermeddler there with, even if he had no legal title thereto. In such a situation, he would be the legal representative of his deceased son in his capacity as an intermeddler with the estate of the minor.

9. To my mind, the heart of the issue herein is whether in the fact situation as also in the eye of law, the legal guardian of the deceased minor is not also at least an intermeddler with his estate. Section 2(11) of the Code of Civil Procedure is in the following terms:-

> " 'Legal representative' means a person who in law represents the estate of a deceased pe:son, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"

10. It is plain from the above that the definition herein is a wide and inclusive one and conceives of two distinct categories. Firstly, the heirs or persons, who in law represent the estate of the deceased person. However, at par with them and in a class by itself is any person who intermeddles with the estate of the deceased. Such a person is equally a legal representative. Now the phrase *intermeddler with the estate* has come to be a term of art and has been construed as one of the widest amplitude. This apart, even the dictionary meaning of the word is one of considerable width. In Chambers's Twentieth Century Dictionary the word'meddle' is given the meaning to interfere unnecessarily, or, without being entitled." Intermeddle is" to meddle or to interfere improperly."

In the New Oxford Illustrated Dictionary, 'meddle' means to concern one-self with what is not ones business. According to the Ramdom House Dictionary' intermeddler' means one who "interferes or intemeddles," which in turn means to "interfere officiously and unwantedly." It is thus manifest that even on its plain dictionary meaning the word is one of wide amplitude.

11. This word has also been the subject matter of considerable judicial scrutiny both in Indian and English laws. In *Naro* -vs- *Harbanshlal and another* (1) Tek Chand,J.,speaking for the Division Bench, observed as under:-

> "Intermeddling means to meddle with the affairs of others in which one has no concern; to meddle officiously; to interpose or interfere improperly. It signifies meddling with the property of another improperly. Intermeddling may take several forms including collecting or taking possession of the assets or other act, which might evince a legal control.
>
> A legal person, who intermeddles, is on the same footing as an *executor de son tort* (executor of his own wrong) as he takes upon himself the office of an executor by intrusion and not so constituted by the testator. He is a person who without authority intermeddles with the estate of the deceased. Very slight act of intermeddling with the property of the deceased makes a person *executor de son tort*,.....

(1) (1962) A.I.R. (Punj.) 457

There is authority for the poroposition that when a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled....".

It would follow from the above that precedent has also authoritatively given to the word'intermeddler' an extremely expanded construction. Indeed, as has been noticed above, an intermeddler is on the same footing as an *executor de son tort*. In the Halsbury's Laws of England, Fourth Edition, Volume 17, in Paragraph 754, it has been said as under with regard to an *executor de son tort*:-

"The slightest circumstance may make a person *executor do son tort*, if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor or administrator. Demanding payment of debts due to the deceased, paying the deceased's debts, carrying on his business, or disposing of goods may make a person *executor de son tort;* but setting up a colourable title to the deceased's goods is not enough. A person who enters upon or collects the rents of a deceased person's leasehold property and pays the ground rent may, by reason of privity of estate or estoppel, render himself liable to the landlord upon the covenants of the lease as *executor de son tort*, but a person who takes over leasebold property from an *executor de son tort* does not."

12. It would be manifest from the above that an intemeddler (who is on the same footing as an *executor de son tort* in English law) is one who in way whatsoever dabbles with or comes in touch

with the estate of the deceased. The wide sweep of the phrase, as a term of art, and the intention of the legislature in expressly including an intermeddler in the definition of legal representatives under Section 2(11) of the Code of Civil Procedure, is thus not in doubt.

13. Now once the width and sweep of the word intermeddler and the intent of the legislature in including it in Section 2(11) of the Code is manifested, it would seem somewhat elementary that a legal guardian in possession of the estate would, in the event of the death of the minor, come squarely within the ambit of an intermeddler with the estate in the eye of law, even if he himself does not happen to be a Class I heir thereto. The legal position of a guardian vis-a-vis his ward with regard to the property of the latter is not in doubt. A minor, because of the incapacity to contract till his majority, holds the estate and property through his legal guardian. It seem unnecessary to enter in any great legal sophistry in this context. It can hardly be disputed that a legal guardian, during the life time of the minor is legally and factually in possession of his ward's estate. The minor has title to the property and is in possession only through his lawful guardian. It seems that the position would not admit of any doubt that the legal guardian of the minor is either in factual or notional possession of the estate of his ward.

14. The issue that then arises is as to what is the consequence of the minor dying in such a situation - does the factum of the actual or notional possession of the estate of the legal guardian evaporate in the thin air with the last breath of the minor ?

I do not think so. No such fiction can be exercised. There is a settled general rule that if a person is specifically found in possession of an estate at a prior date, there is a presumption of continuity of such possession till the contrary is established. This general rule of law is too well settled to admit of any doubt. Yet, within this jurisdiction, if a precedent was needed, it is first available in the authoritative decision of the Full Bench of this Court in *Raja Shiva Prasad Singh* -vs- *Hira Singh and others* (1) and again reiterated in *Ghoghar Raut* - vs- *Jagannath Prasad Singh and others* (2) in the following terms:-

> "The decision can only be based on the general rule of evidence in favour of presuming the continuity of things shown to exist at a prior date. It is certainly a plausible argument that if the plaintiff has shown that he was in possession in 1896, he must be presumed to have continued in possession, unless and until his dispossession is proved by the defendants. But the presumption in question is a general presumption. It would equally apply, no matter what the evidence on which the plaintiff relied to prove his possession in 1896."

15. It is somewhat plain on both authority and general principle that with regard to a legal guardian in possession of the estate of the minor, there would be a presumption of the continuity of possession after the death of the minor till it has been shown otherwise

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(1) (1921) A.I.R. (Pat.) 237.

(2) (1947) A.I.R. (Pat.) 475.

that he was dispossessed thereof.

16. Now, if that be so, and, it is not disputed that the legal guardian was in possession at the time of the death of the minor, the presumption of the continuity of the possession is a strong one, which has to be specifically dislodged. Once it is so, the former legal guardian would be in possession of the estate either lawfully or unlawfully. Where the legal title to the property of the minor has passed to another heir, then the possession of the legal guardian may either be on behalf of those legal heirs with consent or he may nevertheless continue in possession in opposition to their claim. Whatever be the situation, for our purpose, it would suffice that on the principle of continuity of possession, the legal guardian, after the death of the minor, remains in the same situation qua the estate, whether lawfully or unlawfully. To be an intermeddler, the legality or the entitlement is irrelevant. Can it possibly be said that such a person, lawfully or unlawfully in possession of the whole of the estate at the moment of the demise of the minor and thereafter, would not be even intermeddling with the same? As has been highlighted earlier, the concept that the intermeddling with the estate is wide one and even a trifling intrusion therein may bring one within the concept of an intermeddler or an *executor de son tort*. To say that the person, who, the day before, was lawfully in possession of the estate and who continues to be so in a different capacity, would not at least be an intermeddler there with, appears to me as wholly untenable. It must, therefore, be held that the legal guardian in such a situation is undoubtedly within the sweep of the phrase any person who intermeddles with the estate of the deceased, and, is, therefore, a legal representative, within the inclusive

definition of Section 2(11) of the Code of Civil Procedure. Once that is so, it is plain that if he is already on the record of the case, the mere absence of one or the other heirs would not result in the abatement, in view of the long line of authority noticed earlier. Indeed, this position is too axiomatic to deserve further elaboration.

17. In fairness to Mr.S.B.N.Singh, learned Counsel for the respondents, one must notice his reliance on Rules 3 and 4 of Order XXII of the Code of Civil Procedure. He rightly emphasised that the language employed therein is not that the heirs or the heirs in Class I or Class II must be made a party in the event of the death of the original party, but only that the legal representatives of the deceased should be so made. It was contended with plausibility that herein the requirement is not of heirship and whether it is of Class I or of Class II, but of being a legal representative, and, if a person comes within the ambit of being an intermeddler with the estate and subsequently a legal representative, then he would as well represent the estate as the preferential heir in Class I or the subsidiary heir in Class II of Section 8 of the Hindu Succession Act.

18. As the last ditch of attempt, learned Counsel for the appellants had contended that despite one of the legal representatives being on the record, there may nevertheless be partial abatement against one or the other of the deceased respondents. Reliance was sought to be placed on *Prahlad Jha and others* -vs- *Sonelal Mahto and others* (1) and, in particular

(1) (1974) A.I.R. (Pat.) 338.

the observations of the Division Bench in Paragraph 6 of the report. Undoubtedly, these do lend some credence to the stand taken on behalf of the appellants. It is, perhaps, time that for the sake of clarity of precedent, the cobwebs herein should also be cleared. A reading of the decision in *Prahlad Jha's* case (supra) would indicate that the Division Bench somewhat narrowly and constrictedly construed the observations of the Supreme Court in *Mahabir Prasad* -vs- *Jage Ram* and others's case (supra). With respects, the narrowing down of the rule laid down by their Lordships in the said case does not appear to us as well warranted. Apart from the facts of the particular case, their Lordships in no uncertain terms laid down a principle of general application, which does not deserve to be constricted. This position indeed is manifested by subsequent decisions of the Final Court itself, which, far from limiting the rule, have expanded the same.

19. In the aforesaid context, what first calls for notice within this jurisdiction is the fact that an earlier Division Bench in *State of Bihar* vs *Saubhagya Sundari*(1) had taken a contrary view, which seems to have been missed notice in *Prahlad Jha's case.* Yet again, a later Single Bench decision in *Ramchandra* vs *the State of Bihar* (2) preferred to follow the earlier decision in *State of Bihar* vs. *Saubhagya Sundari* (1) and disagreed with the constriction of the wider rule laid down in *Mahabir Prasad's* case. Still later, another Division Bench in *Ramdeo Jha* -vs- *Chandar Thakur & ors* (1) though seeking to distinguish Prahlad Jha's

(1) (1972) A.I.R. (Pat.) 200.

(2) (1974) A.I R. (Pat.) 184

case as one being on its own facts, apparently took a contrary view. This apart, it would appear that in the subsequent decision of the Final Court in *Harihar Prasad Singh -vs- Balmiki Prasad Singh* (2) which was also a case from this Court, their Lordships, in a very exhaustive judgment found no reason to limit the ratio in *Mahabir Prasad's* case (supra), and, indeed virtually took a more liberal and expanded view. In the still later decision in *N.Jayaram Reddi and another -vs- The Revenue Divisional Officer and Land Acquisition Officer, Kurnool* (3), Desai J. formulated the undermentioned propositions, divorced from any limitations of the facts of a particular case:-

"(1) If all legal representatives are not impleaded after diligent search and some are brought on record and if the Court is satisfied that the estate is adequately represented, meaning thereby that the interests of the deceased party are properly represented before the Court, an action would not abate.

(2) If the legal, representative is on the record in a different capacity, the failure to describe him also in his other capacity as legal representative of the deceased party would not abate the proceeding.

(3) If an appeal and cross-objections in the appeal arising from a decree are before the appellate court and the respondent dies, substitution of his legal representatives in the cross-objections being part

(1) (1981) P.L.J.R. 533.

(2) (1975) A.I.R. (S.C.) 733.

(3) (1979) A.I.R. (S.C.) 1393.

of the same record, would enure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not vice versa.

(4) A substitution of legal representatives of the deceased party in an appeal or revision even against an interlocutory order would enure for the subsequent stage of the suit on the footing that appeal is a continuation of a suit and introduction of a party at one stage of a suit would enure for all subsequent stages of the suit.

(5) In cross-appeals arising from the same decree where parties to a suit adopt rival positions, on the death of a party, if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross-appeal and the same would abate."

20. In the light of the aforesaid subsequent precedent, it appears to me, with the deepest respect, that the view of the Division Bench in *Prahlad Jha and others* -vs- *Sonelal Mahto and others* (1) cannot now hold the field and is hereby overruled.

21. It now remains to consider *Jiba Devi and others* -vs- *Satyanand Roy and others* (2) which, as already noticed, had necessitated this reference to the larger Bench. Therein, the point involved herein undoubtedly was raised in specific terms. However,

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(1) (1974) A.I.R. (Pat.) 338.

(2) (1982) A.I.R. (Pat.) 177.

it appears from the judgment that the issue was not elaborately canvassed and the learned Counsel for the parties were somewhat remiss in not bringing all the facets on principle and precedent on the points to the notice of the Bench. In this context, M.P.Varma,J., who wrote the main judgment, summarily disposed of the matter in the following lines:-

> "In this view of the matter, the contention that father of the deceased minor is the legal representative fails. Such a position was permissible before the passing of the Hindu Succession Act, 1956, when the law of survivorship did hold the field in the matter of devolution of the interest of the deceased coparcener."

22. It is plain from the aforesaid that the core question of intermeddling with the estate was neither projected nor considered and the issue was somewhat narrowly and cryptically adjudicated upon on the question of legal heirship alone and the change in law and the provisions of the Hindu Succession Act, 1956. It is true that my learned Brother, S.Ali Ahmad,J.,who was a party to that judgment, adverted very briefly to this aspect in his concurring observations. However, he seems to have been primarily influenced in holding so on the ground that the appellants had failed to prove the factum of intermeddling with the estate, and, it deserves notice that in the second appeal both the courts below had held against the appellants and the Bench apparently did not choose to interfere on the peculiar findings of facts arrived at. It is equally well to recall that in the order of reference in this case, his Lordship, S.Ali Ahmad, J., has himself doubted the ratio in *Jiba Devi's* case (supra). With the deepest respect, in the light of the exhaustive

discussions above, the view in *Jiba Devi and others* -vs- *Satyanand Roy and others* (supra) does not lay down the law correctly and is hereby overruled.

23. Finally to conclude on the legal aspect, the answer to the question posed at the outset is rendered in the affirmative, and it is held that the legal guardian of a minor in possession of his property, who is himself a party to the suit along with the said minor, would, on the latter's death, become his representative as an intermeddler with the estate of the minor under Section 2(11) of the Code of Civil Procedure.

24. Once it is held as above, it is plain that on the virtually admitted facts, the father of the deceased minor was an intermeddler with the estate and consequently his legal representative. Indeed, it may be highlighted that the present case was a suit for partition. That being so, it is well settled that each of the co-sharers is deemed to be in possession of the joing properties. The possession of the minor as such and that of his legal guardian on his behalf is, therefore, not in doubt, and, equally so the possession of the father in his own right of the joint caparcenery properties. Therefore, the father, being on the record already, as the legal representative, no question of abatement would arise.

25. In view of the above, it is unnecessary to adjudicate upon the alternative stand of the learned Counsel for the respondents. It would suffice to highlight that facts were brought to our notice which would render plausible the projected claim on their behalf for the condonation of the delay in bringing the Class I heirs on the record also, as there was sufficient cause for the same. As the appeal must fail on the

preliminary ground, it is unnecessary to delve into the factual grounds for condonation.

26. In the light of the above, the judgment of the learned Single Judge is sustained and upheld, though for a somewhat different reason. In view of some intricacies involved and the conflict of precedent on the point, we leave the parties to bear their own costs.

Lalit Mohan Sharma, J. -- I have gone through the judgment of Hon'ble the Chief Justice, and I regret my inability to agree.

2. It is true that an intermeddler is included in the expression'legal representative' and the guardian of a minor may in an appropriate case be held to represent the estate after his death, but only if the guardian is an intermeddler in fact. A person can be assumed to be such with reference to the estate of a deceased person only if he "intermeddles with the estate" as mentioned in section 2(11) of the Code of Civil Procedure. The question whether a person is an intermeddler so as to be the legal representative of a deceased party in a given case is dependent on the relevant facts, which facts have to be alleged by somebody. If denied, the allegation will have to be proved. The burden of proof initially must rest on the person who so alleges, and, it may stand discharged in some cases on the basis of slight evidence and in other cases stronger evidence may be needed, depending on the facts and circumstances. In the case of the father representing a minor as his guardian it may readily be presumed that he continued in possession of the property of the deceased minor after his death, unless effectively rebutted. He may,

therefore, be assumed to represent the estate as an intermeddler. But the question remains one dependent on fact to be alleged. If necessary assertion is made by a party, the other side will be entitled to an opportunity to deny the same; and, the Court will have to decide the issue only after ascertaining the factual aspect. If none of the parties in a particular case so alleges the question whether the guardian is an intermeddler does not arise for decision and he cannot be presumed to be so as a matter of law. In my view, a general proposition cannot be laid down for universal application that on the death of a minor his guardian must be held to be an intermeddler and, therefore, his legal representative.

3. In the present case, on the death of the minor, leaving behind his mother as the sole heir, during the pendency of the case in the court below, nobody alleged that the guardian was an intermeddler. It was the duty of the defendants (appellants in the court below) to have so asserted as they had to save the appeal from abatement. On the other hand, from the statements made in the judgment of the lower appellate court and of the learned Single Judge of this Court it appears that there was no dispute between the parties that the estate was represented by the mother of the minor. The prayer for her substitution was seriously opposed and the parties were allowed to lead their evidence. Since there was no suggestion by any body that the guardian, as a matter of fact, intermeddled with the estate and was, therefore, the legal representative, no evidence on this aspect was led by either side. I wanted to examine the lower court records and was informed that the same was lost. The discussion in the judgment of the lower appellate court clearly indicates that the only question

debated by the parties was whether there was sufficient cause for condoning the delay in filing the application for substitution after setting aside abatement. The appellants were alleging want of knowledge of the death of the respondent in time. Evidence was led in support of their case that after the respondent filed an application raising the plea of abatement, the appellant Umakant Chaudhary had to verify the position which took time. After considering the evidence (led in the substitution matter before the appellate court) and the arguments addressed on behalf of the parties, the Court below held that the appellants had failed to establish "sufficient cause" explaining the delay. The only other point, which was urged and decided was that as the result of the partial abatement, the appeal abated in its entirety.

4. The prayer of the defendants for setting aside the abatement was inconsistent with the argument addressed on their behalf before us in the present letters patent appeal and they should not, therefore, be allowed to rely on a plea the other side had no opportunity to meet. Even in the memorandum of appeal of Miscellaneous Appeal no.256 of 1978 it was not suggested that the father guardian of the deceased minor continued in possession of the estate of the deceased minor and, therefore, he, being an intermeddler, represented the estate. By the grounds taken in the memorandum the findings were challenged on the same basis on which the prayer for substitution was pressed in the lower appellate court. It was, however, argued at the time of the hearing of the Miscellaneous Appeal that since the father of the minor was "a second class heir" within the meaning of the Hindu Succession Act his presence on the record saved the appeal from abatement. The plea was accepted

by the learned Single Judge in the following terms:-

> "In my opinion, if there is a legal heir of any class on the record, no question of abatement will arise. The appellants are only required to bring other heir, namely, mother on the record. Hence, I direct the court below to add mother as also the heir of Dinesh Paswan."

The appeal was, accordingly, allowed and the case was remitted to the lower appellate court for disposal of the suit on merits.

5. The present letters patent appeal was admitted on 7.2.1983 and when it was placed for hearing before a Division Bench on 19.8.1985 the point now argued was taken for the first time, and the case was referred for the decision by a larger Bench. I have not discovered any petition on the records of the present appeal asserting that the father was the legal representative of the deceased minor as an intermeddler. I presume that a suggestion came only in the argument by the learned Advocate for the respondents. In the circumstances, I hold that the plea which is dependent on facts cannot now be entertained, specially when the consistent stand of the respondents has been otherwise.

6. The learned Single Judge held that although the mother of the deceased minor was not substituted the presence of his father and brothers would save the appeal from abatement, on the ground that a Class II heir within the meaning of the Hindu succession Act is an heir attracting the application of the ratio of the case in *Mahabir Prasad* v. *Jage Ram & ors.*(1) I disagree. The Hindu Succession Act has in the Schedule enumerated the different classes and

categories of heirs of a Hindu male but while so doing it does not lay down that all the heirs in the list are to succeed at the same time. The relations mentioned in Class I, of course, inherit together but the right of those mentioned in Class II arises only in absence of a Class I heir. So long the deceased leaves behind any Class I heir, he or she shall exclude the Class II heirs altogether from taking any share in the estate. The fact that under the law, Class II heirs are mentioned as such is wholly irrelevant for deciding the present question. As admittedly the minor's mother exclusively inherited the estate the presence of the father and the other relations on the records in wholly immaterial. I,therefore, hold that the decision of the learned Single Judge is erroneous in law.

7. The next question is as to what should be the further order in this background. The lower appellate court, after considering the evidence of both sides, rejected the explanation of the defendants for filing the substitution petition late. In the Miscellaneous Appeal, which was a first appeal (under the provisions of Order 43 Rule 1 C.P.C.) the defendants were entitled to a re-assessment of the evidence, which was not done in view of the appeal succeeding on the other point. If the decision of the learned Single Judge is set aside, the prayer of the defendants for setting aside abatement and substituting the mother of the deceased minor has to be reconsidered and while so doing, a liberal approach in their favour has to be adopted in view of the observations of the Supreme Court. This step has to await the reconstruction of

(1) (1971) A.I.R. (S.C.) 742.

the lower court records. I may point out that the restoration of the records cannot be avoided in this case, as even on the judgment of the Hon'ble Chief Justice (brother Ahmad,J. agreeing) the appeal in the lower appellate court has to be heard and disposed of on merits.

8. In the result, the decision of the learned Single Judge is set aside. M.A.256 of 1978 will have to be heard again, but before that is done, the records will have to be reconstructed. This appeal is, accordingly, allowed.

S.Ali Ahmad, J. I agree with my lord the chief justice.

S.P.J. *Appeal dismissed.*

FULL BENCH

Before S.S.Sandhawalia,C.J., S.K.Jha and Uday

Sinha, JJ.

1986.

December, 17.

*Commissioner of Income-tax, Bihar, Patna.**

v.

Sri Shankar Lal Budhia, Ranchi.

Income-tax Act, 1961 (Act XLIII of 1961) --- individual assessee governed by Hindu Law --- status, whether would change to that of a Hindu Undivided Family merely on his marriage.

Where, after a partial partition in the earlier Hindu joint family, the assessee held his share as his separate individual property and filed the returns for nearly a decade in the status of an individual and was assessed as such and after his marriage filed return in the status of a Hindu undivided family;

Held, that the status of an individual assessee governed by Hindu Law would not change to that of a Hindu undivided family under the Income-tax Act automatically on his marriage. The Tribunal, therefore, was not correct in law in holding that the status of

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*Taxation case Nos.13,14 and 15 of 1977. Statement of cases under Section 256(2) of the Income-tax Act, 1961 by the Income-tax Appellate Tribunal,'B' Bench Patna, in the matter of assessment of Income-tax on Sri Shankar Lal Buddia, Ranchi, for Income-tax Assessment Years 1967-68, 1968-69 and 1969-70.

the assessee after marriage was that of an HUF and not that of an individual.

C. Krishna Prasad v. *Commissioner of Income-tax, Bangalore* (1)

Surjit Lal Chhabda v. *Commissioner of Income-tax, Bombay* (2) --- relied on.

Reference under section 256(2) of the Income-tax Act, 1961, at the instance of the Commissioner of Income-tax.

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

The case was placed before a Division Bench for seeking a reference by the Tribunal to this Court and the Division Bench directed for statement and the case to be placed for hearing before a Bench of three Judges.

On this reference.

Mr. B.P.Rajgarhia (Sr.S.C.,I.T.D.) &

Mr. S.K.Sharan (Jr.S.C.,I.T.D.) for the applicant

Messrs.S.B.Gadodia, Pawan Kumar & L.K.Tewary for the respondent.

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(1) (1974) 97 I.T.R. 493.

(2) (1975) 101 I.T.R. 776.

S.S.SANDHAWALIA,C.J. -- Whether the status of an individual assessee governed by Hindu law would change to that of a Hindu Undivided Family under the Income-tax Act merely on his marriage (as yet without issue) - is the somewhat ticklish question necessitating this reference to the Full Bench.

2. The facts may be noticed with relative brevity. The respondent-assessee Shri Shankar Lal Budhia was originally a member of a larger Hindu Undivided Family of Shri Mahabir Prasad Budhia. Way back on the 22nd of March, 1956 there was a partial partition of the said family and at that time the respondent was a minor. Therein he was allocated shares in the Ranchi Electric Supply Co, Budhia Brothers Pvt.Ltd. and Ganpatrai properties Pvt.Ltd. and thereafter he acquired interest in some other immoveable property as well. It is common ground that from the date of the partial partition for nearly a decade the returns were himself filed by him in the status of an individual upto the assessment year 1966-67. The assessment was also throughout made in the status of an individual.

3. However, after his marriage on the 9th of March, 1966 the assessee filed two returns - one in the status of an individual and the other in the status of an H.U.F. for the years 1967-68, 1968-69 and 1969-70. The Income-tax Officer, however, took the firm view that for these years also the status of the respondent-assessee must remain, as in the past, of an individual only. The assessee took the matter in appeal before the Appellate Assistant Commissioner wherein he called for a remand report from the successor Income-tax Officer who later expressed the view that the entire income under both capacities should be assessed in the status of an H.U.F. However, the Appellate Assistant Commissioner took the firm view that in respect of

the assets acquired by the assessee on partial partition of the bigger H.U.F. on the 22nd March, 1956 when the assessee was a minor and even after his marriage on the 9th of March, 1966, his status would continue to be that of an individual till a son was born to him. Aggrieved thereby the assessee came up in further appeal to the Tribunal which held in his favour by observing that after his marriage in March, 1966 the assessee would also constitute an H.U.F. even when no son was born to him. They accordingly set aside the order of the Appellate Assistant Commissioner and remanded the matter back to him to dispose of the same in the light of the above.

4. The Commissioner of Income-tax claimed reference from the Tribunal on the point of law which was, however, declined. Thereafter the Commissioner approached this Court for seeking a mandamus and on 16th of August, 1978 the Division Bench directed that the following question of law for the decision of the Court be stated:

"Whether on the facts and in the circumstances of the case of the Tribunal was correct in law in holding that the status of the assessee even after marriage was that of an H.U.F. and not that of an individual."

Apparently because of the significance of the issue it was also directed that the case should be placed for hearing before a Bench of three Judges.

5. Since I am firmly inclined to the view that the core question before us is now squarely governed both by binding and persuasive precedent, it would be unnecessary, if not wasteful, to launch on any

elaborate dissertations on principle. Nevertheless at the very threshold it first seems apt to recall the terse but celebrated dictum of Sir George Rankin in *Kalyanji Vithaldas and others* v. *Commissioner of Income-tax, Bengal,* (1)

"The phrase'Hindu undivided family' is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words'Hindu co-parcenery', all the more that it is not possible to say on the face of the Act that no female can be a member."

Having thus noticed that the concept of a Hindu undivided family under the Act is different and distinct from a Hindu co-parcenery which is indeed a much narrower concept, one may proceed to the undisputed and the basic rule of Hindu law applicable in the context. This indeed may be noticed from the terse element thereof in article 340 of the authoritative work of Mulla on the Principles of Hindu Law:-

> "340. Devolution of share acquired on partition.
>
> The effect of a partition is to dissolve the co-parcenery, with the result that the separating memebers thenceforth hold their respective shares as their *separate* property, and the share of each member will pass on his death to his *heirs*. But if a member while separating from his other coparceners continues joint with his own male issue, the share

(1) (1937) 5. I.T.R.90.

allotted to him on partition will in his hands retain the character of a coparcenery property as regards the male issue."

Proceeding from the aforesaid firm base, one may briefly advert to the undisputed facts and an objective test which may be applied thereto. Addmittedly from 1956 onwards, after the partition of the earlier Hindu joint family, the assessee held his share as his separate individual property. At that time he was a minor but it is not in dispute that after attaining majority as well both in law and fact he held the taxable property as his separate property and his status as an individual one. It bears repetition that right from 1956 for ten years the respondent assessee himeself filed the return in the status of an individual and was assessed as such. There seems to be no dispute that in this period he had an absolute and unlimited right of ownership to his separate property and not a limited one. Would marriage change that legal position - can be tested on the touch stone whether his wife as yet could challenge or object to any alienation of the property by the assessee after her marriage. Plainly the answer has to be in the negative. Admittedly, as yet there is no child of the wedlock and even if the wife has no right to assail any alienation, one of the basic concepts of limited ownership in a Hindu undivided family would be conspiouous by its absence. Therefore, on this touch stone as well, mere marriage by itself would not convert separate property and individual income-tax statue to that of a Hindu undivided family.

6. If authority was needed for the aforesaid principle, it exists in *C.Krishna Prasad* v. *Commissioner of Income-tax, Bangalore* (1) Therein their Lordships

of the Supreme Court were considering the case of a single individual claiming the status of a Hindu undivided family for purposes of tax and observed as follows:-

> "In view of the above it cannot be denied that the appellant at present is the absolute owner of the property which fell to his share as a result of partition and that he can deal with it as he wishes. There is admittedly no female member in existence who is entitled to maintenance from the above-mentioned property or who is capable of adopting a son to a deceased coparcener. Even if the assessee-appellant in future introduces a new member into the family by adoption or otherwise, his present full ownership of the property cannot be affected."

7. Having cleared the decks, one may now straighaway go to the authoritative enunciation of their Lordships in *Surjit Lal Chhabda* v. *Commissioner of Income-tax. Bombay* (2) which, in my view, now conclusively covers the issue. Apart from other matters, the allied questions came in for direct consideration by their Lordships in the context of an assessee who, besides his wife, had an unmarried daughter as well. It was held therein as under:-

"The appellant has no son. His wife and unmarried daughter where entitled to be maintained by him from out of the income of Kathake Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was

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(1) (1974) 97 I.T.R. 493.

(2) (1975) 101 I.T.R. 776.

thrown into the family hotchpot. Not being coparceners of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever.....

The property which the appellant has put into the common stock may change its legal incidents on the birth of a son.

"In the present case, as stated above, when the property was received by the assessee in partition he was a single member and did not Constitute a family. His status was that of an individual. In the circumstances, the fact of his marriage did not alter the position and in the absence of a son the personal law of the assessee regards him as the owner of the property received by him in partition and the income therefrom as his income. The assessee is, therefore liable to be assessed in his status as an individual as hithertofore and the Tribunal was not justified in holding that the assessee was entitled to be assessed in the status of an H.U.F. after his marriage."

9. From the aforequoted two cases, it would be somewhat axiomatic that if even marriage with a female issue or issues would not convert individual status for purposes of income-tax into an HUF, it is manifest that mere marriage without any issue at all would be very far from achieving any such result. As I have said earlier, it is thus clear that the issue is now governed by binding precedent and by virtue of Article 141 of the Constitution no further discussion thereto is either necessary or possible barring the question whether the view aforesaid would in any way

be at variance with another decision of the final Court itself. Finding himself confined within these narrow parameters, Mr.Gadodia for the respondent assessee, almost in an argument of desperation, sought to contend that the view expressed in Surjit Lal Chhabda's case was at variance with that of their Lordships in *C.Krishna Prasad's* case. A close reading of that judgment would, however, indicate that any such submission is not in the least warranted. In that case their Lordships were primarily considering the question as to whether a single individual would first constitute a family and would constitute a Hindu undivided family for the purpose of income-tax. They answered the threshold question in the negative by holding that a single individual does not constitute a family and consequently any further consideration of being an HUF would not even arise. It was observed as under:

"It would follow from the above that the word'family' always signifies a group. Plurality of persons is an essential attribute of a family. A single person, male or female, does not constitute a family. He or she would remain, what is inherent in the very nature of things, an individual, a lonely wayfarer till perchance he or she finds a mate. A family consisting of a single individual is a contradiction in terms. Section 2(31) of the Act treats a Hindu undivided family as an entity distinct and different from an individual and it would, in our opinion, be wrong not to keep that difference in view."

The above observations far from in any way buttressing the stand of the learned counsel for the respondent, in fact, strongly boomeranged upon him. It does not follow from the observations that because a single individual cannot constitute a family, every two individuals would constitute a Hindu undivided family. Indeed I have already quoted earlier from this

very judgment wherein it has been held that the assessee was an individual and not a family. I am unable to find the least deviation or cleavage in *C.Krishna Prasad* v. *Commissioner of Income-Tax*, Bangalore (1) and *Surjit Lal Chhabia* v. *Commissioner of Income-Tax, Bombay*(2) and the two judgments are in a way supplementary to each other and both go strongly in aid of the appellant revenue.

10. In the light of the aforesaid discussions, the answer to the question posed at the very outset is rendered in the negative and it is held that the status of an individual assessee governed by Hindu law would not change to that of a Hindu undivided family under the Income-tax Act automatically on his marriage.

11. In the light of the above, the specific answer to the referred question is that the Tribunal was not correct in law in holding that the status of the assessee after marriage was that of an HUF and not that of an individual. The question is answered in favour of the revenue and against the assessee. There will, however, be no order as to cost in the three references.

S.K.Jha, J. I entirely agree.

Uday Sinha, J., I agree.

S.P.J. Question answered.

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(1) (1974) 97 I.T.R. 493.

(2) (1975) 101 I.T.R. 776.

FULL BENCH

Before S.S.Sandhawalia,C.J., B.P.Jha and L.M.Sharma, JJ.

1987.

January,3.

*Praveen Shankar Singh and others.**

v.

The State of Bihar and others.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), section 45B, interpretation of --- power under --- when can be exercised.

Per L.M. Sharma and B.P. Jha, JJ (S.S. Sandhawalia, C.J. holding the reference to be infructuous):-

Section 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, on its face has vested the authorities with wide jurisdiction to reopen any closed proceeding and the only limitation mentioned is that the power may

*Civil Writ Jurisdiction Case No.4915 of 1984. In the matter of an application under Articles 226 and 227 of the Constitution.

be exercised "if it thinks fit". It means that the authority concerned is not to act without sufficient cause. The proceeding cannot therefore be reopened for merely making a fishing enquiry to test the correctness of the earlier order.

If fresh material relevant to the question is discovered which, if considered along with the existing materials on the record, is likely to lead to a different conclusion, the proceeding can certainly be re-opened. Further, if any material or matter on the records of a case has been omitted from consideration which may be so substantial as to lead to a different conclusion, the power under section 45B may be exercised. The observations in *Yamuna Rai and others* v. *The State of Bihar and others* (1) are consistent with this view and that case did not lay down the discovery of some fresh material, which was not on the records, as a necessary condition for exercise of power.

Yamuna Rai and others v. *The State of Bihar and ors* (1) held, correctly decided.

Application by the petitioner challenging the re-opening of the case.

The Division Bench, which admitted the case, doubted the correctness of the decision in *Yamuna Rai's* case and referred the case to a Full Bench.

On this reference.

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(1) (1984) P.L.J. 433 = (1984) P.L.J.R. 480.

Messrs Binod Krishna Jha, Subhas Chandra Jha, Pramod Kumar Singh and Miss Jyotsna Thakur. for the petitioners.

Messrs J.N.P.Sinha, G.A., Anjani Kumar Sinha and *Subodh Prasad, Junior Counsel to G.A.*, and *Ratan Kumar Singh* and *Jugal Kishore for respondent* 5. for the respondents

S.S.SANDHAWALIA, C.J., -- In this reference to the Full Bench it is now wholly unnecessary to recount the facts. Suffice it to notice that the controversy herein turns on the language used in section 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 which is in the following terms:-

> "The State Government or the Collector of the district, who may be authorised in this behalf may, at any time, call for and examine any record of any proceeding disposed of by a Collector under the Act and may, if it thinks fit, direct that the case be re-opened and disposed of afresh in accordance with the provisions of the Act."

It is well to recall that at the very threshold stage of admission, learned counsel for the petitioners challenging the impuged order under section 45B had contended that in the absence of any new material or new information on the record the case could not be reopened. Basic reliance for this contention was on the Division Bench judgment in *Yamuna Rai and*

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(1) (1984) P.L.J. 433 = (1984) P.L.J.R. 480.

others v. *The State of Bihar and others*.(1) However, the motion Bench expressed a veiled doubt about the correctness of the view in *Yamuna Rai's* case. Noticing the significance of the issue and the frequency with which it arises in cases under the ceiling laws, they observed as under:-

> "We, accordingly, refer this case to a larger Bench for considering the correctness of the law laid down in the case of Yamuna Rai and others (supra)."

2. As before the admitting Bench so before us, the learned counsel for the petitioners reiterated his reference to and reliance on Yamuna Rai and others v. The State of Bihar and others. It was submitted that on close re-examination the same did not, in any way, divert from the line of earlier precedent within the Court. Reference was made to *Shiv Shankar Prasad Singh & ors.* v. *The State of Bihar & ors.*(1) *Shri Thakur Ram Jankiji* v. *The State of Bihar and others* (2) and *Harish Chandra Singh* v. *The State of Bihar and others* (3).

3. Somewhat surprisingly, learned counsel for the respondent State did not pick up the gauntlet of the challenge to the correctness of the views in *Yamuna Rai's* case, Even when pointedly asked he took up the stand that far from assailing its ratio, he relied thereupon. According to the learned counsel, the observations in the said case, read as a whole,

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(1) (1982) B.B.C.J., 362 = (1982) A.I.R. (Pat.) 141.

(2) (1983) B.L.J., 33.

(3) (1984) P.L.J.R., 988.

were consistent with the earlier stream of cases.

4. In view of the above, it is somewhat plain that the present reference is now rendered infructuous. It is obviously unnecessary and, perhaps, inapt to opine about the correctness of a view regarding which learned counsel for the parties are themselves agreed and with regard to which no challenge has now been raised before us.

5. The case would now go back to an appropriate Bench for a decision on merits.

B.P.JHA,J.:

6. I agree to the order proposed and recorded by my Brother, Hon'ble Mr.Justice L.M.Sharma.

LALIT MOHAN SHARMA, J.:

7. While admitting this writ application, a Division Bench of this Court seriously doubted the correctness of the decision in *Yamuna Rai and others* v. *The State of Bihar and others* (1984 P.L.J.R.480) and referred it to Full Bench. In the order of reference, the Bench has observed as follows:--

"One of the points raised on behalf of the petitioners while challenging the impugned orders (Annexures 2 and 3) passed under section 45-B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as'the Act'), is that in the absence of any new material or new information on the record, the case could not have been reopened. In support of this contention, he relied on a Bench decision of this Court in Yamuna Rai and others v. The State

of Bihar and others (1984 P.L.J.R., 480).

We find ourselves unable to reconcile with the observations of the Division Bench in the above case. In our opinion, the power conferred upon the Collector under section 45-B of the Act is wider as the language of this provision authorises him to call for and examine any record of any proceeding disposed of by the Collector under the Act, and, then if he feels satisfied, he can direct that the case may be reopened."

8. The case was heard before us on 18.9.86 and 20.9.86 when several Division Bench decisions of this Court were placed before us, and the matter was debated at the Bar at some length. Since the Bench which referred the case for decision by a larger Bench requires our opinion as to the correctness of the decision in *Yamuna Rai's* case and since we have heard the matter at length, I think that I should express my view on the question referred. For the reasons given below, in my opinion, *Yamuna Rai's*, case was correctly decided and the stand taken by the learned Government Advocate before us was reasonable and correct. I do not think that as the State has taken a proper attitude before us, we should deny the Division Bench our opinion sought on the question.

9. As has been stated by the Hon'ble Chief Justice, the question relates to the interpretation of section 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. The section on its face has vested the authorities with wide jurisdiction to reopen any closed proceeding and the only limitation mentioned is that the power may be exercised "if it thinks fit". Although the pronoun "it" is not appropriate for the Collector, it must be

assumed that the clause "if it thinks fit" applies to both the State Government and the Collector; as it cannot be presumed that legisla ture intended to vest the State with power to reopen only after application of mind to the facts and circumstances of the case, and at the same time the Collector was authorised to act without any reason, that is, whimsically.

10. The question is as to the effect of the insertion of the expression "if it thinks fit" in the section. It means that the authority concerned is not to act without sufficient cause. The proceeding cannot therefore be reopened for merely making a fishing enquiry to test he correctness of the earlier order. The next question is as to the process by which the authority has to decide that a particular proceeding is fit to be reopened and the basis for taking such a decision. If fresh material relevant to the question is discovered, which, if considered along with the existing materials on the record, is likely to lead to a different conclusion, the proceeding can certainly be reopened. What about a case where the authority decides to get the matter re-examined on the basis of materials already existing? Before dealing with this crucial aspect, on which the Division Bench has sought the opinion of this Bench, I would like to discuss the ratio of *Yamuna Rai's* case.

11. In that case, the Collector had granted 4 units of land to the land-holders who were members of a Hindu joint family, and since the State Government was of the opinion that it was an erroneous order, it directed a re-examination of the case without issuing notice to the land-holders. Both the learned Judges constituting the Bench were of the view that the parties, who were going to be affected, were entitled to notice

before the matter could have been reopened. Mr.Justice B.P.Jha further proceeded to consider the scope of the section and held, inter alia, that the authority concerned must be in possession of new materials before acting under section 45-B. From the tenor of the order of reference (of the present writ application to a larger Bench), it appears that the petitioner had argued that before a proceeding could be reopened, it was essential that materials which were not on the records of the case earlier, should be available. I do not think, that is the correct interpretation of the judgment in *Yamuna Rai's* case. The following observations in paragraph 7 of the judgment may be seen:

"Therefore, in order to reopen the case, the State Government or the district Collector must be in possession of new materials which were not available at the time of giving judgment. This material may be on the basis of the information received by the State Government or the district Collector *or from the record as well*. Suppose some information may be available to the Anchal Adhikari or the Collector, to which the Collector did not apply his mind while passing the order, that information to which mind was not applied by the earlier authority can be a source of information or material for reopening a case." (Emphasis added)

It is, therefore, plain that Mr.Justice B.P.Jha did not lay down the discovery of some fresh material, which was not on the records, as a necessary condition for exercise of power.

12. The procedure laid down in the Act for the purpose of determining the surplus land of a land holder to be acquired is elaborate including a right of appeal and power of revision. In view of the nature

of the resultant consequence, the proceeding is clearly quasi judicial in nature. Vested rights in immovable properties are extinguished and new rights are created. When the land-holders who are deprived of their property and the beneficiary State differ on vital matters requiring a decision by the prescribed authorities, a lis comes into existence. After a thorough enquiry by the authority on the basis of the evidence produced before it, a decision is reached which is tested in appeal and under revisional powers. Normally, the final result achieved after undergoing such a detailed trial ought not to be allowed to be disturbed. The principles of "interest reipublicoe uttsit finis litium", that is, it concerns the State that there be an end to law suits and of "nemo debet bis vexari pro una et eadem causa", that is, no man should be vexed twice over for the same cause, are clearly attracted. Although the said maxims were laid down a long time back, they have been respected throughout the ages. The rules of estoppel by judgment and the principle of res judicata (developed by the English Law on their basis) were solemnly made part of Civil Procedure Code in India. Sir Lawrence Jenkins in *Sheoparsan Singh and others* v. *Ram Nandan Prasad Narayan Singh* (1) quoted Coke as saying that by ignoring the rule relating to the finality of orders passed in closed proceedings, great oppression might by done under colour and pretence of law, and there observed that this principle which was founded on ancient precedent is dictated by wisdom which is for all time. He also pointed out that the principle was not confined to Roman jurisprudence but was recognised in ancient Hindu law, as is clear from the text of Katya-yana

(1) (1916) A.I.R. (P.C.) 78.

who describes the plea thus:

"If a person though defeated at law, sue again, he should be answered'you were defeated formerly'. This is called the plea of former judgment".

13. The original framers of the Act did not include this extraordinary provision (under section 45-B) which was introduced later by an amendment. It is significant to note that while inserting section 45-B in the statute, the legislature did not fix any period of limitation for exercise of the right. It has been repeatedly said that statutes of limitation are statutes of repose with a view to suppress frauds and to supply the deficiency of proofs arising from lapse of time. They quicken diligence by making it in some measure equivalent to right. They discourage litigation. John Voet has been quoted in Story's Conflict of Laws as saying that if controversies are not limited to a fixed period of time, they would become immortal while men are mortal. Plumber, M.R., in *Cholmondelay* v. *Clinton*, 2 Jac. and W.140 observed that the public "have a great interest in having a known limit fixed by law to litigation for the quiet of the community, and that there may be a certain fixed period, after which the possesser may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within a prescribed period, should lose his right, than that an opening should be given to interminable litigation exposing parties to be harassed by State demands."

14. These principles are unexceptionable for every civilised society and in all ages. The section 45-B must be interpreted in this background.

15. It, therefore, futile to suggest that an arbitrary

power has been conferred on the State and the Collector to reopen closed proceedings whenever it or he is inclined to do so. It cannot be assumed that the legislature was acting irresponsibly so as to clothe the authorities with unlimited and uncontrolled powers in order to transgress the established jurisprudential principles.

16. Although it does not appear to be possible to exhaustively law down all the circumstances under which power can be exercised, it can be safely said that it ought not to be invoked lightly. The consequences of such exercise may lead to serious civil consequences and the affected parties must, therefore, be given a chance to be heard before taking a decision to reopen the proceedings. Further, the length of time after which the closed matters are sought to be re-examined should be taken into account; longer the period, stronger should be the ground.

17. Now the question as to whether the authority can decide to reopen the proceeding on a re-consideration of the materials which had earlier been considered. In my view, it is not permissible to do so and this interpretation of the section would be consistent with the age old principles mentioned above and would be reasonable, just and consistent with fair play. It will save not only the land-holder but also the State from a perpetual threat of uncertainty and consequent harassment; for, it is a power which the land-holder may also invite to be exercised in his favour and not only once but repeatedly. If the section is construed in its widest amplitude implying unbriddled and unlimited power, the Collector when asked by an aggrieved land- holder to exercise the same, cannot, without applying his mind, refuse to

entertain the prayer as that would amount to abdication of power. I, therefore, hold that if the materials on the records of a case are taken into consideration by the authorities concerned and a conclusion is reached which becomes final (on appeal and revision or in absence thereof), its finality has to be respected and the proceeding cannot be reopened for giving a second thought. If, however, any material or matter has been omitted from consideration which may be so substantial as to lead to a different conclusion, the power under the section may be exercised. As the observations of Mr.Justice B.P.Jha in paragraph 7 of the judgment in *Yamuna Rai* v. *The State of Bihar* (supra) are consistent with this view, I hold that the case was correctly decided.

18. I do not consider it necessary to discuss the other cases placed before us during the course of hearing. If there be any observation in any decision of this Court decided by a Division Bench or a Single Judge to the contrary (no decision by a larger Bench was placed before us) the same may be deemed to have been over-ruled.

19. Now let the case go back to appropriate Bench for decision on merits, as suggested by the Hon'ble Chief Justice.

S.P.J. *Reference answered*

FULL BENCH

Before S.S.Sandhawalia,C.J., Uday Sinha and S.S.Hasan, JJ.

1987.

January,6.

*Chandeshwar Prasad and others.**

v.

The State of Bihar and others.

Bihar and Orissa Co-operative Societies Act, 1935 (B & O Act VII of 1935), section 65A --- provisions of --- whether suffer from the vice of arbitrariness providing no limitation or guideline -- - whether reasonable and infract Article 14 of the Constitution of India --- whether liable to be struck down.

Held, that, the wide-ranging, unguided and uncanalised powers conferred by section 65 A of the Bihar and Orissa Co-operative Societies Act, 1935 on the State Government to call for any and every proceedings before the Registrar or his subordinates or any other person and decide them as it may deem fit, plainly suffer from the vice of arbitrariness and

*Civil Writ Jurisdiction Case Nos.3469, 3470, 4067 of 1981 and 1031 of 1986. In the matter of applications under Articles 226 and 227 of the Constitution of India.

consequently infract Article 14 of the Constitution and section 65A, therefore, is liable to be struck down.

The Registrar or any person exercising his powers under section 48 of the Bihar and Orissa Co-operative Societies Act, 1935, is a court and the proceedings before him are judicial in nature. Section 65A does not merely confer a power on the State Government to revise matters decided by the Registrar or by officials exercising such power but it extends to any and every matter which may as yet be merely pending before the Registrar or any one of his subordinates or any other person acting under his authority. The State Government is empowered to call for any such record and pass such orders as it may deem fit. In essence, the Minister would then be performing not merely the statutory functions of the Registrar but his purely judicial functions as well and constitute himself as a Judge or a Court of Law. Further, section 65A is devoid of any limitation or of any guideline and it confers the power in naked arbitrariness for deciding the matter as the Minister deems fit *de hors* any law or rule. Therefore, such power under section 65A authorising interference in such purely judicial field would be plainly arbitrary, irrational and unconstitutional.

It is not only over the specific heads covered by section 65A which are otherwise provided in the greatest detail by the statute that a blanket unguided power is sought to be given to the Minister. Apart from the enumerated matters, the State Government is entitled to call for "any other matter concerning the working of the Society". Not only that, the power is yet again vested "to call for any record of inspection or inquiry made under this Act or proceedings of any matter". In essence, section 65A thus creates a

Frankenstein monster whose shadow pervades every provision of statute and every niche and corner of Co-operative work upon which he may at any time choose to lay his hand and dispose of the same by passing such orders as deemed fit. It is an executive repeal of all earlier statutory provisions and vesting the whole gemut of the powers in the hands of the State Government and its Minister without let or hindrance. Section 65A, therefore, cannot withstand the test of reasonableness under Article 14 of the Constitution.

Hare Krishna Upadhyay v. *The State of Bihar & ors.* (1) --- overruled.

No rationale or reason in indicated in the Objects and Purposes of the amending Act 21 of 1976 for the addition of a provision of the nature of section 65A. The provision is not merely an ultimate repository of a revisional power but a blanket power to decide all matters in the original stage itself by the State Government.

Applications by the petitioners.

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

The case was originally placed for hearing before a Single Judge, who referred it to a Division Bench and the Division Bench referred the same to a larger Bench.

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(1) (1979) B.B.C.J. 109

On this reference.

M/s. A.Bose, S.P.Gupta, Kaushal Kumar. Md.Shahjahan Ali Khan, Kisto Kumar Gupta and V. Raman. for the petitioners.

Mr.Kamlapati Singh, G.P.5. with *Mr.Ishwar Singh* JC (CWJC 4067/81) *Mr.Srinath Pathak* JC (CWJC 3469/81) *Mr.Abhay Kr.Singh* JC (CWJC 3470/81) *Miss.Sangeeta Das Gupta*, JC (CWJC 1031/86) for the respondents.

S.S.SANDHAWALIA,C.J. -- The significant question in the field of cooperative law which looms large in this reference to the Full Bench is - whether the wide ranging, unguided and uncanalised powers conferred by Section 65A of the Bihar and Orissa Co- operative Societies Act, 1935, on the State Government to call for any and every proceedings before the Registrar or his subordinates or any other person and decide them as it may deem fit, suffer from the vice of arbitrariness and thus infract Article 14 of the Constitution? If not, the narrower question is whether Section 65A includes within its sweep the strictly judicial matters pending before the Registrar under Section 48 of the said act ?

2. In this set of two connected writ jurisdiction cases, the representative matrix of facts may be noticed somewhat briefly from C.W.J.C.No.4067 of 1981 (*Piro Vyapar Mandal Sahyog Samiti Ltd.,etc.* v. *The State of Bihar and others*), the petitioner -Piro Vyapar Mandal Sahyog Samiti Ltd. - is a society registered under the Bihar and Orissa Co-operative Societies Act, 1935 (hereinafter referred to as the'Act') and respondent no.6 is a member of the said society. The petitioner society filed an award case before respondent no.4

the Assistant Registrar, Cooperative Societies, Arrah, for the realisation of a sum of Rs.3,322/- in principal and Rs.902/75 paise as interest thereon. After hearing, respondent no.4 rejected the aforesaid case by his order dated 16th February, 1981. Aggrieved thereby, the petitioner moved an appeal under section 48(6) of the Act before respondent no.3, the Deputy Registrar, Cooperative Societies, Patna Division, Patna. The latter allowed the said appeal and held respondent no.6 liable for the amount claimed (vide annexure 2 to the writ petition). Against the aforesaid order, respondent no.6 purported to file a review case under section 65A of the Act before the Registrar of Cooperation, Government of Bihar, respondent no.2, and the latter (vide order annexure 1) admitted the same and stayed the operation of the orders of the Deputy Registrar, Co- operative Societies, meanwhile, ex parte. Later the petitioner society, on receipt of a notice, filed a written statement before respondent no.2 taking the stand that he had no jurisdiction to entertain the said petition under section 65A of the Act against an order of appeal which had achieved finality. It is the petitioner's grievance that thereafter respondent no.2 has not fixed any date of hearing of the case and he has no intention of disposing of the case before him. As a consequence, the certificate proceedings under the Public Demands Recovery Act to effectuate the award passed against respondent no.6 has also been stayed and the petitioner is left with no remedy. Aggrieved thereby the present petition has been filed.

3. In the counter affidavit filed on behalf of respondent no.6 the broad factual position is not denied, but it is reiterated that respondent no.2, the Minister, has full jurisdiction to send for any proceedings under

section 65 irrespective of their finality or otherwise and pass such orders as he deems fit.

4. This case originally came up before a learned single Judge who noticing the significance of the question referred the same to a Division Bench. Before the Division Bench yet again a conflict of precedent within the Court was projected necessitating reference to a larger Bench. During the course of the hearing before the Full Bench itself, the vires of section 65A came to be frontally assailed and permission was granted to amend the petition accordingly. In compliance therewith, a supplementary affidavit has been filed to assail section 65A of the Act as *ultra vires* the Constitution of India.

5. The significant and the threshold question herein is whether section 65A suffers from such a vice of arbitrariness as to infract the equality clause under Article 14 of the Constitution. This issue must necessarily revolve round the language of section 65A of the Act and the unguided wide-ranging powers conferred by the said section and it is thus apt to read it out at the very outset :-

> "65A. The power of the State Government to review the order of the Registrar.-
>
> Not withstanding anything to the contrary contained in this Act, the State Government may, of its own motion or on an application made to it by any party aggrieved by the constitution or reconstitution, amalgamation, election, supersession, liquidation or any other matter concerning working of the society call for any record of inspection or enquiry made under this Act or proceedings of any matter pending before the Registrar or his subordinate or any person acting under his authority and examine and pass such orders as it may deem fit."

6. In considering the core question aforesaid, the legislative history of section 65A would not only be relevant but indeed provides a clue to the problem. It is well to recall that this provision was no part of the statute when originally enacted in 1935 and it was not till the year 1976 when it came to be inserted therein. This was done by Bihar Act 21 of 1976. A reference to the said amending Act would show that the primal purpose was to provide for some special provision pertaining to primary agricultural credit society, farmers' service society and multi-purpose co-operative society. With that end in view, an altogether new Chapter VI-B containing section 44AP, 44AQ, 44AR and 44AS were added to the main Act. However, the present section 65A was also inserted thereby with another procedural. Section 65B to provide for the removal of difficulties arising in giving effect to the provisions of this Act. It would thus appear that section 65A was added to the statute during the promulgation of the emergency when Articles 14 and 19 as yet stood suspended and the provision did not have to satisfy the cardinal tests provided thereby.

7. Perhaps at the outset a misapprehension about the nature of section 65A may first be removed. On behalf of the respondent State it was sought to be glibly argued that the provision is not exceptional in nature but is the usual one of the last repository of revisional power vested in the State. To my mind, it is nothing of that kind. What first calls for notice is that this section does not merely confer a power on the State Government to revise matters decided by the Registrar or by officials exercising such power as a revisional or supervisory authority over them. On the contrary it extends to any and every matter which may as yet be merely pending before the Registrar

and not only him but any one of his subordinates or any other person acting under his authority. The State Government is empowered to call for any such record and pass such orders as it may deem fit. Thus, in no uncertain in terms, the wide-ranging powers includes in its sweep the jurisdiction to decide all issues at the very threshold or original stage itself if the State Government is so minded and wipe away all considerations by an arbitrator or officer exercising the powers of Registrar and even the Registrar himself. It is thus not merely supervisory or revisional jurisdiction but a blanket power to decide in the original stage as well.

8. Yet again, the blanket power under the provision of section 65A in the nakedness of its authority provides no criterion or guideline whatsoever for its purported exercise. Power is vested to pass orders as the State Government may deem fit. Unlike the well-known classes of revisional authority, it is not limited to be exercised where there has been a lack of jurisdiction in the authority below or a failure to exercise such jurisdiction. It is not conditioned by any illegality or material irregularity for its exercise. The requirements of incorrectness, impropriety or irregularity of the proceeding is again not a pre-requisite herein. The well-known and well-established pre-requisites for the exercise of a revisional or supervisory power are conspicuous by their absence for the exercise of the power and equally there is no limitation whatsoever on the width of the orders that may be deemed fit.

9. Lastly, it may be noticed in this context that the power herein is conferred not upon a court or a judicial authority. It has been repeatedly said that whenever discretion is vested in a court, it is a judicial

discretion to be exercised on well - known and guided principles and not of humour or whimsicality. However, executive and political discretion is not governed by any such parameters. In *Shri Lachandeo Sahni and another* v. *The State of Bihar and others* (1) it has been held that the power under section 65A can be exercised by the Minister and not by the Secretary of the department. Thus, the section vests this blanket power not in the confines of any guided judicial discretion but primarily an executive and, indeed, a political functionary. It is in the light of the aforementioned factors that the nature and the character of the power conferred by section 65A has to be adjudged for its reasonableness on the touch stone of Article 14.

10. One may now proceed to examine the matter with some pointed reference to section 48 of the Act and the exercise of judicial or quasi-judicial powers therein. It was common ground before us that section 65A includes within its sweep the provisions of section 48 as well and indeed with particularity both the cases herein arise under the later provision. The provisions of section 48 providing for disputes and the resolving thereof in the co- operative field are somewhat too well-known to call for any elaboration. Clauses (a) to (e) of sub-section (1) of Section 48 cover a very wide ranging field of disputes touching the business of a registered society which have to be mandated referred to the Registrar. On receipt of such reference, the Registrar may either decide the dispute or transfer it for disposal to a person exercising the powers of a Registrar or to an arbitrator. Mr.Bose, the learned

(1) (1982) B.B.C.J. 14.

counsel for the petitioners, rightly highlighted that the proceedings herein are judicial proceedings *stricto sensu*. The section not only provides for a virtual judicial adjudication of such disputes and further for an appeal against such an adjudication but indeed finality attached to it by sub-sections (6) and (9), which are in the terms following:-

> S.48(6) "Any person aggrieved by any decision given in dispute transferred or referred under clause (b) or (c) of sub-section (2) may, within three months from the date of such decision, appeal to the Registrar."
>
> S.48(9) "Save as expressly provided in this section, a decision of the Registrar under this section, and subject to the orders of the Registrar on appeal or review, a decision given in a dispute transferred or referred under clause (b) or (c) of sub-section (2) shall be final."

Our attention was also drawn to sub-section (8) to highlight judicial nature of the proceeding in so far as it authorises the Registrar, in apparently ticklish legal issues, to state a case and refer it to the District Judge for decision which is given finality by that sub-section. Section 49 then confers certain powers of a civil court on the Registrar and persons acting as arbitrators under section 48. They are entitled thereby to act in the same manner as if provided in the case of a civil court under the Code of Civil Procedure, 1908. Section 57 then creates a bar of jurisdiction to the civil court in matters required to be referred and adjudicated under section 48. Our attention was also drawn to rule 66 of the Bihar

Co-operative Societies Rules, 1959 (hereinafter called the'Rules') which provides for the procedure in appeal and revision. Particular notice is called for to sub-rule (4) thereof which is in the following terms:-

> R.66(4) "For the purpose of this rule the appellate authority shall have all the powers of a court of appeal as provided in the Code of Civil Procedure, 1908."

The exhaustive provisions of rule 68 pertaining to disputes arising under section 48 are then equally meaningful for emphasising the judicial nature of the proceeding.

11. It is thus plain that section 48 when read with sections 49 and 57 along with the statutory rules, which now form an integral part of the Act, would leave no manner of doubt that the exercise of power under section 48 is a judicial power. Not only that, the Act has itself intended to give finality thereto by the express provisions of sub-sections (8) and (9) of section 48. It would be somewhat wasteful to labour this point because it has already been the subject of discussion and adjudication by the final Court in *Thakur Yugal Kishore Sinha and others* v. *The Sitamarhi Central Co-operative Bank and another* (1) That was a case from this very Court and on a conspectus of provisions of this very Act their Lordships held as follows:

"It will be noted from the above that the jurisdiction of the ordinary civil and revenue Courts of the land

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(1) (1967) A.I.R. (S.C.) 1494.

is ousted under Section 57 of the Act in case of disputes which fell under Section 48. A Registrar exercising powers under Section 48 must, therefore, be held to discharge the duties which would otherwise have fallen on the ordinary civil and revenue Courts of the land. The Registrar has not merely the trappings of a Court but in many respects he is given the same powers as are given to ordinary Civil Courts of the land by the Code of Civil Procedure including the power to summon and examine witnesses on oath, the power to order inspection of documents, to hear the parties after framing issues, to review his own order and even exercise the inherent jurisdiction of Courts mentioned in Section 151 of the Code of Civil Procedure. In such a case there is no difficulty in holding that in adjudicating upon a dispute referred under Section 48 of the Act, the Registrar is to all intents and purposes, a Court discharging the same functions and duties in the same manner as a Court of law is expected to do."

12. In the light of the aforesaid enunciation one may now move forward from the Pole Star finding that the Registrar or any person exercising his powers under Section 48 is a Court and the proceedings before him are judicial in nature. Once that is so, learned counsel for the petitioners Mr.Bose was on the firmest footing in contending that section 65A, which purports to confer power on the State Executive to totally override a Court and its judicial proceedings without any guidelines, is *per se* arbitrary and irrational. This is soon the settled and authoritative rule that the pristinely judicial process cannot be intruded into by the State Executive and not even by legislative mandate or indeed by a constitutional amendment. Herein reliance was

rightly placed on *Smt.Indira Nehru Gandhi* v. *Shri Raj Narain* (1) wherein clauses (4) and (5) of Article 329-A inserted by the 39th Amendment of the Constitution, were struck down. Chandrachud,J. (as his Lordship then was) in concurring with the majority observed as under :

"... But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of Equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the Courts....."

To further buttress the aforesaid enunciation, Mr.Bose, the learned counsel for the petitioners, had further relied on the following observations in *Chandrika Jha* v. *State of Bihar and others* (2)

"... Presumably, the Chief Minister dealt with the question as if it were an executive function of the State Government and thereby clearly exceeded his powers in usurping the statutory functions of the

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(1) (1975) A.I.R. (S.C.) 2299.

(2) (1984) A.I.R. (S.C.) 322.

Registrar under bye-law 29.... Some of the functions exercised under 'executive powers' may include powers such as the supervisory jurisdiction of the State Government under Section 65A of the Act. The Executive cannot, however, go against the provisions of the Constitution or of any law....

..... In our opinion, the State Government cannot for itself exercise the statutory functions of the Registrar under the Act or the Rules.

Neither the Chief Minister nor the Minister for Co-operation or Industries had the power to arrogate to himself the statutory functions of the Registrar under bye-law 29...."

13. In the light of the above, if the Minister cannot arrogate to himself the ordinary statutory functions of the Registrar, then it would be doubly so in the statutory judicial functions of the Registrar under section 48. If it were to be held otherwise then section 65A would authorise a purely executive and indeed a political functionary like the Minister of the State Government to interfere in a purely judicial process and in a field where their Lordships in *Thakur Yugal Kishore Sinha's* case (supra) have held that the Registrar is, to all intents and purposes, a Court discharging the same functions and duties in the same manner as a Court of law is expected to do. Permitting so would be something which neither principle nor precedent can possibly countenance. Indeed such a construction would in effect confer the purely judicial powers of the Registrar under section 48 on the Minister under the garb of section 65A. In essence, the Minister would then be performing not merely the statutory functions of the Registrar but his purely judicial functions as well and constitute himself as a Judge

or a Court of law. Further, as already noticed, section 65A is devoid of any limitation or of any guideline and it confers the power in naked arbitrariness for deciding the matter as the Minister deems fit *de hors* any law or rule. Therefore, such power under section 65A authorising interference in such purely judicial field would be plainly arbitrary, irrational and unconstitutional.

14. Now apart from the larger principle of the intrusion of unguided executive powers into fields pristinely judicial, the learned counsel for the petitioners individually analysed the tremendous arbitrariness which arises from the exercise of the blanket power of the State Government to call any and every proceedings before it and decide them as the Minister thinks fit. Taking these up seriatum, one may first notice the blanket power of interference at the threshold stage of the constitution or the reconstitution of Cooperative Societies. This field is provided for in considerable detail by the provisions of sections 9, 10 and 11 as also by a wide variety of rules framed under the Act. The statute visualises an application for registration to the Registrar only and spells out the requirement of such an application in section 9 itself. The Registrar alone is authorised to require such further information in this regard which he may consider necessary. Yet again, when any question about the eligibility of membership,e.g., whether a person is agriculturist or a non-agriculturist or a person is a resident of a particular town or a village or group of villages and whether two or more villages shall be considered to form a group and further whether any person belongs to any tribe, class or occupation - are all questions which the statute vests for decision in the Registrar alone whose decision in this context

has been declared to be final. This is so mandated in express terms by section 10. Lastly, both the power and the duty is laid on the Registrar to be first satisfied that the Society has complied with all the provisions of the Act and the Rules and its byelaws are in no way contrary to the statute and thereafter if he thinks fit he may register the Society. The power to refuse registration is also vested in the Registrar but by sub-section (3) of section 11 a statutory appeal against such refusal is provided against such decision of the Registrar within two months from the date of his order. I would not wish to enter the thicket of the rules and of the model byelaws which are relevant for the purpose of constitution of a Society. Indeed it is something too manifest to call for any further elaboration that the initial constitution and registration of a cooperative society is a detailed and intricate matter well provided for by the Act and the Rules which have to be administered only by the expertise of a man well-versed therein. The power of the Registrar in this regard and the procedure therefor are canalised and channelled in the well guided parameters by the statute and the precise methodology has been laid down therefor by the detailed provisions under the Act. However, all this is sought to be negated and set at naught by a single arbitrary stroke of section 65A whereby even at the threshold stage of the constitution and registration of a society the Minister may summon the matter before him and decide the whole intricate matter by his fiat - as the section in term says - as he may deem fit. In his whimsicality he may, if he chooses, register a Society which may not even barely meet the requirements of the statute, or, on the other hand, may arbitrarily refuse registration to one well meritted such registration. Plainly enough, the Government or the Minister cannot transpose

themselves into a Registrar and to comply with the mandated provisions of the statute. As I said earlier, the Act as enacted originally, did not even remotely visualise such a blanket provision which came in only in the year 1976, by the Bihar Co- operative Societies (Amendment) Act, 1976 (Act XXI of 1976) The situation of the State Government or its Minister and the Registrar under the Act are inherently different under the Act. Yet again the vested right of appeal from the action of the Registrar would then be set at naught because plainly enough there can be no appeal from Ceasar to Ceasar and thus from the action of the Minister to the State Government under section 10(3) of the Act. The said sub-section (3) would, in fact, be obliterated from the statute in the event of the exercise of power under section 65A. The inherent legal anomalies, indeed absurdities, which would result from the exercise of the power under section 65A, qua the relevant provision of the statute, are indeed too patent. The inherent statutory coundrums that would arise by the Minister arrogating to himself all the functions of the Registrar under sections 9, 10, and 11 of the Act and the Rules and byelaws for the purposes of constituting a Society become obviously beyond any resolution. What has been stated in this context applies equally and indeed doubly in the re-constitution of societies. Herein also the Minister is empowered to call for any matter of re-constitution of a society as well. Unguided power with regard to the very constitution and reconstitution of a cooperative Society cannot even remotely bear to the test of reasonableness under Article 14 of the Constitution.

15. One may now advert to the power qua the amalgamation of cooperative societies. What has been

said above with regard to the constitution and reconstitution of societies would apply even with great in force with regard to amalgamation. That it is a matter replete with intricacy is somewhat self-evident. It would appear that prior to 1976 there did not exist any specific provision for the amalgamation of several societies. This was in turn provided for by insertion of section 44AQ and 44AR in the Act. A look to the detailed provisions of section 44AQ would indicate that though labelled as a single section it is virtually a cluster of sections providing a detailed procedure for such amalgamation. In would not burden this judgment in quoting the provisions in extenso. It suffices to mention that the power to amalgamate is rested in the satisfaction and the opinion of the Registrar that the amalgamation of two or more societies is necessary in order to improve the working, or, in the alternative, for increasing the strength or usefulness and he may on that basis direct their amalgamation into a single society and register the same as a new society. On such amalgamation the Registrar is empowered to depute an officer of the State Government to perform such functions as may be prescribed till the new managing committee is constituted, other provisions and details are specified in six sub-sections of section 44AQ of the Act. In terms subsequent 44AR provides for statutory appeal against the order of the Registrar within 30 days of the date of the order to the State Government, which is then obliged to give a hearing to the objections and thereafter decide the matter, which has been given finality and cannot be challenged in any court of law. Yet again, all these detailed provisions are wholly over-ridden and virtually obliterated by the power under section 65A of the Minister to forthwith call for any matter of amalgamation before himself and decide it as he deems fit. Clearly,

in such a situation the appellate power under section 44AR would be wholly nullified. The conflict of precedent with regard to the constitutionality, applicability and the actual administering of the amalgamation provisions is proof enough of the niceties and intricacies involved in such an exercise. Reference in this connection may be made to the Full Bench judgment of the Punjab & Haryana High Court in *Mota Singh* v. *State of Punjab* (1) which has received tacit affirmation from the final Court later. The blanket interference in so sensitive and intricate a field even at the threshold stage by the Minister without any rule or guideline, reminds one of the picturesque observation of Krishna Iyer, J. in *Rohtas Industries Ltd. and another* v. *Rohtas Industries Staff Union and others* (2):

"....But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop..."

16. Moving ahead one may now advert to the equally sensitive and, perhaps, even more controversial field of election, squarely and precisely prescribed for by the Act and the Rules framed thereunder. Section 14 of the Act mandates that the management of a society, registered under the Act, shall be vested in a managing committee constituted in accordance with the Rules. Sub- section (3) of that section then provides that the term of the members and the office-bearers of the Managing Committee of a registered society

(1) (1979) (1) I.L.R. (Punj.& Har.) 338.

(2) (1976) A I.R (S.C.) 425

shall be three co-operative years and they shall continue to hold office after expiry of their term till the elections are held or for six months from the close of the co-operative year, which is earlier. Rule 22 of the Bihar Co- operative Societies Rules, 1959 (hereinafter referred to as'the Rules') then provides that apart from nomination by the Registrar to the managing committee of a registered society, including its office-bearers, shall be elected by votes from amongst the members of the society at the annual general meeting held in accordance with the bye-laws. Rules 20 and 21 provide in great detail for holding of the general meeting and the procedure thereat. It is unnecessary to delve very deeply into the model bye-laws, which yet again provide for holding of the various kinds of general meetings and functions of the annual general meeting and elections to be held thereof vide model bye-laws 20 to 30. It was common ground before us that election disputes come fairly and squarely within the ambit of section 48 of the Act, to which some detailed reference has already been made, which may not be repeated. Barring the fact that the Registrar may make a reference of such dispute and adjudication thereof has been clothed with finality after appeal by sub-sections (6) and (9) of section 48 of the Act. It was common ground before us that election dispute would also come squarely within the ambit of section 48 of the Act and if any authority is needed, for the proposition it is available in *Manu Raj versess State of Haryana and others* (1)

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(1) (1982) A.I.R. (Punj.) 211.

17. It would be manifest from the above that virtually a complete code for both election to the co-operative societies, which lie at the heart of the cooperative movement, and the resolving of election disputes in appellate forum has been provided under the Act. Nevertheless, section 65A empowers the Minister either *suo motu* or on an application to call for any matter pertaining to an election or election dispute before the Registrar or a subordinate or any other person under the Act and pass such orders as he may deem fit. In this context perhaps one cannot lose sight of the practical aspect that elections to major societies may have a total or partial hue of politics and the Minister cannot entirely lose his basic colour of being a political functionary. Nevertheless, under section 65A of the Act at one stroke the whole elaborate machinery providing for election to the societies, which, as already noticed, is the hearted throb of the cooperative movement, is sought to be set at naught by the Minister deciding either election or election disputes as he may teem fit. Not the least inkling is given as to what procedure he has to follow.The hallowed and democratic right of election may completely be over-ridden rough shod and the whole gamut of provision so meticulously provided by the statute for free and fair election to the managing committee and Chairman, etc.may either be given a go-by or be decided by a person who cannot possibly have the image of impartiality. There is not a hint or a guideline or policy or control on the basis of which the Minister is to interfere in and set aside elections or election disputes in his arbitrary fiat as he may deem fit.

18. Coming now to supersession it may be recalled that the Act vests the management of the society

inflexibly in the elected managing committee. Spirit of cooperative movement is self-help non-profit motive and democratic working thereof evidenced by electoral process. However, section 41 of the Act provides a limited power in the Registrar for the supersession of the managing committees for reasons spelt out by the statute. Such supersession. As sub-section (1) of section 41 of the Act in its very opening line indicates, is rested on the opinion of the Registrar and on the basis that the managing committee is mismanaging the affairs of the society. The section further provides for an opportunity to the managing committee to state its objection and then a detailed procedure to be followed before dissolving the managing committee and vesting control of the society in a person or persons appointed by the Registrar. Section 41 with subsequent amendment and accretion thereto, indeed as many as 10 sub-sections, and to use a phrase employed earlier, is indeed a cluster of sections in essence. This section with care and meticulous detail provides for the requirements for supersession, the period therefor, interim management thereunder and termination of such supersession of managing committees. As appeal is then provided against the order under section 41. The Act is so careful that it provides under section 60 that the power of hearing appeal under section 40 cannot be delegated to any subordinate authority and apparently must be exercised at the highest level.

19. Now despite the care and qualifications with which the statute has hedged and confined that power to supersede the duly elected managing committees, section 65A again provides a blanket power in the Minister to call for any matter pertaining to supersession of the managing committee and decide the same, yet

again as he may deem fit. It bears repetition that he would be governed by no procedure and as has been noticed earlier the moment he chooses to do so, the provisions of appeal against the supersession by the Registrar would be all set at nought when the state Government decides the issues at the threshold stage itself. This would involve a headlong clash with the vested right of appeal given in the case of supersession by the authorities below and the underlying purpose of section 60 which prohibits delegation. All these are short-circuited by the mere expediency and whimsicality of the Minister calling for record and deciding the sensitive issue of supersession at any stage whatsoever and entirely as he may deem fit.

20. Lastly in an equal crucial and final provisions of winding up and liquidation the Minister has again been clothed under section 65A with sky-high powers governed by neither any procedure nor by any restraint. The Act has with utmost care provided by section 42, 43, and 44 with regard to the winding up of a registered society and an appeal against the same or liquidation or dissolution of the said society. It is clear that under section 42 such a winding up has to be rested on the firm foundation of clauses (a) and (b) of the said section. This is to be equally done after proceedings have been undertaken under sections 34,35, 36 and 37, or on the basis of an application by 3/4th members of the society, and only when the Registrar is clearly of the opinion that the society has to be dissolved or where its numbe; has fallen below the prescribed limit. If any of those conditions are not satisfied right of appeal is vested in every member of the society affected by such winding up order to the State Government within two months

from the date of its publication. The winding up order again would not take effect until the expiry of two months from the date of publication of such order in the official gazette, and if an appeal be preferred, unless and until it is confirmed by notification or affirmance in appeal. Liquidation and dissolution thereafter are provided in great detail by eight sub-sections of section 44 of the Act.

21. Equally well it is to recall that by virtue of Chapter VIB inserted by Act XXI of 1976 and section 44-AQ therein a power was vested in the Registrar to order liquidation of societies. However, this was narrowly within the field of the primary agricultural credit societies, farmers, service societies and multi-purpose cooperative societies only. But herein also the power of liquidation was not a blanket one and could be exercised only either in the clear interest of the Cooperative Movement, or for the purpose of securing proper management of the society or for the reason that the society had not been working as a viable unit or that it had incurred bad debts and remained inactive. Herein again a statutory appeal against any order under section 44-AQ was provided by section 44AR which mandated its disposal after duly hearing the parties and their objection.

22. Precedent has repeatedly reiterated and highlighted that for the winding up and liquidation of a society or a company which in essence is the civil death of a legal person, the requirements of the Act have to be meticulously satisfied. Any such action can always be impugned and is invariably set at nought if this transgresses these defined statutory parameters. However, under section 65A of the Act all this is sought to be obliterated and it is provided that even in the

matter of winding up, dissolution or liquidation which, as noticed, is an issue of life and death for the corporate body, the Minister may send for the record and decide these sensitive and conclusive matters forthwith as he may deem fit untrammelled by any limitations and unguided by any procedure.

23. I have so far highlighted the specific heads covered by section 65A which are otherwise provided in the greatest detail by the statute over which a blanket unguided power is sought to be given to the Minister under section 65A to dispose them of as he may think fit. But it is not only over these enumerated matters that this power extends. Section 65A in the residuary clause then proceeds to refer to every niche and corner of cooperative working and places it unreservedly under the whimsicality of executive action by providing that the same may be decided as deemed fit by the Minister. Apart from the enumerated matters the State Government is entitled to call for "any other matter concerning the working of the society". The width of the power is manifest and requires no further elaboration. Not only that the power is yet again vested - "to call for any record of inspection or inquiry made under this Act or proceedings of any matter". Herein again it is well to recall that there are statutory provisions providing in detail for an inspection or an inquiry by the Registrar under sections 34, 35 and 36 of the Act. These are thus again without let or hindrance placed within the fiat of section 65A. It may be recalled that the power extends not only to matters pending before the Registrar but equally to all persons subordinate to him and also to any and every person acting under his authority. In essence, section 65A thus creates a Frankenstein monster whose shadow pervades every provision of statute and every

niche and corner of cooperative work upon which he may at any time choose to lay his hand and dispose of the same by passing such orders as deemed fit. Learned counsel for the petitioners was thus right in his submission that in essence section 65A is an executive repeal of all earlier statutory provisions and vesting the whole gamut of the powers in the hands of the State Government and its Minister without let or hindrance. No method is provided for the exercise of these power; no guideline is even remotely indicated in the section; no procedure is provided for the exercise of these powers. Indeed, counsel rightly highlighted this aspect by pointing out that section 65A does not even talk of what the Minister may think fit, but whatever he may deem fit. Even no application of mind or thought is mandated by the section.

24. Learned counsel for the petitioners has rightly highlighted that the blanket power, in the nakedness of authority, which is conferred by section 65A authorises the Minister to call for any matter under the sun in the cooperative field and decide it as he deems fit. It was rightly argued that the purported detailed wordings of section 65A are somewhat misleading and in fact it can be summarised in the terms following:

> "Notwithstanding anything to the contrary contained in this Act the State Government may of its own motion call the proceedings of any matter pending before the Registrar, or his subordinates, or any person acting under his authority and examine and pass such orders as it may deem fit."

The statutory and legal effect of the provision, therefore, is that is amounts to an arrogation of all

the powers in the statute in the executive fiat of the State Government notwithstanding all the previous provisions of the Act and amounts to a virtual repeal and overriding of all those provisions on the basis of a criterion no other than what the State Government may deem fit. The core question is whether such a provision can withstand the test of reasonableness under Article 14. To my mind, the answer is plainly in the negative.

25. It remains to advert to the samewhat brief observations made in this Context by the Division Bench in *Hare Krishna Upadhgay* v. *The State of Bihar & ors.* (1) Therein the momentous issue of the vires of section 65A has been disposed of somewhat cryptically in a paragraph or two of the judgment in the end. It would appear that the learned counsel for the parties were remiss in not highlighting the issue from all its facets which have been considered in some detail above. No in-depth analysis of the language and sweep of section 65A was attempted, neither any principle nor the meeningful precedents referred to above have been adverted to for arriving at the brief conclusion that section 65A was not violative of Article 14. Perhaps as a palliative it was sought to be observed that the State Government would follow the procedure and the norms enjoined upon the Registrar whilst acting under section 65A. I have already sought to demonstrate earlier that those limitations, procedure and discretions vested in the Registrar by their very nature cannot be imposed upon the State Government nor can the Minister transpose himself identically to the role of the Registrar. That result is an inherent impossibility.

(1) (1979) B.B.C.J. 109.

As pointed out earlier, the vested right of appeal to the State Government granted by the numerous earlier provisions is thus sought to be set at nought and nullified on the basic rule that there cannot be an appeal from Caesar to Caesar. With the deepest respect, the judgment on this point does not lay down the law correctly and has to be overruled.

26. To sum up, it bears repetition that section 65A was inserted nearly four decades after the enforcement of the Act by the amending Act 21 of 1976 during the proclamation of the emergency when the basic freedoms stood suspended. The basic purpose of the amending provision was to add Chapter VIB to the statute and no rationale or reason is indicated in the Objects and Purposes of the same for the addition of a provision of the nature of section 65A. Despite repeated pinpointing, the learned counsel for the respondent State was unable to indicate any rationale and necessity of a provision of this nature after the Act and its working had held the field for more than forty years. As has been noticed earlier, the provision is not merely an ultimate repository of a revisional power but a blanket power to decide all matters in the original stage itself by the State Government. The power is exercisable, as noticed by precedent, by the Minister who is both and executive and political functionary. It warrants a blatant interference by executive action in fields and arenas, some of which are judicial *stricto sensu* and others which are pristinely quasi judicial. It also authorises total interference by the Minister in the registration, constitution and re-constitution of the co-operative societies which would completely override, if not obliterate, the provision of

section 9, 10 and 11 and a wide variety of statutory rules thereunder. In the realm of the amalgamation of co-operative societies the provision would be in head-long clash with sections 44AQ and 44AR and materially efface them off the statute book. In the equally sensitive field of election, which would come well within the ambit of disputes under section 48 and the relevant statutory rules, the resolving thereof is a purely judicial function under the Act. The section warrants a blatant invasion of judicial functions by purely discretionary executive fiat: In the arena of supersession, a whimsical interference is warranted in the detailed provisions of section 41 and the relevant statutory rules apart from obliterating the right of appeal and negating the mandate of section 60. Lastly, even in the closing rites of a legal person like the society by way of its winding up, dissolution and liquidation which are matters of great moment provided in the deepest detail by the provisions of sections 34, 35, 36, 37, 44 and 44AQ they are all sought to be overridden rough-shod by a single stroke in the impugned section 65A. This apart, in each and every matter concerning the working of the society apart from the specifically named and enumerated ones, the Minister is yet clothed with a power of blanket interference.

27. Perhaps, the Achillis heels of the provision is yet the total absence of any criterion, guideline or rationale, by which such a unguided and untrammelled power is to be exercised. Perhaps even rationalising process is obviated because the statute does not even say that the Minister may decide as he thinks fit and, indeed, all that section 65A requires

is that the Minister may decide whatever he may deem fit. One is reminded of the words of Chandrachud, J.,(as his Lordship then was) in *Smt.Indira Nehru Gandhi* v. *Rai Narain* (1) even with regard to the higher fields of the amending powers of the Constitution itself -

> "I find it contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all power - Legislature executive and judicial.'Whatever pleases the emperor has the force of law' is not an article of democratic faith. The basis of our Constitution is a well-planned legal order, the presuppositions of which are accepted by the people as determining the mode by which the functions of the the government will be discharged and the power of the State shall be used."

On the aforesaid analogy, "whatever pleases the Minister" and whatever he deems fit has to force of law" cannot be made an article of legal faith under section 65A. To my mind, the section in its unguided arbitrariness plainly violates the equality clause and the rule of reasonableness enshrined in Article 14. Consequently it is hereby struck down.

28. To finally conclude, the answer to the question posed at the very outset is rendered in the affirmative and it is held that the wide ranging, unguided and uncanalised powers conferred by section 65A of the Act on the State Government to call for any and every proceedings before the Registrar or his subordinates or any other person and decide them as it may deem fit, plainly suffer from the vice of arbitrariness and

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(1) (1975) A I R. (S.C.) 2299.

consequently infract Article 14 of the Constitution. In view of the finding, it is unnecessary and academic to adjudicate on the narrower question whether section 65A would include within its sweep the strictly judicial matters pending before the Registrar under section 48 of the said Act.

29. In the light of the above, C.W.J.C.No.4067 of 1981 (*Piro Vyapar Sahyog Samiti Ltd.* v. *The State of Bihar*) is allowed with costs and the impugned order of the Minister (annexure 1) dated the 11th of August, 1981 is hereby quashed.

30. In C.W.J.C.No.1031 of 1986 (*Mr.Mohsin Ali Biswas* v. *The State of Bihar and others*) is allowed with costs and the impugned order of the Minister dated the 14 the February, 1986 (annexure 4) and all consequential orders are hereby quashed.

31. C.W.J.C.No.3469 of 1981 (*Chandeshwar Prasad* v. *The State of Bihar and others*) is allowed with costs and the impugned order of the Minister dated 18th of August, 1981 (annexure 3) is hereby quashed.

32. C.W.J.C.No.3470 of 1981 (*Ram Dular Sharma.* v. *The State of Bihar and others*) is allowed with costs and the impugned order of the Minister dated the 18th of August, 1981 (annexure 8) and the consequential order are hereby quashed.

Uday Sinha,J. I agrree.

S.Shamsul Hasan,J. I agree

S.P.J. *Applications allowed.*

FULL BENCH

Before S.S.Sandhawalia,C.J.,B.P.Jha and Birendra Prasad Sinha,JJ.

1987.

January, 14.

*Md.Alam.**

v.

Gopal Singh and others.

Court Fees Act, 1870 (Central Act VII of 1870), section 7, Clause (iv) --- suits falling under section 7 (iv) --- estimation of the relief by the plaintiff, whether

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*Civil Revision Nos.851 and 1439 of 1982 and 357, 1366 and 1385 of 1985. Against an order of Shri N.K.Choudhary 3rd. Munsif, Chapra, Dated 6th May, 1982.

C.R.1439/82...Yogendra Pd.Roy and others v. Prithwi Chand Roy and others.

C.R.357/85 ..Abdul Barkar Mohd.Rashid & others v. Bibi Roshan Jahan and others.

C R.1366/85...Swami Sri Akhandanand Pramhansji Maharaj & ors. v. Durganand Choudhary and others.

C R.1385/85 .. Smt. Tara Devi v. Sri Thakur Radha Krishan Maharaj & others

to be ordinarily accepted --- plaintiff, whether given absolute right or option to place any valuation whatever on such relief --- court, whether has jurisdiction to interfere where plaintiff manifestly and deliberately undervalues and underestimates the same --- objection regarding insufficiency or otherwise of the valuation whether can be raised --- mandate at the end of clause (iv) of section 7 that the plaintiff shall value the relief sought --- whether governs each of the proceeding subclauses (a) to (f) equally.

Held, that, in suits falling under clause (iv) of section 7 of the Court Fees Act, irrespective of the various sub clauses thereof, the estimation of the relief by the plaintiff has to be ordinarily accepted. Nevertheless, (i) the plaintiff has not been given any absolute right or option to place any valuation whatever on such relief and (ii) where he manifestly and deliberately undervalues and undrestimates the same. the court is not a silent and impotent spectator thereof and has clear jurisdiction to interfere, (iii) the sufficiency or otherwise of the relief estimated by the plaintiff is now no longer in question and finical objections about the insufficiency of such estimation should not any longer be permitted to be raised by the trial courts,(iv) no difference or line of distinction can be drawn qua the individual sub-clauses (a) to (f) of clause (iv) of Section 7 of the Court Fees Act. The mandate at the end of clause (iv) of section 7 applies equally and evenly to each of the sub-clauses (a) to (f).

A.Ka.Ct.V.Ct. Meenakshisundaram Chettiar v. *A.Ka.Ct.V.Ct. Venkatachalam Chettiar* (1)

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(1) (1979) A.I.R. (S.C.) 989.

S.Rm.Ar.S.Sp. Sathappa Chettiar v. *S.Rm.Ar.Rm. Ramnathan Chettiar* (1) --- followed.

Kesho Mahton and others v. *Ayodhya Mahton and others* (2) *Smt.Prem Kishori Devi* v. *State of Bihar* (3) --- overruled. *Mannu Das and others* v. *Kisto Das and anothers* (4) --- approved. *Mt.Rupia* v. *Bhattullahton and others* (5) observations in, modified.

Applications by the plaintiff in C.R.Nos.851, and 1439. and by the defendant in C.R.nos.1366, 1385 and 357.

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

The cases were placed for hearing before a Division Bench, which referred them to a Full Bench for an authoritative decision.

On this reference.

Messrs S.S.Asghar Hussain, S.Raghib Ahsan, F.Moazzam, Keshav Srivastava, Devendra Pd. Sinha, Roy Shivajee Nath, Shantanu Kr. and Chittaranjan Sinha No.1 for the petitioners

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(1) (1958) A.I.R. (S.C.) 245.

(2) (1983) A.I.R. (Pat.) 67.

(3) (1982) A.I.R. (Pat.) 47.

(4) (1983) A.I.R. (Pat.) 272.

Messrs Shreenath Singh, Guru Sharan Sharma, Ramanand Pd.Yadav, Nagendra Pd.Singh, Ganpati Trivedi and B.P.Yadav for the Opposite parties.

S.S.SANDHAWALIA,C.J. -- The ticklish questions bristling with a conflict of precedent, which has necessitated this reference to the larger Bench, may well be framed in the terms following:-

(i) Whether the plaintiff has an absolute right or option to place any valuation whatever on the relief claimed in a suit governed by clause (iv) (a) of section 7 of the Court-fees Act?

(ii) Whether the court has no jurisdiction to examine the correctness of the valuation given by the plaintiff in view of the provisions of section 4 of the aforesaid Act?

(iii) Whether any difference or line of distinction can be drawn qua the individual sub-clauses (a) to (f) of clause (iv) of section 7 of the said Act?

(iv) Whether the headlong conflict of single Bench judgments in AIR 1983 Patna 67 (*Kesho Mahton and others* v. *Ayodhya Mahton and others*) and AIR 1983 Patna 272 (*Mannu Das and others* v. *Kisto Das and another*) can be reconciled?

2. A representative matrix of facts giving rise to the issues aforesaid may be noticed from Civil

Revision No.851 of 1982. The plaintiff petitioner filed Title Suit No.81 of 1978 in the court of the 3rd Munsif, Chapra, in respect of 19 kathas and 18 dhurs of land in village Tehti and valued his relief at Rs.2,000/- for purposes of court-fee and jurisdiction. This was based on the rebutted stand that he had purchased the suit land under a registered deed dated the 7th of May, 1971 for the aforesaid consideration. Defendats 1 to 4 and 7 to 10 filed a joint written statement, inter alia, taking a plea therein that the value of the disputed property was Rs.15,000/- which was beyond the pecuniary jurisdiction of the Munsif and unless the petitioner pays the court-fee for the said amount, the suit could not proceed. The defendants further filed an application on the 2nd of December, 1982 praying that an issue with regard to valuation and jurisdiction may be decided as the preliminary one. By the impugned order dated the 6th of May, 1982 the learned Munsif framed a preliminary issue on the question of valuation and fixed the case for the 17th of May, 1982 for evidence thereon. In holding so, he noticed a conflict of precedent betwixt AIR 1982 Patna 47 (*Smt.Prem Kishori Devi* v. *State of Bihar and* AIR *1945 Patna* 421(*Salahuddin Hyder Khan and ors.* v. *Dhanoo Lal Chaudhary and others*) and preferred to follow the later judgment because it was by a Division Bench whilst the former was by a learned single Judge.

3. At the threshold stage of admission itself, the learned single Judge noticed the conflict of views and, expressing some doubt in the matter, admitted and referred the case to a Division Bench. Meanwhile identical and similar issues came up in Civil Revision No.462 of 1982 (*Srimati Bachi Devi and others* -versus *The State of Bihar and others*) and other cases before a Division Bench which, by its detailed order of reference

dated the 26th of March, 1985, referred them for an authoritative decision by a Full Bench. The present case along with the other set of first cases was consequently directed to be heard together and that is how the matter is before us.

4. As would appear hereinafter, the issues before us are so replete with precedents (both binding and persuasive that it would be a patent exercise in futility to now launch on a dissertation on principle, Nevertheless, the manner in which the questions herein have come to the fore necessarily deserve to be recalled. Without delving further deep, it may be noticed that in *Mt.Rupia* v. *Bhatu Mahton and others* (1) a Full Bench of this Court after consideration of the existing principle and precedent took the view that under clause (iv) of section 7 of the Court- fees Act (hereinafter called the'Act') the plaintiff has no absolute right or option to place any valuation whatever on the relief claimed, inevitably thereafter the said view held the field and was consistently followed within this jurisdiction by the Division Benches and single Benches. However, a frontal note of dissent against this long line of precedent was struck by the learned single Judge in *Kesho Mahton and others* v. *Ayodhya Mahton and others* (supra) holding that the earlier Full Bench view in Mt.Rupia's case was incorrect and the cases following the same view were not correctly decided because of the supposed ratio to the contrary in *S.Rm.Ar.S.Sp. Sathappa Chettiar* v. *S.Rm.Ar.Rm. Ramnathan Chettiar* (2) Resting himself on the said

(1) (1944) A.I.R. (Pat.) 17.

(2) (1958) A.I.R. (S.C.) 245.

judgment, it was held that the valuation given by the plaintiff under section 7(iv) of the Act is final and conclusive and the Court had no jurisdiction whatsoever to interfere with such estimation and in essence he had an absolute right and option to do so. This view was, however, strongly dissented from shortly thereafter in *Mannu Das and others* v. *Kisto Das and another* (1) which, in no uncertain terms, took the view that the earlier Full Bench in *Most.Rupia's* case (supra) as also the long line of precedent following it was correct and still held the field and was in no way whittled down by the Supreme Court judgment in *Sathappa Chettiar's* case (supra). Inevitably the conflicting judgments created a hornet's nest of controversy both within the Court and the more so for the subordinate courts below which, indeed, has necessitated the present reference.

5. Ere one adverts to the rival contentions of the parties and the cleavage of judicial opinion, it seems apt to refer to the rationale premise underlying the question. One must first highlight the meaningful distinction betwixt the valuation of the property in dispute and the valuation of the relief claimed by the plaintiff therein. Though there may be some similarity, yet these are not synonyms. Whilst the property in respect where of the claim is raised may be of high valuation, the plaintiff's claim of relief with regard thereto may not necessarily be identical. It is for this reason that the Legislature gave considerable liberty to the plaintiff to state the amount at which he values the relief claimed because of the absence of any precise

(1) (1983) A.I.R. (Pat.) 272.

yardstick for its determination. Whilst the value of property may be concretised,e.g.,like market value etc.,the value of relief claimed therein by the plaintiff may not be easily capable of precise measurement. It is significant to notice that whilst the other clauses of section 7 provide for a yardstick or a norm on the basis of which the court fee may have to be ultimately computed by the Court, under clause (iv) this is conspicuous by the absence of any such criteria. Thus the rationale underlying the provision is both the difficulty of first valuing the property as such and the greater one of valuing the relief therein which is sought to be claimed by the plaintiff.

6. In the light of the above, Mr.Asghar Hussain strongly advocated the stand that the plaintiff had an absolute right or option to place any valuation whatever on his relief. It was pointed out that apart from the provisions of clause (iv) of section 7 no statutory rules have been framed in this regard under the Court-Fees Act. Counsel, therefore, contended that this being so, if ultimately the Court is authorised to go into the question of the valuation of the relief, it would itself be riding the high seas rudderless without any compass provided by the Act or the Rules for arriving at the destination of the true value of the relief claimed by the plaintiff. In sum, the contention was that whereas any other clauses of section 7 of the Act the modus of computing the court-fee is provided, it is not so in clause (iv) and, therefore, the Court itself cannot enter the thicket of the valuation of the relief claimed. It was submitted that it is thus safer to leave the matter in the absolute option of the plaintiff to place any value on his relief which according to the learned counsel the Legislature had already done. As regards precedents, Mr.Hussain fell

back on the older cases in *Gauri Lal and others* v. *Raja Babu* (1) *Arunachalam Chetty and others* v. *Rangasamy Pillai* (2) *Chelasani Ramiah* v. *Chelasani Ramaswami* (3) and *Arunachelam Chetty and another* v. *Rangaswamy Pillai* (4)

7. Inevitably Mr.Hussain was compelled to challenge the correctness of the Full Bench view in *Most.Rupia's* case (supra). It was submitted that without itself examining the question at all, the Full Bench merely happened back to the earlier precedent of this Court in *Gauri Lal's* case (supra). Equally it was submitted that not a single reason was given for differing and dissenting with the considered Full Bench decisions of the Madras High Court in *Chelasani Ramiah's* case (supra) and *Arunachelam Chetty's* case (supra). It was, therefore, sought to be contended that Mst.Rupias case could not hold the field in face of the later authoritative pronouncement in *Sathappa Chettiar's* case (supra).

8. On the other hand, Mr.R.K.Verma strongly advocating the contrary view took a rock-like stand that the issue is now concluded by the judgment in *A.Ka.Ct.V.Ct. Meenakshisundaram Ghettiar* v. *A.Ka.Ct.V.Ct. Venkatachalam Chettiar* (5) and all further discussion is thus rendered academic. Nevertheless,

(1) 11 P.L.T. 561.

(2) (1915) A.I.R. (Mad.) 948.

(3) 24 M.L.J.R. 233.

(4) (1915) I.L.R. 38 Mad. 922.

(5) (1979) A.I.R. (S.C.) 989.

on principle he highlighted the fact that the crucial question of the valuation of the suit was no mean issue which could be left in the absolute right or option of one of the interested litigants like the plaintiff. It was pointed out that apart from the mere payment of court-fee. the issue of jurisdiction of the court is linked and directly connected with the valuation of the court-fee and the same is of such significance that it cannot be glossed or slurred over. Section 8 of the Suits Valuation Act virtually equates the issue of jurisdiction with that of the valuation of the relief. The end result, therefore, is that such valuation does not merely govern the payment of the amount of court-fee but more so of the forum where the suit will be tried. Mr.Verma highlighted that if the door of the court's power to look into the issue of valuation is absolutely barred, then it would be open for the plaintiff to place the valuation of his relief in properties worth lacs at a few hundred of rupees and file the suit in the court of a Munsif. By such device he may reduce the forum of the trial to the bottom rung and the right of first appeal would go to the subordinate court, thus depriving the defendant to such a valuable right in the High Court itself if the relief was properly valued. Thus, in a way, the issue is strictly interlinked with the forum of the trial and the following valuable vested rights of appeal and second appeal, This, according to counsel, cannot be left entirely in the interested hands of the plaintiff litigant and leave the court as a silent and impotent spectator of gross. deliberate and designed under valuation of the relief. Counsel relied on Order VII Rule 11 of the Code of Civil Procedure and also highlighted that their Lordships of the Supreme Court had relied thereon in AIR 1979 SC 898.

9. It is manifest from the well-matched divergent stand aforesaid two competing principles vie for acceptance here. The first one stems from the fact that clause (iv) of section 7 does give liberty to the plaintiff to evaluate his relief and the rationale and decision has been authoritatively elaborated in AIR 1958 SC 245 and thus needs no repetition or recapitulation. Yet another aspect which has been highlighted is that procedurally the petty and contentious disputes raised on the issue of valuation by the defendant tend to defeat the substance of the litigation by preliminary wrangles of the fiscal issue of valuation. One cannot be unmindful of the fact that unscrupulous defendants may pointlessly raise issues of valuation in order to delay the matter at the very threshold and thereby obstruct the pace of the suit by resorting thereafter to the revisional jurisdiction. There is no gainsaying the fact that procedural misuse in this context is somewhat rampant and this aspect should not be entirely out of ken. Equally hallowed, however, is the rule that a provision of law is not to be construed on the assumption that the same may be misused or abused. One cannot, in the thin guise of interpretation, amend or override a provision to prevent the alleged misuse and prolongation of litigation by a recalcitrant defendant.

10. Nor can one lose sight of the fact that holding that the plaintiff has an absolute right to place any valuation whatever on his relief and the court has no jurisdiction in the matter at all would equally be capable of gross abuse and even public mischief. Once it is so held, it may and is most likely to lead to a gross and deliberate undervaluing of the relief claimed. Indeed such a finding can only result in a headlong conflict of interest against duty for the plaintiffs. As

their Lordships have said, it is the plaintiff's duty to fairly attempt to estimate the value of the relief claimed even where it is not easy to compute it in money terms. Once it is held that the plaintiff had an absolute right to value his relief then his financial interest would demand that he undervalues it to pay the minimal court-fee against a duty to fairly estimate the valuation in order to pay the proper one. Such a holding may also lead to frivolous litigation. As it fell from one of my learned Brothers, it would follow from such a holding that the unscruplus plaintiff may well sue for properties worth crores of rupees and place their own valuation at a token of one hundred and raise a cloud over the title of the defendant. If the court is left powerless to interfere in such a situation. it would be rendered impotent to counter such frivolous litigation, even though the same may be writ large on the face of the proceeding.

11. It is somewhat plain that both extremes are not devoid of their pitfalls and the capability of being abused. The law has to steer clear of what has been rightly labelled as the falsehood of extremes. The provisions have to be construed on the language and the spirit of the statute with an eye to a synthesis of the competing and rival rationales.

12. Having briefly considered the issue on principle as above and the rationale underlying the provisions of clause (iv) of section 7 of the Act, one may now advert to the basic stand of Mr.R.K.Verma that all other considerations are now rendered somewhat academic by the enunciation of law on the point by the final Court in *A.KA.CT. V.C.T. Meenakshisundaram Chettiar* v. *A.K.A.CT. V.C.T.*

Venkatachalam Chettiar (1) This stand of the learned counsel is not devoid of merit. Indeed, it seems somewhat surprising that the learned counsel for the parties were so remiss as not to bring this binding judgment to the notice of either of the learned single Judges in *Kesho Mahton and others* v. *Ayodhya Mahton and others*) (supra) and *Mannu Das and others* v. *Kisto Das and another* (supra). Had that been done probably the needless controversy and conflict raised would have had no occasion to arise. In Meenakshisundaram Chettiar's case (supra) an identical issue arose directly and frontally before their Lordships under clause (iv) of section 7 of the Act. After quoting the relevant part of the statute aforesaid and equally referring and relying on Order VII Rule 11 of the Code it was concluded as under:

"... This section casts a duty on the court to reject the plaint when the relief claimed is undervalued. If on the materials available before it the Court is satisfied that the value of relief as estimated by the plaintiff in a suit for accounts is undervalued the plaint is liable to be rejected. It is therefore necessary that the plaintiff should take care that the valuation is adequate and reasonable taking into account the circumstances of the case. In coming to the conclusion that the suit is undervalued the court will have to take into account that in a suit for accounts the plaintiff is not obliged to state the exact amount which would result after the taking of the accounts. *If he cannot*

(1) (1979) A.I.R. (S.C.) 989.

estimate the exact amount he can put a tentative valuation upon the suit for accounts which is adequate and reasonable. The plaintiff cannot arbitrarily and deliberately undervalue the relief. A Full Bench of the Andhra Pradesh High Court in a decision in Chillakuru Chenchuram Reddy v. Kanupuru Chenchurami Reddy (ILR (1969) Andh Pra 1042) after elaborate consideration of the case law on the subject has rightly observed that there must be a genuine effort on the part of the plaintiff to estimate his relief and that the estimate should not be a deliberate under-estimation."

To my mind within this jurisdiction the aforesaid forthright enunciation of the law now governs the issue fairly and squarely. As has been noticed earlier, clause (iv) of section 7 of the Act had fallen directly for consideration and the judgment cannot be possibly distinguished by any finical distinctions on the further sub-clauses (a) to (f) thereof. There is no manner of doubt that earlier there has been a deep-seated cleavage of judicial opinion betwixt even Full Benches of the different High Courts and inevitably of the different Division Benches and single Judges inter se in some Courts as in our own as well. Indeed, Mr.Verma pointed out that this question had earlier exercised the judicial scrutiny of as many as eleven Full Benches and innumerable Division Benches had also gone into the issue. Whilst the High Courts of Patna, Nagpur, Andhra Pradesh and Hydrabad in *Mt.Rupia* v. *Bhatu Mahton and ors* (1) *Motiram and ors* v. *Daulat and anr.*(2)

(1) (1944) A.I.R. (Pat.) 17 F.B.

(2) (1939) A.I.R. (Nag.) 50 F.B.

Chillakuru Chanchuram Reddy v. *Kanupuru Chenchurami Reddy* (1) *Manchinna Shantamma* v. *Machinna Lachiah* (2) had taken a view that the plaintiff had no absolute right or option to place any valuation whatever on the relief claimed under section 7(iv) of the Act, the contrary view had been subscribed to by the High Courts of Madras, Lahore, Punjab and West Bengal in *Ghisu* v.*Ram Ballabh (3)Allamsetti Appala Suryanarayana and others* v. *Peeleekhana Venkatasiva Rao Pantulu and another* (4)*Ah Twe and another* v. *Ma Mai Sein and others* (5)*Emperor* v. *Ralla Ram* (6) *Karam ilhi* v. *Muhammad Bashir and. ors* (7) *Vishwa Nath and another* v. *Smt.Sita Bai Anand and ors.*(8) *Narayanqunj Central Co-operative Sale and Supply Society Ltd.*v. *Mafizuddin Ahmad and another* (9).

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(1) (1969) I.L.R. (A.P.) 1042 F.B.

(2) (1955) A.I.R. (Hyd.) 23 F.B.

(3) 13. I.C. (Mad.) 363 F.B.

(4) (1915) A.I.R. (Mad.) 945 F.B.

(5) (1941) A.I.R. (Lah.) 97 F.B.

(6) (1946) A.I.R. (Lah.) 94 F.B.

(7) (1949) A.I.R. (Lah.) 116 F.B.

(8) (1952) A.I.R. (Punj.) 335 F.B

(9) (1934) A.I.R (Cal.) 448 F.B.

Mr.Verma, however, pointed out that some of the States had amended various of the Court Fee Act on the point and, therefore, the statutes being not in *pari materia* some of the judgments may not be directly relevant. However, as I have said earlier, it is now wasteful to enter the thicket or the morass of conflicting precedent aforesaid when the Gordian knot has been finally cut by the final Court itself in *Meenakshisundaram Chettiar's* case (supra).

13. Having held as above, the solitary question that remains is whether there is any conflict in the final Court itself betwixt the ratio of the earlier judgment A.I.R. 1958 S.C. 245 (*S.Rm.Ar.S.Sp.Sathappa Chettiar v.S.Rm.Ar.Rm. Ramanathan Chettiar*) and the recent one in *Meenakshisundaram Chettiar'* case (supra). A tenuous attempt was made on the part of the learned counsel for the petitioner to submit that the said two judgments were in headlong conflict, or in the alternative to distinguish the decision in *Meenakshisundaram Chettiar's* case (supra) on the limited ground that it was rendered under sub-clause (f) of section 7(iv) whilst that in *Sathappa Chettiar's* case (supra) was rendered under sub-clause (b) of section 7(iv).

14. To clear the cobwebs one may forthwith take up the issue whether any distinction can be drawn with regard to the individual sub-clauses (a) to (f) of clause (iv) of section 7 of the Act. For ease of reference the relevant part of the statute may first be read which is in the terms following:

"7. *Computation of fees payable in certain suits.*-

The amount of fee payable under this Act in the suitsnext hereinafter mentioned shall be computed as follows:

(iv) in suits -

(a) *For moveable property of no market-value.*-

For moveable property where the subject-matter has no market- value, as, for instance, in the case of documents relating to title,

(b) *To enforce a right to share in joint-family property.*- To enforce the right to share in any property on the ground that it is joint-family property,

(c) *For a declaratory decree and consequential relief.*- To obtain a declaratory decree or order, where consequential relief is prayed,

(d) *For an injunction.*- To obtain an injunction,

(e) *For easements.*- For a right to some benefit (not herein otherwise provided for) to arise out of land, and

(f) *For accounts.*- For accounts -

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal;

In all such suits the plaintiff shall state the amount at which he values the relief sought;

(v) *For possession of land, houses and gardens.*- In suits for the possession of land,houses and gardens - according to the value of the subject-matter; and such value shall be deemed to be -

where the subject-matter is land, and -

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government;

or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,

and such revenue is permanently settled - ten times the revenus so payable;

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid;

and such revenue is settled, but not permanently - five times the revenue so payable;

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and net profits have arisen from the land during the year next before the date of presenting the plaint -

fifteen times such net profits;

but where no such net profits have arisen therefrom - the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood;

(d) where the land forms part of an estate paying revenue

to Government, but is not a definite share of such estate and is not separately assessed as abovementioned - the market-value of the land:

Even the plain reading of the statute makes it manifest that under the whole of clause (iv) the court fee is to be computed according to the amount at which the relief is valued by the plaintiff. What is, however, significant and deserves highlighting is that the mandate in the last portion of clause (iv) governs each of the preceding sub-clauses (a) to (f) equally and without any exception. The Legislature has not minced its words and without any equivocation has laid down a universal principle applicable for each of the clauses (a), (b), (c), (d), (e) and (f). To my mind, it is both finical and illogical in this context to draw any distinction on the ground of the nature of the suit mentioned in each of the clauses afore-said, whatever be its nature and whatever sub-clause it may fall in, the principle laid down at the end of clause (iv) is applicable to all of them without reservation. Indeed, Mr.Asghar Hussain, the learned counsel for the petitioner, was fair enough to concede that on the language of the statute and on principle no distinction could thus be drawn with regard to sub-clauses (a) to (f). Even when forcefully pinpointed, learned counsel conceded their inability to cite any judgment which had held that different considerations would apply by virtue of the different sub-clauses of clauses (iv) of section 7. Therefore, the vain attempt of one of the learned counsel to wriggle out of the ratio of *Meenakshisundaram Chettiar's* case (supra) by harping on the ground that the same was rendered under clause (f) whilst the earlier judgment in *Sathappa Chettiar's* case (supra) was rendered under sub-clause (b), is wholly unwarranted. To clear the decks it has,

therefore, to be observed that the mandate at the end of clause (iv) of section 7 applies equally and evenly to each of the sub-clauses (a) to (f).

15. Before closing the discussion on this aspect, it becomes necessary to advert to the recent Division Bench judgment in *M/s. Commercial Aviation and Travel Co.(Inc.) and others* v. *Vimla Panna Lal* (1) which has sought to distinguish the case of *Meenakshi Sundaram Chettiar* (supra). In this context it is well to recall that the territories of Delhi were earlier within the jurisdiction of Lahore and later the Punjab & Haryana High Court. As already noticed, there was a long and consistent line of precedent to the contrary beginning with *Barru* v. *Lachman* (2) followed by as many as five Full Benches of the Punjab and Lahore High Courts thereafter. The Division Bench, as noticed in the end, felt itself bound by those decisions and equally by the considerations of *stare decisis* and in their own words -

"... we for one would not like the law to get unsettled suddenly by referring the matter to the larger Bench, particularly when the Act with which the Supreme Court or the Andhra Pradesh High Court was dealing was materially a different provision..."

With the greatest respect, however, it would seem erroneous to presume that in *Meenakshisundaram's* case their Lordships did not deal with provisions of the Court-fees Act of 1870. A reference to paragraph

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(1) (1986) A.I.R. (Del.) 439.

(2) (1914) Punj.R. 23 F.B.

7 of the Report would make it manifest that they in terms quoted section 7(iv) of the Court- fees Act and directed their discussion and interpretation thereto *de hors* the considerations of any other statute. Equally in this context their LOrdships placed firm reliance on Order VII Rule 11 of the Code of Civil Procedure which inevitably is a principle of universal application. They arrived at the ratio on these larger considerations. It is true that the case had arisen under the Tamil Nadu Court-fees and Suits Valuation Act. However, it deserves notice that the significant variation therein under sub- section (2) of section 35 of the said Act is with regard to matters arising after the decree has been passed and not at the threshold stage of the payment of court fee and the valuation of the suit. The difference in the two statutes thus on this point is of little or no relevance. Even otherwise a comparison of the relevant provisions under the Act for the purposes of the determination of court fee and those under the Tamil Nadu Court- fees and Suits Valuation Act, would show that though not identical they are in no way materially different. It was only in the end by way of an ancillary reference that their Lordships approved the broad rationale in *Chillakuru Chenchuram Reddy's* case (supra). With the deepest reverence the applicability of the ratio in *Meenakshi Sundaram Chettiar's* case (supra) to the provisions of section 7(iv) of the Court-fees Act cannot be avoided or distinguished. Even otherwise the Delhi Division Bench did not advert to *Sathappa Chettiar's* case (supra) nor did it examine the matter or larger principle and as is evident from its judgment it considered the view in its narrow parameters of whether or not to refer the matter to a larger Bench in face of a long line of Full Bench precedents by which it was bound. The deep conflict with other jurisdiction was not noticed.

It seems to have missed consideration that the previous Full Benches of the Lahore and the Punjab High Courts had been rendered prior to the coming in of the binding judgment in *Meenakshi Sundaram Chettiar's* case (supra). With deepest respect and reverence I would wish to record my dissent with *M/s. Commercial Aviation and Travel Co.(Inc.)'s* case (supra).

16. To sum up on this aspect, the answer to question (iii) is rendered in the negative and it is held that no difference or line of distinction can be drawn qua the individual sub-clauses (a) to (f) of clause (iv) of section 7 of the Act.

17. Now once it is so held, it is patent that the alleged conflict betwixt *Sathappa Chettiar's* case (supra) and that of *Meenakshi Sundaram Chettiar's* (supra) is purely imaginary rather than real and, if one may say so, it is a classic example of first raising a ghost and then attempting to kill it. On a closer analysis both the judgments harmoniously blend into complementary ratios and, to my mind, it is wholly unwarranted to read them as if in conflict.

18. Somewhat curiously a tenuous attempt was made by counsel to contend that *Sathappa Chettiar's* case (supra) had laid down the rule that the plaintiff had an absolute right or option to place any valuation whatever on his relief. It was sought to be contended that this necessarily followed from the observations in paragraph 13 of the Report. To my mind, the lie direct to such a stand is given in the words of the Constitution Bench itself at the end of the said paragraph of the following terms:

"In the circumstances of this case it is unnecessary to consider whether under the provisions

of this section the plaintiff has been given an absolute right or option to place any valuation whatever on his relief."

19. Now on the basis of the aforesaid observations Mr.R.K.Verma was forcefully dogmatic that if the judges themselves say in terms that they are not considering and deciding a question, it is wrong and erroneous to read the same judgment as having in fact done so. He rightly argued that the authors of the judgment are the best judges of what they had in mind and no oblique inferential conclusions can be planted against their own dictum that the issue is being left open.

20. The aforesaid stand of the learned counsel appears to me as patently sound in principle. Indeed, it is an impeccable rule that where a considered judgment declares that it is not considering and deciding a particular point, it would be wholly futile to attempt to read the observations therein as holding to the contrary. The barest modicum of respect had to be accorded to hold that the Judges of the Bench know their mind and when they declare it, it has to be accepted as a rule. The aforequoted observations can leave no manner of doubt that their Lordships far from deciding the issue even thought it unnecessary to adjudicate thereupon. Indeed, by so observing they expressly and advisedly left the question open. Despite the aforesaid categoric observations, to still hold that their Lordships had decided this question one way or the other, is, to my mind, wholly unwarranted. Equally it has to be noticed that they made this observation with regard to the section generally and not with regard to the individual sub-clauses (a) to (f) of clause (iv) of section 7. The specious argument that though they

had said so in terms, they did not mean so, is almost an irreverenet imputation to be laid at the door of a Constitution Bench. It has to be necessarily presumed that their Lordships meant exactly what they said in no uncertain terms that they did not at all think it necessary to consider the larger question whether the plaintiff has an absolute right or option to place any valuation whatever on his relief.

21. A gloss that is sought to be placed on the earlier observations in paragraph 13 of the Report can be easily removed by a closer and incisive reading thereof. Their Lordships traced the rationale behind clause (iv) of section 7, rightly holding that thereby a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court fee. They briefly examined the theoretical basis of the provision. On all this reasoning the following conclusion was drawn in their own words:

> "That is why Legislature has left it to the option of the plaintiff to value his claim for the payment of court fee. It really means that in suits falling under section 7(iv) (b) the amount stated by the plaintiff as the value of his claim for partition has'ordinarily' to be accepted by the court in computing the court fee payable in respect of the said relief."

22. The key word therein and the clue to the observation is the word *'ordinarily'* designedly and incisively employed by their Lordships.*'Ordinarily'* cannot possibly be read as'invariably' or 'inflexibly'. These words are not synonymus and they mean different and distinct things. There is a large gap betwixt what is ordinarily done and what must inflexibly and mandatorily be done. That gap cannot be bridged or

glossed over by any sophistry. When their Lordships said'*ordinarily*',they did so designedly. This is more than amply clarified and highlighted by the very next observation that in the circumstances they found it wholly unnecessary to even consider - far from decide, whether the provisions of the section invariably 'gave the plaintiff an absolute right or option to estimate his relief. Reading something more in the succeeding paragraphs 14 and 15 of the Report as in any way relevant to the true meaning of section 7(iv), to my mind is again a misnomer. Therein their Lordships were discussing the co-related question of valuation for the purposes of court fee and that for the purposes of jurisdiction by virtue of section 8 of the Suits Valuation Act. Nothing in the said paragraphs can possibly deflect from the clear declaration by their Lordships that they were leaving the crucial question open.

23. It is thus manifest that far from there being any conflict betwixt *Sathappa Chettiar's* case (supra) and *Meenakshisundaram Chettiar's* case (supra) they are indeed complementary and blend into a harmonious ratio. The earlier case laid down that in suits under section 7(iv) of the Act the estimation of the relief by the plaintiff is *ordinarily* to be accepted, but expressly left the question open whether he has been given an absolute right or option to place any valuation whatever on his relief. The later judgment elaborated the extraordinary situation wher the plaintiff has arbitrarily and deliberately undervalued his relief and held that the Court has power and jurisdiction to correct the same. The legal result that thus emerges is that in suits falling under clause (iv) of section 7, irrespective of the various sub- clauses thereof, the estimation of the relief by the plaintiff has to be ordinarily accepted. Nevertheless, the plaintiff has not been given any

absolute right or option to place any valuation whatever on such relief and where he manifestly and deliberately undervalues and under-estimates the same, the Court is not a silent and impotent spectator thereof and has clear jurisdiction to interfere. In the light of the above, the answer to questions (i) and (ii) are both rendered is the negative with the qualifications aforesaid.

24. Then it remains to advert to the view in *Kesho Mahton and others* v. *Ayodhya Mahton and others* (supra). Therein it has been held in dogmatically categoric terms that under section 7(iv) the plaintiff has an absolute option to state the valuation in the plaint and the Court has no jurisdiction to come to a contrary conclusion even on the ground of valuation being unreasonable or arbitrary or any other ground. This view is now in headlong conflict with and contrary to the ratio in *Meenakshi sundaram Chettiar's* case (supra) and cannot possibly hold the field. With great respect it appears to me that the conclusion was rested on a slight misleading of *Sathappa Chettiar's* case (supra) and it seems to have been missed that their Lordships had in terms left the question open whether the plaintiff had an absolute right or option to evaluate his relief. The long line of binding precedent beginning with *Mt.Rupia's* case (supra) was thus disregarded. With deepest respect and for the detailed reason enumerated earlier, the law laid down therein is not correct and is hereby overruled. For identical reasons the earlier judgment in Smt.Prem *Kishori Devi's* case (supra) is also overruled.

25. As a necessary consequence the broad view of the law in *Mannu Das's* case (supra) is accepted. Nevertheless a note of caution must be sounded in

this context and a marginal modification of the principle laid down in *Mt.Rupia's* case (supra) has to be made in view of the subsequent Supreme Court judgments in *Sathappa Chettiar's* case (supra), and that in *Meenakshisundaram Chettiar's* (supra). is significant to notice that the Full Bench in *Most.Rupia's* case did not choose to delve into the matter independently but had preferred to follow the earlier established view in the Court in the following words:-

> "Though two Full Bench decisions of the Madras High Court have held that the valuation put on the plaint by the plaintiff under Section 7(iv) (c), Court-fees Act, is conclusive for the purposes of courts-fee- see 24 M.L.J. 233 (*Chelasami Ramiah* v. *Chelasami Ramasami*) and 38 Mad.922 (*Arunachalam Chetty* v. *Rangasawmy Pillai*) - a Division Bench of this Court in 11 Pat. 161 (Ramcharitar Pandey v. Basgit Rai) has laid down to the contrary, that is to say, in a suit to obtain a declaratory decree with consequential relief the Court it empowered under the law to revise the valuation put by the plaintiff, and, if on such revision it is of opinion that the valuation is insufficient or arbitrary, it has jurisdiction to fix a right value. We naturally prefer to follow the well established rule of this Court in a number of decisions which are all cited in the decision of this Court last mentioned."

Now reference to the Division Bench judgment in I.L.R.11 Patna 161 (*Ramcharitar Pandey* v. *Basgit Rai*) would yet indicate that there was no elaborate independent discussion of the matter on principle and the Division Bench judgment adhered to the earlier precedent even after noticing a conflict of precedent in the Court with that of other High Courts. It seems somewhat manifest that in view of the two

aforementioned Supreme Court decisions the ratio in *Most.Rupia's* case (supra) cannot be upheld in its entirety and has to be necessarily modified in accordance therewith. The sufficiency or otherwise of the relief estimated by the plaintiff is now no longer the question. Finical objections about the insufficiency of such estimation should not any longer be permitted to be raised by the trial courts. Their power herein is not to be viewed as an ordinary one to revise the valuation put by the plaintiff. It is indeed an exceptional power to be exercised in rare cases for interference where on the face of the record the valuation is arbitrary and demonstrably wrong and the plaintiff has manifestly and deliberately undervalued and underestimated the same. Ordinarily this should be evident from the pleadings of the parties themselves and only if it is so the need for further consideration or evidence would arise. The broad and basic parameters now laid down by the final Court in the twin judgments aforesaid are that the estimation of the relief by the plaintiff has to be ordinarily accepted and interference therein is permissible only in exceptional and rare cases where such valuation is patently arbitrary and demonstrably undervalued and under-estimated deliberately.

26. Now applying the abovesaid acid test, it is clear that the impugned order in Civil Revision No.851 of 1982 (*Md.Alam* v. *Gopal Singh and others*) passed by the learned Munsif cannot be sustained on the anvil thereof. There is not a hint or a finding therein that the valuation placed at his relief by the plaintiff was manifestly arbitrary and deliberately undervalued or underestimated. Consequently such valuation would come under the rule that the same has to be ordinarily accepted. The order of the learned Munsif has

therefore, to be set aside and the objection petition of the defendants dismissed. The civil revision application is accordingly allowed with cost.

27. Again in Civil Revision No.1439 of 1982 (*Yogendra Pd.Roy and others* v. *Prithwi Chand Roy and others*) the learned Additional Subordinate Judge, Bhagalpur, has not even remotely adverted to the threshold issue whether the estimation given by the plaintiff was totally arbitrary and deliberately underestimated and undervalued. Instead, he has entered into the finical questions of the sufficiency of the valuation and allied matters. In view of the ratio laid above no interference on such grounds is warranted. The judgment under revision is consequently set aside and the objections with regard to the valuation raised by the defendants are dismissed. The civil revision petition is accordingly allowed with costs.

28. In Civil Revision No.1366 of 1985 (*Swami Sri Akhandanand Pramhansji Maharaj and others* v. *Durganand Choudhary and others*) the court below has come to the conclusion that the suit is properly valued and the court-fee paid is sufficient. On the rule that the plaintiff's valuation is ordinarily to be accepted and the fact that the same has been further upheld by the trial court, any interference by the revisional court is wholly unnecessary. The revision is without merit and is consequently dismissed with costs.

29. In Civil Revision No.1385 of 1985 (*Smt.Tara Devi* v. *Sri Thakur Radha Krishna Maharaj*) the learned Additional Munsif has come to a clear finding that the valuation given by the plaintiff in the suit was in no way arbitrary and unreasonable, and consequently held that the same was rightly valued. On the proposition

enunciated above, there is not the least scope for interference in the considered order under revision. The revision is consequently dismissed with costs.

30. Civil Revision No.357 of 1985 (*Abdul Barkar Mohd.Rashid and another* v. *Bibi Roshan Jahan and others*) has been preferred by the defendant petitioners. They pruported to be aggrieved by the impugned order of the Learned Additional Subordinate Judge despite the fact that the valuation of the property in schedule I has already been enhanced. To my mind, this case comes squarely within the rule in *Sri Rathnavarmaria v. Smt.Vimla* (1) (AIR 1961 SC 1299) wherein it has been held as under:-

"We fail to appreciate what grievance the defendant can make up seeking to invoke the revisional jurisdiction of the High Court on the question whether the plaintiff has paid adequate court-fee on his plaint. Whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State. How by an order relating to the adequacy of the court-fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again the jurisdiction in revision exercised by the High Court under section 115 of the Code of Civil Procedure is strictly conditioned by Cls. (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the court has acted illegally or with material

(1) (1961) A.I.R. (S.C.) 1299.

irregularitiy in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court-fee payable on the plaint."

Apart from the above, even on merits, the court below has held that as regards the valuation of schedule II lands the estimation of the relief by the plaintiff was correct and the court-fee paid by the plaintiff over her own share was consequently accepted. On the principle enunciated above, herein not the least cause for intereference in the impugned order is made out. The revision petition is consequently dismissed with costs.

B.P.Jha,J. I agree.

Birendra Prasad Sinha,J. I agree.

S.P.J. C.R.nos.851 and 1439 allowed.

C.R.nos.357, 1366 and 1385 dismissed.

TAX CASE

Before Uday Sinha and Ashwini Kumar Sinha, JJ.

1987.

February, 20.

*Commissioner of Income-tax, Bihar II, Patna.**

v.

M/s Karuna Mica Co., Giridih.

Income-tax --- *expenses incurred by the assessee for securing advantage of an enduring nature --- whether capital expenditure.*

Where the assessee claimed that the work done in its Mica Mines were in the nature of concreting the walls and roof underground and were carried out under the orders of the Chief Inspector of Mines, Government of India and were in the nature of revenue of expenditure;

Held, that the expenses were incurred once for

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*Taxation Case Nos.42 and 43 of 1976. Ref:- Statement of Case U/s.256(1) of the Income Tax Act by the Income Tax Appellate Tribunal, Patna Bench, in the matter of assessment of Income Tax on M/s Karuna Mica Co., Giridih for the assessment years 1968-69 and 1969-70.

all for securing the advantage of an enduring nature and were in the nature of capital expenditure and not revenue expenditure.

Case laws discussed.

Statement of cases under section 256(1) of the Income Tax Act, 1961.

The facts of the cases material to this report are set out in the judgment of Ashwini Kumar Sinha, J.

M/s.B.P.Rajgarhia and *S.K.Sharan* for the petitioner.

M/s.K.N.Jain and *M.Nath.* for the opposite party.

ASHWINI KUMAR SINHA,J. -- These two references are under section 256(1) of the Income Tax Act, 1961. The assessment years in question are 1968-69 and 1969-70.

2. Both the references involve common question of law and the question of law referred to for the opinion of this Court is as follows:-

> "Whether on the facts and in the circumstances of the case the Tribunal was correct in holding that the amounts of Rs.1,63,735/- and Rs.2,42,216/- incurred by the assessee were expenses of revenue nature and were allowable in the assessment years 1968-69 and 1969-70 respectively".

3. To it appears from the statement of case submitted by the Income-tax Appellate Tribunal, that assessee is a registered firm carrying on business

of extracting Mica from Mica mines taken on lease from the State of Bihar. The Income-tax Officer, in course of assessment for the assessment years in question found that under the head Palmo Godown certain expenses were debited which included expenses on Mines surfaces, channel work. Mines under ground works and bricks used for these works. For the assessment year 1968-69, according to the Income-tax Officer, the total expenditure, which represented expenses of capital nature came to be Rs.1,63,735/- and, similarly, for the assessment year 1969-70, according to the Income-tax Officer, the total expenditure came to be Rs.2,42,216/-, which represented expenses of capital nature.

The assessee's explanation before the Income-tax Officer was that the Narayan Mica Mines wereworked by the firm and these Mica could be worked only for a part of the year, as during the rainy season the mining operation had to be discontinued due to the nallah located above the Mines overflowing. According to the assessee, during the rainy season, it was not possible to close the Mines for fear of cracks taking place which might have resulted in water getting into the Mines. To safeguard against the rain water of the Nallah going into the Mines and for extracting Mica throughout the year, the assessee firm spent substantial amounts in the assessment years in question. The assessee's stand before the Income-tax Officer also was that the work done was in the nature of concreting the walls and roof, underground and it was carried out under the orders of the Chief Inspector of Mines, Government of India, Dhanbad. According to assessee, this work had to be completed by the assessee as it was a condition placed by the Mining authorities for further operation.

4. The Income-tax Officer, however, found that the assessee himself wanted to extend the working of the Mines throughout the year and thus they carried out this work for which permission by the Mining authorities was granted. According to the Income-tax Officer, these works enabled the assessee to work the Mica Mines throughout the year and to extrect more Mica in the years in question. Hence, in view of the Income-tax Officer, this resulted in a clear enduring benefit to the assessee firm inasmuch as before the construction of this wall and roof in the Mines, raising of Mica was done only for a period of six months and after this construction the raising could be done throughout the year. The Income-tax Officer pointed out to the actual increase in the raising of Mica and held it to be the result of the work carried on by the assessee.

The Income-tax Officer held that the expenditures incurred by the assessee for the assessment years in question were of capital nature and the amounts claimed were added.

The orders of the Income-tax Officer are Annexures'A' and'A-1' to the statement of case submitted by the Tribunal.

5. The assessee, as against the orders of the Income-tax Officer, moved the Appellate Assistant Commissioner of Income Tax in appeals for the assessment years in question.

The Appellate Assistant Commissioner, by a consolidated order, took a different view and held that the expenditure incurred by the assessee was of revenue nature and hence the same was an admissible deduction.

6. According to the Appellate Assistant Commissioner, the work carried out by the assessee for the assessment years in question was necessary for carrying on the business operation and the assessee did not acquire any asset/right of enduring nature as a result of these expenses. The Appellate Assistant Commissioner held that the erection of the wall, to ward off the water of the river from getting into the Mine and that way bringing the working operations to a stand still during the rainy season was not an acquisition of an asset of enduring benefit so as to term it to be a capital expenditure. On the other hand, the Appellate Assistant Commissioner was of the view that the same was built for running the business or working it with a view to producing profits and, in that view of the matter, the Appellate Assistant Commissioner held that the expenditure was of revenue nature and an admissible deductions.

The consolidated order of the Appellate Assistant Commissioner has been made Annexure'B' to the statement of case submitted to this Court.

7. Aggrieved by the consolidated order passed by the Appellate Assistant Commissioner, the department moved separately before the Income-tax Appellate Tribunal for the assessment years in question.

The Department's stand before the Tribunal was that the expenses were incurred once for all for securing the advantage of enduring nature. According to the Department, the expenses incurred were of special nature and had not been incurred in the earlier year or in the subsequent year.

On the other hand, on behalf of the assessee, it was submitted that the expenses were incurred in

order to carry on the business of extracting Mica and the productive work carried on by the assessee had become necessary in view of revision of conditions under which the lease had been granted. The assessee's stand also was that the assessee's lease was for a fixed period and the assessee had to abide by the conditions laid down by the Mining authorities.

In short, *the assessee's stand was that the work undertaken by it was only to protect the Mines during the rainy season* and the work had to be completed as it was a condition placed by the Mining authorities for further operation.

8. *The Tribunal observed that the expenses incurred by the assessee were operational expenses and they did not bring into existence any asset or advantage of enduring benefit to the assessee.* The Tribunal held that the expenditure was basically an expenditure incurred for working the Mines in a better manner and, therefore, the expenses had to be allowed as revenue expenditure. And, thus, the Tribunal allowed the expenses as being revenue in nature.

9. Before I deal with the submissions advanced by the respective counsel of the parties, it is pertinent to mention a few more facts, as it appears from the statement of case submitted to this Court as well as from the order of the Income-tax Officer and that of the Appellate Assistant Commissioner.

The assessee's firm filed an application dated 26-2-1962 to the Chief Inspector of Mines for the construction work in the Mines in question. The Chief Inspector of Mines replied to that application. The construction work was done by the assessee only after securing permission from the Chief Inspector of

Mines. Before the construction of the wall and the roof, raising of Mica was done only for six months and after the construction raising of Mica was for all the year round. Thus, it would appear that it was *the assessee who wanted to extend the work of the Mines that it applied for the constructions work to enable the firm to raise more Mica from the Mines through out the year and it was only on the application filed by the assessee's firm that the Chief Inspector of Mines give the directions and for such permission certain conditions were laid down.*

The assessee's stand was that these expenses were incurred in course of Mining business and it enabled the assessee to extract more Mica and also resulted in greater safety in the Mines. According to the assessee, the concreating of the roof and the sides of the pillars was an extra protection undertaken, as desired by the mining authorities. The assessee's further stand before the Income-tax Officer was that the protection work was a necessary safeguard against the percolation as well as overflow of water. The assessee submitted that such work was necessary for the working of the Mines as water flowed and endangered the lives of the workers and the Mining authorities could not permit carrying on the Mining operation, if the protection works were not undertaken.

As already stated above, the Income-tax Officer took the view that these expenses were capital expenses; whereas, the Appellate Assistant Commissioner and the Tribunal held that the expenses incurred by the assessee were operational expenses and they did not bring into existence any asset or any permanent advantage to the assessee and hence

the expenses were revenue in nature and had to be allowed.

10. Occasions have arisen in this Court as well as in other High Courts and also in the Supreme Court to deal with the controversy whether an item of expenditure should be considered as a capital expenditure or revenue expenditure.

The Act does not define the expressions "Capital Expenditure" and "Revenue Expenditure". The line that divides revenue expenditure from capital expenditure is very thin and hence the decisions of the courts have not been able to give a quietus to the controversy whether an item of expenditure is capital or revenue. The decisions enumerate the general tests to be applied to distinguish capital expenditure from revenue expenditure. Whole difficulty arises when the courts are called upon to apply those tests to a given set of facts and barring rare exceptions, the facts of no two cases are similar.

The court has to look to the surroundings circumstances so as to arrive at a decision as to what was the real object and purpose of the expenditure from the commercial point of view. No single test of universal application can be discovered for the solution of the question.

11. A long line of decisions have laid down that when an expenditure is made with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is good reason for treating such an expenditure as attributable not to revenue but to capital. In the case of *Benarsidas Jagannath*

(1) a Full Bench of the Lahore High Court attempted to reconcile the principles enumerated in several decisions and the Full Bench deduced the following broad tests for distinguishing capital expenditure from revenue expenditure. The opinion of the Full Bench of the Lahore High Court in the case of *Benarsidas Jagannath* (supra) was in the following terms:-

> "It is not easy to define the term 'capital expenditure' in the abstract or to lay down any general and satis-factory test to discriminate between a capital and a revenue expenditure. Nor is it easy to reconcile all the decisions that were cited before us for each case has been decided on its peculiar facts. Some broad principles can, however, be deduced from what the learned Judges have laid down from time to time. They are as follows:-
>
> 1. Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment: vide Lord Sands in Commissioners of Inland Revenue v. Granite City Steam ship Company [(1927) 13 Tax Case. 1 at p.14] In City of London Contract Corporation v. Styles (1987)2 Tax Cases 239 at p.243],

(1) 15 I.T.R. 105.

Bowen, L.J., observed as to the capital expenditure as follows:

'You do not use it "for the purpose of" Your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern'.

2. Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade: vide Viscount Cave, L.C., in Atherton v. British Insulated and Helsby Cables Ltd [(1926) 10 Tax Case 155]. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether. Thus, if labour saving machinery was acquired the cost of such acquisition cannot be deducted out of the profits by claiming that it relieves the annual labour bill, the business has acquired a new asset, that is, machinery.

The expressions'enduring benefit' or'of a permanent character' were introduced to make it clear that the asset or the right

acquired must have enough durability to justify its being treated as a capital asset.

3. Whether for the purpose of the expenditure, any capital was withdrawn, or, in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. Fixed capital is what the owner turns to profit by keeping it in his own possession. Circulating or floating capital is what he makes profit of by parting with it or letting it change masters. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital, on the other hand, is not involved directly in that process and remains unaffected by it".

Thereafter occasion arose for the Supreme Court in the case of *Assam Bengal Cement Co.Ltd.*v. *Commissioner of Income-tax* (1) to consider the question and the Supreme Court observed that the synthesis attempted by the Full Bench of the Lahore High Court truly enunciates the principles which emerge from the authorities and it further held as follows:

"In cases where the expenditure is made for

(1) 27 I.T.R. 34.

the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred

was part of the fixed capital of the business or part of its circulating capital. If it was part of the fixed capital of the business it would be of the nature of capital expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductable allowance under section 10(2)(xv) of the Income-tax Act. The question has all along been considered to be a question of fact to be determined by the Income-tax authorities on an application of the broad principles laid down above and the Courts of law would not ordinarily interfere with such findings of fact if they have been arrived at on a proper application of those principles".

Keeping in mind the principles referred to in several decisions, the question posed has to be examined in the light of judicial common sense.

12. The learned counsel for the Revenue submitted that the expenses incurred by the assessee were of a special nature and had not been incurred in any earlier or subsuequent years. The expenses were incurred once for all for securing an advantage of an enduring nature. The learned counsel for the Revenue submitted that the fact that the raising of Mica was increiased from 10657 Kgs. to 145254 Kgs. during the accounting period itself showed that the expenses

incurred were for securing an advantage of an enduring nature.

12. The learned counsel for the Revenue, in support of his submission, relied upon the case of *Commissioner* of *Income-tax, West Bengal* Vrs. *North Dhemo Coal Co.Ltd.* (1) In my opinion, the facts of this case are at part with the facts of the instant case. In the case of Commissioner of *Income-tax, West Bengal* Vrs. *North Dhemo Coal Co.Ltd.* (supra), there was serious disaster in the immediately preceding assessment year, as a result of which the assessee had to construct dams under the instructions of the Mines Department for prevention of recurrence of such disaster, Thus, the dams were constructed for the protection of the Mines as also for the safety of the labours. In that case the following facts were established:

(i) there was new construction viz. that of the dams;

(ii) the purpose of such construction was to prevent recurrence of a disaster which had occurred earlier: and,

(iii) the ultimate object was the protection of the Mines as also the safety of the labours.

In the instant case also the assessee was accorded permission from the Mining Department to extend the workings beneath and within 15 metres of the Nala, though certain conditions were laid down and; thus, (a) there was, admittedly, a new construction; (b) the purpose of the new construction was to prevent over- flooding of the Mines which had occurred earlier and (c) the ultimate object was the protection of Mines as also the safety of the labours.

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(1) 106 I.T.R. 592.

13. The learned counsel for the Revenue also relied upon the case of *C.I.T., West Bengal* vrs. *India Tabacoo Co.Ltd.* (1) In this case the assessee (India Tobacco Co.Ltd.), having acquired a piece of land constructed a Hospital thereon. At the time the Hospital was ready, the Employees' Insurance Scheme came into operation and the Government of Bihar required the Hospital in pursuance of this. Some negotiations thereafter took place between the assessee-company, the Government and the Workers' Union and eventually, a memorandum of settlement was arrived at. The assessee-company had gifted to the government of Bihar the hospital it had constructed together with the land by a deed of gift. Clause 8(d) of the settlement stipulated that the assessee should give a sum of Rs.50,000/- to the Government for the purpose of purchasing equipments for the hospital built by the assessee when it would be taken over by the Government. The company had two kinds of employees, those who were covered by the provisions of Employees' Insurance Scheme, which provides for hospital benefits and also employees who were not covered by the scheme. By making the payment of Rs.50,000/- the Employees of the assessee, who were not governed by the scheme, were entitled to the use of the hospital facilities.

The assessee claimed the amount of Rs.50,000/- as a deduction on the ground that the expenditure was incurred out of commercial expendiency. The appellate Tribunal held that the expenditure was an admissible deduction. On reference, the High Court held that the assessee-company was getting the advantage of having its workers treated at the Hospital

(1) 114 I.T.R. 182.

which was being established by the Government. The equipment to be purchased with the money given by the Company would enure for the benefit of the treatment of the workers of the Company, though the expenditure in question was incurred for commercial purposes yet, at the same time, the assessee Company obtained an advantage or a benefit or a privilege and that benefit or the privilege or the advantage was that the workers, who were not governed by the State Insurance Scheme were entitled to the benefit of treatment at the Hospital run by the Government at no rate or perhaps at concessional rate. On the basis of that benefit, the workers Union also agreed to the settlement. If annual sums had to be spent for meeting the workers expenses for treatment at the hospital, the same would have merited deductions as revenue expenditure. If this was only aspect to the matter, then it might have been possible to hold that the expenditure incurred was a revenue expenditure. But, the High Court held that *the Company not only incurred the expenditure for getting rid of the obligation to make recurring annual expenses for meeting the treatment of its workers but also for getting and advantage or a privilege which, indeed, could be considered to be an asset for an indefinite period to have its workers treated at no expense or at concessional expense. The High Court further held that this was an asset or a benefit and as it enured for a considerable length of time or for an indefinite time, it could certainly be considered to be an asset or advantage of enduring benefit, enduring in the sense in which fixed capital in modern times endures.* It was further held that by making this one lump sum payment, the Company-assessee not only got rid of a liability to make recurring annual payments for the treatments of its workers who were not covered by

the State Insurance Scheme at the Hospital, also obtained this advantage or privilege for an indefinite period. The High Court, ultimately, held that, in the facts of the case, the expenditure in question was capital in character not admissible for deduction.

In the instant case also the expenses incurred were once for all securing an advantage of an enduring nature and, in fact, in the assessment years in question raisings of Mica were increased enormously. Thus, in my opinion, the facts of the case of *C.I.T., West Bengal* vrs. *India Tobacco Co.Ltd.* (supra) are also at par with the facts of the instant case.

14. The learned counsel for the revenue also relied upon the case of *Raza Buland Sugar Co.Ltd.*v. *Commissioner of Income-tax, Delhi Central* (1). In this case one of the questions for the opinion of the High Court was of a similar nature. In this case the State Government introduced a scheme for construction of Workmen's Staff Quarters. Under it, the Company was to lease out its land near its factory to the U.P.Housing Board. The Government was to contribute some amount for construction of Staff Quarters for the factory and the balance by the factory's owners and contractors. This staff quarters were to remain the property of U.P.Sugar and Power Alcohol Housing Board and they were to be leased out to the factory owners on the agreed terms and conditions. The assessee gave out some land and paid Rs.32,004/- towards cost of construction of the quarters and secured the quarters for the exclusive use by its workers for an unlimited time.

The assessee claimed that it had no title to the

(1) 122 I.T.R. 817.

quarters and that the expenditure was revenue in nature and was allowable as such.

The Tribunal repelled the plea of the assessee and held that there was no getting away from the fact that the assessee company derived an advantage of an enduring character, in that it secured quarters for exclusive user by its workers for an unlimited period of time. The Tribunal further held that the circumstance that the assessee was compelled to agree to the scheme was irrelevant in so far as the nature of the expense was concerned.

The High Court held that (i) the workmen's quarters were freshly built; (ii) though the Company was not the owner of the quarters, it was entitled to its exclusive user for an unlimited period of time; and (iii) the assessee, therefore, secured an asset of an enduring nature by expending Rs.32,004/- and the expenditure was capital in nature.

Thus, as it would appear from above, the facts in the case of Raza Buland Sugar Co.Ltd.(supra) were also at par with the facts of the instant case.

15. On the other hand the learned counsel for the assessee conceded that the line that divides revenue expenditure from capital expenditure is very thin, yet the learned counsel for the assessee submitted that the expenses incurred by the assessee were only operational expenses and they did not bring into existence any asset or advantage of enduring benefit to the assessee. The learned counsel for the assessee submitted that the expenditure incurred was basically an expenditure for working the Mines in a better manner and hence the expenses had to be allowed as revenue expenditure and in support of his submissions he relied

upon a Supreme Court case in the case of *Commissioner of Income-tax, Madrass v. Ashok Leyland Ltd.* (1) In this case the assessee company, which was originally importing and assembling motor cars parts, etc.,manufactured by Austin of England, had appointed C.B.Ltd. in 1948 as its managing agents for a period of 14 years. In 1952 the Government of India referred the question of establishing an automobile industry in India to the Tariff Commission. The assessee-company submitted a comprehensive scheme for the manufacture of Leyland trucks and participated in the proceedings before the Commission. The Government instructed the assessee to take up the manufacture of Leyland commercial vehicles and in 1954, the company ceased to manufacture Austin cars in view of the Government's decision. At a meeting held on January 24, 1955, it was suggested by the Minister that the company invite Leylands to provide part of the capital and raise the remaining capital in India and assured that the Government would arrange for the required capital in India but that such a liability would be accepted only if the managing agency was abolished. The directors of the company, having already taken steps to terminate the services of the managing agents, by means of an agreement dated January 29, 1955, terminated the managing agency on payment of compensation of Rs.2,50,000/-.

The assessee-company claimed deduction of that amount in computing its profits as revenue expenditure. The Appellate Tribunal found that, in view of the change in its business activity, the continuance of the managing agents became superfluous and that the company

(1) 86 I.T.R. 549.

terminated their services on business considerations.

It was held that the compensation paid for termination of the services of the managing agents was a payment made with a view to save business expenditure in the accounting period as well as a few subsequent years; was not made for acquiring any enduring benefit or income-yielding asset. The expenditure was of a revenue nature and was an allowable deduction in computing the profits of the assessee-company.

16. In my opinion, the facts in the case of Commissioner of *Income-tax, Madras* v. *Ashok Leyland Ltd.* (supra) are distinguishable. On the particular facts of that case, the Supreme Court held that the expenditure was of a revenue nature.

In my opinion, I hold that the facts of the instant case do not stand at par with the facts in the case of *C.I.T.,Madras* v. *Ashok Leyland Ltd.* (supra) and thus this case (86 I.T.R. 549) does not help the assessee.

17. The learned counsel for the assessee then relied upon the case of *Palani Andavar Mills Ltd.*v. *C.I.T.,Madras* (1) In this case the assessee expended a sum of Rs.12,039/- being a part of the total amount spent on the construction of an Elementary School on the land belonging to the Employees Housing Co-operative Society, the balance amount for the construction being met by the Society. On the completion of the building it was handed over to the

(1) 110 I.T.R. 742.

Municipality to be run as school for the benefit of the children of the employees of the assessee. This amount was transferred to Labour and Welfare Account during the close of the year.

The departmental authorities and the Tribunal treated this sum as a capital expenditure.

The High Court, on reference, held that the school building was from its very inception not intended to be an asset of the company but was to be a part of the welfare scheme for the educational facilities to the children of the employees of the assessee and hence the amount in question was a revenue expenditure.

17A. A mere look to the facts of that case shows

n that the case is clearly distinguishable and I hold that this case, too, does not help the assessee in the instant case.

18. The learned counsel for the assessee then relied upon the case of *C.I.T. (Central), Madras*, v. *Dasa Prakash* (1).

In this case the claim of the assessee, a firm carrying on the business of running a Hotel, for deduction of an expenditure of Rs.37,390/- incurred by it in providing decorated mirrors, plaster - moulded roof, ply-wood panels, etc., in respect of the hotel premises during the previous year was negatived by the Income-tax Officer in the view that the expenditure could not be said to be in the nature of current repairs

(1) 114 I T.R. 210.

to the building as it had brought into existence an asset of an enduring nature and hence it was of a capital nature. The disallowance was confirmed by the Appellate Assistant Commissioner. The Tribunal, however, held that the expenditure was incurred wholly for the purpose of business and was allowable as a deduction under section 37.

On reference to the High Court, at the instance of the department, the High Court held that some of the items in question were in the nature of petty replacement of items which already existed and could not be taken as capital expenditure at all. It further held that other items of expenditure were incurred with a view to beautify the premises and obviously with a view to keep the place fit for the purpose for which persons assembled in the place, namely, for taking food and other edibles; as, without the proper admosphere, it would not be possible to attract the necessary consumers for running the hotel business carried on by the assessee. The High Court further held that the expenses could not be said to be of an enduring nature as the items for which they were used would be of no use with reference to any other place and they could not also be removed and used. They were just fixed in the walls so that they would present an inviting appearance to the customers assembled there. Thus, on the facts of the case, the High Court held that the Tribunal was right in its conclusion that the expenses were allowable as a deduction under section 37 of the Act.

In my opinion, the facts of this case are clearly distinguishable and this case, too, does not help the assessee in the instant case.

19. Thus, I hold that on the facts of the instant case, the cases relied upon by the learned counsel for the assessee do not support the submissions advanced on behalf of the assessee.

20. The Tribunal in the instant case while holding the expenses as revenue expenditure relied upon the case of *C.I.T.* v. *Kirkend Coal Co.* (1) which was approved by the Supreme Court in 77 I.T.R. 530. I am afraid, the Tribunal, in the instant case, wrongly relied upon the case of *C.I.T.* v. *Kirkend Coal Co.* (supra). There the question arose whether the amounts spent by the assessee carrying on the business of coal mining for stowing operation was allowable as business expenditure. It was found as a fact that stowing was an operation carried out in the process of extraction of coal and unless the same was carried out the extraction of coal was not possible irrespective of whether de- pillaring had been done or not. In such a situation it was held that the expenditure incurred for stowing operations was a revenue expenditure. The facts of the present case are not as were in the case of *C.I.T.* v. *Kirkend Coal Co.* (supra).

21. In view of the synthesis of judicial principles attempted by the Full Bench of the Lahore High Court in the case of *Benarsidas Jagannath* (supra) - Para 11 above) which was duly approved by the Supreme Court in the case of Assam Bengal Cement Co.Ltd. (supra - para 11 above) and also in view of the principles enunciated in the cases reported in 106 I.T.R. 592, 114 I.T.R. 182 and 122 I.T.R. 817 (referred in paras 12,13 and 14 respectively); I hold that, in the facts

(1) 60 I.T.R. 537.

and circumstances of the present case, the expenses were incurred once for all for securing the advantage of an enduring nature and I am of the opinion that the expenses incurred in the instant case were in the nature of capital expenditure and not revenue expenditure and I further hold that, in the facts and circumstances of the present case, the Tribunal was not correct in holding that the amounts of Rs.1,63,735/- and Rs.2,42,216/- incurred by the assessee were expenses of revenue nature and were allowable in the assessment years 1968-69 and 1969-70 respectively.

22. Accordingly, I answer the question referred at the instance of the revenue in the negative and in favour of the revenue.

Each party will pay and bear its own costs.

(Lines have been underlined by me for emphasis.)

Uday Sinha, J. I agree.

R.D. *Question answered.*

APPELLATE CRIMINAL

Before Ram Naresh Thakur and Lala Pingla Nath Shahdeo, JJ.*

1987.

March,5.

*Yogendra Rajbhar.***

v.

The State of Bihar.

Criminal Trial --- *exculpatory Statement --- effect of --- Suspicion --- whether to take the place of proof --- conviction, when to be maintained.*

Held, that an exculpatory statement made by an accused cannot be used as confession in legal sense and therefore, it cannot be used against the accused as his confession.

Held, further that a suspicion, howsoever, strong cannot take the place of proof. One has to travel up to the point of proof for conclusion in a Criminal

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*Sitting at Ranchi

**Criminal Appeal No.6 of 1985 (R) with Criminal Appeal No.17 of 1985 (R). Against the decision of Bhagwan Prasad, 3rd Additional Sessions Judge, Dhanbad, dated 4.12.1984.

Salim Mian - Appellant in Cr.App.No. 17/85 (R)

trial. Untill and unless, the guilt is proved beyond all doubts, conviction cannot be maintained.

Appeal by the accused.

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

M/s R.K.Mahto and *Shekhar Prasad Sinha* for the Appellants.

Mr. P.P.N.Roy for the State.

R.N.THAKUR & L.P.N.SHAHDEO,JJ., -- Both these appeals arise out of the same judgment. Therefore, with the consent of the parties and for their convenience they have been heard together and are being disposed of by this common judgment.

2. Both these appellants have been convicted under section 302/34 of the Indian Penal Code and each of them has been sentenced to undergo rigorous imprisonment for life. They have further been convicted under section 201 of the Indian Penal Code, but no separate sentence has been awarded under this count.

3. The prosecution case as told by the Informant (P.W.1) is that about 13 days before the 19th of May, 1982, this appellant Salim and one Nebu Lal came to her house in the evening at about 8 P.M. and called out her son, namely, Ratan Rewani. She said that Ratan Rewani was not in the house. Salim then said that he had given Rs.10/- to Ratan and one water pot to bring toddy and thereafter both of them went away. Ratan did not return to his house. Next morning she enquired from Salim about her son on which Salim said that her son had gone to his father-in-law's house.

Hearing this she kept mum. Some days after the wife of Ratan came from her father's house and then she learnt from her that Ratan had not gone to his Sasural. Thereafter, she (Informant) started searching her son. 13 days after, she went to the Police Station and lodged a case. After four days of lodging the case she came to learn that the dead body of Ratan was recovered. Thereafter she went to the bank of the river and found the dead body of her son, Ratan. There she identified the dead body to be of Ratan because there was one chain of steel in his neck, which he was wearing in his neck when he had left his house. P.W.8 was attached to Jogata Police Station on 19.5.1982 and he recorded the statement of P.W.1 on the direction of the Officer-in-charge, which is Ext.3, on the basis of which a regular case was instituted and on being directed by the Officer- in-charge, he took up investigation of the case. In course of investigation, appellant Yogendra Rajbhar was arrested and on query appellant Yogendra Rajbhar is alleged to have confessed his guilt and further said that he had concealed the dead body by covering with stones in Bhela tarh Jangal. Appellant Yogendra Rajbhar took him to that place and on removal of stone pieces by him, the dead body was recovered. P.W.9 photographed the dead body. The dead body was of a male. This Bhela tarh is by the side of Katari river. One blue shirt and a paint of nila colour were in the dead body and there was a chain of steel in the neck. Appellant Yogendra Rajbhar also made statement before P.W.10, which is Ext.7.

4. After completion of investigation, charge sheet was submitted against these appellants and others.

5. In course of trial 11 witnesses were examined

on behalf of the prosecution. The appellants denied the allegations and pleaded their innocence. Appellant Yogendra Rajbhar denied that the dead body was recovered at his instance.

6. At the outset it must be stated that the entire case rests on circumstantial evidence. Besides the circumstantial evidence, the learned trying court has also relied upon the confession of appellant Yogendra Rajbhar and on the discovery of dead body at the instance of the appellant Yogendra.

7. Learned counsel appearing for the appellants has strenuously argued that no circumstance has been proved beyond all doubts to lead to the only one conclusion that it was these appellants who were responsible for the death of the deceased. It has also been disputed that the recovered dead body was of Ratan. Learned counsel appearing for the appellants has also tried to show that the dead body was never recovered at the instance of appellant Yogendra Rajbhar. Lastly, it has been aruged that the statement contained in Ext.7, is not the voluntary statement of the appellant and it is not confession in the true legal sense.

8. I take up first Ext.7 to see whether it is a confession in the legal sense. If Ext.7 is read carefully the statement is found exculpatory. He has stated in Ext.7 that "Salim Puran and Nebulal Ratan Ko Mar Pit Kiya. Main Ratan Ko Nahin Mara". In earlier part of his statement he has said that other appellants committed sodomy on the deceased, but he himself did not do. He has simply stated that "Ham log bole ki Ratan se hi larki ka kam liya jai". Therefore, I find that it has rightly been argued by the learned counsel for the appellants that Ext-7 is exculpatory and not

inculpatory.

9. Learned counsel has also drawn our attention to the statement of P.W.10, who recorded Ext.7 that he did not thought it proper to tell appellant Yogendra Rajbhar that after his confession was recorded, he would not be handed over to the Police. Apart from this, as stated above, when Ext.7 is exculpatory, it cannot be used as confession in legal sense and, therefore, it cannot be used against the appellant Yogendra Rajbhar as his confession.

10. So far as recovery of the dead body at the instance of appellant Yogendra Rajbhar is concerned, there is the evidence of P.Ws. 1,3,4,5,6,8 and 9. P.W.1 is the Informant and mother of the deceased. She in para-4 of her evidence says that after four days of lodging the case she learnt that the dead body of her son was recovered and then she went to the river and found the dead body of her son lying there. Therefore, she does not say that the dead body was recovered at the instance of appellant Yogendra Rajbhar rather from her evidence, it is clear that the dead body had already been recovered before her arrival. Of couse in para-21 in cross-examination she has said that when the dead body was recovered Daroga jee was there, but still she did not say that it was recovered at the instance of appellant Yogendra Rajbhar. P.W.3 is another son of the Informant and one of the brothers of the deceased. In para-3, he has said that after five days of lodging the case he saw the dead body of his brother under stones on the bank of the river. In para-8 he says that he alongwith his mother (P.W.1) and his elder brother had gone to see the dead body of the deceased. In the last he says that his brother

and 2 to 4 other persons removed the stone pieces and then the dead body was recovered. P.W.4 is an inquest witness. He saw the police getting the dead body searched by appellant Yogendra Rajbhar. There was large number of persons there. In his presence, the dead body was recovered. In para-7 he says that he came to the bank of Katari river after arrival of the police. Then he further says that "jab hamlog pahunche to lash ka nikalana shuru huya". He also does not say that the dead body was recovered at the instance of this appellant Yogendra Rajbhar P.W.5 is another son of the Informant and brother of the deceased. When he heard that the dead body of Ratan had been recovered he along with his mother, his brother and others went to the bank of Katari river and there he found that this appellant Yogendra Rajbhar was removing stones, but his mother and brother do not support him on this point. Then in further cross-examination in para-10 he says that "Lash nikalne ke karib adha ghanta ke bad ham wahan per pahunche". P.W.6 is another inquest witness. He says in para-2 that "iske do tin din ke bad hala huya ki ek lash mili hai. Hala sunkar ham bhi katari nadi ke pas gaya wahan hamne ek lash dekha aur us lash ke samne Yogendra baitha huya tha". P.W.8 has said in para-3 that "Abhiyukt Yogendra Rajbhar to puchh tachh karne ke liye hamne thana per laya". At initial stage he does not say that Yogendra Rajbhar had already been arrested and he was in his custody. Of course in cross- examination he says that he had arrested Yogendra Rajbhar on 23.5.82 before the dead body was recovered. He further says in para-15 that when he came with Appellant Yogendra Rajbhar at the place where the dead body was burried, he called the photographer (P.W.9) and on his arrival the dead body was recovered. P.W.9, who is the photographer does

not support P.W.8 on this point. P.W.9 has said that the Daroga of Jogta Police Station had taken him to Shela tarh and there he took the photograph of the dead body. The photograph is material Exts.I, 1/1 and 1/2. In cross- examination he says that when he came to the bank of the river he saw the recovered dead body and he took the photograph of the said recovered dead body, which had already been recovered.

11. Thus considering the entire aforesaid evidence on the point of recovery I do not find that the prosecution evidence is consistent. Even the Informant does not say that it was this appellant Yogendra Rajbhar, who took out the dead body and it was recovered at his instance. From Ext.3, it will appear that the place of occurrence is at a distance of about 3 K.M. from the police station-Jogata. P.W.8, has said that he had arrested Yogendra Rajbhar on 23.5.82. In Chief at para-3 he says that he brought Yogendra Rajbhar at the Police Station for interrogation and on interrogation at the Police Station he confessed his guilt and thereafter this appellant Yogendra Rajbhar took him to the place where the dead body was found. The inquest report was prepared on 23.5.82 at 7.30 A.M. and, Ext.6, the seizure list, was also written at 7.30 A.M. on 23.5.82. Though it has not come in evidence the exact time as to when P.W.8 arrested Yogendra Rajbhar on 23.5.82, but the fact remains that according to Ext.4, the inquest report and Ext.6, the seizure list, the appellant Yogendra Rajbhar must have been arrested much earlier because from the evidence of P.W.8 itself it appears that after arrest he was taken to the Police Station and then again he was brought to the place of occurrence and thereafter recovery was made. All these things happened before 7.30 A.M.

on 23.5.82.

12. Taking into consideration all these facts, a suspicion arises against the evidence of P.W.8 that it was this appellant, who led to the recovery of the dead body.

13. Another evidence against this appellant Yogendra Rajbhar is of P.W.2. He is a shop keeper. He says that one night at 7-8 P.M. Ratan came to his shop and was taking tea, at that very time Yogendra Rajbhar came to his hotel and demanded two plates of meat. He (P.W.2) demanded the price thereof on which he (Yogendra Rajbhar) paid a note of Rs.20/- Yogendra Rajbhar had brought a katora in which he took the meat. Yogendra Rajbhar, thereafter handed over that Katora of meat to Ratan and thereafter Yogendra Rajbhar and Ratan left his hotel. But this fact is not mentioned in the First Information Report, though it was lodged after 13 days of the occurrence.

14. As regards appellant Salim Mian is concerned, there is the evidence of P.W.1 against him. Besides the evidence of P.W.1, his name is mentioned in the confession (Ext.7). As regards Ext.7, it has already been found that it is exculpatory. That being so, it cannot be used against this appellant Salim Mian. The evidence of P.W.1 is consistent on the point that this appellant along with Nebulal came to her house in search of the deceased, Ratan. Ratan had gone to the market at that time. Salim Mian said that "Ratan Ko das rupya aur lota daru lane ke liya diya tha." Saying this Salim Mian went to his house. This witness had further said that when Ratan did not return, on her query, this appellant Salim Mian had stated to her that Ratan had gone to his Sasural, but this fact that Salim Main told her that Ratan had gone to his

Sasural is not mentioned in the Fardbeyan. Except the aforesaid statement, there is no other statement against this appellant Salim Mian. In my opinion, this statement left to itself, does not exclusively prove the guilt of the appellants.

15. For the reasons state above, I find the circumstances and the evidence do not lead to only one conclusion that it were these appellants, who committed murder of the deceased. A suspicion arises, but suspicion, however, strong cannot take the place of proof. One has to travel up to the point of proof for conclusion in a criminal trial. Until and unless, the guilt is proved beyond all doubts, conviction cannot be maintained.

16. Accordingly, both these appeals are allowed and the order of conviction and sentence passed against these appellants is set aside, and they are discharged from their bail bonds.

M.K.C. *Appeals allowed.*

TAX CASE

Before Uday Sinha and Ashwini Kumar Sinha, JJ.

1987.

March,30.

*Commissioner of Income-tax Bihar-II, Patna.**

v.

M/s Pareck Brothers, Main Road, Ranchi.

Income-tax --- gross profit, computation of --- amount of Central and State sales-tax debited in the profit and loss account, whether has to be deducted.

Where the gross profits in the trading account were artificially inflated by the assessee by debiting the Central and State sales- tax in the profit and loss account;

Held, that to find out the real gross profit, the actual amount of Central and State sales-tax debited in the profit and loss account both from the turnover as well as gross profit shown has to be deducted the application of gross profit on the amount of sales-tax collections or the sales-tax paid, in law, is not correct

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*Taxation Case Nos.10,11 & 12 of 1978. Ref: Statement of case drawn by Income-tax Appellate Tribunal,'A' Bench, Patna in the matter of assessment of Income-tax on M/s Pareck Brothers, Main Road, Ranchi for assessment years 1972-73 to 1974-75.

and the same should be taken as income or expenditure.

Held, further, that, in law, the rate of net sales should be after excluding the amount of sales-tax and there is no justification, in law, for exclusion of the sales-tax amount as part of the profits of the business. The gross profit, in law, is not cost plus profit plus sales-tax but cost plus profit alone.

Case laws discussed.

Statement of case under section 256(1) of the Income-tax Act, 1961.

The facts of the cases material to this report are set out in the judgment of Ashwini Kumar Sinha, J.

M/s B.P.Rajgarhia, Sr.S.C.,and *S.K. Sharan,* Jr.S.C. for the petitioner.

M/s K.N.Jain and *M.Nath* for the opposite party.

ASHWINI KUMAR SINHA,J. -- These three references are under section 258(2) of the Income-tax Act, 1961. The assessment years in question are 1972-73, 1973-74 and 1974-75.

2. This Court, by its separate orders dated 19-1-1979 directed the Income-tax Appellate Tribunal,'A' Bench, Patna, to state the case and refer the following questions of law for the opinion of this Court.

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in dismissing the department's appeal, without dealing with the points on merit, on the basis of the order

passed in the assessee's appeal, when they were not being heard together?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the gross profit rate should be applied in gross turnover, including the amount of sales-tax?"

3. Under the directions of this Court, the Tribunal stated a consolidated case for the assessment years in question.

4. As the questions are common for the assessment years in question, the present three references have been heard together and are being disposed of by a common judgment.

5. As it appears from the statement of case as also from the orders of the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal, the assessee is a firm dealing in Hosiery goods and ready made garments and derives income therefrom. The assessee has not maintained any day to day stock account. He has not furnished any distinctive number either of purchases or sales and hence the average margin of profit earned by the assessee was not possible to be checked. *The assessee debited the sales-tax payment in the profit and loss account. Sales-tax received from the customers were included in the sales price.*

The assessee declared the total turnover of Rs.11,43,939/-, Rs.9,65,647/- and Rs.10,68,682/- for the assessment years 1972- 73, 1973-74 and 1974-75, respectively, for which gross profits were declared at Rs.1,72,680/-, Rs.1,65,969/- and Rs.1,91,949/-, which worked out to 15%, 17.2% and 17.9% .

6. *The Income-tax Officer* adjusted the gross profit and found that the gross profit shown by the assessee in these years were low. He also found that the other dealers have declared better profit on sale of ready made garments. He further *found that the sales-tax received from the customers was included in the sale price, but the sales-tax paid was not debited in the trading account.* He, therefore, considered that the sales-tax paid by the assessee should be debited in the trading account instead of in profit and loss account. As the accounts of the assessee were not amenable to check in absence of day to day stock register and distinctive number of purchases and sales the Income-tax Officer held that the provision of the proviso to section 145(1) of the Act was applicable in the instant case. The Income-tax Officer, accordingly, estimated the profit at 16% on net sales in each year and took the additional profit of Rs.78,033/-, Rs.43,493/- and Rs.48,200/-.

The orders of the Income-tax Officer have been marked Annexures A to A-3 to the statement of case.

7. Being aggrieved by the orders of the Income-tax Officer, the assessee went in appeal before the Appellate Assistant Commissioner. The assessee disputed not only the additions made by the Income-tax Officer in the assessment years in question but also disputed the application of proviso to section 145(1) of the Income-tax Act (hereinafter referred to as'the Act').

The Appellate Assistant Commissioner, after considering the case of the assessee for the assessment year 1971-72 and the margin of profit declared in the assessment years in question, by a consolidation order *held that the proviso the section 145(1) of the*

Act was applicable. However, the Appellate Assistant Commissioner reduced the adoption of gross profit to 18% for the assessment year 1972-73, but adopted the gross profit rate of 20% for the assessment years 1973-74 and 1974-75. He, accordingly, allowed a relief of Rs.44,804/-, Rs.27,160/- and Rs.32,188/-.

The consolidated order of the Appellate Assistant Commissioner has been marked as Annexure-B to the statement of case.

8. Aggrieved by the order of the Appellate Assistant Commissioner, the assessee as well as the department both filed appeals before the Tribunal.

It appears that the appeal of the assessee was disposed of first by the Tribunal. It further appears that the assessee's appeal for the previous assessment year 1971-72 was also pending before the Tribunal and the Tribunal disposed of the assessee's appeal first covering the assessment years 1971-72 to 1974-75. The Tribunal in assessee's appeal held that the profit for the assessment year 1972-73 should be worked out by applying the rate of 16%; whereas, the profit for the assessment years 1973-74 and 1974-75 should be worked out by adopting the rate of 19%.

This was against the rate of 18% applied by the Appellate Assistant Commissioner for the year 1972-73 and 20% in the years 1973-74 and 1974-75.

The order of the Tribunal, disposing of the assessee's appeal has been marked as Annexure-D to the statement of case.

9. The department, in its appeals, objected to

the appellate Assistant Commissioner's order not sustaining the entire additions of Rs.78,033/-, Rs.43,493/- and Rs.48,200/- made by the Income-tax Officer in the assessment years in question.

As the Tribunal reduced the addition maintained by the Appellate Assistant Commissioner, the Tribunal dismissed the departmental appeals.

The order of the Tribunal dismissing the departmental appeals has been marked as Annexure-C to the statement of case.

10. Thereafter, the department moved the Tribunal for reference under section 256(1) of the Act for the assessment years in question.

The applications under section 256(1) of the Act have been marked Annexures F/1 to F/3 to the statement of case.

The Tribunal, by a consolidated order rejected the department's applications filed under section 256(1) of the Act.

The order of the Tribunal refusing reference has been marked as Annexure-E to the statement of case.

11. Thereafter, the department moved this Court under section 256(2) of the Act for the assessment years in question and, as already stated above, this Court directed the Tribunal to state the case to this Court for its opinion on the questions referred to above.

12. The learned senior standing counsel for the department contended that the amount realised as sales-tax by the assessee firms part of its trading

or business receipts and *further contended that the gross profit was not cost + Profit + Sales-tax but cost + profit alone.*'

The learned counsel for the department submitted that in order to find out the real gross profit; sales-tax amount has to be deducted before the submission of return and that the sales-tax amount has to be excluded in order to find out the real gross profit.

13. On the other hand, the learned counsel for the assessee submitted that the assessee committed no illegality in debiting the sales-tax amount in the profit and loss account. The learned counsel further submitted that the assessee having not collected the sales-tax amount separately from the customers on sales, the entire amount (inclusive of the sales-tax amount) must be taken as the gross profit.

14. The learned senior standing counsel for the department, in order to support his submission, relied upon a Supreme Court case in the case of *Sinclair Murray & Co.(P) Ltd.* v. *C.I.T., Calcutta* (1) and another Supreme Court case in the case of *Chowringhee Sales Bureau (P) Ltd.* v. *C.I.T., West Bengal* (2).

In the case of *Sinclair Murray & Co.(P) Ltd.* v. *C.I.T., Calcutta* (supra) the ratio decided in the earlier Supreme Court case in the case of *Chowringhee Sales Bureau (P) Ltd.* v. *C.I.T., West Bengal* (supra) was accepted followed.

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(1) 97 I.T.R. 615.

(2) 87 I.T.R. 542.

(2) (1914) Punj.R. 23 F B.

In the case of *Chowringhee Sales Bureau (P) Ltd.* v. *C.I.T., West Bengal* (supra), the appellant, a private company dealing in furniture, also acted as an auctioneer. In respect of the Sales effected by it as auctioneer, the appellant realised during the relevant period, in addition to the commission, Rs.32,986/- as sales tax. This amount was credited separately in its account books under the head "sales tax collection account". The appellant did not pay the amount of sales tax to the actual owner of the goods. Nor did it deposit the amount realised by it as sales tax in the State Exchequer. Nor refunded it to the persons from whom it had been collected. It took the position that the statutory provision creating that liability upon it was not valid. In the cash memos issued by the appellant to the purchasers in the auction sales the appellant was shown as the seller.

The Income-tax Officer held that the sum of Rs.32,986/- realised as sales tax by the appellant was part of the appellant's income of the same nature as was the commission received by it on the auction sales and the amount was added to the appellants income. The appellant went in appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner decided the case in favour of the appellant. The department thereafter went before the Tribunal and the Tribunal affirmed the A.A.C's order. However, the Tribunal referred the following question to the (Calcutta) High Court for its opinion:

"Whether, on the facts and in the circumstances of the case, the sum of Rs.32,986/- had been validly excluded from the assessee's business income for the relevant assessment year?"

15. The High Court answered the question against

the assessee- appellant.

16. Thereafter special leave was granted and the matter went to the Supreme Court. *The Supreme Court held that the sum of Rs.32,986/- realised as sales-tax by the appellant in its character as an auctioneer formed part of its trading or business receipts.* The Supreme Court further held that the fact that the appellant credited the amount received as sales tax under the head "sales tax collection account" did not make any material difference, and it was further observed that it was the true nature and quality of the receipt and not the head under which it was entered in the account books as would prove decisive. The Supreme Court further held that if a receipt was a trading receipt, the fact that it was not so shown in the account books of the assessee would not prevent the assessing authority from treating it as trading receipt.

In my opinion, the facts of this case are at par with the facts of the instant case. In the instant case, as already stated aboved, the assessee did not maintain any day to day stock account. He did not furnish any distinctive number either of purchases or sales and debited the sales tax payment in the profit and loss account and the sales-tax received from the customers were included in the sales-tax.

Thus, on the ratio decided in the case of Chowringhee Sales Bureau P.Ltd.(supra), the amount realised as sales-tax by the assessee in the present case, in its character, formed part of trading or business receipt. I hold that this Supreme Court case fully supports the submission advanced by the learned senior standing counsel for the department.

17. In the case of *Sinclair Murray & Co.(P) Ltd.* v. *C.I.T., Calcutta* (supra), the appellant company, with its head office at Calcutta, during the assessment year in question, sold jute in Orissa to certain mills for being used in Andhra Pradesh and charged sales-tax under a separate head in the bill as "Sales tax: Buyer's account.....to be paid to the Orissa Government". The sales tax was not paid to the Orissa Government on the ground that the sales were inter-State sales. The assessee contended before the Income-tax Officer that the sales tax realised from the purchaser did not form part of the sale price of the jute and as such did not constitute receipt in jute business. The I.T.O. rejected the assessee's contention, who held that the sales tax formed part of the consideration for the sales and, therefore, the accumulation on that account represented the assessee's income. The Income-tax Officer, accordingly, added the sales-tax amount to the assessee's total income. On appeal by the assessee, the Appellate Assistant Commissioner found that a part of the sales-tax amount realised had been paid to the Orissa Government and thus reduced the assessee's total income. However, the contention of the assessee to the effect that the sales-tax realised was not part of the taxable receipt of the assessee was rejected. The assessee then went before the Tribunal and submitted that the purchaser paid the sales tax and the price of goods to the assessee on under- standing that if ultimately no sales-tax was exigible on those sales, the amount collected as sales tax would be refunded to the purchaser. The amount collected as sales tax, according to the assessee company, could not belong to it but belong to the purchaser and as such could not be treated as income of the assessee. The Tribunal held that where a dealer collects sales-tax under the provisions of section 9(3) of the Orissa

Sales-tax Act, the amount of the tax does not form part of the sale price and the dealer does not acquire any beneficial interest in that amount. Accordingly, the Tribunal held that if at the time of the collection, the amount was collected as sales tax, the subsequent failure of the assessee to deposit the amount in the Orissa Treasury could not transform the character of that amount. The Tribunal consequently came to the conclusion that the Appellate Assistant Commissioner had erred in treating Rs.7,14,398/- as part of the total income of the assessee.

However, the Tribunal referred the question for the High Court's opinion. The question referred was as follows:-

"Whether on the facts and in the circumstances of the case, the sum of Rs.7,14,398/- was liable to be included in the total income of the assessee under the Indian Income-tax Act, 1922 ?"

The High Court held that if tax, which is validly exigible, is realised by a trader from his customer, and is then utilised in his business, the tax so realised cannot but form part of the sale price. *According to the High Court, the tax would be included in the trading receipt of the dealer and would become part of his income as the money realised from the purchaser on account of tax was employed by the dealer for the purpose of making profit and was not separated from the price simpliciter.*

18. The High Court in this context referred to the fact that the assessee did not earmark the amount realised as sales tax and did not put it in a different account or deposit it with the Government. It was further found that the assessee had treated the amount

of sales tax as his own money.

Certificate having been granted, the matter went before the Supreme Court. *The Supreme Court, as already* stated above, relied upon its earlier judgment in the case of *Chowringhee Sales Bureau (P) Ltd.* (supra) and *held that the amount collected by the appellant as sales tax constituted its trading receipt and had to be included in its total income.* It further held that the fact that the dealer was compelled to deposit the amount of sales tax in the State Exchequer did not prevent the applicability of the principles laid down by the Supreme Court in its earlier case, in the case of *Chowringhee Sales Bureau (P) Ltd.* (supra).

In my opinion, the facts of this case also are at par with the facts of the instant case and I hold that the principles decided in this case by the Supreme Court also supports the submission advanced by the learned senior standing counsel for the department.

19. The learned counsel for the assessee, on the other hand, in support of his submission (mentioned in paragraph 13 above), relied upon a Supreme Court case in the case of *Kedarnath Jute Manufacturing Co.Ltd.* v. *C.I.T. (Central), Calcutta* (1) At the very out set I wish to note that the principle decided in this case supports the submission advanced by the learned senior standing counsel for the department and is against the assessee. In this case the assessee was a public Ltd. company doing the business of jute and manufacturing of jute goods. The method of accounting followed by the assessee was the mercantile system. The assessee claimed a deduction of Rs.1,49,776/- on account of sales tax determined

(1) 82 I.T.R. 363.

to be payable on the sales made by the assessee during the period in question.

20. A proceeding relating to assessment of sales tax was pending and before any final decision in that proceeding was taken, the Income-tax Officer completed the assessment. According to the Income-tax Officer, the assessee was not entitled to claim deduction of the aforesaid amount of sales tax inasmuch as it had denied its liability to pay that amount and had made no provision in its books with regard to the payment of that amount. The Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. The Tribunal also dismissed the appeal of the assessee. However, the Tribunal referred the following question of law for the opinion of the High Court:-

"Whether on the facts and in the circumstances of the case, the amount of Rs.1,49,776/-, which was claimed by the assessee as a deduction on account of sales tax was deductable as a business expenses?"

The High Court opined the unpaid and disputed sales tax liability could not form the basis of a claim for deduction for the purposes of income tax. It held that for the purpose of claiming a deduction under section 10(2)(xv) of the Income-tax Act, 1922, mere legal liability was not enough. There had to be an expenditure in the first place and it must be laid out or expended wholly and exclusively for the purpose of such business. The High Court further held that unpaid and disputed sales tax could not be validly deducted in the computation of business income even under section 10(1) of the Act.

21. By way of special leave, the matter went before the Supreme Court and the Supreme Court

held:

"that the moment a dealer made either purchases or sales which were subject to sales tax, the obligation to pay the tax arose. Although that liability could not be enforced till quantification was effected by assessment proceedings, the liability for the payment of tax was independent of the assessment. The assessee, which followed the mercantile system of accounting, was entitled to deduct from the profits and gains of its business liability to sales tax which arose on sales made by it during the relevant previous year. The assessee was entitled to the deduction of the sum of Rs.1,49,776/- being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. That liability did not cease to be a liability because the assessee had taken proceedings before higher authorities for getting it reduced or wiped out so long as the contention of the assessee did not prevail. Further, the fact that the assessee had failed to debit the liability in its books of account did not debar it from claiming the sum as a deduction either under section 10(1) or under section 10(2)(xv).

Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and note the view which the assessee might take of his rights; nor can the existence or absence of entries in his books of account be decisive or condusive in the matter."

22. Thus, it would appear that this case instead of supporting the submission advanced by the learned counsel for the assessee fully supports the submission advanced on behalf of the department.

23. There is no element of profit on the amount of sales-tax and hence the application of gross profit on the amount of sales-tax does not arise; rather the surplus or deficit of the sales tax collection and sales-tax paid should be taken as income or expenditure separately. *The sales-tax paid or collected cannot form part of the gross profit, as the same is collected as the agent of the Government.*

24. *There is no justification, in law, for exclusion of the sales-tax amount as part of the profit of the business.* As would appear from the facts of the instant case, the gross profits in the trading account were artificially inflated by debiting the Central and State sales-tax in the profit and loss account. Hence, to find out the real gross profit, the actual amount of Central and State sales-tax debited in the profit and loss account both from the turnover as well as gross profit shown has to be deducted. *The application of gross profit on the amount of sales-tax collections or the sales tax paid, in law, is not correct and the same should be taken as income or expenditure.*

I, on the principle laid down by the *Supreme Court in the case of Sinclair Murray & Co.(P) Ltd.*(supra) and in the case of *Chowringhee Sales Bureau (P) Ltd.*(supra), hold that the sales-tax amount realised by the assessee formed part of its trading or business receipts.

I further hold that, in law, *the rate of net sales should be after excluding the amount of sales tax and there is no justification, in law, for exclusion of the sales-tax amount as part of the profits of the business. I further hold that the gross profit, in law, is not cost plus profit plus sales-tax but cost plus profit alone.*

25. As I have held above that the gross profit was not cost plus profit plus sales-tax but cost plus profit alone, I hold that *the sales tax amount has to be excluded in order to find out the real gross profit. In the instant case the sales-tax received from the customers was included in the sale price; hence to find out the real gross profit, the sales-tax amount has to be deducted and then what remains as the balance is the gross profit.*

Consequently it is also held that in order to show the real gross profit, the sales-tax amount has to be deducted before the submission of the return.

It would be relevant to quote Section 145(1) and its proviso of the Act:

> "145(1)Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed by the assessee:
>
> *Provided that in any case where the accounts are correct and complete to the satisfaction of the Income-tax Officer but the method employed is such that, in the opinion of the Income-tax Officer, the income cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."*

On the facts and in the circumstances of the case (as detailed above), I further hold that the proviso to Section 145(1) of the Act was applicable in the

instant case and the Income-tax Officer and A.A.C. both correctly applied the proviso to section 145(1) of the Act in the instant case.

26. For the aforesaid reasons, the question no.2 is answered in favour of the revenue and against the assessee. Thus I hold that, on the facts and in the circumstances of the case, the Tribunal was not justified in holding that the gross profit rate should be applied in gross turnover including the amount of sales-tax.

27. As the department's case and the assessee's case have been dealt with on merit while answering question no.2, question no.1 losses its significance and is not needed to be answered.

Parties shall bear their own costs.

28. Let a copy of this judgment be transmitted to the Assistant Registrar, Income-tax Appellate Tribunal, Patna, in terms of section 260 of the Income-tax Act, 1961.

(The lines in the judgment have been underlined by me for emphasis.)

Uday Sinha,J. I agree.

R.D. *Question answered.*

CIVIL WRIT JURISDICTION

Before N.P.Singh and B.P.Singh. JJ.*

1987.

April, 14.

*Bajrangbali Coke Briquetting Industries.***

v.

The State of Bihar & ors.

Central Sales Tax Act, 1956 (Act LXXIV of 1956), Sections 14 (ia) and 15(a) --- Scope and applicability of --- manufacturing briquettes by mixing coal dust with soil and molasses --- whether a product of coal or coke to be treated as goods specified in section 14(ia).

If the words "coal, including coke in all its forms", have to be given a wide meaning, then any product directly connected with coal or coke, has to be held as a product of coal, or coke, in whatever form it may be. In the instant case, when the respondants, have admitted that the petitioners are preparing briquettes for domestic consumption by mixing coal dust with soil and molasses, the briquettes so prepared have direct connection with coal or coke, especially when coal dust is the main ingredient of the product.

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*Sitting at Ranchi.

**Civil Writ Jurisdiction Case No.755 of 1986 (R). with Civil Writ Jurisdiction Case No.1277 of 1986 (R).

Bimal Briquetting Manufacturing Company Petitioner in C W.J C.No.1277/86(R)

Once the briquettes prepared by the petitioners are held to be a form of coke then they are entitled to the protection of section 15 of the Act.

Held, therefore, that in the instant cases the communication issued by the Deputy Commissioner, Commercial Taxes, on the basis of the decision taken by the State Government that briquettes prepared from the coal dust be treated as unspecified goods must be quashed and the coke briquettes prepared by mixing coal dust, soil and molasses should be treated as goods specified in the entry 14(ia), being a form of coke during the assessment proceeding.

Case laws reviewed.

Applications 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 N.P.Singh, J.

Messrs G.C.Bharuka, Prabhu Dayal Agarwala, Shankar Lal Agarwal, and *D.N.Choudhry* for the petitioner in C.W.J.C.No.755 of 1986(R)

Messrs B.P.Rajgharia and Prabhu Dayal Agarwala for the petitioner in C.W.J.C.No.1277 of 1986(R)

Mr.S.K.Chattopadhaya, G.P.I. and *Mr. Shekhar Sinha*, J.C.to G.P.I. for the State in C.W.J.C.No.755 of 1986(R).

Mr.S.B.Gadodia, S.C. and *Mr.M.S.Mittal*, J.C. to S.C. for the State in C.W.J.C.No.1277 of 1986(R)

N.P.SINGH, J. -- These writ applications have been

filed on behalf of different petitioners for quashing a communication dated 10.1.1986 issued by the deputy Commissioner, Commercial Taxes, Bihar to the different Assistant Commissioners, Commercial Taxes, to treat briquettes prepared from coal dust as "unspecified goods" over which sales tax payable was at the rate of 8 per cent.

2. It is the case of the petitioners that they manufacture coke briquettes meant for domestic consumption by mixing coal dust, soil and molsses by mechanical process. According to the petitioners, as the coke briquettes are prepared from coal dust, it will be deemed to be declared goods under section 14(ia) of the Central Sales Tax Act, 1956 (hereinafter referred to as'the Act') over which sales tax cannot exceed 4 per cent of the sale or purchase price thereof, in view of section 15(a) of the Act.

3. In the counter affidavit filed on behalf of the respondent- State, which has been sworn by the Commercial Tax Officer, the assertion made on behalf of the petitioners regarding the ingredients and process of manufacturing of the coke briquettes has not been danied. It has been stated:-

> "The deponent further states and submits that coal briquettes are not coal nor coke as these are manufactured machanically by mixing coal dust, soil and molasses."

As such it is not in dispute, in the present writ applications, that the petitioners are manufacturing briquettes by mixing coal dust with soil and molesses which is being used for domestic use. The controveray is only as to whether such briquettes can be held to be either coal or coke so as to be held to be declared goods within the meaning of section 14(ia)

of the Act.

4. The relevant part of section 14 of the Act is as follows:-

> "14. Certain goods to be of special importance in inter-State trade or commerce:-
>
> It is hereby declared that the following goods are of special importance in inter-State trade or commerce:-.....
>
> (ia) coal, including coke in all its forms, but excluding charcoal:
>
> Provided that during the period commencing on the 23rd day of February, 1967, and ending with the date of commencement of section 11 of the Central Sales Tax (Amendment) Act, 1972 (61 of 1972), this clause shall have effect subject to the modification that the words "but excluding charcoal" shall be omitted;"

Section 15 prescribes the restrictions and conditions in regard to tax on sales or purchase of declared goods within a State. The relevant part of section 15 is as follows:-

> "Every sales tax law of State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:-
>
> (a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed four per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;....."

5. Article 286(3) of the Constitution says:-

> "Any law of a State shall, in so far as it imposes, or authorises the imposition of,-
>
> (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce;
>
> be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may be law specify."

In view of the aforesaid mandate under the Constitution, any law to be made by the State imposing a tax on sale or purchase of goods declared by Parliament to be of special importance, in inter-State trade or commerce, has to be subject to such restrictions and conditions as specified by the Parliament; as for the present by sections 14 and 15 of the Act. This legal position has not been contested by the respondents. But, according to them, the briquettes prepared by the petitioners are neither coal nor coke in any form but a separate unspecified goods in respect of which the restrictions and conditions imposed by section 15 of the Act are not applicable.

6. In appears that from time to time controversy has arisen before different Courts in connection with restriction imposed by section 15 of the Act in respect of briquettes prepared from coal dust along with other ingredients like soil, molasses etc. as to whether they are coal or coke. In the case of *India Carbon Ltd.* v. *Supdt. of Taxes, Gauhati* (1) the Supreme Court had to consider the scope of expressions "coal, including coke in all its forms", occurring in section

14(ia), for the purpose of determination whether it shall include "petroleum coke". In that connection it was observed:-

"It may be that the clause mentions coal only and then declares that word shall include coke in all its forms. That shows that the object of the words which follow coal is to extend its meaning.In the writ petition it was stated in Para 2 that "coke is the refuse left after destructive distillation of coal, shale or oil and is called petroleum coke, Metallurgical coke or pitch coke, to indicate its source or origin; but all these are carbonacious material used for the same purpose and having same properties, more or less, main being - Mixed Carbon,-volatile Mattars,-Ash and - Moisture.....At any rate, the language employed is so wide viz. "Coke in all its forms" that petroleum coke which is a form of coke cannot possibly be excluded merely by reference to the word "Coal"."

In the case of *I.-T.Commr., A.P.* v. *Taj Mahal Hotel* (2) it was pointed out:-

"The word "includes" in often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the "statute". When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include."

7. If the words "coal, including coke in all its

(1) (1972) A.I.R. (S.C.) 154.

(2) (1972) A.I.R. (S.C.) 168.

forms," have to be given a wide meaning, then any product directly connected with coal or coke, has to be held as a product of coal or coke, in whatever form it may be. In the instant case, when the respondents have admitted that the petitioners are preparing briquettes for domestic consumption, by mixing coal dust with soil and molasses, the briquettes so prepared have direct connection with coal or coke, especially when coal dust is the main ingredient of the product. Even, in the impugned communication, the Deputy Commissioner has described the briquettes having been prepared from "coal dust". It is not in dispute that coal dust are nothing but particles of coal. Even coke is prepared in different forms from coal after undergoing a process of manufacture. It has been stated in'Chemical Engineers's Handbook', 3rd Edn.,st page 1566, which was also noticed by the Supreme Court in the aforesaid case in respect of coke:-

"Coke is a hard, dense, infusible carbonization residue that ranges from a dull gray-black to a silvery gray the latter is characteristic of good quality, high temperature coke. A coke of this type makes a ringing sound when dropped or struck with a hard object. It exhibits a porous celluler structure, which primarily depends upon the kind of coal used and the rate of heating during the carbonization process."

Encyclopaedia Britannica, Vol.5 (1973 Edition page 35) describes coke as follows:-

"Coke is a hard, cellular mass of carbonaceous material Coke is essentially a partially graphitized and cellular form of carbon. Coke is solid residue that remains after certain types of bituminous coals are heated to a high tamperature out of contact with air

until substantially all of the volatile constituents of the coal have been driven off. The residue consists principally of carbon..... "

8. In the case of *K.C. Industries, Moradabad* v. *Asst. Sales Tax Commr.*(1), a Bench of Allahabad High Court considered the question with which we are concerned in respect of coke briquettes "manufactured by machanically pressing the mixture of coal dust, multoni mitti and molsses" and came to the following conclusion:-

"The allegation that coke briquettes are meant for domestic kitchen consumption is not denied in the counter affidavit. The coke therefore manufactured by mechanical pressing is used for the same purpose as coke. The contents of coke briquettes namely moisture, volatile matters, ash and carbon are the same as in any other coke. The mere change in shape by machanical pressing does not change the commodity. It remains the same. In Webstar's Third New International Dictionary'Form' has been defined as,'the shape and structurs of something as distinguished from the material of which it is composed. Mere change of shape or structure in the raw material does not result in production of a new commodity. And even if it is so the entry is wide enough to cover in its fold commodities which remain the same despite change in shaps. Coke briquettes thus being only a preparation of coke dust are covered by the expression'coke in all its form'."

9. Again Madras High Court in the case of Deputy

(1) (1973) Tax.L.R 2129

Commr. of *Comml. Taxes* v. *Kuppuswami Chetty* (1) considered a product known as 'leco briquette' and pointed out that the process which goes to the manufacture or making of lignite briquette was the same as employed for the purpose of obtaining coke and as such the product was covered by section 14(ia) i.e. a form of coke. The Madhya Pradesh High Court, in the case of *Commr. of Sales Tax* v. *Punjab Coal & Kutti Farm* (2) considered whether "Nalidar Coal" should be deemed to be a coal. It was pointed out in that connection that as "Nalidar Coal" was made of coal dust mixed with some earth and water and used as fuel it has to be treated as coal. I may, however, point out that in this case reference was made to the judgment of the Supreme Court in the case of *Commissioner of Sales Tax* v. *Jaswant Singh Charan Singh* (3) where even charcoal was included in the term "coal" for purposes of determining the rate of sales tax. However, later by, amendment, charcoal has been excluded from section 14 (ia) of the Act.

10. In the case of *Haryana Briquettes Industries* v. *State of Haryana and another* (4) a Bench of Punjab and Haryana High Court considered whether "coal briquettes" are included in section 14(ia) of the Act, After pointing out that as coal briquettes were manufactured by mixing coal dust with molasses and are used for domestic kitchen consumption, it was

(1) (1980) 45 S.T.C. 308.

(2) (1981) 47 S.T.C. 351.

(3) (1967) 19 S.T.C. 469. (S.C.)

(4) (1987) 64 S.T.C. 330

held that they are covered by the definition as given in item (ia) of section 14 of the Act.

11. Giving the meaning of coal in the popular sense a Bench of Allahabad High Court, in the case of *D.C.Development Federation Ltd.* v. *Commr., Sales Tax* (1) held that coal dust is a coal as it has the same combustible property as coal and used for similar purpose. Similarly, in the case of *Binod Mills Co.Ltd.*v. *Commr. of Sales Tax, M.P.* (2) the view that coal ash is a coal was expressed.

12. The learned Standing Counsel resisting the claim of the petitioners urged that unless it is found that the briquettes prepared by the petitioners are either coal or coke in some form, it has to be held as goods not covered by section 14(ia) of the Act so as to attract the restrictions imposed by section 15 of the Act. He pointed out that by mixing different materials and minerals, during process of manufacture, an entirely new and separately identifiable product may come into existence. That product need not be held, necessarily as a part of one of the constituents used, as in this case coal dust. In support of his contention reference was made to the judgment of the Supreme Court in the case of *Hindustan Aluminium Corporation Ltd.* v. *State of U.P.*(1) (S.C.) In that case, the Supreme Court was construing an entry "all kinds of minerals, ores, metals, and alloys including sheets and circles used in the manufacture of brasswares and scraps

(1) (1970) 26 S.T.C. 464.

(2) (1972) 29 S.T.C. 413

....." In that connection it was pointed out that the expression "including" does not enlarge the meaning of the word "metal" and "must be understood in a conjunctive sense, as a substitute for "and". It was held that aluminium rolled products were distinct commercial items from aluminium ingots and billets. In my view, when the Supreme Court itself has interpreted the expression "coal, including coke in all its forms", occurring in section 14(ia) of the Act, in the case of *India Carbon Ltd.* v. *Supdt. of Taxes, Gauhati* (supra) and observed "that the object of the words which follow coal is to extend its meaning", it is not possible for this Court to give a restricted meaning to the expressions aforesaid and to hold that articles or products which are not coal or coke in its strict terms, shall not be included under section 14(ia) or they should be held to be a separate distinct product although the main constituent being either coal or coke in some form or the other.

13. Reference was made on behalf of the State to the judgment of the Supreme Court in the case of *Hajee Abdul Shukoor & Co.* v. *State of Madras* (2) where a question had arisen as to whether dressed or tanned hides and skins should be treated as one class of goods for the purpose of taxation or as two different classes of goods. It was held that if the statute treats both these kinds of hides and skins as differant commodities then the provisions providing for levy of tax on raw hides and skins at different

(1) (1981) 48 S.T.C. 411.

(2) (1964) 15 S.T.C. 719.

point even in the absence of any provision for the taxation of dressed hides and skins cannot be held to be discriminatory and invalid. The aforesaid judgment is not of much help to the State because in the concerned Statute the Hides and Skins had been treated as different commodities.

14. Reliance was also placed by the respondents on the case of *Healthways Dairy Products Co.* v. *Union of India* (1) where a controversy had arisen whether the expressions "condensed milk" in the notification shall also include "condensed skimmed milk" and it was held that "condensed skimmed milk" shall not be included in the "condensed milk". As the schedule which was under consideration in the aforesaid case had simply mentioned "condensed milk" Supreme Court held that it cannot include "condensed skimmed milk". In the instant case, when the framers of the Act have not only said coal including coke but have added further "in all its forms", then any product which can be held to be a form of coke has to be included under section 14(ia).

15. The Standing Counsel then referred to the judgment of the Supreme Court in the case of State of *Tamil Nadu* v. *Pyare Lal Malhotra* (2) The Supreme Court considered the scope of expression "iron and steal" given in section 14(iv) of the Act. After pointing out that as the aforesaid clause after having mentioned "iron and steel" uses the expressions "that is to say" and gives a list of different categories of iron and steel products like pig iron and cast iron including ingot etc it was held that each of the categories falling

(1) (1976) A I R (S C.) 2221.

(2) (1976) 37 S T C 319.

under "iron and steel" constitutes a new species of commercial commodity. The interpretation given to the expression "iron and steel" in section 14(iv) cannot be applied to section 14(ia) of the Act because in section 14(iv) after mentioning "iron and steel" the framers of the Act added the expressions "that is to say" and specified the different products. In that background, each of the products mentioned were held to be new species of commercial commodities for purposes of sales tax. Here all form of coke have been included section 14(ia) and they have not been specified as separate products.

16. It was then submitted on behalf of the respondents that as in the case of *Kundori Labour Co-op. Socy.Ltd.* v. *State* (1) a Full Bench of this Court has held that slurry is not coal and thereafter a Bench of this Court in the case of *Waste Products Reclaimer P.Ltd.* v. *Coal Controller* (2) has held that briquettes prepared out of slurry are not coal, it should be held that briquettes prepared even from the coal dust are neither coal nor coke. From a bare reference to the aforesaid Full Bench judgment it shall appear that this Court first ascertain on the materials on racord as to what was commonly known as slurry. In that connection it was pointed out that "in the earlier decades slurry had been allowed to go waste and was a pollutant which had to be painstakingly thrown in the rivers or stream in order to be washed away-------- Slurry is consequently a residual or a waste product or at the highest a by-product of the chemical process which

(1) (1) (1986) A.I.R. (Pat.) 242.

(2) (1986) Bihar Law Times 577

having been passed through the slurry ponds in the washery premises itself is designedly thrown or discharged in the Bokaro River..... Therefore, the residuary rejects of the process of washing coal cannot be equated with coal itself. Slurry and sludge, therefore, cannot be raised to the pedestal of being coal itself for the processing of which they are the consequential wastes. It, thus seems plain that the true nature of slurry is that it is a residue, reject or waste of an industrial process consisting of mud, ash, oily substances, water and carbonaceous ingredients. Therefore, intrinsically to label this industrial effluent as coal itself would, indeed, be far-fetched, if not absurd.". Any decision in respect of slurry after having found it to be a residue, reject or waste of an industrial process consisting of mud, ash, oily substances, water and carbonaceous ingredients has no bearing to the present controversy because, in the instant case, it is an admitted position that the coal dust is the main ingredient/constituent of the briquettes prepared by the petitioners. Even if briquettes are being prepared, out of slurry for the domestic use, that may not be held to be covered by section 14(ia) because it is neither coal nor any form of coke, but once the briquettes prepared by the petitioners are held to be a form of coke then they are entitled to the protection of section 15 of the Act.

17. An objection was also taken on behalf of the State regarding the maintainability of the present writ applications on the ground that the petitioners should take this objection before the Sales Tax Officers

at the time of passing of the assessment orders. instead of invoking the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution. It is well-known that normally this Court does not entertain a writ application against a grievance that an assessee is likely to be taxed by giving wrong interpretation of some entry in the relevant statute; that objection has to be heard initially by the Taxing Officer and then to be examined by the appellate authorities. At a later stage, in accordance with the provisions of the statute or under Article 226 of the Constitution, this Court can examine if any entry or provisions of the taxing statute has been wrongly applied. But, in the instant case, as the Deputy Commissioner has issued a direction to all officers concerned directing them to treat the briquettes prepared from the coal dust as unspecified goods and to levy tax at the rate of 8 per cent. the apprehensions of the petitioners are justified that the taxing officers are not going to apply their independent mind on the question aforesaid. It may be pointed out that the said decision had been taken at the level of the State Government which is apparent from the impugned communication (Annexure'1' in C.W.J.C. No.755 of 1986(R) as well as Annexure'2' in C.W.J.C.No.1277 of 1986(R) where the Deputy Commissioners have specifically mentioned that the State Government has taken the decision that coal briquettes should be treated as unspecified goods. Apart from that after having admitted these writ applications and having heard the counsel for the parties, at length, in my view, it will not be proper for this Court to dismiss the writ applications without expressing its opinion on the nature of the product

when it is an admitted position that the petitioners are preparing briquettes by mixing coal dust with soil and molasses. In the case of *M/s. Filterco* v. *Sales Tax Commr., M.P.*(1) the persons aggrieved filed writ petition against the order of the Commissioner before the High Court which was dismissed by the High Court saying that correctness of the impugned order should be considered by the appellate authorities. under the provisions of the M.P.General Sales Tax Act and if the petitioners of the writ application were aggrieved by the decision of the appellate authorities, a reference under section 44 of the said Act could be made to the High Court. The Supreme Court observed that High Court should have examined the merit of the case instead of dismissing the writ petition in limine. It was said "although technically it would have been open to the appellants to urge their contention before the appellate authority, namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner, has already passed well considered order in the exercise of his statutory jurisdiction."

18. In the instant case. although the impugned order does not appear to have been passed by the State Government in exercise of any statutory power but, in view of the decision having been taken by the State Government and communicated to different authorities, it will be a futile exercise on the part of the petitioners to agitate the question from one forum to another. As such I am not inclined to dismiss the writ application on this ground. A similar view.

(1) (1) (1986) A I R (S C) 626

was expressed by this Court in the case of *Ashok Industries* vs. *State of Bihar* (1).

19. On behalf of the petitioners it was also urged that if the briquettes prepared by them are held to be coal briquettes or coke briquettes, in view of section 15(a), tax should not be levied at more than one stage. It was pointed out that the respondents are not entitled to realise sales tax even at the rate not exceeding 4 per cent, from the petitioners who are manufacturing the briquettes, if sales tax has already been paid over the coal or coal dust from which coke briquettes are being prepared. There is no occasion to decide this question, in the present writ applications. In the present writ applications, we are concerned only with the question whether the coke briquettes prepared by the petitioners shall be deemed to be a form of coke, over which the sales tax in the State of Bihar cannot exceed 4 per cent, in view of section 14(ia) read with section 15(a) of the Act and as to whether a decision taken by the State Government in respect thereof and communicated to the different authorities should be quashed. The question whether the petitioners are not liable to pay sales tax at all because that will amount to levying tax at more than one stage has to be decided by the taxing officers on the materials produced by the petitioners during the course of the assessment proceeding. It cannot be disputed that the aforesaid question has to be determined with reference to the facts of each case.

20. In the result, these two writ applications are allowed and the communication issued by the Deputy Commissioner, Commercial Taxes, on the basis of the

(1) (1) (1979) B.B.C.T. 465.

decision taken by the State Government that briquettes prepared from the coal dust be treated as unspecified goods, is quashed. The assessment order passed in the case (C.W.J.C.No.1277 of 1986(R)) which is based on direction of the Deputy Commissioner aforesaid is also quashed. I direct that coke briquettes prepared by mixing coal dust, soil and molasses, as in the present case, should be treated as goods specified in the entry 14(ia), being a form of coke, during the assessment proceedings. In the circumstances of the case, the parties shall bear their own costs.

B.P.Singh,J. I agree.

M.K.C. *Application allowed.*

APPELLATE CRIMINAL

Before R.N.Lal and L.P.N.Shahdeo, JJ.*

1987

May,8.

*Taiyab Gowala.***

v.

The State of Bihar.

Code of Criminal Procedure, 1973 (Act 2 of 1974), *section 294(3) --- Scope and applicability of --- postmortem report non- examination of the doctor to prove the postmortem report --- effect of --- an injury report or postmortem report, whether and when covered under section 294(3) of the Code --- such document, whether to be taken as substantive evidence.*

Sub-section (3) of section 294 of the Code of Criminal Procedure, 1973 contemplates only genuineness of the documents to be and not that of the document or contents thereof. An injury report or postmortem report is fully covered under this new provision if the genuineness of the document is not challenged or not disputed.

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*Sitting at Ranchi.

**Criminal Appeal No 4 of 1986(R). Against the judgment of Shri Loknath Prasad. Ist Additional Judicial Commissioner, Ranchi dated 13 12 1985

Held, therefore, that in the instant case the postmortem report (Ext.3) whose genuineness was not denied or challenged by the appellant has to be taken into consideration under sub-section (3) of section 294 of the Code of Criminal Procedure, 1973.

Case Laws reviewed.

Appeal by the accused.

The facts of the case material to this report are set out in the judgment or R.N.Lal, J.

Mr.A.S.Dayal for the appellant.

Mr.P.P.N. Roy, A.P.P. for the State.

R.N.LAL,J. -- This appeal is directed against the judgment of Shri Loknath Prasad, 1st Additional Judicial Commissioner, Ranchi, in Sessions Trial No.257 of 1978 dated the 13th December, 1985 by which the appellant was convicted and sentenced to undergo imprisonment for life under section 302 of the Indian Penal Code.

2. On 23.7.1965 at about 11.30 A.M. Md.Azam, the informant (P.W.3) learnt from one Md.Hanif (P.W.5) that Monsoor (the deceased) was lying in the Sadar hospital, Ranchi, in injured condition. He rushed to the hospital. Mansoor had a piercing injury on his abdomen which was grievous. He learnt from Mansoor that he had some quarrel with the appellant near Tiwary Street in Ranchi town and the appellant Taiyab Gowala gave a knife blow on his abdomen. He moved a few steps to catch rickshaw but could not proceed further. Fateh Mohammad (P.W.4) carried him to the hospital

on a rickshaw. Later Mansoor succumbed to his injuries. The deceased had said to Fateh Mohammad and the informant that the appellant had given him the knife injuries on his stomach. The Police tried to apprehend the appellant who absconded and he could be arrested on 23.9.1977 after about 12 years. The Police had inspected the place of occurrence and had examined the witnesses also. Inquest had been done on the dead body of deceased Mansoor and the postmortem report (Ext.3) was also obtained by the Police. After completing investigation the Police had submitted chargesheet in this case under section 302 of the Indian Penal Code.

3. Out of the 11 prosecution witnesses examined in this case P.Ws.1 and 2 have simply spoken about seizure of certain articles, like clothes and chappal of the deceased, before them by the Police under the seizure list prepared in their presence on which they signed. P.W.8 was simply tendered. William Minz (P.W.11) proved the writings of the postmortem report and the signature of the doctor (Ext.3). He proved writing of the case diary also (Ext.2). P.W.10, Md.Saleem, is another formal witness in whose presence the inquest had been done. Pramod Kumar (P.W.9) is a Police officer who has simply stated that he was able to arrest the appellant on 23.9.1977 on getting a secret information as he was absconding earlier. The investigation had been done by some other Police officer. He only submitted chargesheet in this case.

4. Md.Hanif (P.W.5) stated that he was working in the Refugee Market and there he learnt that a man has killed his brother. Then he went to his uncle, Md.Ajam (P.W.3) and both went to the hospital and found Mansoor lying on a bed. He did not see anything

else.

5. Md.Ajam (P.W.3), the informant of the case stated that he was informed about the injury on Mansoor by Md.Hanif (P.W.5). At that time he did not know who had given that knife blow to Mansoor. In the hospital he saw bandage the abdomen of Mansoor. He asked Mansoor about the name of the assailant and he was told that Taiyab Gowala, the appellant, was the assailant who inflicted the injury to him near Tiwary Tank near the chowk of Kunjra mohalla. Thereafter, he succumbed to his injuries. He also learnt that Fateh Mohammad (P.W.4) had carried the injured to the hospital. P.W.4 had told him that he had carried him from near Kunjra mohalla chowk to the hospital. The injured had walked a few steps but he fell down on a rickshaw. The investigating officer had inspected the place of occurrence and had enquired about the occurrence from the witnesses. The deceased was his nephew. He gave his fardbeyan to the Police. He further stated that nurses and compounders were in the hospital. When he had seen the injured he was not unconscious. Md.Hanif (P.W.5) had also gone with him to the hospital. He personally did not see the occurrence. According to this witness, the deceased had told him that the appellant had given him the knife injury. The appellant was the assailant who had given him the knife blow.

6. Fateh Mohammad (P.W.4) stated that he was taking tea in a hotel near the Masjid from where a lane goes to Gowaltoli. He suddenly heard halla that a man had been stabed. Hurriedly he come out and saw the appellant going on a cycle towards Gowaltoli. Near Tiwary Babu road he found Mansoor fallen and injured condition. He carried him on a rickshaw to

the hospital and got him admitted there. Many persons had gathered there. He started weeping. The deceased was speaking 'save me', 'save me'. 'The appellant had killed him', and the deceased had repeated it several times. Near the place of occurrence there is house of Satyanarain Tiwary and one Coronation Medical Hall. Some more houses are there. The tea stall was a distance of about 10 to 12 steps from there. Mansoor after getting the injury was moving his legs on the ground and was speaking 'Baba save me.'

7. Abdul Quadir (P.W.6) is a witness of an altercation between Taiyab (appellant) and Mansoor (the deceased) near the chowk at about 9 a.m. Taiyab took out a knife from his pocket and gave knife blow on the abdomen of Mansoor. Thereafter, Taiyab fled away towards Gowaltoli. Mansoor ran towards Main Road but he fell down. Later this witness learnt that Mansoor succumbed to that injury. This witness was on his fruit stall from where he saw the occurrence. The place of occurrence was at a distance of about 10 or 11 yards from there. There were several stalls near his stall. One Siya Rozy has a house nearby. The clothers of the injured were blood stained. He was examined by the Police. The deceased was aged about 24 to 25 years at that time. The witness identified the appellant in the court also.

8. Chhedi Mian (P.W.7) is another eye witness of the occurrence who stated that at that morning hour he was sweeping his shop. An altercation ensued between the appellant Taiyab Gowala and Mansoor, the deceased. All on a sudden Taiyab Gowala took out his knife having spring mechanism therein and then gave knife blow on the abdomen of Mansoor. Taiyab Towala. thereafter, fled away on his cycle

towards his house in mohalla Gawaltoli. The injured was in very bad condition. When injured's uncle Fateh Mohammad (P.W.4) came there he was asked to take the injured to the hospital immediately. This witness was also examined by the Police. Mansoor had cought his abdomen by his both hands. One Tiwary jee has his house nearby. The place of occurrence was at a distance of about 10'to12' from his house. He had shown the place occurrence to the Police.

9. The appellant was examined under section 313 of the Code of Criminal Procedure and he denied to have caused any such injury.

10. The death of Mansoor due to stab injury in his abdomen is not challenged. It is also admitted that the appellant remained absconding for about 12 years and hence the trial got delayed. Nothing has been taken from any of the prosecution witnesses showing that the prosecution witnesses had any enmity grudge grievance against the appellant. Rather the only suggestion thrown to them is that they have said lies. There is nothing on the record to show for what reason the prosecution witnesses specially P.Ws. 3 to 7 would speak lie implicating the appellant in this murder. The points raised by the appellants are that the alleged injury was not caused by the appellant and secondly, the postmortem report was not properly proved as required under the law because the doctor or the doctors were not examined to prove the same. It was also said that the investigating officer was not examined in this case, but I think, the non-examination of the investigating officer has hardly anything to do in this case as the eye witnesses have said a lot about the place of occurrence, the various articles already seized under the seizure list as given by P.Ws.1

and 2 and the inquest report was prepared on 23.7.1965 only. P.Ws.3,4,6 and 7 have all spoken of the dying declaration made by Mansoor the deceased in which the deceased had stated that Taiyab Gowala, the appellant, had given him the stab injury. Rather, P.Ws.6, and 7 have clearly stated that they had seen the appellant altercating with the deceased at that time. So the identification of the appellant is well proved and there is no doubt left with regard to that. The contention of the appellant on this point cannot be accepted.

11. The second point to be considered is if the postmortem report can be taken into consideration legally in this case as the doctor was not examined to prove the postmortem examination report though his writings and signature on the said postmortem report (Ext.3) was proved by P.W.11 and genuineness of the writing of the said doctor was not challenged in cross- examination Rather in cross-examination of these witnesses regarding proving these documents (Exts. 2 and 3) was declined by the defence.

12. Mr.P.S.Dayal, learned senior counsel appearing on behalf of the appellant submitted that in the absence of examination of the doctor, the postmortem report was not legally proved and hence it should not be taken into consideration and it is not known as to what injuries were caused on the deceased or how, could they be caused. He relied on a decision in the case of *Sheo Govind Bin and another*-versus- *The State of Bihar* (1985 P.L.J.R.1019) at pages 1022 and 1023 in which the Patna High Court (D.B.) held that when postmortem report was not proved by a competent witness there is no proof of cause of death and the postmortem report is not

purposeful and meaningful and it should not be taken into consideration. In another case, in *Asutosh Kumar Manoj and others*- versus- *State of Bihar* (1985 B.B.C.J.386) at pages 391 to 392 the postmortem report had not been proved but the doctor holding the postmortem examination was examined and his evidence was accepted by the court. However, the question that the postmortem report cannot be taken into consideration in the absence of the doctor was forcefully pressed by Mr.Dayal as accepted in the earlier decision of this Court i.e. *Sheo Gobind Bin and another* -versus- *The State of Bihar* (supra).

13. For looking into the legal proposition it is necessary to look into the provision of section 294 of the Code of Criminal Procedure which is as follows:-

"Section 294. No formal proof of certain documents.-

(1) Where any document it filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the gunuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceedings under this Code without proof of the signature of the person to whom it purports to be signed.

Provided that the Court may, in its discretion, require such signature to be proved."

This provision was not available in the old Code of Criminal Procedure, rather this provision came into existence with the new Code of Criminal Procedure, 1973. According to this provision, sub-section (3) of section 294 contemplates only genuineness of the documents to be and not that of the document or contants thereof. In my view, the injury report or the postmortem report is fully covered under this new provision if the genuineness of the document is not challenged or not disputed. In other words in such a situation such a document ought to be taken as substantive evidence. Similar view was taken in *Sheikh Hussinsab*-versus- *The State of Maharashtra* (1) which is as under;

"Such dispensing of the proof is restricted only to such documents of which genuineness is not challenged or disputed when called upon to do so under sub-section (1). Under the Evidence Act evidence can be oral or documentary. Even the original primary documents cannot read in evidence merely because the same are relevant and produced, unless the authenticity thereof is established. Mode of proof for establishing such authenticity is prescribed under section 67 to 71 of the Evidence Act. These can be used in evidence for adjudication of points in dispute only after they are proved to be authentic and genuine by this mode."

It was also held therein that section 294 of the

(1) (1983) Cr.L.J. 487 (F.B.)

Code of Criminal Procedure was introduced to dispense with this avoidable waste of time and facilitate removal of such obstruction in the speedy trial. The postmortem report is also a document as any other document and there is nothing in section 294 of the Code of Criminal Procedure to justify exclusion of it from the purview of documents covered thereby. The mode of proof of it also is liable to be weighed as of any other document.

14. A similar question had arisen in *Saddiq and others* - versus- *State* (1) and it was observed at page 301:

> " -- Under sub-section (3) of section 294 Cr.P.C. any inquiry report filed by the prosecution under sub-section (1) of section 294 Cr.P.C. may be read as substantive evidence in place of the deposition of the doctor who prepared it if its genuineness is not being disputed by the accused. If its genuineness is disputed then the doctor who examined the injured person must appear in the witness box to prove his injuries and also to prove the injury report and in such a case the statement of the doctor would be the substantive evidence and the injury report may be used to corroborate or discredit this testimony.

Their Lordships of the Allahabad High Court disagreed with the view taken in *Ganpat Raoji Suryavanshi* -versus- *State of Maharashtra* (1980 Crl.S.U. 853-Bombay).

15. With high regards for earlier Patna decision as reported in 1985 P.L.J.R. 1091 we respectfully

(1) (1981) Cr.L J. 379 (F.B.)

disagree with the same as section 291 of the Code of Criminal Procedure was not a considered therein nor the Full Bench decisions of the Allahabad High Court and Bombay High Court were considered. Thus, I find that the postmortem report (Ext.3), whose genuineness was not denied or challenged by the appellant, has to be taken into consideration under sub-section (3) of section 294 of the Code of Criminal Procedure.

15. According to the postmortem report (Ext.3) the dead body of Mansoor had the following antemortem injuries:-

i) Penetrating wound 5/2" long with incised margins x 1" x penetrating in abdominal cavity. The wound vertically in the pit of stomach. Terminal part of stomach and a part of traverse colon were protruding from the wound inside abdominal cavity.

General injuries

i) Anterior margin of left lobe of liver was incised for 3/2".

ii) Protruded portion of stomach showed two perforation both on its anterior wall - one bigger than the other 3/4".

The injuries were sufficient to cause death and these were caused by some piercing weapon with sharp cutting edge within 24 hours. Death according to the doctor was caused by internal haemorhage and shock caused by the injury in the pit of stomach and intra abdominal injuries.

16. The above injuries go to show that there was a grievous penetrating wound caused by some sharp cutting weapon on the abdomen in the pit of stomach and it was the cause of death. Thus, the postmortem report fully corroborates the prosecution story that the stab injury given by the appellant on the abdomen of Mansoor (deceased) has caused the death as discussed earlier.

17. Mr.P.S.Dayal, senior counsel for the appellant relied on a decision in the case of *Sarbeshwar Malik*-versus- *The State* (Orissa) (Eastern India Criminal Cases- 31) in which it has been held that for sudden quarrel picking up and stab injury caused on the chest resulting in death, the conviction may be altered from one under section 302 to section 304 part II of the Indian Penal Code. In the case before us there is no evidence that altercation had suddenly cropped up. The appellant was the only assailant who had given the knife blow on the abdomen of the deceased. In the case referred to by the learned counsel for the appellant the first assault had been given by the two accused by lathi and thereafter the appellant had given crowbar assault to the deceased. The intention of the appellant in that case was not to commit murder by lathi but in the instant case the appellant had a knife and he gave that knife blow on the abdomen of the deceased which is a vital part of the body and that one blow was enough to cause his death.

18. Mr.P.S.Dayal, further submitted that maker of the dying declaration should be mentally fit and it must have been made free from prompting or external influence. Here again I am unable to agree with Mr.Dayal because the deceased was alone at that time. There was no question of any prompting or external influence.

The deceased could simply say that he was stabbed by Taiyab Gowala and as per the evidence discussed above he repeated it several times. So this was free from any prompting or external influence. The deceased was conscious of the assault and gave out the name of the appellant. He could not survive long. Thus, I find that the said declaration and the account of the eye witnesses are beyond any shadow of doubt.

19. Mr. Dayal further submitted that the provisions of section 294 of the Code of Criminal Procedure should be read along with section 45 of the Indian Evidence Act. In this connection the reading of section 47 of the Indian Evidence Act is also relevant. The postmortem report, the writing of which was properly proved under section 47 of the Indian Evidence Act, was available before the defence for challenge, denial and cross- examination, but the defence did not do anything. In that view of the matter it cannot be said that genuineness of the document was in dispute or challenge.

20. In view of the circumstances discussed above I find that there is no merit in this appeal which is hereby dismissed.

L.P.N.Shahdeo,J- I agree.

M.K.C. *Appeal dismissed.*

CIVIL WRIT JURISDICTION

Before S.B.Sanyal, J.

1987.

July,3.

*R.C.Kaul, Development Officer Department of Industries, Government of Bihar Patna.**

v.

The State of Bihar & ors.

Bihar Service Code, 1952, Rule 84 --- *provisions of --- whether a bar to crossing of efficiency bar if writ-petitioner has been promoted to higher post --- Government of Bihar memo no. 3014 dated 31.7.1980 --- effect of --- writ-petitioner, whether entitled to interest at the rate of 12% on all his, dues.*

Rule 84 of the Bihar Service Code cannot stand in the way of a person in his crossing efficiency bar if he has been promoted to a higher post bearing higher salary. Such cases will be governed by Government of Bihar memo no.3014 dated 31st July, 1980.

Held, that all actions against the writ-petitioner having failed and the writ-petitioner having obtained a promotion to a higher post while he was stuck at the efficiency bar, such an order of promotion itself

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*C.W.J.C.No.3619 of 1981. In the matter of the an Application under Articles 226 and 227 of the Constitution of India

will be deemed to be an order impliedly sanctioning the crossing of the Efficiency bar.

Where the writ-petitioner till the date of his retirement took all possible steps to obtain the benefits of crossing the Efficiency Bar but to no effect and even his representations to this effect has not even been replied to;

Held, that the inaction on the part of the respondents in the instant case is most deplorable, illegal and unjustified. The writ-petitioner shall be entitled to interest on all his dues at the rate of 12% per annum till the payment is made.

Case laws discussed.

Application under Articles 226 and 227 of the Constitution.

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

M/s. Subodh Prasad Krishna Kr.Sinha for the petitioners.

Mr. Ram Nandan Prasad S.C.IV Mr. Navin Sinha J.C.to S.C.IV. for the State.

S.B.SANYAL, J. -- This writ petition has been filed on behalf of the petitioner for issuance of a Writ of Mandamus directing respondents to pay to the petitioner all his dues in accordance with law as envisaged under the Bihar Service Code after passing necessary orders with respect to his crossing the Efficiency Bar in the scale of pay of Rs.510-1155/-.

2. The relevant facts:- On 14.1.58 petitioner joined the Industries Department. He was confirmed on 14.1.59 as District Industries Officer in the scale of Rs.510-1155/-. On 14.1.72 he reached the stage of Efficiency Bar when he was drawing his basic salary of Rs.980/- (Annexure-1). Had the petitioner crossed the Efficiency Bar, in that event, on 14.1.73 he was entitled to a basic salary of Rs.1015/-, but no order whatsoever either way was passed with respect to petitioner's crossing of the Efficiency Bar. In June, 1973, the petitioner was promoted to the post of Development Officer in the scale of Rs.620-1415/-. On 28.5.74 the petitioner was suspended owing to his conduct and efficiency. But without any enquiry in respect of his conduct, the Government revoked the order of suspension on 5.8.75. On 12.8.75 when the petitioner reported for duty he was handed over a notice of compulsory retirement. It however, was set aside by the Tribunal and the petitioner was reinstated from the day he joined the service after the withdrawal of his suspension order. The petitioner filed several representations for passing an order as to the crossing of Efficiency Bar but no order has yet been passed even though the petitioner superannuated on 1.10.81.

3. Learned Counsel for the petitioner submits that on the promotion of the petitioner to a higher post in June, 1973, which had a higher scale of pay i.e. Rs.620-1415/-, it would be deemed that the petitioner was promoted after crossing the Efficiency Bar in the lower time scale of pay obtainable to the said post. In this connection learned Counsel has drawn my attention to a resolution of the Government which is marked Annexure-4 and contended that where no order either way is made with respect to the question of Efficiency Bar, in that event, a promotion to a higher

post would amount to crossing the Efficiency Bar by the concerned employee. This circular is dated 31st July, 1980.

4. Learned Counsel appearing on behalf of the Government, on the other hand, drew my attention to the provisions of Rule 84 of the Bihar Service Code which reads thus:-

> "Where an efficiency bar is prescribed in a time-scale, the increment next above the bar shall not be given to a Government servant without the specific sanction of the authority empowered to withhold increments."

Learned Counsel further contended that the petitioner cannot have any legal right to seek issuance of a Writ of mandamus since no order either way has been passed.

5. Admitedly the petitioner was stuck at Rs.980/- on 14.1.72 at the stage of Efficiency Bar. He admitedly would have received a sum of Rs.1015/- had he crossed the Efficiency Bar on 14.1.73. On his promotion in June, 1973, from a junior to the superior post in the scale of Rs.620-1415/- according to Appendix-6 item no.18 of the Bihar Service Code his basic salary would have been fitted in the superior grade at Rs.1235/-. The petitioner, however, was fitted at Rs.1190/- in the superior grade as per item no.17 of the said chart treating his salary to be Rs.980/- in the lower scale, where he was stuck by virtue of Efficiency Bar. The petitioner has made numerous respresentation but to no effect and ultimately he has retired on 1.10.81.

6. Standing Counsel no.4 appearing on behalf of the government has drawn my attention to the case of *Shangara Singh* Vs. *State of Punjab and others*,

(1) in which a similar provision like Rule 84 of the Bihar Service Code has been dealt with and it was observed that unless there is specific satisfaction of the authority, the Efficiency Bar cannot be removed and removal of the Efficiency Bar depends on the satisfaction of the competent authority. Therefore, unless such an order is passed, it cannot be said that any right of the petitioner is violated. In *Shangara's* case (supra), there is a specific order disallowing the claim. It is not a case where at the stage of the Efficiency Bar, the petitioner is promoted to a higher post in a higher scale of pay. In the instant case, the employer found the petitioner fit for being promoted and accordingly he was promoted which manifests that he was efficient enough to hold the higher post. There has been no order whatsoever refusing sanction to cross Efficiency Bar inspite of demands. Even though, decades have passed, there has been also no order withholding the increment of the petitioner. Actions taken against the petitioner by way of suspension has been unilaterally withdrawn by the State Government. The compulsory retirement order have been set aside by the Tribunal reinstating the petitioner from the date of joining his post after withdrawl of the suspension. There is nothing against the petitioner which could deprive him of the salary of the post held by him. Rule 84 of the Bihar Service Code, 1952, is silent about crossing of Efficiency Bar in the case of promotion of an incumbent, to a higher post prescribing higher scale of pay. The Government on the contrary has issued a circular in the year 1980 which is Annexure-4, stating, inter alia, that in the event where no order is passed with respect to the Efficiency Bar, an individual

(1) (1978) 2 S.L.R. 484.

promoted to a higher post will be deemed to have crossed the Efficiency Bar. In the case of *Shri Brahm Dev Seth* vs. *Union of India and ors.* (1) the Supreme Court held that the order relating to Efficiency Bar must be passed either preceding the date on which the public servant is to cross the Efficiency Bar or shortly thereafter. In the instant case no order whatsoever has been passed even though more than 10 years have elapsed. In *Jwala Prasad Singh* vs. *State of Bihar through Secretary, Political (Police) Department and another* (2) a Division Bench of this Court while interpreting Rule 83 and 84 of the Bihar Service Code, held that there could be no justifiable reason for inaction in the matter of passing an order permitting the petitioner of the said case to cross the Efficiency Bar as envisaged by Rule 83 of the Bihar Service Code. It was held that the petitioner shall be deemed to have crossed the Efficiency Bar on his confirmation and, therefore, all other consequential reliefs would follow.

7. I, therefore, hold Rule 84 Bihar Service Code cannot stand on the way of a person in his crossing efficiency bar if he has been promoted to a higher post bearing higher salary. Such cases will be governed by Govt.decision no.3014 dated 31st July, 1980 (Annexure-4). I also find that all actions against the petitioner having failed and the petitioner having obtained a promotion to a higher post while he was stuck at the Efficiency Bar, such an order of promotion

(1) (1974) 1 S.L.R. 680.

(2) (1973) 1 S.L.R. 546

itself will be deemed to be an order impliedly sanctioning the crossing of the Efficiency Bar.

8. Now coming to the question of payment of interest on the amount due learned Counsel for the petitioner has relied strongly upon a recent decision of (1985) (2) SLJ 445 where a Division Bench of the Bombay High Court having held that the Efficiency Bar was unjustifiably and illegally withheld till date, awarded interest on the amount due to the petitioner of the said case. In this case also I find the inaction on the part of the respondent is wholly unjustified and arbitrary, even though, there has been a clear cut circular of the Government that on promotion, in absence of any order as to Efficiency Bar, it would be deemed that the person has crossed the Efficiency Bar. The petitioner till the date of his retirement took all possible steps to obtain the benefits of crossing the Efficiency Bar but all his attempts ended in futility. His representations to this effect has not even been replied to. There has been no counter-affidavit filed on behalf of the State justifying the withholding of the salary. Six years have rolled by since the date of petitioner's superannuation. In my opinion the inaction on the part of the respondents in the instant case is most deplorable, over and above illegal and unjustified. I, therefore, direct that the petitioner shall be entitled to interest on all his dues at the rate of 12% per annum till the payment is made.

9. I issue a writ in the nature of Writ of Mandamus directing the respondents to pay the petitioner the salary obtainable to him on his having crossed the Efficiency Bar in June, 1973, in accordance with the guidelines provided an Annexure'A' to Appendix -6

of Bihar Service Code, and the dues to which the petitioner is found entitled to bear interest at the rate of 12% per annum from the date when the said sums were payable to the petitioner on having crossed the Effeciency Bar till actual payment is made. The direction should be carried out within three months from the date of receipt of this order. Hearing fee assessed at Rs.1000/-.

10. In the result the writ petition is allowed with the directions and observations as aforesaid.

R.D. *Petition allowed.*

CIVIL WRIT JURISDICTION

Before Satya Brata Sanyal, J.

1987.

July,27.

*Mahendra Narain.**

v.

The State of Bihar & others.

Service --- *writ-petitioners designated as Associate Professors of Medical College, management of which had been taken over by State under Bihar Private Medical College Taking Over of Management) Ordinance, 1977 for obtaining recognition by Medical Council of India --- conduct of State Government, whether would amount to implied approval to the appointment and promotion --- Estoppel principles of --- action of State Government. whether would amount to acquiesence and waiver of requirement of prior*

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*Civil Writ Jurisdiction Cases no.5147 and 5303 with 5205 of 1985.

In the matter of applications under Articles 226 and 227 of the Constitution of India.

Dr.Vijay Kumar Srivastava...C.W.J.C.No.5303 of 1985...Petitioner.

Dr.Binod Bihari Sinha.....C.W.J.C.No.5205 of 1985...Petitioner.

approval in the matter of appointment and promotion.

When the writ-petitioners were designated as Associate Professors they were appointed to that particular post in order to obtain recognition of the Medical College by the Medical Council of India and consequent recognition of the University by the Central Government.

The conduct of the State Government in the facts and circumstances of the case, would amount to implied approval of the petitioner's appointment and/or promotion made by the Board of Control constituted under Bihar Private Medical College (Taking Over of Management) Ordinance, 1977, hereinafter called the Ordinance as Associate Professors.

It is well established that under certain conditions silence or inaction constitute a representation as much as positive language or conduct for the purpose of Estoppel. It was the legal duty of the State to take steps or to disclose to the Medical Council of India or to the petitioners that these promotions have not their approval and, therefore, invalid. On the other hand, the State by their conduct by reaping the benifit of such promotions, led everybody to believe that no such fact, exists or that there is nothing so abnormal or peculier in the nature of the transaction or in the circumstances of the case as to give rise to any duty of disclosure and to shape Medical Counsil's course of action on that assumption.

Held, that in any event, it will amount acquiescence and waiver of the requirement of prior approval in the matter of appointment and promotion and/or implied approval of the State to the appointment and promotion.

Held, further, that the appointments as Assistant Professors had the prior approval of the Medical Council of India of which the State had full knowledge. It was, therefore, that the state did not take any action under section 16 of the Ordinance which can safely be assumed to be State's tacit approval of the action taken by the Board of Control in the best interest of the Medical Colleges.

Held, further that the plea of the Government raised on the basis of the letter of the Joint Director of the Health Department that the temporary designation of the writ-petitioners as Associate Professors was accorded without prior approval of the State Government is rejected and overruled.

Held, also, that writ-petitioners' appointment as Associate Professor was validly made and the Government was directed to treat the writ-petitioners, to have been validly appointed as Associate Professors from the date they have been so designated and give all consequential benefit flowing therefrom, Any teaching experience gained as being temporarily designated on a particular post should also enure to the benefit of the writ- petitioners. The State was directed to consider the cases of the writ-petitioners along with other eligible candidates if they have the requisite experience and qualification for being appointed as Professors as laid down by Medical Council guidelines for promotion as Professors.

Case laws discussed.

Applications under Articles 226 and 227 of the Constitution.

The facts of the cases material to this report

are set out in the judgment of S.B.Sanayal, J.

M/s Ram Chandra Prasad Sinha, Sudhir Kumar Katriar, Ravi Shanker Prasad & Alok Kumar Sinha for the petitioner in C.W.J.C.No.5147 of 1985.

M/s Ram Balak Mahto, A.G., & Amar Nath Mishra, J.C. to A.G. to the State in C.W.J.C.No.5147 of 1985.

M/s Tara Kant Jha, S.B.N.Singh & Krishna Murari. For the Respondents

M/s Basudeo Prasad, Anil Kumar & Sunil Kumar for the petitioner in C.W.J.C.No.5303 & 5205 of 1985.

M/s Ram Balak Mahto, A.G., & Syed Rafat Alam, J.C. to A.G. for the State in C.W.J.C.No.5303 and 5205 of 1985.

S.B.SANYAL,J. -- These three writ petitions have been heard together because of some common points involved. This judgment will govern them all.

2. For proper appreciation of the respective cases, I have summarised the facts of each case separately.

C.W.J.C.No. 5147 of 1985:

The petitioner, who is a Doctor-cum-teacher in the Department of Medicine in Nalanda Medical College Hospital, Patna seeks issuance of a writ of mandamus directing respondents no.1 to 3 to declare the petitioner to be an Associate Professor in the Nalanda Medical College Hospital with effect from 10.2.1978 and to include him in the list of Associate Professors dated 1.2.1985 (Annexure-22). for being considered for

promotion to the post of Professor in the Department of Medicine in all the Medical Colleges of Bihar and to quash the provisional seniority list of Assistant Professors dated 21.9.1985 (Annexure-27), wherein the petitioner is shown in serial no.15. By amendment of the writ petition a further prayer has been made to quash Annexure-31 promoting the respondents as Professors ignoring and without considering the claim of the petitioner who is the senior most Associate Professor in the State of Bihar.

3. According to the petitioner, he passed M.B.B.S. examination in the year 1961 from Prince of Walse Medical College, Patna University. During the period July, 1969 to February, 1975 for a period of five years nine months; the petitioner is said to have performed the duty of a Registrar in Fazakerley District General Hospital, Liver Pool, University of Liverpool (U.K.) teaching-cum- clinical assignment from July 1969 to December, 1973. In 1973 the petitioner passed his M.R.C.P. from U.K. But he continued to stay in England and in January, 1974 he joined Hammersmit Hospital, Post Graduate Medical School, University of London and continued upto March, 1974 as a clinical fellow. Thereafter, he joined St James Teaching Hospital Area Health authority (Teaching), Leads, U.K., as consultant Physician and Clinical Lecturer for the period March, 1974 to February, 1975. In this process the petitioner acquired teaching-cum-clinical experience of about five years nine months in different Medical Institution in England. On his return from England he got appoinment letter from Nalanda Medical College as an Assistant Professor of Medicine vide letter dated 30.6.1975/1.7.1975 and he joined his post after due selection by the Management on 24.6.1975 (Annexures-2,3 and 4.).

4. Nalanda Medical College was a private Medical College. The Government by an Ordinance, known as Bihar Private Medical College (Taking Over of Management) Ordinance, Bihar Ordinance no.36 of 1977, (hereinafter referred to as the Ordinance), took over the Management of the said College. The management of the College vested in a Board of Control constituted under the Ordinance. There were vacancies for the post of Associate Professor. In order to find out the suitability of the petitioner's appointment as an Associate Professor, he was asked by the Board of Control to furnish all his testimonials and certificates and other biodatas to Professor U.R.Bhardawaj, Head of the Department of Physiology, for adjudging his teaching experience (Annexure-5). All relevant papers, materials and the biodata furnished by the petitioner was sent to the Medical Council of India to find out his eligibility for being appointed as an Associate Professor. The Secretary of the Medical Council of India wrote to the Chairman on 2.1.1978/11.1.1978 that in supersession of all previous letters from this office in this regard the Executive Committee of the Council in their meeting held on 13th December, 1977, found the petitioner eligible as Associate Professor of Medicine. On 10th February, 1978, the petitioner was given the designation of Associate Professor, Medicine, on a temporary basis on the basis of the said decision of the Medical Council of India (Annexure-7). Petitioner pursuant thereto joined his duty as Associate Professor of Medicine on and from 10.2.1978 (Annexure-8). The action of the Chairman was approved by the Board of Control on 12.4.1978 (Annexure-9) and a certificate seem to have also been issued by the Principal of the College in this regard on 29.8.1978 (Annexure-10). Respondent no.5, Dr. Akhilesh Sharan, and respondent no.7, Dr.D.K.Shrivastava are said to

have been promoted as Associate Professor on 20.7.1978. The Bihar Private Medical Colleges Taking Over Act, 1978 (hereinafter to be referred to as the Take Over Act), Bihar Act 5 of 1978, was enacted. All Private Medical colleges in the State of Bihar was taken over by the Government and under section 6(2) of the said Act, the State Government constituted a Committee known as Screening Committee of Experts to examine the biodata of each member of the teaching Staff and ascertain whether appointment, promotion or confirmation that was made hitherto is in accordance with the University Regulations and in conformity with the guidelines laid down by the Medical Council of India. The Screening Committee was required to take into consideration all relevant materials including length of service in the College, whereafter under section 6(3) of the Take Over Act the State Government would decide in respect of each member of teaching Staff on the merit of each case, whether to absorb him in Government service or to terminate his services or allow him to continue on an adhoc basis and/or re-determine the rank, pay, allowances etc.

5. Upon issuance of Notification dated 22.1.1979 under section 3(1) of the Take Over Act the Board of Control, constituted under the Ordinance, came to be dissolved under section 4(a) of the Take Over Act. The College was granted temporary recognition for the Award of M.B.B.S. degree from the Magadh University and the same was being extended on the basis of inspections held by the Medical Council of India from time to time. One of such inspection report forwarded by the Secretary, Medical Council of India to the Registrar, Magadh University, on the basis of observation of the Inspectors held in February 1979, is dated 30th March, 1979. The inspection report of

the Inspectors of the Council, which is an enclosure to the said letter showed that the petitioner and Dr.B.B.Sinha (petitioner in C.W.J.C. no.5205 of 1985) are Associate Professor of Medicine with eight years' teaching experience (Annexure-12). The principal, however, replied to the said letter and reported, on amongst other, that the petitioner and Dr.B.B.Sinha are Associate Professor with nine years teaching experience (Annexure-13). There was another inspection by the Medical Council of India for the purposes of extension of recognition and such an inspection was held on March, 1980, and the Medical Council of India decided that the temporary recognition of the College be extended for a further period of one year that is up to 30.4.1981. It found that in the Department of Medicine five posts of Associate Professor have been filled up and the incumbent on the fifth post is on leave (Annexure-14). The temporary recognition was again extended up to 30th April, 1982, pursuant to a similar inspection by the Medical Council of India on 7.4.1981 and it approved the continuance of the existing staff as they fulfilled the requirement of the Regulation and/or guideline of the Medical Council of India (Annexure-28).

6. This was followed by another inspection report in December, 1981 by the Medical Council of India suggesting to fill up the various teaching posts lying vacant on priority basis as also construction of Hospital etc. The Screening Committee constituted earlier on 19.9.1978 (Annexure-15) submitted a report on 15.3.1980 (Annexure-20). At page 39 of the proceeding of meeting of the Screening Committee published by Government of Bihar, department of Health in Booklet form, petitioner was shown to be eligible as Assistant Professor, Medicine, since June, 1978 and the decision

as to the validity of petitioner's appointment as an Associate professor was postponed for consideration till receipt of the advise from the Medical Council of India regarding his teaching experience abroad. At page 29 of the Booklet, the Committee stated that they have counted teaching experience gained in recognized teaching Institution in India. So far as teaching experience gained abroad they have only considered the teaching experience gained by the teachers in Wels National Medical School Hospital, Cardiff University of Liverpool. For teaching experience gained elsewhere the matter to be referred to the Medical Council. The petitioner submitted his representation to the said report vide Annexure-21 where the petitioner gave all details resulting in his appointment as an Associate Professor as also his having been already screened by Medical Council of India and found eligible for the post of Associate Professor and his legitimate continuance on the said post. It was contended that the decision of his eligibility as an Associate Professor by the Medical Council of India is a closed Chapter and can not be further awaited. The College gained recognition on the basis of his being Associate Professor of the College fulfilling the requirement of staffing pattern as required by Medical Council of India for recognition and on the same basis the respondents went on obtaining renewed recognition. The recommendation of the Screening Committee, therefore, so far as the petitioner is concerned, be cancelled and he be confirmed to the post of Associate Professor, to which he was appointed after consultation with the Medical Council of India on 10th February, 1978. According to the petitioner, he should now be considered for promotion to the post of Professor in the light of the order of the Patna High Court passed on 27th November, 1979 in C.W.J.C. no. 4554

of 1978 to which the petitioner is a party (See 1981 Bihar Bar Council Journal 510). The respondent-Government wrongly prepared the list of fourteen Associate Professors excluding the petitioner, as eligible for promotion to the post of Professor of Medicine and asking their place of choice (Annexure-22). Subsequently, a seniority list of Assistant Professor was prepared by respondent no.1 on 21.9.1985 wherein the petitioner has been wrongly shown at serial 15. Inspite of High Court's interim order dated 22.11.1985, on 3.12.1985 eight respondents were promoted as Professor of Medicine (Annexure-31) without considering the case of the petitioner for such promotion. It may be stated here that on 22.1.1986 this Court while admitting the writ application, ordered that any appointment or promotion made during the pendency of the writ petition will be subject to the result of the case.

7. *C.W.J.C.no.5205 of 1985*: In this writ petition the petitioner, Dr.Binod Bihari Sinha, who is similarly a teacher in Medicine in Nalanda Medical College, seeks quashing of Annexure-7, dated 21.9.1985, wherein the petitioner has been shown at serial no.16 as an Assistant Professor of Medicine even though at the relevant time he was an Associate Professor, as also Annexure-8 dated 1.2.1985 the prepared panel of Associate Professors, who were to be considered for promotion as Professor but did not include the name of the petitioner and further to issue directions to the respondent-State to absorb the petitioner as an Associate Professor with effect from 10.2.1978 as he has been working as an Associate Professor since then and for a further direction to consider his case for promotion as Professor alongwith all eligible Associate Professors and for declaring the promotion

of respondents 3 to 7 and 11 to 13 (vide Annexure-14 of amendment petition) as void in breach of Article 14 and 16 of the Constitution of India as well as in implied breach of the stay order passed by this Court dated 11.11.1985.

8. On 1.7.1975 the petitioner was appointed as Assistant Professor of Medicine in Nalanda Medical College (Annexure-1) and worked as Assistant Professor till 9th February, 1978. As the management of the College was taken over under the Bihar Ordinance 131 of 1976 the College came to be governed by Board of Control. The Board of Control, on 4.9.1971, took a decision to refer the cases of teachers to the Medical Council of India by forwarding the qualification of the teachers and their teaching experience. On 16.12.1977, the Chairman of the Board of control was informed that the Executive Committee of the Council in their meeting held on 13.12.1977, the petitioner may be appointed to the post of Associate Professor (Annexure-10). On 10.2.1978 after receiving the recommendation of the Medical Council of India as per the order of the Chairman the petitioner, like Dr.Mahendra Narain, was designated as Associate Professor in Medicine on a temporary basis (Annexure-2) on 10.2.1978. The Board of Control affirmed the action taken by the Chairman which resulted in provisional recognition of the College by the Medical Council of India (Annexure-3). In the mean time, Bihar Act 5 of 1978 came into force by which the College was taken over by the State of Bihar. A Screening Committee was constituted under section 6(2) of the Take Over Act to screen the teaching Staff of the College to find their suitability in the light of the decision in C.W.J.C.no.4554 and 5004 of 1978 to which this petitioner was party. That writ petition challenged the

vires of the Take Over Act with a further prayer that the teachers of the taken over Colleges should continue to hold the post that they were holding on the date of take over without change of status and emoluments. The writ petitions were admitted on 5.10.1978, while admitting the writ petitions, an interim order was passed restraining the respondent-State from filling up the vacant teaching post of the Nalanda Medical College by persons who are not teachers of the said college. A Supplementary affidavit was filed on behalf of the Government in C.W.J.C.no.5004 of 1978 for vacating the interim order of stay stating therein:

"That all the existing teachers of the private Medical Colleges would be certainly considered and as far as practicable absorbed in the highest post they are found fit." (Annexure-4, Para 4)

9. In paragraph 3 of the said affidavit the qualification required for being appointed as Associate Professor as laid down by the Medical Council was referred to. It was said that for being considered for appointment as a lecturer/Assistant professor the minimum teaching experience is of three years on junior teaching post i.e. Tutor and similarly three years teaching experience as a lecturer/Assistant Professor for being considered to be appointed as Associate Professor. For being appointed as Professor one must have experience of five years an Associate Professor. The qualification referred to in the said supplementary affidavit is, in fact, the requirement of 1974 guidelines of the Medical Council. The two writ petitions were disposed of by consent judgment on 27th November, 1979 (Annexure- 5):

"It is also conceded by both the counsels that

the State Government can alter the terms and conditions and terminate the services of the teaching Staff provided their selection was not in accordance with the University Regulation and on the basis of the guidelines laid down by the Medical Council of India. In other words, it is conceded that sub-section (3) of section 6 of the Act (Take Over Act) is being controlled by sub-section (2) of section 6 of the Act. Thus, the State Government under sub- section (3) can terminate the services of any of the teaching staff which was not made in accordance with the University Regulation and on the basis of the guideline laid down by the Medical Council of India and not otherwise. If these two conditions are not fulfilled then the State Government has authority to terminate the services of any of the teaching staff. In other words, these petitioners will not be placed before second Screening Committee or the second Selection Board for their appointment. We, therefore, direct that these petitioners should be promoted according to their claim, if any, subject to the directions of the State Government. The respondents are further directed to follow the principles laid down in this case and in all other identical cases of the teaching staff of all the private Medical Colleges which have been taken over by the State Government."

10. The Screening Committee met to consider the case of the petitioner in the light of the aforesaid judgment but, in so doing, the Screening Committee decided to screen the teachers on the basis of 1971 Regulation of the Medical Council of India approved under section 33 of the Medical Council Act, 1956. At page 39 of the booklet of the Screening Committee (Annexure-20) the petitioner was shown eligible for Assistant Professor, Medicine, since July, 1978 and

his claim about teaching experience in Kurji and R.M.R.I was directed to be referred to the Medical Council of India for their opinion.

11. The petitioner filed his representation stating therein that he was appointed as an Associate Professor by the Chairman of the Board of Control after his eligibility was duly considered and tested by the Medical Council of India as per the letter of the Medical Council of India dated 16th December, 1977, to the Chairman, Board of Control. It was also contended that the eligibility of the petitioner ought to have been considered on the basis of 1974 Medical Council of India Guideline and not by 1971 Regulation. The Government of Bihar and its department of Health had itself notified and adopted the 1974 Guideline vide Notification no.1/C 1/703/74-7377 (1) dated 23.11.1976 (Annexure- B, Paragraph-3). The screening Committee, therefore, adopted a wrong criteria by resort to 1971 Regulation; therefore its recommendation cannot be accepted. It was also contended that in view of the judgment of this Court the petitioner having fulfilled the 1974 guideline of the Medical Council of India, was entitled to hold and to be absorbed as Associate Professor of Medicine in Nalanda Medical College but the Screening Committee and the State Government erred in taking a decision to absorb the petitioner as Assistant Professor of Medicine with effect from 1.7.1978 treating his experience between 1.7.1975 to 30.6.1978 as Junior Teacher. After having so done, Annexure-7 was issued retrospectively demoting the petitioner from the post of Associate Professor to Assistant Professor, illegally and arbitrarily against the interim stay order. The illegality was perpetrated further by not including the name of the petitioner for consideration for the appointment of Professor in the Government Panel of

Associate Professors prepared on 1.2.1975 (Annexure-8). The petitioner has also drawn attention of the Court to the report of the Medical Council of India during the period February, 1979 showing the petitioner as an Associate Professor with eight years teaching experience (Annexure-9).

12. *C.W.J.C.no.5303 of 1985:* In this case the petitioner, Dr.Vijay Kumar Srivastava, seeks a direction commanding the State Government to absorb the petitioner as Associate Professor of Surgery with effect from 10.2.1978 and further promoting him to the post of Professor of Surgery in Nalanda Medical College, Patna. He is aggrieved by the decision of the Screening Committee holding him eligible as Assistant Professor of Surgery since 10.2.1978 and the Screening Committee's reference as to the validity of his appointment as Associate Professor only to be considered after receipt of advise from Medical Council of India regarding his expereince abroad. The petitioner seeks direction that his name should be omitted from the list of Assistant Professor of Surgery dated 3.4.1986 (Annexure-10/1) which is against the teeth of interim order dated 15.11.1985 restraining the State from demoting him, as also to include him in the panel of Associate Professors (Annexure-10 dated 12.3.1986) which was prepared without considering the case of the petitioner, to appear and give their consent for promotion and posting as Professor of Surgery. He further prays for direction to implement the consent judgment in C.W.J.Cs no.5004 and 4554 of 1978 dated 27.11.1979.

13. *Facts*: The petitioner claims to be Registrar West Browich and District General Hospital and Hallam Hospital, a post-graduate Medical Centre linked to the

University of Brimingham for the period January, 1969 to May, 1973. From May, 1973 to August, 1974, he worked as Medical Assistant (Senior Registrar Grade) and Lucum Consultant. He also gathered research experience during the period of foreign teaching (See Annexure-13 series). On 25.7.1975 the petitioner was appointed as Assistant Professor of Surgery by the Governing Council of the Nalanda Medical College. On 16.12.77 vide Annexure-9 Medical Council of India recommended for appointment of the petitioner as Associate Professor of Surgery and reiterated the same on 11.1.1978 vide Annexure-12. Thereafter, on 10.2.1978 the petitioner was promoted as Associate Professor on the recommendation of Medical Council of India as per the orders of the Chairman, Board of Control in consultation with Principal (Annexure-2). The Board of Control re-affirmed the action taken by the Chairman on 12.4.1978 (Annexure-3). After the nationalization and Take Over of the College by the Take Over Act of 1978, Government constituted a Screening Committee under the Take Over Act which was also challenged by the petitioner in C.W.J.Cs no.4554 and 5004 of 1978. In the said petitions the Government filed a suppelementary affidavit to vacate the order of stay referring to the qualification provided by 1974 Guideline of the Medical Council of India with an assurance that the petitioner will be absorbed to the highest post if they are found fit fulfilling the said qualifications. In February, 1979 the Medical Council of India submitted an inspection report showing the petitioner as Associate Professor of the College (Annexure- 7). On 27.11.1979 the two writ petitions aforesaid were disposed of by a consent judgment; the contents of which have already been extracted in-extenso earlier. On 15.3.1980 the Screening Committee met to consider the case of the petitioner

and on the basis of 1971 Regulation of the Medical Council of India, the petitioner was stated to be eligible as Assistant Professor since July, 1978. The discussion as to the validity of petitioner's appointment as Associate Professor was postponed till the advise of Medical Council of India of foreign teaching experience is obtained. The petitioner filed a representation against the report of the Screening Committee (Annexure-6) but curiously the petitioner was excluded from the panel to be considered for being appointed as Professor (Annexure-10) and the petitioner was shwon in the impugned panel of Assistant Professors (Annexure-10/1). In short, inspite of petitioner's being appointed as an Associate Professor after obtaining the opinion of the Medical Council of India some time in 1978 the Government held him eligible only as Assistant Professor of Surgery since 10.2.1978 on the basis of the report of the Screening Committee, which is *per se* illegal, void, without jurisdiction and is in breach of the direction of the High Court contained in C.W.J.Cs no.4554 and 5004 of 1978.

14. The State has filed counter - affidavit in C.W.J.C.no. 5227 of 1985 and has prayed that this should be treated as counter-affidavit in all these cases as well. As per order dated 12.11.1986, the State has filed copies of the said counter- affidavit in all these cases to complete the records. The stand of the State is that the criteria to be applied as required under section 6(2) of the Take Over Act is to determine the eligibility of a person to hold a particular past, according to the requirement of 1971 Regulation of the Medical Council of India which has been framed under section 33(j) of the Indian Medical Council Act, 1956 and approved by the Government of India in June, 1971. Other criteria that has been circulated

by the Medical Council of India after 1971 are recommendations but not regulation, therefore is not legal and binding. In paragraph no.8 of the counter-affidavit the State is stated to have re-designated the teaching posts, namely, Professors as Professors; Lecturers as Associate Professors; Tutors as Assistant Professors; Registrar and Resident Officer as Registrar and Resident; but this decision is stated to have been taken by Resolution dated 23rd November, 1976 which has been annexed and marked Annexure-B. Apart from the re-designation in paragraph no.3 of the said Resolution it has also been stated that the existing criteria for confirmation in the teaching post would be as hereunder:

(a) for becoming Assistant Professor one must have three years' teaching experience in junior teaching post;

(b) for Associate Professor one must have three years'experience as Assistant Professor; and

(c) for becoming Professor one must have experience of five years as Associate Professor.

This, however, is the requirement of revised recommendation of the Medical Council of India in the year 1974 (which will hereinafter to be referred to as 1974 Guideline). It has also been stated that the petitioners were not eligible to be appointed as Associate Professor "on the basis of the Guideline laid down by the Medical Council of India or University Statute". The Committee was constituted under section 6 of the Take Over Act to screen the eligibility of the teachers on the basis of 1971 Regulation, which is the only approved Regulation. The Committee did

not find the petitioners eligible, therefore they were not validly appointed as Associate Professor. It has also been submitted that the petitioners were never appointed as Associate Professor but they were "temporarily designated by the Chairman of the Board of Control". The Chairman in his letter dated 13.7.1978 has clearly stated that the question of their final appointment and promotion will be subject to the approval of the Government's final decision in the matter (Annexure-C). It has further stated that the designation given to the petitioners was subsequently withdrawn on 24.4.1978 saying that the Board of Control is not in a position to rectify the designation unless the clearance from the Government is indicated (Annexure-D).

15. Further, on 2.8.1977 itself the Government issued a direction to the Chairman of the Board of Control that without obtaining prior approval from the Government no decision should be taken by the Board of Control in regard to promotion of the teachers (Annexure-E). The designation given by the Board of Control is in violation of the direction of the Government and, therefore, invalid or at best the designation was given temporarily which can not be the foundation of any claim which can be enforced in writ jurisdiction. As to the various letters issued by the Indian Medical Council approving the appointment (paragraph no.22 of the counter-affidavit) it has been stated that it is of no avail to the petitioners because the basic question was whether the appointment as Associate Professor was made validly. The stand of the State further is that (paragraph no.27 of the counter-affidavit) teaching experience for work in foreign country is not admissible. Dr.Narain, petitioner in C.W.J.C.no.5147 of 1985, did not possess three years' teaching experience of

Registrar or Resident in recognised institution in India which is assential for appointment to the post of Assistant Professor nor was he ever given regular appointment to the post of Associate Professor but was merely designated as Associate Professor. He completed three years' teaching experience only in the year 1978 and, therefore, the Government has recognized him as Assistant Professor and his experience as Assistant Professor is being calculated from the year 1978. The Screening Committee did not recognize the claim of Dr.Narain with regard to his teaching work abroad. The Government also considered the representation of Dr.Narain against the recommendation of the Screening Committee and in its meetings held on 3.1.1985 and 10.1.1985 rejected his representation on the ground that foreign teaching experience is not admissible. His teaching experience is admissible from 24.6.1975 as junior teacher and from 24.6.1978 as Assistant Professor. Therefore, he could not have been an Associate Professor from 10.2.1978. So far as Dr.Binod Bihari Sinha (petitioner in C.W.J.C.no.5205 of 1985) is concerned, the Screening Committee found him eligible as Assistant Professor of Medicine since July, 1978 but his teaching experience for working in Kurji Hospital and R.M.R.I is not admissible. But, the Committee accepted the experience of Dr.Sinha as Junior teacher from 1.7.1975 and as Assistant Professor from 1.7.1978 which has been accepted by the State Government. There is, however, no averment so far as Dr.Srivastava (petitioner in C.W.J.C. no. 5303 of 1985) is concerned, but it seems that his case being parallel to Dr.Mahendra Narain, I will assume that the same is also the stand of the Government with respect to him.

16. Mr.Ramchandra Prasad Sinha, learned

counsel appearing on behalf of Dr.Mahendra Narain, has submitted that on the Taking Over of the Management of the private Medical Colleges, the power to manage the College vested completely in a Board of Control for the management of the Institution and the said Board was authorised to take such steps as may be necessary for the purpose of efficiently managing the College and shall exercise such other powers as may be found under section 4 of the Management Act. The Board of Management, however, is reguired to function under the Control of the State Government. Under section 16 of the Management Act the State Government is empowered to give direction to the Board as they deem fit for the proper management of the College and if the Board violates the direction, the State Government, is empowered to remove the Board and constitute a new Board. According to the learned counsel there is no provision in the Act which required every action to be taken by the Board to be previously approved by the Government. The Government did not cancel the Notification constituting the Board nor gave any direction under section 16 not to make appointment or do so after approval by the State. The Board, in order to obtain recognition of the College to confer recognized degrees, in their wisdom, took the opinion of Medical Council of India from time to time before designating the petitioners as Associate Professors to conform to the requirement of a teaching Unit in the clinical department. The Unit system required that Unit must have one Professor/Associate Professor, one Reader/Assistant Professor, one Registrar/Tutor and one Houseman for ten beds. The regulation provided that in case of specialities under Medicine and Surgery the qualifications and experience of teachers should be as required in the Regulation, but difficult cases may

be considered on individual merit. To fulfil the requirement for recognition the Board of Management, after having sent all the biodatas of the petitioners, obtained the opinion of the Medical Council of India for the petitioners appointment and/or their promotion in the Institution. The Medical Council of India kept on inspecting Institution from time to time and never raised their finger that the petitioners, who were working as Associate Professors, did not have the requisite qualification; on the contrary, treated them as Associate Professor in the respective discipline fulfilling the requirement for recognition, kept on taking work from the petitioners as Associate Professor, treated them as Associate Professor, enjoyed the recognition of the Institution accepting the petitioners projection as Associate Professor by the Medical Council of India and obtaining recognition of the University by the Central Government, with valid power to confer M.B.B.S. degree. This action on the part of the State amounts to approval of their appointment by the Board of Control as Associate Professor. The State Government is, therefore, estopped to rely upon Annexure-B, the letter dated 2.8.1977, questioning the said appointment as having been made without the State Government's prior approval and/or to question their not being at all appointed but merely designated temporarily to obtain recognition.

17. Mr. Basudeo Prasad, learned counsel appearing on behalf of the two other petitioners, similarly contended that now there is no scope to question the appointments whether done with the approval of the Government or not, and whether they were at all appointed in view of Annexure-C and E of the counter-affidavit. The State has taken full advantage of the efficient management by the Board

of Control in obtaining recognition and get it renewed from time to time. Apart from the question of estoppel, the bogey of no appointment or invalid appointment in view of Annexures-C and E is really exhibiting fraud in exercise of executive power to deceive the Medical Council of India and the Central Government, on the one hand, by obtaining recognition of the Institute and the teachers and students, on the other, that they were no at all validly appointed teachers nor the students consequently given valid degrees - it was all a camouflage.

Both the learned counsel, further, contended, relying upon Annexure-6 (C.W.J.C.no.5147 of 1985), Annexure-10 (C.W.J.C.no. 5205 of 1985) and Annexure-12 (C.W.J.C.no.5303 of 1985), that the Secretary of the Medical Council of India wrote to the Chairman, Board of Control on 2.1.1978/11.1.1978 on the subject "Teachers eligibility qualifications - Appointment of Teachers in Magadh Medical College", in reply to the Chairman's letter of 1st December, 1977, that the matter regarding appointment of the petitioners was considered by the Executive Committee of the Medical Council of Inda at its meeting held on 13th December,1977 and found all the petitioners eligible to hold the post of Associate Professor or Medicine and Associate professor of Surgery. Thereafter, on 10.2.1978 vide Annexure-7 (C.W.J.C. no.5147 of 1985); Annexure-2 (C.W.J.C. no.5205 of 1985) and Annexure-2 (C.W.J.C. no.5303 of 1985) as per direction of the Chairman of the Board, the petitioners were designated as Associate Professor in the respective discipline on a temporary basis. The Board in its agenda, Item no.4, ratified and affirmed the decision of the Chairman in this direction for facilitating recognition of the College by the Indian

Medical Council. There is implied approval of the appointments which is manifest from State's own conduct and representation to the Medical Council. Annexure-E is not even a Government order much less a direction under section 16 of the Taking over of the Management Act. All orders of Government, in view of Article 166 of the Constitution, should be made by the Governor, which it is not, therefore Annexure-E has no validity or lagitimacy. The Board ratified the appointments on 12.4.1978 vide Annexure-3 (C.W.J.C.no.5303 and 5205 of 1985) and Annexure-9 (C.W.J.C.no.5147 of 1985). Therefore, there could be no question of withdrawing the designation as is contended by the State relying upon Annexure-D dated 24.4.1978. Further, Annexure-D is relevant as it concerns only question of rectification of the designation prayed for by some others. It was also urged forcefully that all these objections cannot be permitted to be raised now after the State having suffered an inter-party judgment in C.W.J.C.no.5004 and 4554 of 1978 dated 27.11.1979 that the terms and conditions of the doctors of Private Medical Colleges will be altered if their selection was not in accordance with University Regulation or Medical Council of India Guidelines. The teachers, on fulfilment of the aforesaid test shall also be entitled to promotion. This writ petition is actually for implementation of the consent order; the scope of the writ being whether on the date they were appointed they had the required qualification and experience. The power of the State Government under section 6(3) is not absolute but one controlled by section 6(2) of the Take Over Act.

18. Learned counsel have also urged that the Screening Committee did not reject the foreign experience of the petitioners but only observed that

their cases as Associate Professor will be examined after advice received from the Medical Council of India regarding their teaching experience abroad which means that the Government will accept the validity of appointment as Associate Professor subject to the report of the Medical Council of India regarding their teaching experience abroad. But, curiously before the opinion was received the promotion to the post of Professors were made treating the report of the Screening Committee as final i.e.on the relevant date the petitioners were merely treated as Assistant Professor. Further, Medical Council of India having already expressed their opinion both before and after their appointment as Associate Professor; re-reference to the Medical Council of India to adjudge once again their eligibility to hold that post is a harassment only to deprive the petitioners of their legitimate right in order to favour a few. Annexures- 12,13,14,28, and 29 (C.W.J.C.No. 5147 of 1985) and Annexure-7 (C.W.J.C.no.5303 of 1985) namely the reports of the Medical Council of India, copies of which have always been forwarded to the Government of Bihar, indicated the petitioners' promotion as Associate Professor. The stand of the State that the teaching experience acquired in foreign countries is inadmissible is wholly unsubstantial and groundless since it is now well established that teaching experience in teaching Institutions in foreign countries are recognized by the Medical Council of India. Further, according to the learned counsel, the Screening Committee adopted wrong norms in screening the candidates because under section 6 of the Take Over Act the Guidelne of the Medical Council of India ought to have been applied and the relevant Guideline at the time of screening was the 1974 Guideline of the Medical Council of India, which ought to have been applied in screening the

candidates. The qualification required in 1974 Guideline has also been accepted by the State Government as will be evident from paragraph no.3 of the decision of the Government (Annexure-B) as also from the Supplementary affidavit filed in C.W.J.Cs no.4554 of 1978 and no.5004 of 1978 (Annexure-18 of C.W.J.C.no.5147 of 1985) i.e. for becoming Associate Professor, one must be three years as Assistant Professor and for becoming Professor one must be for five years as Associate Professor.

19. Learned counsel also contended that under Clause 10 of the Guideline of the Medical Council of India in appropriate cases the qualification and teaching experience requirement could be relaxed depending on the merit of the case. The Medical Council once having approved and rendered their opinion holding them eligible to hold the post of Associate Professor, manifest that the petitioners fulfilled the qualification and experience of the Guideline and/or the Medical Council, after considering the entire biodata, relax, in their wisdom, any deficiency in their experience. In short, the learned counsel submit that the decision of the Government is in clear violation of the earlier judgment of this Court and in violation of the powers conferred under section 6 of the Take Over Act.

20. I would first of all like to dispose of two minor contentions raised by the State, desentitling the petitioners to the relief sought for.

21. One of the point is that the petitioners were never appointed as Associate Professor. They were merely designated as Associate Professor in the exigencies of circumstances, namely, the impending

recognition of the Colleges by the Medical Council of India. As the petitioners were never appointed but merely designated as Associate Professor they have no legal right to enforce. I do not find substance in this contention of for the reason the word "designate" means "select, appoint, nominate, to mark out, to point out, to name, indicate etc.". The word "designation" means' also an appointment and assignment to a particular office" (See Black's Law Dictionary, Fifth Edition page 402). I, therefore, hold that when the petitioners were designated as Associate Professors they were appointed to that particular post in order to obtain recognition of the College by the Medical Council of India and consequent recognition of the University by the Central Government (Annexure-15 of C.W.J.C.no. 5303 of 1985).

22. The other point raised by the State is that the teaching experience acquired by the petitioners in a foreign country is not admissible for being reckoned under Medical Council of India (Paragraph no.27 of the Counter-affidavit), therefore, it should be ignored in finding out the eligibility of the petitioners' for being promoted as Associate Professor and/or Professor. This question is no more res-integra in view of the decision of the Supreme Court in the cases of State of *Bihar and Another* vrs. *Ashish Kumar Mukherjee* (1) and *Dr.Ram Janam Singh* vrs. *State of Bihar* (Civil Appeal no.2106 of 1978 decided on 21.11.1986) it was held that teaching experience from teaching Institutions which are linked with and/or recognized teaching Institutions by the Universities and Organisations in Schedule-II and Schedule-III and

(1) (1975) A.I.R. (S.C.) 192.

recognized by the Central Government under section 14 of the Indian Medical Council Act, 1956, have to be reckoned for appointment of persons to the post of teachers of Medical College. I, therefore, find no substance in the broad proposition that foreign teaching experience is irrelevant and inadmissible as contended by the State.

23. Next, I will take up the State's objection based on Annexures-E, C & D to the appointment of the petitioners as Associate Professors in Medicine and Surgery in Nalanda Medical College of Magadh University. In point of time Annexure-E is dated 2.8.1977 issued by Mr.P.B.Singh, Joint Director of Health, to the Chairman of Board of Control constituted under the Ordinance. It says that Government has taken a policy decision to take over the Colleges therefore it is requested that before obtaining Government approval no decision of promotion of the teachers be taken. On 13.3.1978 (Annexure-C), the Chairman of the Board of Control wrote to the Principal in view of the impending inspection of the final M.B.B.S. examination of the Medical Council of India and the consequent recognition of the unit system of the various clinical department which have been put into effect, the petitioners and few others be given designation as Associate Professor on temporary basis. The question of their final appointment and promotion will be subject to the approval of Government. On 24.4.1978 (Annexure-D), Principal wrote to all heads of the department that Board of Control is not in a position to rectify the designation/promotion of certain doctors as Associate Professor unless clearance of the Government is communicated to it. The letter does not spell out the name of the doctors who sought rectification of their designation or promotion.

24. All the petitioners were appointed or promoted as Associate Professor on 10.2.1978 (Annexures- 7 to 11 of C.W.J.C.no.5147 of 1985; and Annexure-2 of C.W.J.Cs.no.5205 and 5303 of 1985). This letter issued by the Chairman of the Board only say that they are designated as Associate Professors on a temporary basis, along with others. It nowhere says that this designation is subject to the approval of final decision of the Government. This letter of appointment appear to have been followed by issuance of Annexure- 'C' almost after one month i.e. 13.3.1978, stating their final appointment is subject to the approval of the Government. On 12.4.1978, however, the Board of Control of the College held a meeting and under agenda 4, approved and ratified all actions taken by the Chairman in obtaining provisional recognition of the College by the Medical Council of India and appreciated the efforts of the Chairman in this direction. Then comes Annexure-D dated 24.4.1978, to the effect that rectification of designation can not be made for certain doctors without communication from the Government. This document do not refer to the petitioners nor there was any question of rectification of petitioners designation, as they had already been designated as Associate Professors.

25. Under section 4(2) of the Ordinance, the Board of Control was invested with the power to take such steps as may be necessary for the purpose of efficiently managing the College and shall exercise such other powers and such other duties, as may be prescribed, subject to the control of the State Government. Under section16 of the Ordinance the State Government may issue such directions to the Board of Control as the Government may deem fit for the proper management of the College and in the event on non- compliance

of such directions the State Government may remove the Board of Control and constitute a new Board. For efficiently managing the Medical Colleges, to obtain recognition of the College and the renewal of the recognition must be of paramount interest for the Board of Control, as otherwise the College will be of no worth even requiring a Board of Management. It was the requirement of the Medical Council Regulation that the teaching unit in the clinical department shall have a Ward of a minimum of 25 beds and a maximum of 60 beds in the principal subjects i.e. Medicine, Surgery, Midwifery and Gynecology and 16 beds minimum per unit in the allied specialised subjects and each unit should have one Professor/Associate Professor, one Reader/Assistant Professor, one Registrar/Tutor, one Houseman for ten beds. On introduction of the Unit system and to fulfil this requirement for recognition, the Board of Control was compelled, in the interest of efficient management of the Medical College, to appoint and promote eligible teachers, with this end in view the Board of Control collected the biodata of all the petitioners, referred the same to the Medical Council of India and obtained the approval of the Medical Council of India for appointment and/or promotion as Associate Professor in Medicine and Surgery of the College. The Medical Council of India, after careful scrutiny of the total teaching experience and qualification of the petitioners, found them fit for appointment as Associate Professors which will be apparent from the communications received by the Chairman of the Board as hereunder:

Annexure-6 of C.W.J.C.no.5147 of 1985:

"No.MCI-12(II-6) 77-Med./25311 dated New Delhi Delhi 2.1.78/11.1.78-

Sub- Teachers Eligibility qualifications- appointment of teachers in Nalanda Magadh Medical College.

Sir,

With reference to your letter no. 1013, dated the 1st Dec.,1977 on the subject noted above in supersession of all previous letters from this office in this regard, I am to state that the matter regarding appointment of following doctors was considered by the executive committee of this council at its meeting held in 13th Dec.,1977 and I am directed to state that the following are eligible for the posts mentioned against their names:

1. Dr.Mahendra Narain Associate Prof. of Medicine.

....

4. Dr.V.K.Srivastava Associate Prof. of Surgery.

....

Yours faithfully,

Sd/- U.B.Krishnana."

Annexure-10 of C.W.J.C.no.5205 of 1985:

"Dear Dr.Mukhopadhya,

Kindly refer to your telephone conversation regarding appointment of teachers in Patliputra Medical College, Nalanda Medical College, and Magadh Medical College, Gaya.

The Executive committee of this council at its meeting held on the 13th Dec.1977 decided that the following doctors may be appointed to the post shown against

each.

....

3. Dr.B.B.Sinha,Nalanda Medical College.

Assoc.Prof of Medicine.

4. Dr.V.K.Srivastava, Nalanda Medical College.

Assoc. Prof of Surgery.

....

Yours faithfully,

Sd/- U.B.Krishnan

Dr.B.Mukhopadhyaya,

MCH, F.R.C.S., F.MAHS

Saidpur Road,

Patna-800004."

Annexure-12 of C.W.J.C.no.5303 of 1985:

"No.MCI-12(1)6/77-Med./25311 dated New Delhi 110002. 2.1.1978/11.1.1978.

Subject:Teachers Eligibility qualifications -appointment of Teachers in Nalanda & Magadh Medical College.

Sir,

With reference to your letter no.1013, dated the 1st Dec.1977 on the subject noted above and in supersession of all previous letters from this office in this regard, I am to state that the matter regarding appointment of following doctors was considered by the Executive Committee of this council at its meeting held in 13th Dec.1977 and I am directed to state that the following are eligible for the posts mentioned against their names:

1. Dr.Mahendra Narain Associate Prof. of Medicine.

....

4. Dr.V.K.Srivastava Associate Prof. of Surgery.

....

Yours faithfully,

Sd/- U.B.Krishnan."

There has been successive inspection by the Medical Council of India of the College for renewal of recognition and all such reports were sent to the Bihar Government which was duly accepted by it without any mur mur (See Annexures-12,14,28 and 29 of C.W.J.C.no.5147 of 1985 and Annexure-7 of C.W.J.C.no.5303 of 1985). In all these reports the petitioners were shown as Associate Professors. The recognition was granted to the Medical Colleges and/or renewed on the basis of these reports. Central Government approved the recommendation of Medical Council of India for the temporary approval of Nalanda Medical College for the period up to 30.4.1980 and

the M.B.B.S. degree awarded by the University to which this College is affiliated, got included in the first schedule of Medical Council Act with a direction that any shortcoming and deficiency pointed out by the Inspectors of the Council in their inspection report before 30.4.1980 should be rectified (See Annexure-15 of C.W.J.C.no.5303 of 1985). The step taken by the Board in my opinion, by appointing the petitioners as Associate Professors after taking clearance from the Medical Council of India, was for the purpose of efficient management of the College. The State also, after nationalisation, kept on taking work from the petitioners as Associate Professors, treated them as Associate Professors and enjoyed the recognition of the Institutions projecting the petitioners as Associate Professors to the Medical Council of India. Question is, can the State now turn round and question the appointments and/or promotions as invalid in view of the letter dated 2.8.1977? The petitioners have contended that Annexure-E is not an order of the Government as it has not been authenticated in the manner prescribed by the Rules of Executive Business. Further, it cannot be held to be a direction within the meaning of section 4(2) of the Ordinance for efficient management of the College. Section 4(2) of the Ordinance refers only to the control of the State Government. This section is again subject to section 16 of the Ordinance which empowers the State Government to give direction for proper management of the College and in the event of breach of direction by the Board of Control, the State Government is further empowered to remove the Board of Control. It was also submitted that the stand taken in C.W.J.Cs no.4554 and 5004 of 1978 which arose consequent upon take over of private Medical Colleges challenging the vires of section 6(2) and section 6(3) of the Take

Over Act, is contrary to the present posture of the State.

26. I find a supplementary affidavit filed in C.W.J.C.no.4554 of 1978 for vacating the order of stay restraining appointment and promotion in the Medical Colleges, State Government stated that all existing teachers of the earstwhile private Medical Colleges would be certainly considered if they are fulfilling the requirement of the Medical Council of India of minimum academic qualification and teaching experience for the highest post as far as practicable (See Annexure-18 of C.W.J.C.no.5147 of 1985). In the order passed in the said writ petitions on 27.11.1979 it was consented by the State that they would alter the terms and conditions and terminate the services of the teaching staff if their selections were not in accordance with the University Regulation and on the basis of the Guideline laid down by the Medical Council of India (Annexure-19 of C.W.J.C.no.5147 of 1985). Here in these writ petitions the State, inspite of the stand taken earlier and having sufferred a consent judgment, contend that no promotion will be deemed to be legal which did not have prior approval of the State Government as required by Annexure-E. It is now too late in the day for the State Government to get rid of the appointments by relying upon its decision of prior approval, having reaped the benefit of the promotions in obtaining recognition of the Medical Colleges by the Medical Council of India; having not objected or murmured to the promotions at any stage inspite of the various inspection reports made by the Medical Council of India from time to time for continued recognition of the Medical Colleges and/or extension thereof by forwarding the copies of the inspection reports to the State Government showing the petitioners

as Associate Professors; having further given a clear consent when the Take Over Act itself was under challenged in C.W.J.C.no.5147 of 1985 that the Government will absorb all the teachers engaged in the Medical Colleges to the highest post if they are found fit as per the requirement of the Medical Council of India Guideline; having not dissolved the Board of Control for violation of the direction (Annexure-E) issued under section 16 of the Ordinance which the State Government was so empowered. The very conduct of the State, in the facts and circumstances of the case, in my opinion, would amount to implied approval of the petitioners' appointment and/or promotion made by the Board of Control, as Associate Professors.

27. It is well established that under certain conditions silence or inaction constitute a representation as much as positive language or conduct for the purpose of Estoppel (See Spencer Bower and Turner, the Law relating to Estoppel by representation page 48). It was the legal duty of the State to take steps or to disclose to the Medical Council of India or to the petitioners that these promotions have not their approval and, therefore, invalid. On the other hand, the State by their conduct by reaping the benefit of such promotions, led everybody to believe that no such fact exists or that there is nothing so abnormal or peculier in the nature of the transaction or in the circumstances of the case as to give rise to any duty of disclosure and to shape Medical Council's course of action on that assumption. In my opinion, the State's silence, inaction for years and their stand taken in the earlier writ petition amounts to an implied representation of the non- existence of any thing of the kind on the basis whereof every representee altered their position on the faith of that representation.

Therefore, the State is now estopped setting up the existence of such surprised or undisclosed facts. In any event it would amount to acquiescence and waiver of the requirement of prior approval in the matter of appointment and promotion and/or implied approval of the State to the appointment and promotion.

28. There is one more reason for me to hold that the promotions had the approval of the State Government. For the purpose of efficient management of the College, which was the function of the Board of Control, they had the impending duty of obtaining recognition and for the said purpose appointments and promotions were urgently required and in their wisdom, after obtaining the opinion of the Medical Council of India, they promoted the existing teachers. If that was a breach of the direction of the State Government, as envisaged by Annexure-E, the State Government was empowered to dissolve the Board of Control in exercise of power conferred under section 16 of the Ordinance. But the State Government did not do so evidently as it was "for the proper management of the College". The words "control of the State Government" under section 4(2) of the Ordinance do not mean that every action of the Board for the efficient management of the College had to have State Government's seal and stamps. In that event the State Government will be usurping the power of management by the Board of Control constituted under section 3 of the Ordinance to exercise all the powers of the managing Committee of the College. The State exercised only supervisory jurisdiction to over see efficient and proper management. I am also of the

opinion that under section 16 the State Government could give such direction to the Board which was meant for proper management of the College. Even if it is assumed that the direction contained in Annexure-E was by the State Government, it was not insisted upon by the State as it was likely to affect the proper management of the College when the latter was passing through crucial stages with the career of hundred of students to obtain immediate recognition and to meet the requirement of Medical Council of India. The appointments however, had the prior approval of the Medical Council of India of which the State had full knowledge. It was, therefore, the State did not take any action under section 16 of the Ordinance which can safely be assumed to be State's tacit approval of the action taken by the Board in the best interest of the College. I hold that the appointments and promotions of the petitioners cannot be held to be illegal because it was violative of Annexure-E, the letter of the Joint Director of the Health Department.

29. I now take up the submission whether the State Government was at all justified in issuing Annexures-22 and 27 (C.W.J.C. no.5147 of 1985), Annexures-7,8 and 14, (C.W.J.C. no.5205 of 1985) and Annexures-10 and 10(1) (C.W.J.C. no.5303 of 1985) upon the tentative decision of the Screening Committee (Annexure-20 of C.W.J.C.no.5147 of 1985). Could these orders to the detriment of the petitioners at all be passed before finally determining the eligibility of all the candidates? Whether such a decision of the State Government is ultra-vires Articles 14 and 16 of the Constitution of India and Section 6 of the Take Over Act as interpreted by the previous judgment of the

High Court (C.W.J.C. no.5004 of 1978 decided on 27th November, 1979) where it was held that the decision of the Government under section 6(3) is subservient to the decision of the Screening Committee under section 6(2) of the Take Over Act. The judgment lay down in no unclear terms "In other words it is conceded that sub-section (3) of section 6 of the Take Over Act is being controlled by sub-section (2) of section 6 of the Act". Question, therefore, is unless the decision of the Screening Committee under section 6(2) of the Take Over Act attains finality could the State Government take any decision under section 6(3) of the Take Over Act. At this place it would be worthwhile to extract the previous consent judgment of this Court, even though repetative, to properly appreciate the point.

"It is also conceded by both the counsel that the State Government can alter the terms and conditions and terminate the services of the teaching staff, provided their selection was not in accordance with the University Regulation and on the basis of the guidelines, laid down by the Medical Council of India. In other words, it is conceded that sub-section (3) of section 6 of the Act is being controlled by sub-section (2) of section 6 of the Act. Thus, the State Government under sub-section (3) can terminate the services of any of the teaching staff only if the appointment of the teaching staff was not made in accordance with the University Regulation and on the basis of the guide-lines laid down by the Medical Council of India and not otherwise. If these two conditions are fulfilled then the State Government has authority to terminate the services of any of the teaching staff. In other words, these petitioners will not be placed before the second screening committee or the second Selection Board for their appointment.

We, therefore, direct that these petitioners should be promoted according to their claims, if any, subject to the direction of the State Government. The respondents are further directed to follow in all other identical cases of the teaching staff of all the private medical colleges which have been taken over by the State Government."

(C.W.J.Cs no.5004 & 4554 of 1978 decided on 27.11.1979)

30. The Screening Committee was unable to decide about the claim of teaching experience outside India except Wels National Medical School Hospital Cardiff, University of Cardiff. Teaching experience gained in other types of Hospital and Institutions abroad, they felt reference has to be made to the Medical Council. In Annexure-2 of the Committee's report list of such teachers, whose case has been referred to Medical Council, have been stated (See pages 30 and 39 of the report of the Screening Committee; Booklet published by the Health Department; Annexure- 20). In the case of Dr.V.K.Srivastava and Dr.Mahendra Narain, they found them eligible as Assistant Professor of Surgery and Medicine since February and June,1978, respectively but postponed deciding validity of their appointment as Associate Professor till advice is received from Medical Council of India regarding their experience abroad. In the case of Dr.B.B.Sinha, they found him eligible as Assistant Professor, Medicine since July, 1978 but his claim of teaching experience in Kurji Hospital and R.M.R.I as well was referred to Medical Council of India's advice. Therefore, the Screening Committee could not decide the case of these three doctors. From the earlier judgment it is crystal clear that any decision of the State Govrnment

under section 6 (3) of the Act must abide by the decision of the screening Committee and the State Government cannot act in exercise of its power under section 6(3) of the Take Over Act, as a second screening committee for the purpose of absorption, termination and re-determination of the rank of the doctors.

31. No material has been placed before me by the State Government whether after March, 1980, the State Government has obtained the opinion of the Medical Council of India as directed by the screening Committee in their meeting held on 14.3.1980 and 15.3.1980. The very first page of the minute of the Screening Committee states as follows :

> "Considered the Resolution of the Government along with the judgment of Patna High Court in C.W.J.Cs no.5004 and 4554 of 1978 and noted that in view of the clear directive contained in the High Court judgment the Committee would be well advised to base their recommendation on the Medical Council of India Regulation and the University Regulation if there be any. The Committee, therefore, decided to screen the teachers on the basis of 1971 Regulations of the Medical Council of India, approved under section 33 of the Medical council of India Act, 1956".

I really wonder how in this state of affairs the Government could at all prepare a *final* panel of Professors Assistant Professors and Associate Professors and accord promotion to others as Professors, ignoring the consideration of the petitioners without obtaining the views of the Medical Council of India as desired by the Screening Committee as also in view of previous directive of the Patna High Court. The Government had no authority to determine the teaching experience of these doctors in India and

abroad in determining their fulfilment of the qualification as laid down by the Medical Council of India for being appointed as an Associate Professor and/or Professor. The screening Committee was also directed by the High court to act strictly according to the *guideline* of the Medical Council of India and University Regulation, if available. Admittedly, there being no University Regulation, the Screening Committee was required to screen the teachers only on the basis of the *guideline* of the Medical Council of India. The preparation of a panel of Professors without finalising the panel of Associate Professors where from the promotion is effected is bound to occssion inequality in the matter of appointment and promotion. It also suffers from the vice of irrationality and arbitrariness, devoid of fair play and justice. I am, therefore, constrained to hold that seniority list showing petitioners as Assistant Professor of Medicine and Surgery (Annexure-7 of C.W.J.C. no. 5205 of 1985; Annexure-27 of C.W.J.C. No. 5147 of 1985 and Annexure-10/1 of C.W.J.C. no.5303 of 1985) before obtaining the opinion of Medical Council of India is not in accordance with law. The inclusion of their name in the said list, therefore, has to be quashed. The promotion of respondents as Professors (Annexure-8 of C.W.J.C. No. 5205 of 1985) and the letter asking for preference regarding posting as Professor (Annexure-22 of C.W.J.C. no. 5147 of 1985 and Annexure- 10 of C.W.J.C. no. 5303 of 1985) before finalisation of the cases of the petitioners do not appear to be legal and valid since the petitioners were excluded from consideration. Had the petitioners been justly appointed as Associate professors fulfilling the norm as required in C.W.J.C.no.5004 of 1978 decided on 27.11.1979 they became entitled to be promoted as Professors. As a matter of fact, some petitioners claim to be the senior most Associate

Professor in their discipline.

32. Further, the State Government had before it the materials to show that the appointment of the petitioners were made after the Medical Council of India found them fit and duly qualified with required teaching experience to be appointed as Associate Professor (See Annexure-12 of C.W.J.C. No. 5147 of 1985; Annexures 9 and 12 of C.W.J.C. no.5205 of 1985 and Annexure-7 of C.W.J.C no 5303 of 1985). It had also before it the opinion of the Medical Council of India in the form of their inspection reports dated 7.4.1981 and December, 1981 (Annexures-28 and 29 of C.W.J.C. 5147 of 1985) even after the report of the Screening Committee dated 15.4.1980 (Annexure-20 of C.W.J.C. no.5147 of 1985). As such the State Government if at all wanted to exercise their power under section 6(3) of the Take Over Act due to some urgency and/or due to exingencies of the situtation, it could have acted on the basis of those materials without calling for further advice of the Medical Council of India to avoid duplication of work, which would have been in consonance with the earlier judgment of this court and the requirement of section 6 of the Take Over Act.

33. For that matter, I can not really appreciate even the screening Committee's directive to obtain again the opinion of the Medical Council of India as to the teaching experience of these petitoners abroad and in India. Be That as it may, the State Government has before it the various representations of the petitioners (see Annexure-21 of C.W.J.C. no.5147 of 1985; Annexure-6 of C.W.J.Cs. no.5303 and 5205 of 1985) bringing it to its knowledge every fact leading to their appointment as Associate Professor, as also

the subsequent reports of the Medical Council of India after the submission of the report of the Screening Committee, which ought to have pursuaded it to treat them as validly appointed Associate Professor and considered their case along with others for promotion to higher post. In the alternative awaited the receipt of further opinion of the Medical Council of India as per Screening Committee's directive.

I do not think the State ever realise the grievous and disastrous consequences of its stand that the petitioners were not qualified to be appointed as Associate Professor and/or validly appointed as Associate Professor. Inevitable consequence would be the recognition obtained from Medical Council of India and the Central Government was by misrepresentation of facts and resort to deception and all degrees and diplomas conferred so long are scrap of papers. I have not been able to fathom this dual policy of the State nor can this policy be justified on any moral or legal ground. it may also be mentioned, in this connection, that Medical Council of India also possess the power of relaxation of requisite experience on a reference made to the Council as envisaged under Clause 9 of 1971 Regulation (last page) and clause 10 of 1974 Guideline on considration of Individual Merit.

34. I would like to dispose of one more point seriously urged before me by the State to the effect that in any event the petitioners were only temporarily designated as Associate Professor (vide Annexure-C), therefore the experience gained by them as Associate Professor will not be equivalent or at par with those who were permanently appointed as Associate

Professor nay at all for consideration of their further promotion as Professors. This argument is also devoid of substance in view of the law laid down by the Supreme Court in the case of *Dr. Ashim Kumar Bose* Versus *Union of India* (1). It has been held that :

"There is hardly any difference so far as teaching experience is concerned whether it is acquired on regular appointment or as specialist in a teaching Hospital with the ex-officio designation."

The ratio, in my opinion, is actual gaining of teaching experience in a recognized teaching Institution have to be reckoned for the purposes of eligibility to be considered for appointment or promotion as the case may be in a Medical Institution.

35. One more question has been strenuously urged before me is that the Screening Committee adopted wrong legal test by trying to screen the teachers on the basis of 1971 Regulation. It was submitted by the learned counsel that the earlier judgment of the High Court referred to the Guideline of the Medical Council of India for determination of the eligibility and right of promotion of teachers. The Medical Council of India at the time of appointment also applied the Guideline of 1974. The resolution of the State Government dated 23rd November, 1976. Annexure-B, in which the qualification has been Stated is in effect the adoption of the teaching experience as has been prescribed in the revised Regulation of 1974. This was also the stand of the State as to

(1) (1983) A.I.R. (S.C.) 509.

the teaching experience for the post of Associate Professor in the supplementary affidavit filed in the previous case (C.W.J.Cs 5004 and 4554 of 1978, Annexure-18). This statnd of the State Government is also manifest from paragraph no.11 of the Counter-affidavit filed on behalf of the State.

36. on behalf of the private respondent it has been urged that the test to be applied is the 1970 Regulation of the Medical Council of India because this is the Regulation purported to have approved under section 33 of the Medical Council of india Act, 1956 by the goverment of India on 5th June, 1971 but the revised recommendation of the Medical Council of India of the year 1974 do not seem to have been approved by the Government of India under section 33 of the Medical Council Act because 1974 revised Regulation do not purport to say so. It is, therefore, said that under the Medical Council Act, 1956, the revised recommendation of 1974 cannot be adopted to determine the required qualification and teaching experience of the teachers appointed in a recognized Medical Institution.

37. The revised recommendation of the Medical Council of India on the qualifications required for appointment of the persons to the post of teachers has been approved by the council at its meeting held on 16.3.1974 after complying with the procedure as laid down under section 19A of the Indian Medical Council Act, 1956. Section 19A authorizes the Council to prescribe the minimum standard of Medical education required for granting recognized Medical qualifications by the Universities and Medical Institutions in India. It further requires that the draft Regulation and all subsequent amendment thereof should be furnished

to the State Government for their comments and on consideration of the comments received within three months from the date of furnishing the Draft Regulation, the proposed Regulation should be placed before Central Government for sanction.The revised recommendation states at the very first page of the booklet, that the requirements of Section 19A has been complied with. What is being argued by the private respondents that the power to make regulation is under section 33 of the Medical Council Act and there being no reference of section 33 in the Revised Recommendation of 1974, therefore revised recommendation never attained the status of Regulation.

38. Section 19A has been inserted on 16.6.1964 by amending Act 24 of 1964. Section 19-A vests the Medical Council with the power to prescribe the standards of medical education. It further provides the mode and manner of framing Regulation, in this connection, and when to obtain the sanction of Central Government to the proposed Regulation for its finality. Section 19-A also empowers amendment of the existing Regulation. It is true that the power to make Regulation by the Council is to be found under section 33 of the Medical Council Act. It requires making of Regulation only with the previous sanction of the Central Government. Both the sections speak about sanction of the Central Government to the proposed Regulation. If, therefore, the revised recommendation of 1974 has obtained finality on fulfilment of all the requisite conditions under section 19-A, it becomes statutorily enforcable. The revised recommendation of 1974 says in so many words at the very outset that the 'recommendations have been approved' after complying with the procedure laid down under section 19-A of the Indian Medical Council Act. At page 3 of the revised

recommendation, the 1974 document is referred as "PRESENT REGULATION" and "PRESENT REQUIREMENT"

39. My attention has been drawn to a division Bench decision in the case of *Rama Shanker Singh* vrs. *The Principal Darbhanga College* (1) in this connection. In that case it was held in paragraph no.6 of the judgment: "if the recommendation has not been finalised as required under section 19 A" they will have only advisory value nevertheless requiring great value to be attached. By finality their lordship meant complicance of section 19 A (2) which makes it statutory Regulation. In *Rama Shanker* case (supra) the Regulation of November, 1964 was under consideration of the Central Government for inclusion under Regulation.

Therefore, merely because there is no reference of section 33 of the Indian Medical Council Act in the revised recommendation of 1974, from that itself, it is not possible to conclude that the recommendations did not comply with all the requirement of 19 A when it purports to have been so complied and referred to as present Regulation. No evidence in the nature of any letter or telegram and/or any certificate of the Council has been produced by the Private respondents, as was done in *Rama Shanker's* case (supra) in rebuttal of the averments inscribed in the very first and third page of Revised Recommendations of 1974.

(1) (1969) A.I.R. (Pat.) 11.

40. Medical Council of India is not a party to the writ petitions and, therefore, I have no opportunity to know their stand in this regard. The materials available on the record, however, manifest that the Medical Council of India is folllowing the staffing pattern as envisaged under the revised recommendation of the year 1974. The State of Bihar has also prescribed the same standard of qualification for appointment of person to the various post of teachers in the Resolution, Annexure-B, in the year 1976. The State, in their supplementary-affidavit in the earlier writ petition, has adopted the qualification requirement as it is to be found in the revised Regulation of 1974 (Annexure-18). The revised recommendation also purports to have been made as required under section 19A of the Indian Medical Council Act. Section 6(2) of the Take Over Act refers to University Regulations and the *Guidelines* laid down by the Medical Council of India for the purpose of screening the candidates as to their appointment and promotion. The previous judgment also refers to *Guidelines* laid down by the Medical Council of India. The minute of the Screening Committee do not anywhere show that they obtained the opinion of the Medical Council of India as to whether the revised recommendation of 1974 received the sanction of the Central Government. What is discernible from the minute of the Screening Committee is that the screening have to be made on the line suggested by the High Court's judgment in C.W.J.Cs no. 5004 and 4554 of 1978. The Committee, therefore, decided to screen the teachers on the basis of the 1971 Regulation of the Medical Council of India approved under section 33 of the Medical Council of India Act, 1956. If the 1974 revised recommendation has attained finality as required under section 19A that alone would be the test for screening the qualification for

appointment of the persons to the post of teacher-s and not 1971 Regulation.

41. Be that as it may, section 6 of the Take Over Act, 1957, mandates the Screening Committee to scan the qualification and experience of the teachers as per University Regulation and Medical Council Guideline the previous judgment, to which the State and petitioners were parties, directed the Government to get the teachers tested as to their qualification and experience as per Medical Council *Guideline*, the Medical Council also is obtaining the staffing pattern as laid down in their Revised recommendation, 1974, enforced and implemented and on that basis approved the appointment of petitioners as Associate Professor. The State also, in its turn, adopted the said qualification and teaching experience in its Resolution passed, in the year 1976 (Annexure-B) and reiterate the same in their earlier supplementary affidavit paragraph no.3 (Annexure-18 of C.W.J.C. no.5147 of 1985) and following the Guideline the staffing pattern recommended by Medical Council of India was adhered to and thus *obtained the approval of the Central Government* in extending recognition to this Institution (See Annexure-15 of C.W.J.C. no. 5303 of 1985) on 8.5.1979 in the following words:

> "I am directed to convey the approval of the Central Government to the recommendation of the Medical Council of India for the temporary approval being given to the following medical Colleges up to 30th April, 1980.
>
> Item no.8 - Nalanda Medical College."

I therefore, hold that the Screening Committee under the order of the Court dated 27.11.1979 in C.W.J.C. no.5004 of 1978 which was also founded

upon the State's supplementary affidavit in the said case, ought to have proceeded to scan the teaching experience of the petitioners on the basis of Revised recommendation of 1974. This also appears to be dictate of section 6 of the Take Over Act since it refers to *University Regulation* in keeping with the *Guideline laid down by Medical Council of India.* Approval of the Central Government in the matter of Staffing pattern as laid down under Revised recommendation of 1974, adds statutory force to the said Guideline of 1974.

42. Mr. Tara Kant Jha, learned counsel appearing for some of the respondents, contended that the Medical Council of India prescribed only minimum standards and it does not seem that object and purpose of the Indian Medical Council Act is to prohibit the Institutions in India from laying down standards higher or more stringent than the minimum standard prescribed by the Medical Council. He has, in this connection, relied upon a decision in the case of *Kumari Darshan Ahuja* vrs. *Agra University* (1)

43. Similar was the argument of Mr. S.B.N.Singh, learned counsel while appearing for some of the respondents. Both the learned counsel further drew my attention to the case of *Dr. Hari Ram Singh* vrs. *State of Bihar and Others* (2).

The case of *Kumar Darshan Ahuja* (Supra) relate to failure of the petitioners in the clinical examinations of opthalmology and E.N.T. in obtaining the final

---

(1) (1982) A.I.R. (All.) 1359.

(2) (1983) P.L.J.R. (N.O.C.). 9

M.B.B.S. degree held by the Agra University. In the said case even though under the Regulation of the Indian Medical Council Act there is no requirement that the candidate should obtain fifty per cent marks in the clinical examination of Opthalmology and E.N.T. the Agra University made obligatory for all candidates to secure fifty per cent marks in all the clinical examination including Opthalmology and E.N.T. It was held in that case that the Ordinance is not ultra vires because the Indian Medical Council Act control the minimum standards of Medical education and to regulate their observance. University can always prescribe a little higher standard than that laid down by the Medical Council of India. It does not, therefore, with a slightest degree, run counter either to the letter or spirit of minimum standard laid down by the Medical Council of India in its Regulation. This case is clearly distinguishable. I am concerned in this case as to the eligibility of the petitioners being appointed as Associate Professor and further being considered along with other eligible candidates for promotion as a Professor. The State nowhere says in their counter-affidavit that they have laid higher qualification for eligibility for being appointed as Associate Professor and/or for being considered for promotion as Professors. On the contrary, they adopted the same eligibility test as has been recommended by the Medical Council of India. This case is, therefore, of no help to the respondents. The case of *Dr. Hari Ram Singh* (Supra) only lays down that if any Regulation framed by the Indian Medical Council without the approval of the Central Government it will not attain the status of a Regulation. There could be no two opinion about the same.

44. The plea of the Government raised on the

basis of Annexure-E that the temporary designation of the petitioners as Associate Professor was accorded without prior approval of the State Government (Annexure-E) is rejected and over-ruled for reasons already indicated earlier.

45. Two courses are left to Court in view of the finding recorded in the preceding paragraphs in order to grant relief to the petitioners: One is to refer the case of the petitioners to the Screening Committee; and the other to hold the petitioners' appointment as Associate Professors validly made by the Board of Control. In adopting the first course, I find the Screening Committee constituted under section 6(2) of the Act is only required to determine whether the appointment of the petitioners was made in accordance with "the University Regulation and in keeping with the guidelines laid down by the Medical Council of India", as per judgment in C.W.J.C.no.5004 and 4554 of 1978 dated 27.11.1979. The Committee is not left with any discretion to form its own assessment of the merit and suitability of teachers of the Colleges that have been taken over. No discretion of the Committee will come into play during the whole process. Further, the Committee was constituted on 19.9.1978; it took about a year and half to submit its report; A new Screening Committee may have to be reconstituted as some of the members may not be available for one reason or the other; The petitioners or at least some of them have been deprived of what is their legitimate due for a sufficiently long time. To permit the matter to hang on, as it must, if the matter is to be re-referred to the Screening Committee; in

my opinion, would not be in the interest of justice and expeditious resolution of long standing controversy.

As far as the second course is concerned, I find the Medical Council of India have already rendered their opinion as to the eligibility of the petitioners for being appointed as Associate Professors after examining their biodata including teaching experience, whose advice is re-sought by the Screening Committee without assigning any reason. The only discernable reason is that the Committee is unable to form their opinion as to their experience. The inspection report of the Medical Council of India, both before and particularly after the submission of the report of the Screening Committee appraising the petitioners' continuance as Associate Professor for continued recognition of the College by the Medical Council of India with the approval of the Central Government being already there, it only goes to affirm Medical Council's opinion that the petitioners are validly appointed as per Medical Council Regulation. Admittedly, there is no University Regulation in this connection apart from Medical Council Regulation. In short, the petitioners' eligibility to hold the post of Associate Professors have already been determined by the Medical Council of India. The advice sought for by the Screening Committee in their report is already obtainable with the State Government. In my opinion, therefore, it would be sheer duplication of the work and an exercise in futility to the detriment of the petitioners. The second course appear to me to be more in consonance with justice and fair play. I, therefore, hold the petitioners' appointment as Associate Professor validly made and direct the Government to treat the petitioners to have been validly appointed as Associate Professors from the date they

have been so designated and give all consequential benefit flowing therefrom. Any teaching experience gained as being temporarily designated on a particular post should also enure to the benefit of the petitioners. The name of the petitioners from the panel of Assistant Professor is quashed. The respondent-State is directed to consider the cases of the petitioners along with other eligible candidates if they have the requisite experience and qualification for being appointed as Professor as laid down by Medical Council guidelines for promotion as Professors. Any promotion made during the pendency of these writ petitions is subject to the direction contained herein. All action taken pertaining to the subject, by the respondent-State should be held only to be tentative contain no final right to the beneficiers. The undertaking given by the respondent-State in their supplementary affidavit in C.W.J.C. no.5004 of 1978 for vacating stay to the effect "that all the existing teachers of the Private Medical College would be certainly considered as far as practicable to be absorbed in the highest post they are found fit" is directed to be given effect to fully.

46. In the result, the writ petitions are allowed. A writ of mandamus is issued directing the respondent-State to give effect to the directions contained in paragraphs no.44 and 45 of the judgment expeditiously. There shall be no order as to costs.

R.D. Applications allowed

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Arms Act, 1878 section 17, sub-section (3). clause (a), revocation of a gun licence under during registration and pendency of a criminal case for major or capital offence--- whether Justified--- subjective satisfaction of the licensing authority, whether to be exercised for adequate reasons.

Held, that the registration and pendency of a criminal case for a major or capital offence may for adequate reasons justify the suspension or revocation of a licence under clause (a) of subsection (3) of section 17 of the Arms Act, 1878.

It is true that sub-section (3) does not in term provide that the pendency of a criminal charge is a grant for the revocation of licence. Clause (a) warrants revocation if the licensing authority is satisfied that the holder of the licence "is for any reason unfit for the licence under the Act." The employment of such phraseology in the statute by the framers can leave no manner of doubt that a wide residuary discretion has been vested in the licensing authority to revoke provided it is satisfied that the holder is unfit for the licence under the Act. The implication of the holder in serious or horrendos capital crime in a particular case may furnish an adequate ground for the licensing authority for being so satisfied. Sub-section (1) requires the licensing authority to give notice in writing to deliver up the licence to it. That would invariably give an opportunity to the licensee to show some cause against such action. A further safeguard is

provided by subsection (5) of section 17. The licensing authority must record in writing reasons therefor and also furnish to the holder of the licence on demand a brief statement of the same unless in exceptional cases he is of the opinion that it will not be in the public interest to furnish such statement. Nevertheless the requirement of recording reasons in writing is inflexibly mandatory. Therefore, it cannot be easily said that the subjective satisfaction of the licensing authority hedged in by the statutory requirements cannot be exercised on the basis of the pendency of the serious or capital criminal charge. If such subjective satisfaction has been broadly and reasonably exercised, it would come within the parameters of the statute under clause (a) of sub-section (3) of section 17 of the Arms Act.

Kapildeo Singh v. The State of Bihar and others (1987) - I.L.R.66, Pat. 1160

Bengal Ferries Act, 1885 -[- Sections 6,7,8 and 9 and Bihar Land Reforms Act, -[- 1950 Section 4 --- composite settlement of a public ferry declared under section 6 of the Bengal Ferries Act and a sairat ferry vested in the State under section 4 of the Bihar Land Reforms Act, --- whether permissible in law --- composite settlement, whether governed by the provisions of the Bengal Ferries Act or by the purely administrative instruction for the settlement of sairats --- State Government, whether can interfere in the case of composite settlement.

Per S. S. Sandhawalia, C.J. and S. Ali Ahmad, J (Birendra Prasad Sinha, J contra) :-

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Held, that the law permits a composite settlement of a publice ferry declared under section 6 of the Bengal Ferries Act, 1885, and a *sairat* ferry vested in the State under section 4 of the Bihar Land Reforms. Act.

There is nothing in sections 7 and 9 or any other provisions of the Bengal Ferries Act. 1885, which raises a legal bar against a composite settlement. Nor can or indeed should the State be prevented if it finds it convenient to club together the public ferries which are statutorily controlled. And vested in it under the Bengal Ferries Act and the *sairat* ferries now vested free from legal encumbrances by virtue of section 4 of the Bihar Land Reforms Act. Therefore, the somewhat doctrinaire and extreme stand that public ferries and *sairat* ferries cannot in law be compositely settled even by way of a public auction, must necessarily be rejected.

Held, further, that in the event of a composite settlement of public and *sairat* ferries the same shall be governed by the provisions of the Bengal Ferries Act, 1885, and the Rules framed thereunder and not by the purely administrative instructions for the settlement of *sairats*. This flows from the basic proposition that no mere excutive instruction or Governmental Circulars can possibly override or erode the mandates of the legislature itself and the subordinate legislation framed thereunder.

The relevant provisions of the Bengal Ferries Act, 1885, and the statutory rules framed thereunder vest the control, leasing and management of the public

ferries in the Magistrate of the district subject to the direction of the Commissioner. The State Government as such does not enter into or in any way figure in this statutory scheme. Any frontal interference by the State Gvernment in the control, management and the settlement of public ferries under the Act is not warranted in the eye of law. The same procedure applies to a composite settlement also, and the State Government has no power to interfere therewith.

Held, therefore, that the State Government in varying and extending the period of the lease to three years acted without jurisdiction and its order was liable to be quashed and that of the statutory authority namely, the Commissioner to the effect that the period of lease must be for one year only must be maintained.

Per Birendra Prasad Sinha, J:-

A public ferry governed by the provisions of the Bengal Ferries Act and a *Sairat* ferry governed by the Bihar Land Reforms Act cannot be clubbed together and a composite settlement of a Public ferry and *sairat* ferry is not permissible in law. Neither the Bengal Ferries Act nor the Bihar Land Reforms Act provide for clubbing together of the two types of ferries.It follows,therefore,that a composite settlement can neither be governed by the Bengal Ferries Act nor by the provisions made under the Bihar Land Reforms Act. The two types of ferries are controlled by two statutes each prescribing different types of procedure for settlement. When a detail procedure has been prescribed under the Bihar Land Reforms

Act, the rules and various circulars and orders issued from time to time for the settlement of the *Sairats* by the prescribed authorities, it would be difficult to hold that such *sairats* can also be settled by the Magistrate of the district under the Bengal Ferries Act by merely clubbing such *sairat* ferries with the Public ferries. **Page**

In the instant case, the respondent-District Magistrate, therefore, had no authority to club a Public ferry along with other *Sairat* ferries and make a composite settlement and the entire procedure was without jurisdiction.

Ranjit Singh v. The State of Bihar and others (1987) I.L.R. 66, Pat. **1101**

BIHAR LAND REFORMS ACT, 1950

Section 4. see Bengal Ferries Act, 1885. **1101**

Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, sections 3 (3) and 4 (2) --- untrained teacher on the date of the report of the Special Board whether can claim to be considered and absorbed in Government service on subsequent acquisition of the training qualification --- Full Bench judgment in Ram Ballabh Prasad Singh and others v. The State of Bihar and others (1), whether extends *mutatis mutandis* to teachers as well under section 3 (3).

Held, that a teacher, who was untrained on the date of the report of the special board under section 3 (3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981,

cannot claim to be considered for absorption in government service on the ground of having subsequently on the acquired the requisite qualifications.

It is evident from the second paragraph of sub-section (3) of section 3 of the Act that the procedure prescribed thereby envisages the considereation of the qualification and the suitability of teachers much earlier than the actual take over by a committee (conveniently labelled as a special board) constituted by the State Government for the said purpose. It is only on the basis of the evaluation and report of the said committee or the special board that the government would later appoint such persons on the date of the take over of the institution. The crucial point of time and indeed the outer limit for such consideration is the state of the report of the special board for the consideration of eligibility, qualification and suitability of teachers for absorption. There is no vested right in a teacher to claim that after the question of his qualification and suitability has been duly considered by the special board and reported upon, he has chosen to later qualify himself and his case should be re-examined on the date of the notification. Indeed section 3 (3) does not visualise a second special board for consideration of any such cases on or after the date of notification.

Held, further, that the ratio of the Full Bench judgment in *Ram Ballabh Prasad Singh and others* v. *The State of Bihar and others* (1) is applicable in terms to teachers first and by way of extension brings

in Headmasters within the ambit of the said term. Page
Indeed far from the said judgment not being applicable to the case of teachers itself, *it stricto sensu* first governs the teachers and then by necessary implication the Headmaster, who in the words of the Full Bench, being the head teacher, is brought into the fold. The rationale and ratio of the Full Bench judgment aforesaid extends *mutatis mutandis* to teachers as well under section 3 (3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act. 1981.

Ram Naresh Prasad Nirala v. State of Bihar and others (1987), I.L.R.66, Pat. 1152

CODE OF CRIMINAL PROCEDURE, 1973

- Section 389. See Constitution of India. 1182

Constitution of India, Article 21, --- Code of Criminal Procedure, 1973, section 389 --- scope and applicability of --- constitutional right of speedy trial, whether includes the expeditious disposal of substantive appeals against conviction as well --- bail on the ground of inherent limitations or inability of the High Court in hearing and disposing of substantive appeals against convictions on capital charge after one year of the pendency of the appeal, whether and when can be granted---exceptions to the general rule enunciated--- section 389, whether envisages grant of bail on the ground of inordinate delay in hearing of substantive appeals.

Per S.S. Sandhawalia, C.J. and N.P. Singh, J (S.H.S. Abidi, J Contra)

Held, that, the constitutional right of speedy trial implicit in Article 21 of the constitution includes within its sweep the expeditious hearing of substantive appeals against conviction as well Article 21 does not stop short at the end of the trial but continues to extend its protective shield even after the post conviction stage. Expeditious hearing of substantive appeals against convictions is fairly and squarely within the mandate of the said Article. Equally it has to borne in mind that in the event of later acquittal by the appeallate court the long incarceration in jail during the pendency of the appeals is inherently incompensatable in terms of money. In any case it is a virtually legal impossibility to secure monetary damages against the State for wrongful or false imprisonment in such cases Added to this is the fact that both for undertrials, and for convicts, in jails within the state the conditions are admittedly sub-human. There is thus no option but to hold that the issue of delay occasioned by the High Court's own inability to hear the substantive appeals expditiously *de hors* the merits is directly and materially relevant for consideration in the grant of bail to the convicts.

Held, further, that unless there are cogent grounds for acting otherwise, an appellant on conviction on a capital charge would become entitled to a favourable consideration for grant of bail when after one year of incarceration and pendency of the appeal the High Court is unable to bring the substantive appeal pending before it to a final hearing. No exhaustive classification of cogent grounds for acting otherwise is either possible or

desirable. However, where capital crime may further be peculiarly heinous and horrendously brutal in its nature and shocking to the conscience of the Court and society in general, convicts would not be ordinarily entitled to such concession of bail once they have been held guilty by the trial court of such grievous crime, for example, multiple and mass murders on caste and tribal considerations, dacoity coupled with murder, rape with murder, bride-burning or bride-murder terrorist crime, day-light bank robbery abduction for ransom followed by murder, indiscriminate use of firearms and bombs in murders disturbing public order and so on.

Even under section 389 of the Code of Criminal Procedure inordinate delays in the hearing of substantive appeals because of the Court's own inability to do so would be an extremely relevant factor for the grant of bail. The said section mentions the recording of reasons for suspending the sentence and undoubtedly it would be a good reason to state that there is no practicable possibility of expeditious hearing of the appeal.

Per S.H.S. Abidi, J :-

Considering the position of the system of working in our courts, it appears that there are some reasonable causes for the delay in disposal of cases and in spite of best efforts of the courts delays have become inevitable. As a mater of fact the delays are not to be looked but its causes should be removed by providing speedy justice. Orders for bail or orders for abatement of appeals on the ground of delays may

create paradise for criminals and expose the law abiding and peaceful citizens to horrors and dangers.

After conviction one cannot be and is not deprived of his liberty and he files appeal. The appellate courts are to exercise their powers and they do exercise their powers. For that provision has been made in the code and section 389 is there. After appeal the court can suspend the execution of the sentence and crder for the release of the appellant on bail till the disposal of the appeal on any such condition as the court thinks fit and proper to impose. For this the court is to record the reasons.

There is no reason to fix the reasonable period of time at one year with a despotic formula or to adopt different standands in respect of offences both, for the shocking as well as non-shocking. If the ground of delay is the consideration without keeping in view the merits of the case in the case of non-shocking cases then why there should be no consideration of delay in the case of those persons in respect of whom conscience is shocked. In both the cases delay in the disposal of the case may the entitle the appellants for consideration of the bail when the court is not able to hear the case early. The legislature in its wisdom did not think proper to fix any period, otherwise it would have been possible for the legislature to have fixed a period.

In view of Chapter XII, Rule 17 sub-rule (c) of the Patna High Court Rules, the cases in which bail has been refused to the appellant after conviction can be given priority and precedence in hearing and they

can be heard earlier than those cases in which bail has been granted by the court and if this rule is strictly followed then the appeals in which the convicts are in jail can be heard within a very reasonable period of time which may in cases come down to less than year. It appears that this rule has been observed more in breach resulting in inability of the courts to hear the appeals. When a provision exists in the Patna High Court Rules about the early listing as "expedition" it could be resorted to and if it is resorted to then no such situation can arise for fixing a period. The time lag between the prosecution from the stage of the court below till the disposal of the appeal will not come in way and the law will have its own course. The law has made a provision for early disposal in its Rule. Without following that rule, if the accused are enlarged on bail simply because the period of one year has elapsed, it will be something to deviate from the provision of law as well as the judicial pronouncement of the highest court of law.

Anurag Baitha v. The State of Bihar (1987) I.L.R. 66,Pat. **1182**

Limitation Act, 1963 -[- Article 136. scope of--- execution of decree-period of limitation of twelve years, computation of--- time, whether to run from the date of the appellate decree in the event of an appeal or the date of the original decree.

Held, that, the *terminus a quo* for computing the limitation of twelve years under Article 136 of the Indian Limitation Act, 1963, is the date of the appellate decree in the event of an appeal and not that of the

original decree. **Page**

The languge of Article 136 talks of a decree and its enforceability. It does not limit or constrict itself to the original decree alone. The words employed are "any decree" and "when the order becomes enforceable".

An appeal under the Code of Civil Procedure is a continuation of the suit and the appeal must be taken as part and parcel of the continuing trial. In essence where an appeal has been preferred, the suit is disposed of truly and finally by the appellate decree and not by the original one.

Equally well established it is that in the event of an appeal the decree of the trial court merges with that of the appellate court. The original decree by virtue of merger loses its very existence and it is the appellate decree which subsists. The decree which is enforceable is only that of the appellate court and not of the original court and time must necessarily run from the date of the decree which is enforceable one.

Jokhan Rai V. Baikunth Singh (1987), I.L.R. 66, Pat. **1138**

FULL BENCH

Before S. S. Sandhawalia, C.J., S. Ali Ahmad and Birendra Prasad Sinha JJ.

Ranjit Singh.*

V.

The State of Bihar and others.

1987.

January, 7.

The State of Bihar and others.

Bengal Ferries Act, 1885 (Bengal Act I of 1885), sections 6, 7, 8, and 9 and Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950), section 4 --- composite settlement of a public ferry declared under section 6 of the Bengal Ferries Act and a *sairat* ferry vested in the State under section 4 of the Bihar Land Reforms Act --- whether permissible in law--- composite settlement whether governed by the provisions of the Bengal Ferries Act or by the purely administrative instructions for the settlement of sairats --- State, Government, whether can interfere in the case of a composite settlement.

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* Civil writ jurisdiction Case No. 4881 of 1985. In the matter of an application under Articles 226 and 227 of the Constitution of India.

Per S. S. Sandhawalia, C.J. and S. Ali Ahmad, J (Birendra Prasad Sinha, J contra) :-

Held, that the law permits a composite settlement of a public ferry declared under section 6 of the Bengal Ferries Act, 1885, and a *sairat* ferry vested in the State under section 4 of the Bihar Land Reforms Act.

There is nothing in sections 7 and 9 or any other provisions of the Bengal Ferries Act, 1885, which raises a legal bar against a composite settlement. Nor can or indeed should the State be prevented if it finds it convenient to club together the public ferries which are statutorily controlled and vested in it under the Bengal Ferries Act and the *sairat* ferries now vested free from legal encumbrances by virtue of section 4 of the Bihar Land Reforms Act. Therefore, the somewhat doctrinaire and extreme stand that public ferries and sairat ferries cannot in law be compositely settled even by way of a public auction, must necessarily be rejected.

Held, further, that in the event of a composite settlement of public and *sairat* ferries the same shall be governed by the provisions of the Bengal ferries Act, 1885, and the Rules framed thereunder and not by the purely administrative instructions for the settlement of *sairats.* This flows from the basic proposition that no mere executive instruction or Governmental circulars can possibly override or erode the mandates of the Legislature itself and the subordinate legislation framed thereunder.

The relevant provisions of the Bengal Ferries Act, 1885, and the statutory rules framed thereunder vest the

control, leasing and management of the public ferries in the Magistrate of the district subject to the direction of the Commisioner. The State Goverment as such does not enter into or in any way figure in this statutory scheme. Any frontal interference by the State Goverment in the control management and the settlement of public ferries under the Act is not warranted in the eye of law. The same procedure applies to a composite settlement also, and the State Goverment has no power to interfere therewith.

Chetal Sao and ors. v. *The State of Bihar and ors.*(1) *Rambharosa Singh* v. *The Government of the State of Bihar and others* (2), *The Government of State of Bihar and ors. v. Ram Bharosa Singh and another* (3) --- reffered to.

Ganesh Prasad v. *The State of Bihar and ors.* (4) - overruled to that extent.

Held, therefore, that the State Government in varying and extending the period of the lease to three years acted without jurisdiction and its order was liable to be quashed and that of the statutory authority namely, Commissioner to the effect that the period of lease must be for one year must be maintained

Per Birendra Prasad Sinha, J:-

A Public ferry governed by the provisions of the

(1) (1986) P.L.J.R. 149.

(2) (1953) A.I.R. (Pat.) 370.

(3) (1956) A.I.R. (S.C.) 640.

(4) (2967) C.W.J.C. no. 277 of 1967, decided on 18.8.1967.

Bengal Ferries Act and a *Sairat* ferry governed by Bihar Land Reforms Act cannot be clubbed together and a composite settlement of a public ferry and a *Sairat* ferry is nor permissible in law. Neither the Bengal Ferres Act nor the Bihar Land Reforms Act provide for clubbing together of the two types of ferries. It follows, therefore, that a composite settlement can neither be governed by the Bengal Ferries Act nor by the provision made under the Bihar Land Reforms Act. The two types of ferries are controlled by two statutes each prescribing different types of procedure for settlement. When a detailed procedure has been prescribed under the Bihar Land Reforms Act, The rules and various circulars and orders issued from time to time for the settlement of the *Sairats* by the prescribed authorities, It would be difficult to hold that such *Sairats* can also be settled by the Magistrate of the district under the Bengal Ferries Act by merely clubbing such sairat ferries with the Public ferries.

In the instant case, the respondent- District Magistrate, therefore had no authority to club a Public ferry alongwith other *Sairat* ferries and make a composite settlement and the entire procedure was without jurisdiction.

Application by the petitioner.

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

The Division Bench at the motion stage itself referred the case to a Full Bench for hearing.

On this reference.

M/s. Chandra Shekhar Prasad Singh and Akhileshwar Kumar Pandey. for the petitioner.

Mr. J.N.P Sinha with M/s. Subhash Prasad and Anjani Kumar Sinha, J.Cs. and *M/s. Tara Kant Jha and Chittarnajan Prasad Sinha.* For the respondent.

S.S. Sandhawalia, C.J :- Issues of some significance which finally emerge for adjudication in this reference to the Full Bench may well be precisely formulated in the terms following:

(i) Whether a composite settlement of a public ferry declared under section 6 of the Bengal Ferries Act, 1885 and ferry vested in the State under section 4of the Bihar Land Reforms Act is permissible in law?

(ii) If so, whether such a composite settlement is to be governed by the provisions of the BengalFerries Act or by the purely administrative instruction for the settlement of sairat?

(iii) Whether the Division Bench judgment in *Ganesh Prasad* V. *the State of Bihar and other* (Civil writ Jurisdiction Case No.277 of 1967- decided on the 18th August 1967) lays down the law correctly?

2. The facts giving rise to the questions aforesaid may be noticed with the relative brevity. On the 25th of January 1985 public notice was issued under the authority of the District Magistrate of Bhojpur for a composite settlement of a group of ferry ghats including Telpa-Ekauna, Gangi Keshopur, Aleghl tola and Sinha Bora Ghat, to be held by open public auction on the 4th of February, 1985

for a term of three years from. 1985-86 to 1987-88. The firm stand of the petitioner is that Telpa-Ekauna is a public ferry so declared under section 6 of the Bengal Ferries Act, 1985 (hereinafter called the Act). it would however, appear that the said public auction could not be held and fresh notices were issued for the settlement fo the aforesaid ghats by a public auction on the 20th of February, 1985, but apparently the terms were changed for only one year, i.e., 1.4.1985 to 31.3.1986 (vide annexure 2 to the petition). The petitioner avers that it was only on the 5th of March,1985 that he came to know that the District Magistrate of Bhojpur had settled the af resaid ferries in favour of respondents 4 and 5 for a period of three years and vide Case no.9 or 1985-86 sent the same for approval of the learned Commissioner, Patna Division. The reupon the petitioner filed a petition before the Commissioner aforesaid for the cancellation of the settlement, inter alia, on the ground that there was no sufficient public notice. The matter was heard at some length by the learned Commissioner and by his detailed order dated the 25th of March, 1985 (Annexure 3) running in to twelve typed pages he concluded as under :

"Furthermore, there is a possibility that in case this group of ferries is auctioned for the years 1986-87, they may fetch a much higher amount than the present bid. Hence the present settlement may be made for a period of one year only w.e.f. 1.4.1985."

It is the petitioner's case that for the purposes of the settlement of public ferries the Commissioner is the final authority and he cannot abdicate his statutory

functions in this regard, and under some erroneous impression he forwarded the case to the State Government for its approval that the proposed settlement should be finalised for a period of one year only. The petitioner even challenged the order of the Commissioner by way of Civil writ Jurisdiction Case No.1721 of 1985 (*Ranjit Singh* v. *The State of Bihar*) which, however, was dismissed as withdrawn on the 24th of April, 1985. However, later by a cryptic order dated the 10th of April, 1985 the State Government extended the term of the settlement of the ferries in question from one to three years-vide the impugned order contained in Annexure 5 - which when translated is in the following terms :

"The Government, after considering the original records, has accorded approval to the settlement of the said ghats for a period of three years i.e. from 1.4.85 to 31.3.88 under special circumstances vide memo no. 948 of the Deputy Secretary to the Government, Revenue and Land Reforms Department, Bihar, Patna.

Accordingly, issue notice to the contractor to obtain Parwana on executing a registered deed of agreement."

Aggrieved by the above, the present writ petition has been filed for quashing the same and for upholding the order of the Commissioner sanctioning the settlement for a period of one year only.

3. In the counter-affidavits filed on behalf of the respondent State and the private respondents 4 and 5 the broad factual position is not seriously controverted. However, the stand sought to be taken on behalf of the

private respondents is that the ferry in question is governed by the Sairat Manual and the provisions of the Act have little or no application to a composite settlement of this kind. It is the stand that the State Government is fully empowered under the Sairat Manual to pass the impugned order (Annexire 5) for a period of three years. Both the State and the private respondents further attempt to raise cloud that Telpa Ekauna is not a public ferry under section 6 of the Act, and it is sought to be stated that the long standing admissions in this regard were due to a mistake of fact. A some what curious stand sought to be taken on behalf of the respondents is that though Telpa-Ekauna is not a public ferry under section 6 of the Act, it is nevertheless an undeclared public ferry which admittedly has been since long been settled earlier by the local authorities of Chapra Municipality and since 1964 by the District Magistrate of Shahabad (now Bhojpur).

4. In the present case after a number of adjournments at the motion stage itself, firm reliance was placed on behalf of the respondents on the case of *Ganesh Prasad* v. *The State of Bihar and others* (Civil writ Jurisdiction Case No.277 of 1967). The Division Bench noticed that therein it was held that the order of the State Government could not be invalidated on the ground that both public ferries and Sairat ferries had been clubbed together and settled. Doubting such a view, the matter was reffered to a Full Bench and that is how it is before us now.

5. Perhaps, at the very outset it is necessary for terminological exactitude that the phraseology to be applied

to different classes of ferries should be coined out with some precision. In the definition clause itself the Act makes a broad division of public and private ferries. In section 5 the terms 'ferry' and 'private ferries' are defined as under :

> " 'Ferry' includes a bridge of boats, pontoons or rafts, a swing-bridge, a flying-bridge, a temporary bridge and a landing stage."
>
> "Private ferries' includes all ferries other than those declared to be public ferries or established as such, under section 6 of this Act."

However, within the State by the passage of time another class of ferries has also come into existence which though not being public ferries under this Act, are nevertheless vested free from all encumbances in the Government. This results from section 4 (a) of the Bihar Land Reforms Act which is in the following terms :

> "Such estate or tenure including the interests of the proprietor or tenure holder in any building or part of building comprised in such estate or tenure and used primarily as office or cutchery for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, jalkars, hats, bazars, (mela) and ferries and all other sairati interests as also his interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether been worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests of raiyats or under-raiyat) shall, with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-

holder shall cease to have any interests in such estate or other than the interests in expressly saved by or under the provisions of this Act."

It appears to me that now it would be somewhat anomalous to label the ferries vested in the Government under the aforesaid section as private ferries. As the later part of the section indicates, such ferries are deemed to be within the broad sweep of *sairati* rights. Therefore, it would be apt to lable this class of ferries vested in the Government under section 4 as a sairat ferry. This terminology appears to me as having the further merit of being earlier so employed by the Division Bench in *Ganesh Prasad* v. *The State of Bihar and others* (supra). It may thus be clarified that the term 'sairat ferry' is hereafter being employed for all such ferries vested in the Government by virtue of section 4 of the Bihar Land Reforms Act whilst 'public ferry' denotes the ferries declared or established under section 6 of the Act; the residue continue in the generic label of private ferries.

6. Ere one proceeds further it appears some what apt to have a bird's eye view of the long history of the law governing the ferries in the region. It would appear that as early as the beginning of the nineteenth century provisions had been made in Regulation VI of 1819 with regard to ferries in the then widespread province of Bengal in British India. However, it was only in 1885 that the Bengal Ferries Act was promulgated to regulate ferries within the territory subject to the Lieutenant-Governor of Bengal and it came in to force on the 1st of August, 1885. There by the earlier provisions regulating the ferries were

repealed by section 2 in the terms following :

> "Regulation VI of 1819 and Bengal Act I of 1886 are here by repealed; but all determminations, declarations, orders and rules made, engagements entered into and securities taken under such Regulation and Act, shall be deemed to be respectively made, entered into, and taken under this Act."

The plain language above leaves no manner of doubt that all earlier declarations, Orders and Rules made under Regulation VI of 1819 were continued and deemed to have been made under this Act. It is not in dispute that the Act continued to hold sway over the province of Bengal which included the present State of Bihar and even now continues to be so applicable. Later, as has been noticed earlier, by virtue of section 4 of the Bihar Land Reforms Act ferries and all other *sairati* interests owned by proprietors or tenure-holders came to be vested in State free from all encumbrances. Such *sairat* ferries thereafter came to be governed by a host of circular and order concerning the settlement of sairats in the khas mahal and vested estates which are collated in the Sairat Compendium authoritatively issued by the Revenue Department of the Government of Bihar. It is against this historical legislative background that the issue falls for examination herein.

7. Yet again, another threshold issue may be first resolved. The respondent State attempted to scuttle the merits of the case by attempting to take the stand that Telpa-Ekauna was not a public ferry under the Act. It was sought to be contended that because the petitioner had

not placed on the record the relevant notification declaring this ferry as a public one either under the Act or under Regulation VI of 1819 or any law even prior to that, it must be presumed that the said ferry is not a public ferry. Taking the cue from the State, The Private respondents have also sought to buttress this patently untenable Stand.

8. One cannot but express some surprise over the specious plea taken even by the State that the long standing Telpa-Ekauna ferry was not a public one. The lie direct to such a stand is given by the Bihar Ferries Manual authoritatively published by the Local self-Government Department of the Government of Bihar. There is no dispute that this is an authoritative Government publication declaring it to be an authentic collection containing the Bengal Ferries Act,1885 and the Rules made thereunder with important Government Order etc. As the introduction to this Manual would indicate, this itself is merely reprint of an earlier publication and the Rules made thereunder. It is indicated that opportunity has been taken to add notifications and Orders issued by the Government from time to time on the subject.This Manual is divided into four parts, namely, (1) This Bengal Ferries Act, (2) Rules made under the Act, (3) important circulars and notifications thereunder and (4) Part IV containing an authentic list of public ferries in the State of Bihar give districtwise. In the said list in Part IV at serial no. I in the Saran district Telpa-Ekauna (Combined ferry) in expressly shown as a public ferry in the State of Bihar.

Learned counsel for the respondent State could not possibly and indeed did not assail the authenticity of the

official publication of the Bihar Ferries Manual. Thus, the State's own authoritative document clearly declares Telpa-Eldauna to be a public ferry and this, to my mind would be nearly conclusive unless it was unequivocally rebutted which has not even remotely been done.

9. A part from the above, what is equally significant is the fact that in *Ganesh Prasad* v. *The State of Bihar and others* (Civil writ Jurisdiction Case No.277 of 1967), decided wayback on the 18th August, 1967, the Division Bench had recorded as under:

" It is not disputed that Telpa Ekauna is a public ferry under the Bengal Ferries Act, 1885 (hereinafter referred to as the Act). The other ferries Gangi Keshopur, Alekhi tola and Sinha Boar Ghat (hereinafter referred to as the Sairat ferries) belonged to the erst-while landlord and vested in the State of Bihar under the Bihar Land Reforms Act. Telpa falls within the jurisdiction of the chapra Municipality, while Ekauna falls within the jurisdiction of the District Board of Shahabad.

Learned counsel for the petitioner rightly pointed out that the aforesaid finding was given on the express pleadings of the respondent State itself that Telpa-Ekauna was a public ferry even way back in 1967. It is common ground that the State of Bihar was not only a party to the said case but was well represented and it is admitted that no further appeal was carried against the said judgment. The matter in a way has thus achieved finality and the issue that Telpa-Ekauna is a public ferry under the Act or not would even come within the wide ranging principles of constructive *res judicata* between the parties. Equally Mr.

J.N.P. Sinha, learned counsel for the respondent State, was at least fair enough to concede that ever since the said judgment the said ferry has been treated as public ferry. Not only so but apparently from much earlier than the judgment, the admitted position was that it had always been so treated for the purpose of settlement etc. In the present proceedings again what is equally conclusive is Annexure 6, dated 8.2.1979, which is a letter of the Collector of Bhojpur addressed to the State Government giving the details regarding settlement etc. of Telpa-Ekauna ferry. Annexure 6 was placed on the record on behalf of the writ petitioner and its authenticity is not even remotely questioned. Therein the official stand of the then Collector of Bhojpur was in the terms following :

> " So far as the question of Telpa, Ekauna Ghats is concerned, Telpa is situated in Saran district and Ekauna is situated in Bhojpur district. The settlement of the ferries of these ghats used to be done jointly by the Chapra Municipality and the District Board, Shahabad, till 1964. These ghats were also declared as public Ghats under the Bengal Ferries Act, 1885.
>
> Prior to 1964, the settlement of Bora ghat of the Revenue Department, Sinha ghat of the Bhojpur District Board, Telpa ghat of Saran Municipality and Ekauna ghat of Bhojpur district used to be done separately, as a result of which differences used to crop up amongst the three contractors and serious law and order problem used to appear before the administration which was solved by the State Government in the year 1964 and since then the settlement of the said Bora ghat and ferry ghat is done

jointly and the income is proportionetely divided.

Therefore, in the light of the aforesaid facts, the question of declaring the Arrah - Ghangi Keshopur, Alekhi Tola, Sinha Bora ghats as public Ghats does not asrise. Sinha, Telpa, Ekauna, which are ferry ghats, have already been declared as public Ghats since long before, its full details can be known from the concerned department.

Yet again the public nature of Telpa-Ekauna ferry is evidenced by reference to the Shahabad Gazetteer at page 396 wherein Telpa-Ekauna is expressly mentioned. Similarly, in the gazetteer for the Saran district Telpa-Ekauna finds express mention as a conspicuous public ferry. In the light of all the aforesaid factors it does not lie in the mouth of the respondent State that Telpa-Ekauna is not a public ferry.

10. In a last pitch attempt, and indeed what appears to me as an argument desperation, Mr. Tara Kant Jha on behalf of the private respondents had attempted to contend that because this ferry had earlier been settled either alternately or jointly by the Chapra Municipality and the District Board of Shababad, this should be taken out of the ambit of a public ferry. Reliance was sought to be placed on the observations in *Ganesh Prasad's case* (supra) that there had been differences between the two local authorities which had led to a conference on the 12th of November, 1962 in the Patna Secretariat in which it was resolved that the Telpa-Ekauna (combined ferry) and the other Sairat ferries should be settled together by the Collector of Shahabad. Assuming this to be true, this would not in any way denude the ferry of its public nature, it having

been so declared under section 6 of the Act. Reference here in may be made to section 35 of the Act which is in the term following :

> "35. Management may be vested in District Board. It shall be lawful for the Lieutenant Governor to order that any public ferry situated in any district in which a District Board has been established under the provisions of the Bengal Local Self-Government Act of 1885, or situated, within or adjacent to the limits of any Municipality, shall be managed by such District Board or by the Commissioners of such Municipality as the case may be, and such District Board shall have all the powers vested in the Magistrate of the district under this Act, except the power specified in sections 7, 17 and 32 and thereupon such ferry shall be managed accordingly.
>
> The Lieutenant Governor may, from time to time vary or annul any orders made under this section."

The aforesaid provision clearly empowers the Government to vest the management of public ferry, if it so chooses, in the local authority. However, this can in no way take away or affect the character of a public ferry under the Act. The vain attempt of the private respondents to raise a some screen over the issue is a self servicing attempt to conced the pristine and almost evident that conceal the pristine and almost self-evident fact that Telpa-Ekauna has since long been and continues to remain a public ferry governed by the provisions of the Act.

11. In fairness to Mr. T.K. Jha I must also notice his ingenious attempt to draw some imaginary inferences from the employment of the term 'combined ferry' with regard

to Telpa-Ekauna in the list of public ferries in part IV of the Bihar ferries Manual. There is no meaningful pleading or any factual basis on this point at all in the present case. In a full Bench I would not even for a moment launch on a roving enquiry of conjectures as to the meaning to be attributed to the word combined cryptically employed in a solitary item of part IV of the Manual aforesaid. To enter into any realm of fantasy as to what meaning should be first attributed to the word 'combined' and thereafter to infer a legal result therefrom appears to me as an exercise in futility which should not be indulged in. For the reasons recorded above, it must, therefore, be unhesitatingly concluded that Telpa-Ekauna is a public ferry under section 6 of the Act.

12. One may now more directly advert to question no. (i) framed at the very outset. Learned counsel for the petitioner first took up a somewhat tall stand that a public ferry under the Act and a sairat ferry cannot in law be clubbed together for a composite settlement thereof. It was contended somewhat vehemently that any such clubbing was inherently impermissible. Learned counsel drew our attention to sections 7,8 and 9 which govern the control, superintendence and settlement of public ferries as against the provision of sections 16 and 22 pertaining to private ferries.

13. Undoubtedly there is a significant line of distinction between public ferries under the act and the sairat ferries vesting free of all encumbrances under the State under section 4 of the Land Reforms Act. It is true that the provisions of the Act with regard to the public ferries

so declared under section 6 thereof may not *stricto sensu* be applicable to such sairat ferries. However I am unable to detect any inflexible legal bar mandatorily prohibiting the composite settlement of a public ferry and a sairat ferry where it becomes either necessary or expedient. Since both these classes of ferries are either controlled or vested in the State Government, one cannot imaginarily induct an absolute prohibition against the State for clubbing them together for the purposes of a joint settlement if it finds it either more profitable or more convenient for any other valid reason. It would be possible and permissible for the State to jointly settle a number of ferries some of which may be public ferries *stricto sensu* whilst others are merely *sairat* ferries. Indeed it appears to have been so done for many a decade now as manifested from the judgment in *Ganesh Prasad* v. *The State of Bihar and others* (supra). Even prior to the sixties it would appear that the public ferry of Telpa-Ekauna has been jointly settled with the sairat ferries of Gangi Keshopur, Alekhitola, Sinha Bora Ghat etc. In the present case the auction was held for a number of ferries together and a look at the relevant annexure is indicative of the fact that a convenient clubbing together of the ferries for a composite settlement is the rule rather than the exception. I am unable to find anything in sections 7 and 9 or any other provisions of the which raises a legal bar against a composite settlement. Nor can or indeed should the state be prevented if it finds it convenient to club together the public ferries which are statutorily controlled and vested in it under the Act and the *sairat* ferries now vested free from legal encumbrances by virtue of section 4 of the Bihar Land Reforms Act. Therefore, the

somewhat doctrinaire and extreme stand of the learned counsel for the petitioner that public ferries and sairat ferries cannot in law be compositely sattled even by way of a public auction, must necessarily, be rejected.

14. To sum up on question no. (i) the answer to the same is rendered in the affirmative and it is held that the law permits a composite settlement of a public ferry under section 6 of the Bengal Ferries Act, 1885 and *sairat* ferry vested in the State under section 4 of the Bihar Land Reforms Act.

15. Moving over to question no. (ii) the stand of the learned counsel for the petitioner there on appears to me as impeccable, he had contended in the alternative that in case a composite settlement was permissible, then at least the procedure for such composite settlement must necessarily be the statutory procedure prescribed by the Act and the Rules framed thereunder. In sum, the argument was that in the event of a clubbing together of a public ferry and a sairat ferry for making a composite settlement the only procedure permissible would be that provided under sections 6 to 10 of the Act and the Rules framed under section 15 for the management of public ferries prescribing the model form of agreement therefor. The firm stand was that the circulars issued from time to time by the Revenue Department contained in the Sairat Compedium can have no application whatsoever to such a composite settlement.

16. In order to appreciate the contention abovesaid, it is apt to notice in extenso the provisions of sections 7,8 and 9 of the Act which are in the terms following :

"7. Control of public ferries vested in the magistrate of district - The control of all public ferries shall be vested in the Magistrate of the district, subject to the direction of commissioner."

"8. *Superintendence of public ferries* - The immediate superintendence of every public ferry shall be vested in the magistrate of the district, in which such ferry is situated, or in such other officer as the State Government may, from time to time, either by name or by official designation, appoint.

And such Magistrate officer shall, except when the tolls at such ferry are leased, make all necessary arrangments for the supply of boats for such ferry, and for collection of the authorised rolls leavible thereat."

"9. *Ferry tolls may be leased by auction*- The tolls of any public ferry may, from time to time, be leased by public auction for such term as the Magistrate of the district in which such ferry is situated may, with the approval of the Commissioner, direct.

The Magistrate of the district or the officer authorised by him to conduct such auction may, for sufficient reason to be recorded in writing refuse to accept the offer of the highest bidder and may accept any other bid, or may withdraw the tolls from auction.

Execution of contract by lessee. The lessee of the tolls of the tolls of every ferry which have been leased under this section shall execute a contract, setting forth the condition on which the tolls of such ferry are to be held and shall give security for its due fulfiliment."

It is equally apt to quate the provisions of rule 5 framed under section 15 of this Act:

> '5. When it has been determined to lease the tolls of any public ferry by auction under section 9 of the Act I (B.E) of 1885, the Magistrate shall take steps to obtain approval of the Commissioner of the division to the term for which the ferry is to be leased and shall, If he obtains such approval cause an adertisement of such auction is held both in English and the vernacular, in such place and in such manner as to him shall seem expedient."

The succeeding rules 6 to 12 then provide in considerable detail for the procedure for leasing out such public ferries. Rule 6 in its various clauses (a) to (k) lays down the contents of the advertisment and the succeeding rule 7. Inter alia, requires that as also the methodology shall personally hold the auction as also the methodology for conduction the same. Rule 10 then prescribes that the contract which the lessee will be in the prescribed form appended to the Rules. Whilst rule 123 refers to the statutory terms for which the lessee shall be bound.

17. Now even a plain reading of sections 7,8 and 9 can leave little manner of doubt that the control and the leasing of public ferries have been statutorily vested in the Magistrate of the district subject to the directions and approval of the commisioner. Section 7 in no uncertain terms declares that the contral of all public ferries shall be vested in the Magistrate of the district, subject of course, to the direction of the commissioner. Similarly, the superintendence of public ferries is again basically, If not

intirely, laid in hands of the Magistrate of the district, Section 9 which has particular reference to the leasing of ferry tolls mandates that this shall be done by public auction and for a period which the Magistrate with the approval of the Commissioner may prescribe or direct, What is, perhaps, of equally greater singificance is the provisions of section 15 of the Act. These even confer upon the Magistrate of the district with the approval of the Commisioner to make rules consisent with the Act for matters laid out in clauses (a) to (b) thereof Rules framed under this section are then required to be published in the Offcial Gazette in such manner as the State Goverment directs and shall there upon have the force of law. As has been noticed already, model rules for managment of public ferries with the model form of agreement have been prescribed. Rule 5 quoted above and the succeeding rules confer powers on the Magistrate and the Commissioner for the statutory procedure for leasing out of the ferries culminating in a statutory contract of lease executed with the lessee as prescribed.

18. The aforesaid resume makes it manifest that the relevant provisions of the Act and the statutory rules framed thereunder vest the control, leasing and management of the public ferries in the magistrate of the district subject to the direction of the Commisioner. The State Goverment as such does not enter into or in any way figure in this statutory scheme. Learned Counsel for the petitioners was thus on a some what firm footing in his submission that any frontal interference by the State Government in the control, managment and the settlement

of public ferries under the Act is not warranted in the eye of law.

19. It would bear repetition that the aforenoticed provisions of the Act and the Rules framed thereunder have prescribed some what metisulously for the mode and procedure of the settlement of public ferries under the Act. Once it is held as above that it is permissible to make a composite settlement of a public ferry and a *sairat* ferry, the singnificant question that neccessarily follows is as to what would be the procedure for making such a composit settlement ? Is it to be exclusively governed by the provisions of the Act or only by the administrative instructions for the settlement or sairats or a mixture of the two? To my mind the answer to this query is clear and categoric that if there has to be a composite settlement, then the procedure applicable to the same would be exclusively statutory as prescribed under the Act and the Rules. This flows from the basic the basic proposition that no mere executive instruction or Governmental circulars can possibly override or erode the mandates of the Legislature itself and the subordinate legislation framed thereunder. As has been noticed already and indeed this was not disputed that so far as public ferries under the Act are concerned, they have to be exclusively governed by the statutory procedure. When such a public ferry is joined in a composite settlement with the *sairat* ferry the statutory procedure applicable to its settlement would continue to apply with the same rigour.

20. The matter also deserves examination from another refreshing angle. It is a hoary principle that when

the law or the statute prescribes a particular method for doing a thing it can be done only by that method and no other. Therefore, if the Act and the Rules provide in no uncertain terms for the settlement of public ferries, this can be done only in that manner, the composite nature of the settlement not withstanding. Negatively put, applying any other procedure would in a way be overriding and, in any case, deviating from what has been laid out by the statute itself. It is well settled that what the law prohibits directly cannot be done indirectly.

21. Yet again, the anomalous results that may flow from holding that the Government circulars and instructions in the *Sairat* Compendium would apply to a composite settlement, may be noticed. If it were to be so held it would be possible to club a *sairat* ferry with a public ferry for the purposes of settlement to negate the application of the provisions of the Act. The end result can be that a surreptitious clubbing of a *sairat* ferry with the public ferry under the Act would take it out of the ambit and sweep of mandatory provisions designedly prescribed by Legislature. To indirectly allow instrusion by the State by combining a *sairat* ferry with a public ferry would be permitting the Executive to indirectly intrude into the field of public ferries which the Act has squarely placed in the hands of the Magistrate of the district, subject to the control of the Commissioner. Learned counsel for the petitioner carried the matter to a logical extreme by pointing out that if this were to be allowed it would be possible to surreptitiously deviate from the whole scheme of the Act by simply combining one *sairat* ferry with each public ferry

so declared under section 6 of the Act and thus take it out of the sweep of its salutary provisions and the rules framed thereunder for the purpose of settlement thereof. Therefore, on larger principle also, the stand of the learned counsel for the petitioner was that even if a composite settlement of the public and the *sairat* ferries was permissible then the provisions applicable there to must be pristinely those of the Act and the Rules alone. I am unreservedly inclined to agree with this submission. Where two different procedures for the settlement of *sairat* ferries and those of the public ferries under the Act are applicable, then if it is sought to make a composite settlement of such ferries, it is the prescribed statutory procedure of the Act which would override the executive or administrative one. The legislative mandate and the subordinate legislation by rules framed thereunder cannot possibly be overridden or deviated from on the basis of any executive fiats issued from time to time. Therefore, though the clubbing together of a public ferry and a *sairat* ferry is held to be permissible, the procedure for a composite settlement there of can only be the statutory procedure prescribed by sections 7 to 10 of the Act and the Rules framed thereunder.

22. Reference in this connection may also be instructively made to the recent Full Bench case of Chetlal Sao and others v. The State of Bihar and others (1) There in what fell for construction was the character of the administrative instructions and circulars in the *Sairat* Compendium applicble to the settlement of fishery rights in *jalkars*. After a consideration of principles and precedent

(i) 1986) Pat L.J.R. 149

it was concluded as under :

" The answer to the question no.1 posed at the outset is thus rendered in the negative and it is held that the administrative instructions and circulars issued from time to time for the lease of fishery rights in tanks (sairats) vested in the State are not statutory in nature and conseguently not binding.

In the light of the aforesaid finding it would be some what plain that in the event of any conflict betwixt a procedure expressly statutory in nature and one purely administrative and nebulous by way of instructions issued from time to time, it is the former which should be given pride of place and must prevail over the latter.

23. To finally conclude on this aspect the answer to question no. (ii) is rendered in the terms that in the event of a composite settlement of public and *sairat* ferries the same shall be governed by the provisions of the Bengal Ferries Act and the Rules framed thereunder and not by the purely administrative instructions for the settlement of *sairats.*

24. Now once it is held as above, that a composite settlement is to be governed exclusively by the provisions of the Act and the Rules, then it is somewhat plain sailing for the petitioner thereafter. Even the learned counsel for the respondent State Mr. J.N.P. Sinha had to fairly concede that in such a situation the State Government does not enter at any stage and cannot interfere with the statutory powers of the District Magistrate and the Commissioner. However, I am not in the least basing myself upon any

such concession. A part from principle which has been earlier elaborated, the identical result flows also from the binding precedent as well. This issue came up pointedly before the Division Bench in *Rambharosa Singh* v. *The Government of the State of Bihar and others* (1) wherin it was uneuivocally held as under :

" The learned Advocate General, therefore, argued that, since the State is a party to the agreement which the lessee has to execute, it should be inferred that the State can give directions to the District Magistrate as its agent. I cannot accede to this argument in view of the fact that the Act and the rules framed thereunder give the sole control of the ferries to the District Magistrate, subject only to the direction of the Commissioner, and I do not think that the State Government can give directions to the District Magistrate..."

The Division Bench judgment was challenged by the State of Bihar in appeal but the Constitution Bench in the *Government of State of Bihar and others* v. *Ram Bharosa Singh and another* (2) unreservedly recorded that they were in full agreement with the view taken by the High Court and affirmed the same.

25. It remains to advert to the Division Bench judgment in *Ganesh Prasad* v. *The State of Bihar and others* (supra), doubts about the correctness of which had indeed necessitated this reference to the larger Bench. Learned counsel for the petitioner frontally assailed the

(1) (1953) A.I.R. (Pat.) 370

(2) (1956) A.I.R. (S.C.) 640

relevant part of the ratio and the reasoning therein. It was contended that even after rightly holding that the District Magistrate and the Commissioner were the final statutory authorities under the Act, the Bench thereafter seems to have slipped into the error of a patch-work decision of holding that whilst the Government had no power to interfere with the management of a public ferry, namely, Telpa-Ekauna, it had power to interfere with the matters relating to *sairat* ferries despite the fact that the bid and the settlement were a composite one. We were invited to clear the cobwebs and overrule the second limb of the holding in the case aforesaid. The submission of the learned counsel herein is corrrect. The Division Bench following the earlier view came to the conclusion that the proposition that the State Government has no power to interfere with the settlement of public ferries is beyond dispute and cannot be challenged. Nevertheless in applying the rule to a composite settlement it proceeded to hold that the State Government had the power to interfere therewith and consequently even to cancel the bid or the settlement of a public ferry as well. It appears to me that the issue was not properly projected before the Division Bench and lerned counsel for the parties were some what remiss in not canvassing the principle and the provisions of the statute in their proper perspective. It does not seem to have been noticed that such a finding in effect implies the overriding of the Act and the statutory provisions by administrative instructions. With the deepest respect this aspect of the finding of the Division Bench in *Ganesh Prasad* v. *The State of Bihar and others* (supra) does not lay down the law correctly and is hereby over-

ruled. The answer to question no. (iii) is thus rendered in the negative and in the terms above.

26. In the light of the aforesaid conclusions it necessarily follows that the order of the Government (Annexure 5) must fall. It is common ground that the Commissioner in his exhaustive order (Annexure 3) held that the lease was not to extend beyond one year and his finding on this point was categoric and unequivocal. As noticed above, finality is attached to the same and his minor deviation of purportedly referring the matter for the approval of the State Government would not in the least detract from the clear cut legal position. It may also be noticed that the learned counsel for the Petitioner both in the stand before us and even in the pleadings supported the order of the Commissioner that the period of the lease must be for one year only. Under the Act the Government has no jurisdiction to override the final decision of the authorities on whom the power of settlement is conferred by the statute. In varying and extending the period of the lease to three years by a cryptic order the State Government acted without jurisdiction and its impugned order (Annexure 5) therefore, must be and is hereby quashed and that of the statutory authority, namely, the Commissioner, is consequently maintained.

27. The writ petition is accordingly allowed, but in view of some intricate questions involved, the conflict of precedent, the overruling of the earier precedent, I would leave the parties to bear their own costs.

S. Ali Ahmad, J. I agree with My lord the Chief.

Justice.

1. Birendra Prasad Sinha, J. With profound regards for the Hon'ble the Chief Justice, I regret for my inability to agree with the findings arrived at by him on question no. 1 and 2 formulated by him.

2. The facts of the case have been so succinctly set out in the judgment of My lord the Chief Justice that I will do better by not restating the same. On the question whether Telpa-Ekauna is a public ferry, I entirely agree with him.

3. But in my view, a public ferry governed by the provisions of the Bengal Ferries Act and a Sairat Ferry governed by the Bihar Land Reforms Act cannot be clubbed together and a composite settlement of a Public ferry and a Sairat ferry is not permissible in law. It follows, therefore that a composite settlement can neither be governed by the Bengal Ferries Act nor by the provisions made under the Bihar Land Reforms Act.

4. The admitted position is that neither the Bengal Ferries Act nor the Bihar Land Reforms Act provide for clubbing together of the two types of ferries. Section 7 of the Bengal Ferries Act vests in the Magistrate of the district the control of Public ferries declared under section 6 of the Act. The power of the Magistrate of the district is subject to the direction of the Commissioner. Such Public ferries may be leased out by a public auction by the Magistrate of the district with the approval of the Commissioner under section 9 of the Act. It is no where provided that such Magistrate of the district may also lease

out any Sairat ferry along with the Public ferry or for that matter club them together.

5. Management of the estates and tenures vested in the State under Land Reforms Act has been transferred to the State. Section 13 of the Bihar Land Reforms Act, 1950 provides that all estates and tenures vested in the State under the Provisions of the Bihar Land Reforms Act shall, as far as practicable, be managed according to the rules for the time being in force for the management of Government estates subject to such directions as may, by general or special order, be issued from time to time by the State Government in this behalf. According to the provisio to section 13,the management of such estates and tenures including trees, forests, fisheries, jalkars, hats, bazars and *ferries,* comprised in such estates and tenures within a particular area in respect of which a Gram Panchayat has been established under the Bihar Panchayat Raj Act. 1947 may be entrusted to the said Gram Panchayat on such terms and conditions which may be fixed by the State Government and subject to such rules as may be prescribed. A special provision seems to have been made in the Land Reforms Act for the benefit of the Gram Panchayat and for the development of a local self governent. No similar provision is to be found in the Bengal Ferries Act. According to section 36 of the Land Reforms Act, the State Government may by notification direct that any power which is conferred on it by the said act shall, in such circumstances and under such conditions, if any, as may be specified in that behalf be exercised or discharged by any officer or authority subordinate to the State

Government. The provisions of the Bihar Land Reforms Act shall have effect notwithstanding anything contained in any other law for the time being in force, as provided under section 42 B of the Land Reforms Act. This clearly means that in respect of the superintendence and control of the estates and tenures vested in the State under the Land Reforms Act provision conferred in the said Act shall have to be followed and cannot be superseded by any other law for the time being in force. Rules have been made under section 43 of the Land Reforms Act for the purpose of settlement of Hat, Bazar, Mela etc. Rule 7-P of the Bihar Land Reforms Rules, 1951 provides that the Collector or the prescribed authority shall, in the first instance, issue individual notices to the outgoing intermediaries and their heirs enquiring whether the outgoing intermediaries were prepared to forego compensation and execute a lease in the prescribed form. In respect of such Hat, Bazar or Mela settlement will be made with the outgoing intermediaries in the event of their agreeing to forego compensation. The collector or the prescribed authority shall also invite sealed tenders by an appointed date and time for settlement of such Hat, Bazar of Melas, as the case may be. Rule 7-R Provides that if the intermediaries are prepared to take settlement on the terms offered by the collector or the prescribed authority the Hat, Bazar etc. shall be settled with him or them. But if the Collector or the prescribed authority finds that such settlement should not be made, he should refer the matter through the Commissioner for order of Government decision shall be final. In case no reply in response to the notice sent to the outgoing intermediaries is received by the Collector or the

prescribed authority he shall settle such Hat, Bazar or Mela for the reserve Jama fixed under Rule 7-U with the registered Cooperative Society or the Gram Panchayat of the area. In the event of failure to make settlement to the Cooperative Society or the Gram Panchayat, the Collector or the prescribed authority shall settle such Hat, Bazar or Mela by public auction which shall be held on the appointed date, time and place and for which a fresh general notice shall be published in the manner provided in Rule 3-A. A detailed procedure has thus been prescribed under the rule for the settlement of the sairati interests vested in the State.

6. It may be relevant here to state that apart from the rules framed under section 43, certain directions have also been issued from time to time by the State Government for the management of the estates and tenures. Those directions and instructions are to be found in the Sairati compendium issued by the Revenue Department in the Government of Bihar. Powers have been delegated for the settlement of Sairats vested in the State putting a financial limit within which the Additional Collector, Collector and the Commissioner can sanction settlement of Sairats. If the limit fixed for the Commissioner exceeds then the settlement of the Sairats has to be sanctioned by the State Government (Vide letter No. E-IX-101 45-55-5235-IR date 21st September, 1955 from Additional Under Secretary to Government of Bihar, Revenue Department to the Commissioners and Collectors). It is not necessary to refer to the other letters and circulars in this respect showing what procedure shall be adopted by the prescribed

authority in the matter of settlement of the Sairats within their financial limits.

When such a detailed provision has been made under the Bihar Land Reforms Act, the rules and various circulars and orders issued from time to time for the settlement of the Sairats by the prescribed authorities, it would be difficult to find that such Sairats can also be settled by the Magistrates of the district under the Bengal Ferries Act by merely clubbing such Sairat ferries with the public ferries.

7. With great respect that would not only be against the mandate of law but shall also defeat the purpose of the Bihar Land Reforms Act. As noticed above the settlement has to be made, in the first instance with the outgoing intermediaries, failing that with the Gram Panchayats, then with the Cooperative Societies and failing that also by public auction by the Collecctor or the prescribed authority.

8. Under the Bengal Ferries Act, The power to settle a Public ferry vests in the Magistrate of the district with the approval of the Commissioner. There is no financial limit put on him like the Sairat ferries. None of these acts provide for clubbing a Public ferry with the Sairat ferries. To concede that power to the Magistrate of the district will not only be against the mandate of law but the same may have disastrous effect. The Magistrate of the district may club together many such sairat ferries vested in the State with the Public ferries and even though reserve Jama in respect of that Sairat ferries is much above the

financial limit put on the Collector by the Land Reforms Act, settle the same along with the Public ferry and there by usurp the powers not vested in him and defeat the provisions of the Land Reforms Act. Looking at it from another point of view, if the Magistrate of the district can club a Public ferry with the Sairat ferries and made the settlement under the Bengal Ferries Act then the converse also must be permissible. Why then an Additional Collector or a Collector or any other prescribed authority under the Land Reforms Act not club a Public ferry with the Sairat ferries and proceed to make the settlement in accordance with the provisions contained in the Land Reforms Act ?If one is permissible in the absence of any provision in either of the acts then the other also must be permissible. The power for clubbing the two types of ferries under the two different acts cannot therefore, be presumed in the absence of specific provision in that regard.

9. It is a well known rule that a statue should not be construed as taking way the jurisdiction of an authority or tribunal in the absence of clear and unambiguous language to that effect (*Commissioners of Customs and Excise* v. *Cure & Deeley, Ltd.* (1). where clear and unequivocal language Capable of only one meaning is used in an enactment, it must be enforced however harsh or absurd or contrary to common sense the result may be (*Cartiedge* v. *E. Jopling & Sons Ltd*, (2). The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and

(1) (1962) 1.Q.B. 340
(2) (1963) A.C. 758

expedient. It is the duty of the court to expound the law as it stands and to "leave the remedy to others" (*Sutters* v. *Briggs*. (1) Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature (See Craies on Statute Law, P.65, 7th Edn.).

10. The two types of ferries, as I have said above are controlled by two statutes each prescribing different types of procedure for settlement. Without there being any specific provision in that behalf, the two types of ferries cannot be clubbed and consequently there cannot be a composite settlement.

11. Needless to say that it is in the domain of the Legislature to enact two types of law and prescribe different modes of execution and the courts can not read something which is not specifically provided there in by introducing a third procedure.

12. It, therefore, follows that the entire procedure for the settlement of Telpa Ekauna a Public ferry along with other Sairat ferries was without jurisdiction. The respondent-District Magistrate had no authority to club these two types of ferries and make a composite settlement.

13. I will, therefore, annul the entire settlement and direct the concerned authorities to make the settlement of Public ferry in accordance with the provisions contained

(1) (1922) 1.A.C. 1

in the Bengal Ferries Act and those of the sairat ferries in accordance with the provisions contained in the Bihar Land Reforms Act and the rules framed thereunder.

S.P.J. Application allowed

FULL BENCH

Before S.S. Sandhawalia, C.J., S. Ali Ahmad and
S. B. Sanyal, JJ.

1987
January,9.

Jokhan Rai. *
v.
Baikunth Singh

Limitation Act, 1963 (Central Act XXXVI of 1963). Article 136, scope of --- execution of decree ---period of limitation of twelve years, computation of --- time, whether to run from the date of the appellate decree in the event of an appeal or the date of the original decree.

Held, that, the *terminus a quo* for computing the limitation of twelve years under Article 136 of the Indian Limitation Act, 1963, is the date of the appellate decree in the event of an appeal and not that of the original decree.

The language of Article 136 talks of a decree and

* Civil Revision No. 472 of 1984. Against the order of Shri Maheshwar Thakur, Execution Munsif, Patna, dated the 24th of February, 1984.

its enforeceability. It does not limit or constrict itself to the original decree alone. The words employed are "any decree" when the order becomes enforceable ". An appeal under the Code of Civil Procedure is a continuation of the suit and the appeal must be taken as part and parcel of the continuing trial. In esssence where an appeal has been preferred, the suit is disposed of truly and finally by the appellate decree and not by the original one.

Equally well established it is that in the event of an appeal the decree of the trial court merges with that of the appellate court. The original decree by virtue of merger loses its very existence and it is the appellate decree which subsists. The decree which is enforceable is only that of the appellate court and not of the original court and time must necessarily run from the date of the decree which is enforceable one.

Lakshmi Narain Guin and others v. *Niranjan Modak* (1) --- relied on.

Kali Prasad Bajpayee and others v. *Bhagwati Prasad and another.* (2) --- overruled.

Case laws reviewed.

Application by the judgment debtor.

The facts of the case material to this report are

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(1) (1985) A.I.R. (S.C.) 111.
(2) (1980) A.I.R. (Pat) 280.

set out in the judgment of S.S. Sandhawalia, C.J.

The case was originally placed for admission before a single judge who directed the case to be disposed of by a Division Bench, which referred the case to a Full Bench.

On this reference.

Messrs Asghar Hussain, Moinuddin Ahmad and M. Hasibuddin for the petitioners.

Messrs Sheo Dayal Singh, Kamla Prasad Ray, Shivshanker Prasad and Nawal Kishore Sharma for the Opposite party.

S.S. Sandhawalia, C.J. :- Whether the *terminus a quo* for computing the period of limitation of 12 years under Article 136 of the Indian Limitation Act, 1963 is the date of the original decree alone or in the event of an appeal that of an appellate decree as well - is the some what significant question necessitating this reference to the Full Bench.

2. The chequered history of the litigation has completed its silver jubilee. The decree-holder filed Title Suit No. 161 of 1961 against the judgment-debtor which was dismissed by the 2nd Additional Munsif, Patna, way back on the 25th of January, 1964. A title appeal was preferred against the same in which the judgment and decree of the lower court was set aside and the suit decreed (vide judgment dated the 23rd of December, 1969. The judgment-debtor thereafter filed Second Appeal No. 120 of 1970 which ultimately came to be dismissed after a

decade on the 21st of March, 1980.

3. The opposite party decree-holder filed Execution Case No. 7 of 1983 in the court of the Execution Munsif, Patna. Therein petition under order XXI Rule 23 of the Code of Civil Procedure (hereinafter called the Code) and article 136 of the Indian Limitation Act (hereinafter to be referred to as the 'Act') was preeferred by the judgment-debtor taking the stand that the execution poceedings were beyond period of twelve years from the grant of the decree on the 23rd of December, 1969 Basic reliance was placed on AIR 1980 Patna 280 (*Kali Prasad Bajpayee and others* v. *Bhagwati Prasad and another*). The execution court, however, rejected the petition of the judgment-debtor.

4. Aggrieved thereby, the present civil revision was preferred. At the threshold stage of admission, the learned single Judge noticed the divergence of opinion in *Kali Prasad Bajyapee's case* with a long line of contrary precedent and, therefore, directed the case to be disposed of by a Division Bench. Before the Division Bench again a frontal conflict betwixt Kali Prasad Bajpayee's case and AIR 1978 Andhra Pradesh 342 and AIR 1976 Calcutta 122 (*Posani Ramachandraiah* v. *Daggupati Seshamma* and *Shyama Pada Choudhury* V. *Sana Choudhury & Co.* and others respectively) taking a contrary view was noticed and the matter was referred to the Full Bench for an authoritative decision.

5. Ere one examines the rival contention it seems apt and, indeed, necessary to notice the legislative history of the provision which also tends to provide a clue to the

problem. Prior to the enactment of the limitation Act,1963, the relevant provisions governing the field were section 48 of the Code of Civil Procedure and articles 182 and 183 of the old Limitation Act, 1908. It is somewhat manifest that the language of article 182 of the old Limitation Act had created a hornet's nest of controversy and a deep cleavage of judicial opinion. This was noticed by the Law Commission for repealing the said article and enacting the present article 136 in the following terms :-

> * Art. 182 (old) has been a very fruitful source of litigation and is a weapon in the hands of both the dishonest decree-holder and the dishonest judgment-debtor. It has given right to innumerable decisions. The commentary in Rustomji's Limitation Act (5th Edition) on this Article itself covers nearly 200 pages. In our opinion the maximum period of limitation for the execution of a decree or order of any civil court should be 12 years from the date when the decree or order became enforceable (which is usually the date of the decree) or where the decree or subsequent order directs any payment of money or the delivery of any property to be made at a certain date at recurring periods the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. There is therefore, no need for a provision compelling the decree holder to keep the decree alive by making an application every three years. There exists a provision already in s. 48 of the Civil Procedure Code that a decree ceases to be in enforceable after a period of 12 years. In England also the time fixed for enforcing a judgment is 12 years. Either the decree-holder succeeds in realising his decree within this period or he fails and there should be no provision enabling the execution of a decree after that period. To this provision an exception will have to be made to the effect that the

Court may order the execution of a decree upon an application presented after the expiration of the period of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within the twelve years immediately preceding the date of the application. S. 48 of the Civil procedure Code may be deleted and its provisions may be incorporated in this Act." (Extracted from R. Mitra's Limitation Act, 1963, 1964 Edition at page 794).

In consonance with the above, section 48 of the Code as omitted by section 28 of the Act the Bill for the Limitation Act, 1963 itself enumerated the following objects and reasons for the enactment of article 136 :-

"Existing Article 182 has been a fruitful source of litigation and therefore the proposed Art. 135 (now Art.136) in lieu thereof, provides that the maximum period of limitation for the execution of a decree or order of any Civil Court shall be 12 years from the date when the decree or order became enforceable (which is usually the date of the decree or order) or where the decree or subsquent order directs any payment of money or delivery of any property to be made at a certain date or at recurring period, from the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree or order. There is no reason why a decree should be kept alive for more than 12 years. Section 48 of the Civil Procedure Code, 1908, provides that a decree ceases to be enforceable after 12 years. In England also the time fixed for enforcng a judgment is 12 years. Where, however, the judgment-debtor has, by fraud or force, prevented the execution of a decree within the prescribed period, suitable provisions for extending the period are being made in clause 16 (now S. 17) of the Bill on the lines of S. 48 (2) of the Code of Civil Procedure, 1908.

Existing Article 183, which makes special provision for decrees and orders of Courts establish by Royal Charter, is no longer necessary.

It is also provided that the period of 12 years will not apply to decrees granting perpetual injunction."

Article 135 as finally enacted is now in the following terms :-

Description of application.	Period of limitation	Time from which period begins to run
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which, execution is sought, takes place : Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

6. Inevitably the sheet anchor of the learned counsel for the petitioner is the Division Bench judgment in *Kali Prasad Bajpayee and others* v. *Bhagwati Prasad and another* (supra). This undoubtedly buttresses his stand and relying thereon counsel firmly contended that it is the

original decree alone which is executable and consequenfly time must run from the date of such a decree only. It was submitted that where no stay of the execution of decree had been granted by that appellate court, there was no inpediment in the way of the plaintiff in executing the decree. The learned counsel was compelled to go to the logical extreme of subsequent rendering of the appellate decree is irrelevant to the issue of execution of the original decree itself. According to him, the *terminus a quo* begins from the date of such a decree and like a pole star is unchangeable thereafter.

7. It seems to me that the question here is so well covered by principle, language of the statue and binding precedent, that it would be somewhat wasteful to launch on too elaborate a dissertation, Nevertheless the salient and exiomatic aspects of the issue may briefly recapitulated. Perhaps what first meets the eye is the fact that the language of Article 136 talks of a decree and its enforceability. It does not limit or constrict itself to the orginal decree alone. The words employed are " any decree" and "when the order become enforceable". To read article 136 as confined to the decree of the trial court or the original decree alone would be doing violence to the language of the statute by unceremoniously inserting the words "trial court" of 'original' along with the words " decree or order" whereever used in the said article. Thus even on a plain and meaningful reading of article 136 as now enacted, it is manifest that it cannot be read as a decree of the trial court or the original decree alone. Consequently, the some what hypertechnical harping of the learned

counsel for the petitioner on the stand that the word ' decree' must be coustrued as the original decree or that of the trial court must be categorically rejected.

8. Yet another matter which is axiomatic in our civil jurisprudence is that an appeal under the Code of Civil Procedure is a continuation of the suit. Now once this unchallengeable dictum is accepted , It necessarily follows that the moment an appeal is filed, the finality of the judgment and decree is autamatically put in a flux and the appeal must be taken as part and parcel of the continuing trial, In essence where an appeal has been preferred, the suit is disposed of truly and finally by the appellate decree and not by the original one.

9. Equally well established it is that in the event of an appeal the decree of the trial court merges with that of the appellate court. The doctrine of merger is too well known to call for further elaboration. Indeed the moment the appellate decree comes into being, the original decree loses its independent entity. Perhaps one can go to the length of saying that on an appellate decree being passed, the original decree by virtue of merger loses its very exestence. In the concept of merger, thereafter it is the appallate decree which subsists. After it is rendered, the decree which is enforceable is only that of the appellate court and not of the original court. To put it tersely, in the event of an appeal the enforceable decree is that of the appellate court.

10. In the light of the above, the core question is as to which decree is executable in the event of an appeal-

that of the trial court or of the appellate court ? I believe the answer is somewhat plain that in the event of an appeal it is ultimately the appellate decree which becomes enforceable and to executed.

11. Now once it is held as above, It follows that the time must necessarily run from the date of the decree which is enforeable one. It is incongruous to hold that through the enforceable decree is the appellate one, time and limitation must run from the date of the original decree alone.

12. Having noticed the language of the statute and the larger principle, one may now briefly advert to a consistent stream of precedent which is hoary in its origin. It is unnecessary to delve further than (1932) L.R. 59 I.A. 283 (*Nagendra Nath Dey and another* v. *Suresh Chandra Dey and others*) wherein Sir Dinshah Mulla, speaking for the Privy Council whilst construing analogous provision of article 182 of the Indian Limitation Act, 1908 and noticing some conflict of precedent on the point held as under :-

" Their Lordships think that nothing would be gained by descussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article: ' where there has been an appeal' time is to run from the date of the decree of the Appellate Court.' There is, in their Lordships, opinion. no warrant for reading into the words quoted any qualification either as to the character of the appeal or " as to the parties to it' the words mean just what they say .....

It is at least an intelligible rule that so long as there is any question sub judice between any of the parties those

affected shall not be compelled to persue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment debtor prejudiced."

Again in (1932) L.R. 60 I.A. 83 (*Hussain Asghar Ali and others* v. *Ramaditta Mal and others*) Privy Council in no uncertian terms held as under :-

" Thier Lordships think when an order is judicially made by an Appellate Court which has the effect of finally disposing of an appeal. such an order gives a new starting-point for the period of limitation prescribed by art. 182 (2) of the Act of 1908. They recognize that there has been some difference of opinion upon this question in Indian Courts, but they think that the principle enunciated above is in accordance with he view taken in the majority of cases and is the effect of the decision in *Gohur Bepari* v. *Ram Krishna Shaha* (1927) 32 C.W.J. 387, on which both Courts have relied in the present proceedings."

It is manifest from the above that binding principle has been earlier unequivocal and categroical in holding even under the old Limitation Act that the enforceable decree is the appellate one and time would, therefore, necessarily run from its date in the event of an appeal. Obviously enough in the absence of an appeal the original decree is the only enforceable decree and the period of limitation would be computed from its date. This larger priciple has been re-affirmed by the recent binding precedent in AIR 1985 SC III (*Lakshmi Narayan Guin and others* v. *Niranjan Modak*) There in Pathak, J. (as the

learned Chief Justice then was) who was construing section 13 (i) of the West Bengal Premises Tenancy Act, has observed :-

"Does the decree here refer to the decree of the trial court or where an appeal has been preferred, to the appellate decree ?

Plainly, reference is intended to the decree which disposes of the suit finally. It is well settled that when a trial Court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on the merits, the trial Court decree is said in law to merge in the appellate decree, and it is the appellate decree which rules."

Even more directly on the point is the decision of the Division Bench presided over by Sabyasachi Mukharji, J.. In AIR 1976 Calcutta 122 (*Shyama Pada Choudhury* v. *Saha Choudhury & Co. and others*) and the decision of a Division Bench presided over by Chinnappa Reddy, J.. In AIR 1978 Andhra Pradesh 342 (*Posani Ramachadraiah* v. *Daggupati Seshamma*). The learned counsel for the petitioner could pose no serious challenge to this long unbroken line of precedent.

13. Reverting to the case of *Kali Prasad Bajpayee* there is no gainsaying the fact that it lends support to the stand and taken by the petitioner. However, with respect it may be noticed that the learned Judges apparently erred in launching themselves on a comparison of the old law in articles 182 and 183 of the Limitation Act, 1908 and article

136 of the present one. It is not in dispute that the provision applicable and which fell for consideration is plainly enough that of article 136. As was noticed at the outset, the whole object and purpose of the amendment in the old law was to cut the Gordian knot of controversy raised by the involved language of article 182 which had created a sharp cleavage of precedent. Despite the legislature having done so by substituing article 136 thereafter, the learned Judges for shaking the plain highway re-entered bye-ways in the impassable thicket of old laws and arrived at a conclusion which, with respect, seems to be untenable both on the language of the statute and principle. A perusal of the judgment indicates that the axiomatic principle of the theory of merger and the continuation of the suit in the event of the appeal and the enforceability of the appellate decree seem to have all been missed and not projected adequately before the Bench. The long line of precedent noticed above was apparently not placed before the Division Bench. With the deepest deference, the view taken in *Kali Prasad Bajpayee and others* v. *Bhagwati Prasad and another* (supra) is untenable and would lead to gravely anomalous results. The judgment is, therefore, overruled.

14. To sum up, the answer to the question posed at the outset is rendered in the terms that the *terminus a quo* for computing the limitation of twelve years under article 136 of the Act is the date of the appellate decree in the event of an appeal and not that of the original decree.

15. Once it is held as above, it is plain that there is no merit in this revision petition. The Learned Execution Munsif rightly held that time as to run from the date of the

dismissal of the appeal by the High Court on the 21st of March, 1980. The execution application was thus plainly withiin time. The order of the court below is affirmed and this revision petition is dismissed, however, without any order as to costs.

S. Ali Ahmad, J.. I agree

S.B. Sanyal, J.. I have had the privilege of reading the judgment of my Lord the Chief Justice. I proposed to do no more than say that I concur and that this revision petition be dismissed.

S.P.J. Petition dismissed

FULL BENCH

Before S.S. Sandhawalia, C.J., Lalit Mohan Sharma and S. Ali Ahmad, JJ.

1987

January, 12.

Ram Naresh Prasad Nirala

v.

State of Bihar and others.

Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 (Bihar Act XXXVIII of 1982), sections 3 (3) and 4 (2) --- untrained teacher on the date of the report of the Special Board, whether can claim to be considered and absorbed in Government service on subsequent acquisition of the training qualification --- Full Bench judgment in Ram Ballabh Prasad Singh and others v. The State of Bihar and others (1), whether extends mutatis mutandis to teachers as well under section 3 (3).

Held, that a teacher, who was untrained on the date of the report of the special board under section 3 (3) of the

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* Civil writ Jurisdiction Case No. 437 of 1985. In the matter of an application under Articles 226 and 227 of the Constitution of India.

(1) (1986) P.L.J.R. 373.

Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981, cannot claim to be considered for absorption in government service on the ground of having subsequently acquired the requisite qualifications.

It is evident from the second paragraph of sub-section (3) of section 3 of the act that the procedure prescribed thereby envisages the consideration of qualification and the suitability of teachers much earlier than the actual take over by a commitee (conveniently labelled as a special board) constituted by the State Government for the said purpose. It is only on the basis of the evaluation and report of the said committee or the special board that the government would later appoint such persons on the date of the take over of the institution. The crucial point of time and indeed the outer limit for such consideration is the date of the report of the special board for the consideration is the date of the report of the special board for the consideration off eligibility, qualification and suitability of teachers for absorption. There is no vested right in a teacher to claim that after the question of his qualification and suitability has been duly considered by the special board and reported upon, he has chosen to later qualify himself and his case should be re-examined on the date of the notification Indeed, section 3 (3) does not visualise a second special board for consideration of any such cases on or after the date of notification.

Held, further, that the ratio of the Full Bench judgment in *Ram Ballabh Prasad Singh and others* v. *The State of Bihar and others* (1) is applicable in terms to teachers first and by way of extension brings in

(1) (1986) P.L.J.R. 373

Headmasters within the ambit of the said term. Indeed far from the said judgment not being applicable to the case of teachers itself, it *stricto sensu* first governs the teachers and then by necessary implication the Headmaster, who, in the words of the Full Bench, being the head teacher, is brought into the fold. The rationale and ratio of the Full Bench judgment aforesaid extends *mutatis mutandis* to teachers as well under section 3 (3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981.

Application by the teacher, who was not absorbed in Government service.

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

The case was placed for admission before a Division Bench, which referred the case to a Full Bench for hearing.

On this reference.

M/s. Rameshwar Prasad, Amarendra Kumar Sinha, R.K. Ranjan and Mrs. Kusum Lata Sinha for the petitioner.

M/s. J.N.P. Sinha (G.A.), S.K. Singh (G.P. IV), R.N. Choudhary (J.C. to G.A.) and V.N. Sinha (J.C. to G.P.IV). for the respondents.

S.S. Sandhawalia, C.J. :- Does the rationale and the ratio of the Full Bench's judgment in *Ram Ballabh Prasad Singh and others* v. *The State of Bihar and others* (1) extend *mutatis mutandis* to teachers as well under

(1) (1986) P.L.J.R. 373

section 3 (3) of the Bihar Non-Government secondary schools (Taking Over of Management and Control) Act, 1981 ? Can a teacher, who was untrained on the date of the report of the Special Board, under section 3 (3) of the Act aforesaid inflexibly claim to be considered and absorbed in Government service on the ground of the subsequent acquisition of the training qualification? These are the twin significant questions which have come to the fore in this reference to the larger Bench.

2. The facts deserve notice with relative brevity. The petitioner was appointed as an Assistant Teacher by the private Managing Committee of the D.N. High School, Chamhera Rasalpur, on the 10th of February, 1979. It would appear that this was even prior to the permission for the establishment of the said school which admittedly was granted under the Bihar Secondary Education Board Act, 1976, on the 18th of October, 1979. It is equally common ground that the said school was not a recognised one. Prior to the taking over of the school under the Bihar Non-Government Secondary School (Taking Over of Management and Control) Act. 1981, respondent no.2, the Director of Secondary Education, constituted a Special Board including the District Education Officers, Nalanda, for the purpose of inspecting the school. The said Board submitted its report on the 10th of February, 1982. Admittedly even on that date the petitioner had not acquired the teacher's training qualification and his name was thus shown in the report at serial no.10 as an untrained teacher. It was much later that on the 15th of April, 1982 the petitioner allegedly passed the examination and acquired the diploma in teaching. On the taking over of the school on the 20th of July, 1982, the petitioner, after consideration,

was not absorbed in Government service. He unsuccessfully represented against the same and aggrieved by the rejection of the representation the present writ petition was filed on the 29th of January, 1985. Therein, *inter alia*, it was claimed that by virtue of section 4(2) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 (hereinafter referred to as the Act') the services of the petitioner *ipso jure* stood transferred to the State Government. Some grievance was sought to be made on the ground that the respondent State had recognised the service of some untrained teachers as well in some other schools and the petitioner should be afforded the same indulgence.

3. At the threshold stage of admission the Bench noticed some conflict of precedent in the tangle field of the absorption of the school teachers and, therefore, referred the case to a Full Bench and that is now the matter is before us.

4. In the counter-affidavit filed on behalf of respondent no. 2 it is highlighted that the D.N. High School, Chamhera Rasalpur was merely a proposed school and on the date of the notification dated the 20th of June, 1982 for the take over the services of only such teachers were considered and accepted who were found both qualified and suitable. It is asserted that the petitioner was not a trained graduate on the date of his appointment and was not even eligible to be appointed as a teacher in any recognised school. It is then pointed out that D.N. High School, Chamhera Rasalpur, being not a recognised one, on a consideration the services of seven teachers had been approved for absorption. In the supplementary counter-

affidavit it has, however, been categorically averred that the very initial appointment of the petitioner in the private school was an invalid one. For the purposes of the establishment of the school and subsequent recognition in Managing Committee of the petitioner's school had written to the Bihar Secondary Education Board on the 22nd of January, 1979 (vide Annexure A to the supplementary counter-affidavit) that no untrained teacher shall be appointed in the school. Nevertheless, contrary to the said undertaking the Managing Committee had later illegally and without Jurisdiction as well as mala fide appointed the petitioner, who was untrained, as a teacher in the school on the 10th of February, 1979. This being the admitted position the stand of the respondent is that the petitioner has not the remotest claim of being absorbed with the taking over of the school. It is further the stand that under section 3 (3) of the Act at best the petitioner could be appointed against nine sanctioned post and even according to his standing in the school, he was at serial no. 10 in the report of the Special Board which disclosed the list of teachers and their seniority according to the appointment.

5. Somewhat curiously learned counsel for the petitioner again sought to raise the argument that even in cases falling under section 3(3) of the Act the teachers of the taken over school would *ipso jure* become Government employees in the same school by virtue of section 4(2) of the Act. The Full Bench's judgment in *Ram Ballabh Prasad Singh's case* (supra) was sought to be distinguished on the ground that the same was applicable to Headmasters *stricto sensu* and was not attracted in the case of teachers.

6. To my mind, the argument aforesaid has only to be noticed and rejected and is indeed a submission of

desparation. A cursory analysis of the Full Bench judgment in *Ram Ballabh Prasad Singh's case* (supra) would indicate that in fact it applied squarely to the case of teachers under section 3 (3). Indeed the language of section 3(3) itself talks only of the posts of teachers. The question in the reverse before the full bench was whether the Headmaster would come within the ambit of the word "teachers" in the said section. There is thus no manner of doubt that the ratio of *Ram Ballabh Prasad Singh's case* (supra) is applicable in terms to teachers first and by way of extension brings in Headmasters with in the ambit of the said term. Indeed, far from the said judgment not being applicable to the case of teachers itself, it *stricto sensu* first governs the teachers and then by necessary implication the Headmaster who, in the words of the Full Bench, being the head teacher, is brought into the fold. This, indeed, is manifest from paragraph 16 of the said judgment in the following terms :-

"From whichever angle the matter may be viewed, it seems to be plain that both generically and on the definition clauses and the language of the statute, a Headmaster clearly comes within the wideranging terminology of teachers in the second paragraph of section 3(3). The answer to question no. 1 is thus rendered in the affirmative and it is held the Headmaster of an unrecognised secondary school before its take over shall be deemed to be a teacher of that school for the purpose of examination of his qualification and suitability (for appointment to Government service) under section 3(3) of the Act."

7. Now once it is held that the aforesaid ratio is applicable to the case of the present petitioner, it is evident

that the petitioner's case has no leg to stand upon. Indeed, proceeding further, the Full Bench has also held in no uncertain terms that the teachers of a school taken over under section 3(3) had not automatically become the teachers of the school after its take over by virtue of section 4(2) of the Act. The rationale for that conclusion cannot be given better than in the words of the Full Bench itself as under whilst pointedly noticing that what is said in the context of headmaster *mutatis mutandis* applies to teachers as well :-

" 18. On a close reading of sub-section (3) of section 3 and in particular the second paragraph thereof,, it appears to me that the said provision is the very antithesis of any theory of automatic appointment of Headmasters into Government service and the nationalised schools. A plain reading of the second paragraph would indicate that it first hinges on the qualifications of the teachers working against the posts in an unrecognised school. The very eligibility for consideration and appointment to Government service would first depend upon the qualification of such a teacher. Plainly enough, if the incumbent teacher does not satisfy even the test of the basic prescribed qualifications, the question of his appointment to Government service would have to be ruled out at the threshold. Any question of the automatic appointment or transfer of an unqualified teacher "to my mind, cannot simply arise under the second paragraph. Secondly, despite the test of qualifications being satisfied and the teacher being eligible for consideration, a further requirement of suitability is laid out by the statute. A teacher may be qualified and eligible and yet not suitable for appointment into permanent Government service. It was forcefully highlighted on behalf of the State by the

learned Advocate-General that section 3 (3) deals with unrecognised schools to the extent that they may have merrily as yet applied for permission of establishment. In such private institutions empirically managed by the proprietors or managing committees, the possibilities of favouritism and nepotism for appointment to the post of teachers and Headmasters were not only there but indeed rampant within the State. It was highlighted that though the incumbent Headmaster may be qualified yet he may have an atrocious service record and be an established drunk or a debauch. Is such a person to be automatically appointed on take over in a nationalised school and become a permanent part of the educational set up of the State? The learned Advocate-General was thus right that yet a second hurdle of suitability has to be "crossed desipte the existence of the eligible qualifications. Thirdly, the test of qualifications and suitability has to pass through a crucible committee constituted by the State Government for the specific purpose of examining the same with regard to the unrecognised schools. Later on I would refer to the statutory instructions for the constitution of such a committee. It is only after such a statutory committee comes to a favourable conclusion with regard to the suitability of the incumbent that they would be considered for appointment in Governmet service. Fourthly, it appears from the language of the second paragraph that the opinion of the committee is not conclusive for an automatic transfer of such incumbent into Government service. Such persons are then to be expressly appointed in Government service at the time of take over. It deserves pointed highlighting that the language employed here is not of any automatic transfer of service but an express fresh appointment by the Government. It seems plain that section 3 (3) and the

second paragraph thereof far from visualising any automatic transfer of services provides for the specific pre-conditions before an incumbent of the post of a teacher in an unrecognised school is to be raised to the status of Government service in a nationalised school.

"41. To finally conclude, the answer to question no. 2 posed at the outset is rendered in the negative. It is held that the Headmaster of a school taken over under section 3(3) does not automaticall become the Headmaster of the schoolafter its take over under section 4 (2) of the Act."

In the light of the aforesaid discussion and enunciation it necesarily follows that the rationale and ratio of the full Bench judgment in *Ram Ballabh Prasad Singh's case extends mutatis mutandis* to teachers as well under section 3 (3) of the Act.

8. In view of the aforesaid conclusion what deserves highlighting is that herein it is the admitted position that the special board in its report had expressly found the petitioner at serial no. 10 and thus not even within the range of the nine posts which the State Government under the statue to consider for absorption. The petitioner, therefore, has not even the semblance of aright in this context.

9. It was then contended on behalf of the petitioner that as regards the qualification and eligibility of a teacher the same is to be determined on the date of the notification for the take over of the school and not earlier. On that premise, it was contended that herein by the actual date of the take over notification the petitioner had secured a diploma for teaching and was thus not ineligible.

10. The aforesaid contention, to my mind, has to be

merely noticed and rejected. The second paragraph of sub-section (3) of section 3 of the Act is in the following terms :-

> "The qualification and suitability of teachers working against 9 posts of the school, one clerk and two orderlies of such school before the promulgation of this Act, shall be examined by a committee constituted by the State Government for the purpose and if found suitable for appointment in government service along with taking over the management and control of the school."

It is evident from the above that the procedure prescribed thereby envisages the consideration of the qualification and the suitability of teachers much earlier than the actual take over by a committee (conveniently labelled as a special board) constituted by the State Government for the said purpose. The said committee or the special board is inevitably enjoined to give its opinion and report with regard to the suitability for appointment in government service of the said teachers. It is only on the basis of this evaluation and report that the government would later appoint such persoons on the date of the take over of the institution. Plainly enough the issues of qualification, eligibility and suitability are considerations which arise much earlier and have to be opined upon by the said board in its report for the prior consideration by the Government which may later culminate in both the taking over of the school and the absorption of some of its staff in government service. To contend that the qualification and suitability of the teachers are to be taken note of as on the date of the take over notification itself,

appears to me as the classic example of putting the cart before the horse. The qualifications and suitability of the teachers and other staff are first the relevant consideration on which the take over of the school and the absorption of such staff is to take place and not that on or after the date of the take over the qualification, etc., of the teachers and other staff should come up for consideration. It must, therefore, be held in no uncertain terms that the crucial point of time and, indeed, the outer limit for such consideration is the date of the report of the special board for the consideration of eligibility, qualification and suitability of teachers for absorption. There is no vested right in a teacher to claim that after the question of his qualification and suitability has been duly considered by the special board and reported upon, he has chosen to later qualify himself and his case should be re-examined on the date of the notification. Indeed, section 3(3) does not visualise a second splecial board for consideration of any such cases on or after the date of notification.

11. To conclude on this aspect, it is held that a teacher, who was untrained on the date of the report of the special board under section 3(3) of the Act aforesaid cannot claim to be considered for absorption in government service on the ground of having subsequently acquired the requisite qualifications.

12. Lastly, even on the issue of the factual merits also the petitioner's case is unworthy of acceptance. In the supplementary counter affidavit it has been averred in paragraph 9 and 10 thereof, which have not been controverted, that the managing committee of this private

school had earlier given the clearest undertaking on 22nd of January, 1979 (annexure A to the supplementary counter affidavit) much earlier than the appointment of the petitioner that it would not appoint any untrained teacher for the school. Nevertheless, in the clearest violation of the said undertaking, the petitioner was appointed as a teacher when he was not even qualified therefor and against a post which was not a sanctioned one. The stand of the learned Advocate-General was thus right and impeccable that the very appointment of the petitioner on its inception was firstly illegal because no unqualified teacher could be appointed and secondly the same was in gross violation of the undertaking given by the managing committee of the school for the purpose of securing permission for the establishment thereof. Yet agains, as has been noticed, the petitioner in the said school ranked at serial no. 10 in seniority (vide annexure 2) and was thus not even within the area of the consideration of the nine posts of teachers against which absorption could be done.

13. Before parting with the judgment it may be noticed that one of the consideration for this reference to the Full Bench was some alleged conflict betwixt *Nandkishore Prasad Mandal* v. *President, Bihar Secondary Education Board & others* (1977 PLJR 277) and the decision in the unreported case of C.W.J.C. No. 3434 of 1983 (*Vijay Kumar Gupta & others* v. *The State of Bihar & others*) disposed of on 7.11.1983.

Learned counsel for the parties are, however, agreed that the questions considered in the said decision are not the least relevant to the issue here and any discussion

thereof would thus be wholly academic. I would, therefore, decline to go into that matter because observations in this context would, to my mind, be plainly obiter.

14. The writ petition is plainly without merit and is hereby dismissed. There will, however, be no order as to cost.

Lalit Mohan Sharma, J., I agree.

S. Ali Ahmad, J., I also agree.

S.P.J. Petition dismissed

FULL BENCH

Before S.S. Sandhawalia, C.J., S. Shamsul Hasan & Ram Chandra Prasad Sinha, JJ.*

1987.

January, 16.

Kapildeo Singh. *

V.

The State of Bihar and others.

Arms Act, 1878 (Central Act XI of 1878), section 17, sub-section (3), clause (a), revocation of a gun licence under, during registration and pendency of a criminal case for major or capital offence --- whether justified --- subjective satisfaction of the licensing authority, whether to be exercised for adequate reasons.

Held, that, the registration and pendency of a criminal case for a major or capital offence may for adequate reasons justify the suspension or revocation of a licence under clause (a) of sub-section (3) of section 17 of the Arms Act, 1878.

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* Civil Writ Jurisdiction Case No. 6294 of 1985. In the matter of an application under Articles 226 and 227 of the Constitution of India.

It is true that sub-section (3) does not in term provide that the pendency of a criminal charge is a grant for the revocation of licence. Clause (a) warrants revocation if the licensing authority is satisfied that the holder of the licence "is for any reason unfit for the licence under the Act." The employment of such phraseology in the statute by the framers can leave no manner of doubt that a wide residuary discretion has been vested in the licensing authority to revoke provided it is satisfied that the holder is unfit for the licence under the Act. The implication of the holder in serious or horrendous capital crime in a particular case may furnish an adequate ground for the licensing authority for being so satisfied. Sub-section (1) requires the licensing authority to give notice in writing to deliver up the licence to it. That would invaribably give an opportunity to the licensee to show some cause against such action. A further safeguard is provided by sub-section (5) of section 17. The licensing authority must record in writing reasons therefor and also furnish to the holder of the licence on demand a brief statement of the same unless in exceptional cases he is of the opinion that it will not be in the public interest to furnish such statement. Nevertheless the requirement of recording reasons in writing is inflexibly mandatory. Therefore, it cannot be easily said that the subjective satisfaction of the licensing authority hedged in by the statutory requirements cannot be exercised on the basis of the pendency of the serious or capital criminal charge. If such subjective satisfaction has been broadly and reasonably exercised, it would come within the parameters of the statute under clause (a) of sub-section (3) of section 17 of the Arms Act.

M/s Govind Saran and Sons v. *State of Bihar and*

another (1) --- distinguished.

Application by the person whose licence was revoked.

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

The case was initially placed for admission before a Division Bench, which referred it to a Full Bench.

On this referrence.

M/s Yogendra Mishra, Mithilesh Kumar Khare and P.K. Thakur, for the petitioner.

M/s J.N.P. Sinha, G.A., Mr. Indu Prabha Singh, G.P.VI, and Mr. Subodh Prasad, J.C. to G.A. for the respondents.

S.S. Sandhawalia, C.J. Would the registration and pendency of a criminal case for a major or capital offence justify the suspension or revocation of a licence under clause (a) of sub-section (3) of section 17 of the Arms Act? - is the significant question necessitating this reference to the Full Bench.

2. The facts lie in a narrow compass. Kapildeo Singh petitioner was the holder of a licence for D.B.B.L. gun granted by the District Magistrate of Sitamarhi. On the 14th of November, 1978 a case under section 302, 307, 147, 148, 149 and 436 of the Indian Penal Code, section 27 of the Arms Act and section 3 of the Explosive

(1) (1983) A.I.R. (Pat.) 96.

Substance Act was registerd at Police Station Dumra against the petitioner and others. Therein, inter alia, allegations had been made that the petitioner Kapildeo Singh armed with his gun was a member of the unlawful assembly and in the transaction gunshots were fired at Tribeni Baitha though the actual fatal injuries were attributed from the gun of Mangru Singh, co-accused. Later the police after investigation submitted charge sheet and the Chief Judicial Magistrate, Sitamarhi, took cognizance and committed the petitioner and his co-accused to the Court of Session where the trial is still pending.

3. During the pendency of the aforesaid case respondent no. 3 District Magistrate, Sitamarhi, issued show cause notice to the petitioner as to why the gun licence in his favour be not cancelled. In response thereto the petitioner showed cause which did not find favour with the District Magistrate who cancelled the petitioner's licence by order dated the 15th of September, 1981. On appeal the learned Commissioner set aside that order and remanded the same primarily on the ground that the District Magistrate had not complied with sub-section (5) of section 17 by recording the reasons in writing for the cancellation. On remand respondent no. 3 reconsidered the matter and after recording reasons again revoked the petitioner's licence vide Annexure 3 to the writ petition, dated the 22nd April, 1985. On appeal,respondent no. 2 the commissioner, upheld the order of the District Magistrate on the ground that the order was now well-reasoned and there was more than enough cause to cancel the licence of the petitioner (vide Annexure 4), dated 23rd July,1985).

4. Aggrieved by the orders aforesaid the present writ petition has been preferred. At the threshold stage of

admission it was noticed that the question whether the pendency of a criminal case would justify cancellation or suspension of the licence under section 17 of the Arms Act, had been a matter of some controversy which should be authoritatively resolved by a Full Bench and the case was accordingly referred to the Full Bench.

5. Before one proceeds to microscopically examine the provisions under section 17 of the Arms Act, 1959 (hereinafter referred to as the 'Act') the broad approach to the issue may be first settled. In our Constitution and jurisprudence there is no fundamental right to bear arms unlike the Second Amendament to the American Constitution which at least suggests such a right in the following terms :-

> "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

In construing the aforesaid provision the Supreme Court of the *United States in Presser* v. *Illinois* (1) has observed as under :

"It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force of reserve militia of the United States as well as of the States, and, in view of this prerogative of the Federal Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from

(1) 116 U.S. 252

performing their duty to the General Government. But.... we think it clear that the sections under consideration do not have this effect."

However, it is apt to notice in modern times even in the United States any Constitutional right to possess and bear arms has now come under carping criticism in view of the raising of the ugly heads of gun-running, gangsterism and the mafia. In sharp contrast therewith there is no such analogous provision in other jurisprudential system and indeed under the India law the right to carry arms is a privilege conferred by the Act and other similar statues which primarily leave the grant thereof in the discretion of the licensing authority. Reference in this connection may instructively be made to the relevant parts of sections 3, 13 and 14 of the Act :

> "3. Licence for acquisition and possession of fire-arms and ammunition :-
>
> (1) No person shall acquire, have in his possession, or carry any fire-arm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder :
>
> 13. Grant of licences :- (1) An application "for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.
>
> (2) On receipt of an application, the licensing authority shall call for the report of the officer-in-charge of the

nearest police station on that appllication and such officer shall send his report within the prescribed time.

(2A) The licensing authority. after such inquiry, If any, as it may consider necessary. and after considering the report received under sub-suction (2), shall, subject to the other provisions of this chapter, by order in writing either grant the licence or refuse to grant the same;

14. Refusal of licences :- (1) Not with standing anything in Sec. 13 the licensing authority shall refuse to grant --

(a) a license under Sec. 3, Sec 4 or Sec.5 where such licence is required in respect of any prohibited arms or prohibited ammunition:

(b) a licence in any other case under Chapter II,

(i) where such licence is required by a person whom the licensing authority has reason believe--

(1) to be prohibited by this Act, or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammuntion; or

(2) to be of unsound mind; or

*(3) to be for any reason unfit for a licence under this Act; or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant license.

It would be manifest from the aforesaid provisions

that under the Act there is first a legal bar for having in possession or carrying a fire-arm unless a valid licence is first secured in accordance with the provisions of the Act. Secondly even the original grant under section 13 (2A) is vested entirely in the licensing authority and it seems that the widest discretion has been given to it. Even after conforming to the procedural requirments the licensing authority may, as regards the general category of arms. either grant the licence or refuse to grant the same. This discretion in this context has perhaps been deliberately. kept untrammelled. Further, under section 14 the law mandates a refusal to grant license even where the licensing authority has reason to believe that the applicant is for any reason unfit for licence under the Act. The larger tilt of the law in this context is thus somewhat too plain to call for further elaboration.

6. On the basis of the aforesaid provision the learned Goverment Advocate for the respondent State has forcefully contended that it the very original grant of refusal of a licence is thus entirely rooted in the wide discretion of the licensing authority, its subsequent suspension or revocation has to be viewed in the identical light. This submission, however extends to an unwarranted extreme. It has to be kept in mind that the requirments of the original grant or refusal and those of the subsequent sespension or revocation of a licence are not wholly identical. The conditions for suspension and revocation are spelt out under section 17 and have indeed to be statisfied, However there is no gainsaying the fact that as a matter of larger approach the issue of suspension and revocation would take some hue form the provisions of the original grant or refusal of a license as well.

7. Inevitably one may now advert to the relevant parts of section 17 and sub-sections (3), (4) and (7) thereof may be noticed in extenso :-

> "(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fir or revoke a licence,-
>
> (a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force. from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or *is for any reason unfir for a licence under this Act*; or
>
> (b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence. or
>
> (3) if the licence was obtained by the suppression of material information or on the
>
> "basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or
>
> (d) if any of the conditions of the licence had been contravened; or
>
> (e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver up to licence
>
> (4) The licensing authority may also revoke a licence on the applicaiton of the holder thereof.
>
> (7) A court convicting the holder of a licence of any offence

under this Act or the rules make thereunder may also suspend or revoke the licence.

(8) Provided that if the conviction is set aside on appeal or otherwise. the suspension or revocation shall become void.

8. In the light of the aforesaid provisions the primal contention of Mr. Mishra for the petitioner was that in the aforequoted section 17 there is no provision or mandate that the pendency of a serious criminal case would warrant the revocation of a licence. Counsel, therefore submitted that the mere registration of a criminal case or its continued pendency was no grant for the extreme step of revocating the licence.

9. Now it is true that sub-section (3) does not in term provide that the pendency of a criminal charge is a grant for the revocation of licence. However, it is equally true that it is not posible for the legislature to conceive every situation in the future which may render the suspension or revocation of a licence granted earlier necessary. It is therefore, that the residuary discretion is left in the licensing authority. On this score, the language employed is again of the widest amplitude. Clause (a) warrants revocation if the licensing authority is satisfied that the holder of the licence "is for unfit for the licence under th Act".

10. Now, the employment of such pharaselogy in the statute by the framers can leave no manner of doubt that a wide residuary discretion has been vested in the licensing autority to revoke provided it is satisfied that the holder is unfit for the licence under the Act. The issue thus, is whether the pendency of a maior or capital crime case may not, in the opinion of the District Magistrate, satisfy

him that such a person is unfit for holding the licence further. Plainly enough such discretion given by the statute cannot be put in a strait-jacket. It cannot possibly be said that in a particular case the implication of the holder in serious or horrendous capital crime may not furnish an adequate ground for the licensing authority for being satisfied that the former holder of the weapon is now unfit for the privilege of the licence granted under the Act. This is more so in the light of the fact that sub-section (1) requires the licensing authority to give notice in writing to deliver up the licence to it within such time as may be specfied in the notice in the event of variation, suspension and the revocation of licence. That would in variably give an opportunity to the licensee. as in the present case to show some cause against such action. It is after consideration of this explanation that the licensing authority may, on the over all cricumstances, be satisfied from the nature of the case that the person is now unfit for continuing as a licensee for arms. A further safeguard is provided by sub-suction (5) of section 17. The licensing authority must record in writing reasons therefor and also furnish to the holder of the licence on demand a brief statement of the same unless in exceptional cases he is of the opinion that it will not be in the public interest to furnish such statement. Nevertheless the requirement of recording reasons in writing is inflexibly mandotary. Therefore it canot be easily said that the subjective satisfaction of the licensing authority hedged in by the statutory requirements cannot be exercised on the basis of the pendency of the serious or capital criminal charge. If such subjective satisfaction has been broadly and reasonably exercised, to my mind, it would come within the parameters of the statute under clause (a) of sub-section(3) of section 17.

11. A stong note of caution, however, must be sounded in this context. It is not the pendency of any and every criminal case which would inflexibly warrant the suspension or revocation of a licence validly granted. A criminal case may range from a paltry traffic offence to the most horrendous capital crime. Whilst the pendency of the former may hardly provide an adequate basis under section 17(3), in the case of the latter after notice and hearing of the explanation such action may well become necessary. Equally the use or employment of the licensed weapon in the alleged crime might well be a relevant and added factor for consideration in the exercise of the discrerion by the licensing authority. There is no gainsaying that licensed weapons are not to be allowed to degenerate into crime weapons. it bears repetition that sub-section (3) puts the matter in the subjective satisfiction of the licensing authority and inevitably the issue cannot be put in the procrustean bed of a precise definition or an exhaustive enumeration of situation in which such discreation may be exercised.

12. Mr, Mishra had then sought to contend that the actual use or misuse of the of the licensed weapon in the alleged murder and even the petitoner's participation therein is as yet subjudice before the Court of Session. Therefore, the licensing authority could draw no sustenance from what as yet are only allegations in a pending case. for revoking the licence. This argument loses sight of the fact that under sub-section 3(a) it is the subjective satisfaction of the District Magistrate that for some reason the holder has become unfit for the licence. It is not the requirment of clause (a) aforesaid that there must be a formal conviction on a criminal charge only for holding a person as unfit. There is a wide gap betwixt the

two, namely a reasonable subjective satisfaction and an objective conviction on a criminal charge resting on the basis of acceptable evidence. One cannot go to the length of holding the because is as yet pending trial the licensing authority could not be subjectively satisfied about the unfirnbess of the holder. if the argument of Mr. Mishra were to be accepted then in the context of even a most horrendous crime committed with licensed weapons the licensing authority would be denuded of all powers of suspending or revoking the licence till the completion of the trial and a conviction thereone perhaps, the matter can even be elongated so long as an appeal against such conviction may be pending. Indeed, it appears to me that under sub-section (3) the actual conviction or acquittal on the criminal charge does not have an inflexible or conclusive impact on the exercise of the discretion by the licensing authority thereunder. Even if the holder of the licence may be acquitted by narrowly giving the benefit of doubt. the licensing authority could, perhaps, still take the view that along with other factors such a person may not be fit for folding an arms licence. Equally conviction on any and every criminal charge would not provide an inflexible rule that the licensing authority must revoke the same and it may well be justified in allowing the continuance of the said licence. As is noticed hereafter conviction and acquittal are issues of relecance under sub-section (7) for the criminal court and not conclusive for the licensing authority who is governed by the provisions of sub-section (3).

13. Reference may now be instructively made to sub-section (7) of section 17. This empowers the court convicting the holder of a licence of any offence under the Act, to suspend or revoke the same. However. the proviso

to the sub-section equally mandates that if the conviction is set aside on appeal or otherwise, the suspension or revocation would also become void. It manisfest thereform that the statute has vested a different power in a different authority in the event of a conviction narrowly for offences under the Act or the rules framed thereunder. This is thus a separate power in the event of an objective conviction for a crimimal offence under the Act. It is rightly rested on the substantiation of such a charge and on acquittal therefrom automatically renders the suspension or revocation void in itself. What has to be kept in mind is that the requirement or position under sub-section (7) is distinct and different . Whilst the discretion under sub-section (3) is based on the subjective satisfaction of the District Magistrate, the other is rested on the objective fact of a conviction under the Arms Act and the power of the criminal court to do so. The two things ate distinct and apart.

14. Lastly Mr. Mishra with some ingenuity had attempted to seek the aid of sub-section (7) for an ancillary argument. It was contended that during the pendency of the criminal trial the licensing authority could at best suspend the arms licence and then in the event of the petitioner's acquittal such suspension should be automatically withdrawn. It was sought to be submitted that the revocation of the licence tends to pre-judge the issue and the result of the pending trial.

15. A closer analysis of the aforesaid submission would indicate that this strongly boomerangs upon the petitioner. It was to be kept in mind that the presctibed statutory conditions for suspension and revocation of a licence are identical, The provisions of clauses (a)(b))(c)

and (d) of sub-section (3) are with absoulte informity applicable to the grounds for suspensions as well as for revocation of a licence. No finical distinction can thus be drawn betwixt the two. Therefore, if the pendency of a criminal case can be an adequate ground for the suspension of the licence, the same would be equally adequate for its revocation as well. No logical distinction can be drawn to hold that what is adequate for suspension would not be adequate for revocation. Herein the disreation as to which of the two would be more appropriate is vested in the licensing authority and ordinarily. It would not be easy for the court to intrude into that arena.

16. In fairness to the learned counsel for the petitioner, it must be noticed that his reliance on *M/s. Govind Saran & Sons* v. *State of Bihar and another* (1) seems to be wholly itt-placed. Therein the Division Bench was considering the suspension of the registration certificates granted under the Fertiliser Control ,Order 1957. A perusal of the judgement would indicate that clauses 6 and 17 of the order aforesaid pertaining to the grant and refusal of registraton and the power to cancel the registration are wholly and entirelly different from the corresponding provision of the Arms Act. There is nothing even remotely equivalent therein to the wide ranging discretion given to the licensing authority to revoke the licence if he is satisfied that for any reason the holder is unfit therefore. Even otherwise it is somewhat manifest that the consideratrions under the Fertilizer Contral Order would be wholly alien to what one has to consider under the provisions of the Act. The judgment, apart from being distinguinshable, indeed appears to be of little or no

(1) (1983) A.I.R. (Pat.) 96

relevance.

17. To finally conclude, the answer to the question posed at the outset is rendered in the affirmative. It is held that registration and pendency of a criminal case for a major or capital offence may for adequate reasons justify the suspension or revocation of a licence under clause (a) of sub-section (3) of section 17 of the Act.

18. Once it is held as above, it would be plain that the case of the petitioner is devoid of merit. It is well to recall that the licensing authority had in the first instance applied its mind to the facts and revoked the licence. On appeal the matter was remanded on the gound of the reasons having not been adequately stated under sub-section (5) of section 17. The licensing authority has thereafter considered the matter afresh and given adequate reasons including its satisfaction that the licensed weapon had apparently been carried in the course of a criminal transaction . The appellate authority of the Commissioner has affirmed those reasons. In the writ jurisicrion I find not the least reason of interfering in the condurrent orders of the authorities below. The petition fails and is hereby dismissed without any order as to costs

S. Shamsual Hasan,J. I agree

Ram Chandra Prasad Sinha, J. I agree

S.P.J

Petition dismissed

Full Bench

Before S.S Sandhawalia, C.J.,N.P Singh and

S.H.S Abidi, J.J

1987

Febury, 4.

*Anurag Baitha.**

v.

The State of Bihar

Consititution of India Article 21, --- Code of Criminal Procedure, 1973 (Central Act II of 1974), section 389 - --- scope and applicability of --- consititutional right of speedy trial, whether includes the expeditious disposal of substantive appeals against conviction as well --- bail on the gound of inherent limitations or inability of the High Court in hearing and disposing of substantive appeal against convictions on capital charge after one year of the pendency of the apeal whether and when can be granted-exceptions to the general rule enunciated---section 389, whether envisages grant of bail on the ground of inordinate delay in hearing of substantive appeals.

Per S.S. Sandhawalia, C.J. and, N.P Singh, J (S.H.S. Abidi, J Contra)

Held, That, the constitutional right of speedy trial

* Criminal Appeal No, 151 of 1985. In the matter of an application under section 389 of the code of Criminal Procedure.

implicit in Article 21, of the Constitution includes within its sweep the expecditious hearing of substantive appeals against conviction as well. Article 21 does not stop short at the end of the trial but continues to extend its protective shield even after the post conviction stage. Expeditious hearing of substantive appeals against convicitons is fairly and squarely within the mandate of the said Article. Equally it has to be borne in mind that in the event of later acquittal by the appellate court the long incarceration in jail during the pendency of the appeals is inherently incompensatable in terms of money. In any case it is a virtually legal impossibility to secure monetary damages against the State for wrongful or false imprisonment in such cases. Added to this is the fact that both for undertrials. and for convicts, in jails within the State the conditiions are admittedly subhuman. There is thus no option but to hold that the issue of delay occasioned by the High Court own inability to hear the substantive apeals expditiously *de hors* the merits is directly and materially relevant for consideration in the grant of bail to the convicts.

Sheela Barse and others v. *The Union of India and others (1) Gupteshwar Barhi* v. *The State of Bihar (2) The State of Bihar* v. *Ramdaras Ahir and others (3) Madheswardhari Singh* and another v. *The State of Bihar (4) The State of Bihar* v. *Maksudan Singh and others (5) Babu Singh and others* v. *The State of Uttar Pradesh (1)*

(1) (Judgments Today 1986 Supreme Court 136) = (1986) A.I.R. (S.C) 1774

(2) (Criminal Appeal No. 317 of 1975 decided on 16th Februry, 1984)

(3) (1984) B.B.C.J 749 = (1985) Cr. L.J

(4) (1986) P.L.J.R. 767

(5) (1986) A.I.R. (Pat) 38 F.B = (1986) B.B.C.J. 26 F.B.

refered to.

Held, further that unless there are cogent grounds for acting otherwise, an appellant on conviction on a capital charge would become entitled to a favourable consideration for grant of bail when after one year of inacarceration and pendency of the appeal the High Court is unable to bring the substantive appeal pending before it to final hearing. No exhaustive classification of cogent gounds for acting otherwise is either possible or desirable. However, where capital crime may further be peciliarly heinous and horrendously brutal in its nature and shocking to the conscience of the Court and society in general convicts would not be ordfinarily entitled to such concession of bail once they have been held guilty by the trial court of such grievous crime, for example, multiple and mass murders on caste and tribal murder, bride-burning or bride-murder, terrorist crime, day-light bank robbery abduction for ransom followed by murder, indiscriminate use of firearms and bombs in murder disturbing public order and so on.

Even under section 389 of the Code of Criminal Procedure inordinate delays in the hearing of substantive appeal because of the Court's own inability to do so would be an extremely relevant factor for the grant of bail. The said section mentions the recording of reasons for suspending the sentence adn undoubtedly it would be a good reason to state that there is no practicable possibility of expeditious hearing of the appeal.

Kashmira Singh v. *The State of Punjab (2) Kadra Pahadiya and others* v. *State of Bihar (3) Hussainara*

(1) (1978) A.I.R (S.C.) 527
(2) (1977) A.I.R (S.C) 2147
(3) (1981) A.I.R (S.C) 939

Khatoon and others v. *Home Secretary, State of Bihar (1)* ----- *relied on.*

Per S.H.S Abidi, J:-

Considering the position of the system of working in our courts, it appears that there are some reasonable causes for the delay in disposal of cases and in spite of best efforts of the courts delays have become inevitable. As a matter of fact the delays are not to become be looked but its causes should be removed by providing speedy justice. Orders for bail or orders for abatement of appeals on the ground of delays may create paradise for criminals and expose the law abiding and peaceful citizens to horrors and dangers.

After conviction one cannot be and is not deprived of his liberty and he files appeal. The appellate courts are to exercise their powers and they do exercise their powers. For that provision has been made in the code and section 389 is there. After appeal the court can suspend the execution of the sentence an order for the release of the appellant on bail till the disposal of the appeal or on any such condition as the courts thinks fit and proper to impose. For this the court is to record is to record the reasons

Bhola and *others v. State (2)* ----- referred to.

There is no reason to fix the reasonable period of time at one year with a despotic formulas or to adopt different standards in respect of offences both, for the shocking as well as non-shocking. If the ground of delay is

(1) (1979) 3 S.C.R 169

(2) (1974) Cr. L.J. 1318

the consideration without keeping in view the merits of the case in the case of non-shocking cases then why there should be no consderation of delay in the case of those persons in respect of whom canscience is shocked. In both the cases delay in the disposal of the case may entitle the appellants for consideration of the bail when the court is not able to hear the case early. The legislature in its wisdom did not think proper to fix any period, otherwise it would have been possible for the legislature to have fixed a period.

In view of chapter XII, Rule 17 sub- rule(c) of the Patna High Court Rules, the cases in which bail has been refused to the appellant after conviction can be given priority and precedence in hearing and they can be heard earlier than those cases in which bail has been granted by the court and if this rule is strictly followed then the appeals by the court and if this rule is strictly followed then the appeals in which the convicts are in jail can be heard within a very reasonble period to time which may in cases come down to less than a year. It appears that this rule has been observed more in breach resulting in inability of the courts to hear the appeals. When a provision exists in the Patna High Court Rules about the early listing as "expedition" it could be resorted to and if it is resorted to then no such situtation can arise for fixing a period. The time lag between the prosecution form the stage of the court below till the disposal of the appeal will not come in way and the law will have its own course. The law has made a provision for early disposal in its rule. Without following that rule. if the accused are enlarged on bail simply because the period of one year has elapsed, it will be something to deviate from the provision of law as well as the judical pronouncement of the highest court of law.

State of U.P v. *Hari Ram (1)* ----- refered to.

Appeal by the accused and prayer for bail renewed by him during the pendency of the appeal.

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

The matter came up before a Division Bench which referred the matter to a larger Bench for considerarion of the question of continuation in jail even after consviction for a period too long when the court is primarily responsible for the delay in hearing of his appeal.

On the reference.

Mr. Rash Bihari Singh, Senior Advocate and *Mr. Rajeeja Roy* for the petitioner

Mr. *Lala Kailash Behari Prasad* for the State

S.S.Sandhawalia, C.J :- The inherent quest for certainty and uniformity in the law, even in the discretionary arena fo the grant or refusal of bail in subsantive appeals on capital charges pending in the High Court has in essence necessitated this reference to the Full Bench.

2.More than four years ago the first information report against the petitioner and others was registered at Garkha Police Station, Garkha, on the 22nd of July, 1982, on charges of murder and other offences. The petitioner was arrested soon thereafter and following the somewhat expeditious investigation the prosecution filed the charge sheet against the petitioner and his co-accused who were then commited to trial before the Court of Session. He was finally convicted for offences under sections 302 read with section 34 and 333 of the Indian Penal Code as also under section 27 of the Arms Act and was sentenced to

(1) (1983) A.I.R (S.C) 1081

life imprisonment on the capital charge and for two years and one year, respectively. on the minor charges though the sentences were to run concurrently. Throughout the trial, the petitioner was declined bail and remained in custody.

3. Criminal Appeal No, 151 of 1985 (*Anurag Baitha and others* v. *The State of Bihar)* was then prefered by the petitioner along with his co-accused which came up for admission before the Division Bench on the 21st of February, 1985 Whilst the two co-appeliants were granted bail, the petitioner was declined the concession primarily on the ground that he was the main assailant to whom the primal role in the crime had been attributed. More than a year thereafter. whilst the petitioner was in continued incarceration, he renewed his prayer for bail primarily on the ground that his appeal could not be possibly listed for hearing and disposal for a considerable time as yet. The matter came up before a Division Bench to which my learned Brother Abidi, J. was a party, which poignantly noticed the issue whether continuarion in jail even after conviction could be authorised for a period too long to have any justification when the appellant is ready for hearing and the Court is primarily responsible for the delay. Noticing the two competing principles appearing to be conflicting, namely, one which is applied when the prayer for bail is refused on merits and the other has arisen on account of the long incarceration of the petitioner and the inevitable delay in the hearing of his appeal. the matter was referred to a larger Bench for laying down firm judical guidelines to be applied in such cases. This is how the matter is before us now.

4. At the very thereshold it must be said that though

I have devoted deep and anxious consideration to the issues herein, It is my fond hope that the ratio of this judgment may prove to be truly ephemeral and at the earliest be relegated to the dead past. As is manifest, the issues herein arise entirely because of inevitable but nevertheless grave delays in the hearing of appeals in capital offences within this Court. The moment such appeals can be heard with just expedition as they should be, the question herein would obviously evaporate into the thin air. With some justifiable pride, It is to be recalled that right till the close of the year 1983 even murder appeals preferred in the year 1972 and well beyond a decade were still pending disposal. Fortunately these delays have been eliminated in their entirety within jurisdiction of the Ranchi Bench of this Court where appeals filed in the current year itself are now being listed and disposed of. But for the fact that the Court has remained crippled by the absence of full one-third of its sanctioned strength and as many as thirteen vacancies on this Bench have existed, there would have been no question of any delays in such hearings. This, however, was not to be. Yet hopefully the identical position of wiping out all delays at the Patna Bench itself would be reached well within the next year, However, there is no gainsaying the fact that as of today 1983 murder appeals only can be listed (barring the specially ordered cases) and heard in the ordinary course and there thus remains a yawning gap of three years or more betwixt the filing of an appeal and its final disposal so long as this remains and if it unfortunately recurs, the significant issues raised herein have to be considered and frontally faced.

5. Mr. Rash Behari Singh, learned Counsel for the Petitioners, in an able argument at the very outset pionted

out that herein the issue of the grant of bail was plainly divisible in two clear-cut categories. Firstly, the grant of bail on merits. This would involve examination, whether the judgment indicates any inherent weakness on the merits of the case generally or against a particular appellant, and equally innumerable other considerations which enter into judical scrutiny for the suspension of a sentence of a convicted accused, whilst his appeal is pending for disposal. This flows from Section 389 of the Code of Criminal Procedure. The merits of the case having been once considered under the aforesaid provision remain more or less a constant factor barring the addition of any exceptional factor thereafter. Entirely a class apart is, however the second category where the issue of the grant of bail is on the ground of delay and inherent limitations or inability of the court of appeal in hearing and disposing of the substantive appeal within a reasonable time. Counsel highlighted that it is this latter and second category alone which primarily and solely calls for examination herein.

6. Perhaps, at the very threshold it may be stated for the sake of clarity that the aforesaid stand of the learned Counsel is impeccable. The core question herein is the long delay during the trial of offences in which the convict may have been denied bail and the matching delays in the hearing of the substantive appeals thereafter. I may straightaway reiterate that herein what calls for consideration is not so much the merit of the individiual case, but the issue herein is that of delay because of limitations of this Court itself to hear appeals. This is the more so when it is added to a long travail in the trial court where also bail could not be granted to the convict as in the present case, Indeed, the question is, as the referring

Bench rightly noticed, whether the inherent justice of the law can permit incarceration of the incarceration of the appellant in jail even after conviction for an inordinately long period of time when he is ready and indeed insistent for the hearing of his appeal but the delay is caused by the Court's own limitations. To put it tersely and not mincing matters, the question is as to the appellant's right vis-a-vis the court's own default. It is to this alone that we must now address ourselves.

7. Mr. Rash Behari Singh, learned Counsel for the petitioner, has presented the issue from an altogether refreshing angle, relying basically on what the Full Bench called the trilogy of the Division Bench in the *State of Bihar*-vs-*Ramdaras Ahir and others* (1) and the Full Benches in *The State of Bihar*-vs-*Maksudan Singh and others* (2) and *Madheshwardhari Singh and another*-vs-*The State of Bihar* (3). It was submitted that in the new criminal jurisprudence under Article 21 the constitutional right of speedy trial would necessarily include in its sweep at least the expeditious disposal of the substantive appeals as well. Counsel contended that denial of bail and consequently of liberty during the pendency of such appeals beyond a reasonable time, when occasioned by the High Court's own limitations entirely would involve a violation of the spirit of the speedy trial rule, if not its strict letter. Suggesting a time-frame, Counsel further contended that where the appellant is ready and indeed insistent for the hearing of his appeal, but the same cannot be heard beyond a period

(1) (1984) B.B.C.J. 749 = (1985) Cr. L.J.

(2) (1986) A.I.R. (Pat) 38

(3) (1986) P.L.J.R. 767

of one year, then barring particularly heinous crimes and exceptional cases, an appellant would be entitled to a favourable consideration for the grant of bail after one year because of the Court's default. Very fairly, learned Counsel himself stated that this should be the rule and the judicial guideline for ordinary and general application, and there may be exceptions thereto in the context of particularly heinous crimes or other circumstances which may not permit immediate and easy categorisation.

8. Now in appraising the aforesaid larger stand, it appears to me that its three distinct facets well projected by Counsel have to be kept in a somewhat sharper focus. Firstly, there is no gainsaying the fact that the constitutional right of a speedy trail would merely be a teasing mirage in capital offences, if the substantive appeals against convictions are not disposed of for years or a decade and the appellants are meanwhile obliged to rot in jail custody, sometimes even for the whole of the sentence imposed and in any case for a substantial part thereof, till the final hearing of such appeals. It is, perhaps, unnecessary to now elaborate this issue on principle afresh, because, within this jurisdiction it is concluded by the earlier Division Bench judgement in *Ramdaras Ahir's case* and its express subsequent affirmance with further elaboration by not one but two subsequent Full Benches in the *State of Bihar*-vs-*Maksudan Singh and Madheshwardhari Singh*-vs-*The State of Bihar (supra).* In the case aforesaid, it has been held as follows :-

"How, once it is held that the constitutional right to a speedy trial is as much within the sweep" of Article 21 as it by the express terms of the Sixth Amendment of the

American Constitution, it seems to follow that the word 'trial' herein is not to be confined to the procrustian bed of only the actual original trial proceeding. As Chinnappa Reddy, J., in *T.V. Vatheeswaran's case* (supra) has pithily observed- 'Procedure established by law does not end with the pronouncement of sentence' alone. It would indeed be no satisfaction to the citizen, if an illusory speedy trial is then hung up in the balance by an inordinately delayed appeal hanging perpetually over his head. In this context, the nature of a criminal appeal under the Code of Criminal Procedure calls for somewhat pointed notice.

"Under Chapter XXIX, the Code confers a substantive right of appeal in convictions on a capital charge by the Sessions Judge to the High Court. By virtue of Section 378 it also confers a right in the State to prefer an appeal against acquittal. Equally well it is to recall that under Chapter XXVIII of the Code, when the court of session passes a sentence of death, then, irrespective of any appeal by the convict, the same must be submitted to the High Court for confirmation of the sentence. By statutory mandate it must be heard by two or more High Court Judges. It is well settled by precedent that in such a reference, the High Court must itself re-appraise the evidence afresh, examine the whole record and then come to its own conclusion, whether the conviction is justified or not. It must also see, if additional evidence is necessary and, even if the convicted appellant does not rely upon the defence evidence the High Court, nevertheless, should appraise the same.

"*(See Bhupendra Singh* vs. *The State of Punjab and Surjeet Singh* vs. *The State of Punjab.)* The Code

provides in detail the mode of preferring appeals and the manner of their admission and hearing thereafter. It is plain from the above that the Code confers a vested and substantive right of appeal in convictions on capital charges. Equally well-settled it is that such appeals are hearing and re-appraisal of the evidence and the appellant is entitled to agitate all questions of fact and law before a court of criminal appeal. It would thus be manifest that the nature of a criminal appeal under the Code-whether against conviction or directed against acquittal-is a re-hearing and a continuation of the trial. The appellate court is not merely a court of error and the moment the appeal is preferred, the finality of the judgment of the trial court disappeared and the whole issue is in a flux afresh. Therefore, there seems to be no option, but to hold that the word 'trial' in the context of the constitutional guarntee of a speedy trial includes within its sweep a substantive appeal by the Code to the High Court-whether against conviction or against acquittal. Thus it would follow that the constitutional right of speedy trial evisages an equally expeditious conclusion of a substantive appeal and not merely a technical completion of the proceedings in the original court alone.:"

9. It is well to recall that the ratios in *Ramdaras Ahir's case* were challenged and again put to test in *Maksudan Singh's case*. However, these were reaffirmed by majority in the said case with further elaboration. The very issue yet again came up for consideration in *Madheshwardhari Singh's case,* wherein, another Full Bench unanimously approved the earlier view.

10. To my mind it seems now settled beyond cavil

that Article 21 extends to the post-conviction stage as well and it does not stop and end with the pronouncemen of sentence in the trial. Indeed, as the Constitution Bench in *Sunil Batra's case* (1) highlighted the fundamental rights and in particular Article 21 continued to be applicable even to prisoners after all court proceedings have terminated by affirmance of their conviction, right up to the Final Court, *O. Chinnappa Reddy*, J., in *T.V. Vatheeswaran*-vs-*The State of Tamil Nadu* (2) summed up the legal position in the following words :-

"So, what do we have now? Article 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out fundamental Rights. A person under sentence of death may also claim Fundamental Rights. The fiat of Article 21 as explained is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonalble procedure implies a right to free legal services where he cannot avail them. It implies humane conditions of detention, preventive or punitive. *'Procedure established by law' does not end with the pronouncement of sentence; it includes the carrying out of sentence. That is as far as we have gone so far.*"

It seems to me that thereafter we have gone a step further and in the right direction in the very recent reiteration of the principle in *Sheela Barse and others*-vs-*The Union of India and others* (3).

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(1) (1978) A.I.R. (S.C.) 1675
(2) (1983) A.I.R. (S.C.) 361
(3) Judgments Today 1986 Supreme Court 136

"We have already held in *Hussainara Khatoon and others-vs-Home Secretary, State of Bihar* (1) that the right to speedy trial is a fundamental right implicit in Article 21 of the Constitution. If an accused is not tried speedly and his case remains pending before the Magistrate or the Sessions court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held up on account of some interim order passed by a superior court or the accused is responsible for the delay in the trial of the case. *The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right.*"

There thus remains no doubt now that Article 21 of the Constitution would continue to extend its protective shield even after the post-conviction stage.

11. It perhaps deserves reiteration and highlighting that within this jurisdiction the hazard of being compelled to suffer the whole of the sentence even on a capital charge and in any case a substantial part thereof is not an imaginary but an actual one in practice. By way of example reference may be made to Criminal Appeal No. 317 of 1975 decided on 16th February, 1984 (*Gupteshwar Barhi* v. *The State of Bihar*). Therein the Division Bench to which I was a party recorded as under in acquitting the sole appellant:-

"Since this is a case in which nobody has come to support the case of the prosecution, much less the informant himself or the persons said to have been injured during the course of the dacoity in question, and the

(1) (1979) 3 S.C.R. 169

conviction has been based only on the retracted confession of the appellant himself, which is also admittedly uncorroborated, the conviction of the appellant has accordingly been set aside by an order of this Court dated the 8th February, 1984, and the appeal has been allowed."

What, however, heart-rendingly calls for notice is the fact that the appellant therein was arrested on the 4th of January, 1971 and continued throughout in custody for the reason that the bail had been declined or his being unable to furnish bail, for a period of thirteen years and fortythree days. It is traumatic for the Judges to acquit a convict only to find that he has already undergone the maximum sentence on a capital charge or a substantial part thereof. It is a harrowing experience which I would not wish to be repeated not only for myself but also for Brother Judges hereafter. It is well to recall that in the somewhat classic example from our own State in *Rudal Sah* v. *State of Bihar and another* (1) the petitioner had remained and continued in incarceration for more than fourteen years even after his acquittal. Their Lordships closed that judgment with the hope that there will be no more Rudal Sahs in Bihar or elsewhere. I am afraid that though not with the same severity, the spectre of minor Rudal Sah's continues to recur and this Court should be a sentinel to prevent such recrudescence. As has been noticed earlier, when criminal appeals remain pending in court whilst the appellants are battering its doors for hearing, the convicts who are denied bail would often enough be obliged to undergo a substantial part of their sentence including the time spent firstly in delayed trials and later on in equally delayed hearing of appeals. To my mind, a procedure which not only may in actuality lead to

the convict suffering the whole or the substantial part of the sentence imposed upon him before his substantive appeal is heard and he may thereafter be formally acquitted, is one which cannot stand the test of being, reasonable, just and fair. Indeed it would in every sense be the opposite thereof. Therefore, any hyper-technical exclusion of a substantive appeal from the ambit of the constitutional right of speedy trial and as a necessary consequence delayed trial followed by late hearing of appeal can lead to no other result than the one epitomised by the aforesaid case of *Gupteshwar Barhi* v. *The State of Bihar*. If Article 21 and the right to speedy public trial is not merely a twinkling star in the high heavens to be worshipped and rendered vociferous lip-service only but indeed is an actually meaningful protective provision, then a fortiorari expeditious hearing of substantive appeals against convictions is fairly and squarely within the mandate of the said Article.

12. Secondly, what has to be borne in mind is the fact that the Code and the civil law as they stand today provide no remedy or compensation in cases where an accused person who has been obliged to undergo the whole or a substantial part of the maximum sentence (even on a capital charge) and is later even honourably acquitted by the superior courts. I am inclined to accept the stand of Mr. Rash Bihari Singh, the learned counsel for the petitioners, who poignantly contended that in reality long incarceration in jail, whereafter a person is acquitted, is not compensatable in money terms at all. Inherently, the lost years of the best part of the citizen's life spent in incarceration either awaiting trial or judgment in a

substantive appeal whereafter he is acquitted are irreversible and irreparable injuries for which suitable recompense is an impossibility. Reference in this context may well be made to *Rudal Sah's case* above wherein the final Court itself has taken that view. However, this aspect was more frontally highlighted in *Maksudan Singh's case* (supra) even in the context of a professor-accused, who was not even in custody, as under:

"He laboured under the shadow of death and destitution for more than five years till he was acquitted on the 31st August, 1976. However, his deliverance seemed to be short-lived and the State appeal against his acquittal was admitted. By an application dated 6th of December, 1976 he applied to the Vice Chancellor, Bihar University, for withdrawal of his suspension order and for being allowed to join his post. However, this prayer was categorically rejected and he was not permitted to join his post because of the pendency of the Government Appeal. This appeal, however, hung over him like the sword of Damocles for another eight years. He was deprived of the chance of becoming the principal of his college and to rise further in his profession which was his life time ambition. During the pendency of the Government Appeal, he retired from service and even after retirement, he was denied payment of his provident fund, gratuity and other pensionary benefits on the ground that as yet the Government Appeal against his acquittal was pending disposal. In our social conditions and family bonds, his sons and daughters were denied the place of life which

(1) (1983) A.I.R. (S.C) 1056

was their due and lost good options of marital status because of the horror of a capital charge pending against this respondent and ocasioned by the withholding of all financial benefits "to him, Mr. Rash Bihari Singh, his learned counsel, rightly highlighted that the loss and prejudice to this respondent is perhaps irretrievable and he is but a broken man and a mere shadow of himself, irrespective of the fact whether today his acquittal is sustained or otherwise."

In the light of the above, it must, therefore, be painfully noticed that though some period of incarceration in capital cases becomes inevitable, yet the raw fact of life cannot be lost sight of that even after an honourable acquittal no recompense for the years lost for ever and gone by in custody can possibly be granted to such a person.

13. Now, apart from the inherent incompensatability of the invaluable years lost in incarceration, what calls for pointed notice is that the Code and civil laws as they stand today, perhaps cannot but, indeed, does not provide for any hope for monetary compensation for a person wrongly charged for serious crimes and honourably acquitted thereafter. The concept of damages for malicious prosecution in our jurisprudence exists only in a very limited arena even against a private prosecutor, not to talk of the State as such. Such persons can, if at all, hope to succeed in a minuscule number of cases where it can be established to the hilt that there was malice in fact and the false prosecution stemmed from no other source but that. As against the State, when it prosecutes, such a claim, if not virtually barred, is perhaps impossible to be established

in actual practice. Counsel for the parties were agreed that in State prosecutions on capital charges any hope of damages for false imprisonment or for malicious prosecution is indeed crying for the moon. Fairly enough it was pointed out that not a single case could be cited where even in the clearest case of false implication, or an established frame-up, even a penny of damages by way of compensation could be secured against the State by such an accused person even for long periods of incarceration which, undoubtedly, is tantamount to false imprisonment. Learned counsel for the State, Mr. Lala Kailash Behari Prasad, was fair enough to concede that even where the appellate court comes to the firmest finding that the convict was wholly falsely implicated or even where his plea of alibi may succeed absolutely to establish beyond doubt that he was far removed from the place of crime, the accused person cannot possibly hope to secure any monetary damages against the State itself. Without finally pronouncing on this aspect, there appears to be in effect a sovereign immunity of the State for any damages for false prosecution based apparently on the hoary Anglo-Saxon concept that the Crown can do no wrong. Thus, the law, as it stands today, even for a life time lost in detention during trial and appeal does not entitle an accused person to a penny of compensation—monetary or otherwise-after even an honourable acquittal.

14. Yet another factor perhaps peculiar to our State (but not wholly irrelevant in some other parts of the country)) has also been rightly projected by the learned counsel for the petitioners. This is the abnormal and, indeed, the abominable condition prevalent in the jails within the State which callously herd human beings in

patently sub-human conditions both at the under-trial and post-conviction stages. It is perhaps right to recall that in *T.V.Vatheeswaran's case* (supra) the Supreme Court held in terms that Article 21 implies also humane conditions of detention—preventive or punitive. Can it possibly be said that these exist at least within our State? Regretfully, the answer is to be in a categorical negative. The prison houses in the State of Bihar barring exceptions are in a chaotic shambles. There both undertrials and convicts including children are incarcerated and huddled together in crumbling structures, sometimes more than a century old, which are unfit for housing human beings. They are crowded beyond number and not unusually holding six or seven times the inmates for which they were originally designed, and wherein there is not enough space for the prisoners even to stretch themselves or sleep at night. In many supposed prisons the inmates take their turns to sleep at night in cells where even the most elementary conveniences necessary for human beings are denied. Indeed, it has to be seen to be believed that prison inmates are herded together sometimes worse than animals. It was in this context that Mr. Rash Bihari Singh rightly highlighted that in such like conditions avoidable incarceration should be the rule, and not the exception, till the final decision of a substantive appeal renders such custody inevitable. Principle apart, authority is equally consistent with the rule that sub-human jail conditions are relevant to the issue of grant of bail in the following words of V.R.Krishna Iyer,J., in *Babu Singh and others* v. *The State of Uttar Pradesh* (1):-

(1) (1978) A.I.R (S.C) 527

"Equally important is the deplorable conditions, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible."

15. To recapitulate briefly it seems well settled within this jurisdiction that the constitutional right of speedy trial includes within its sweep the expeditious hearing of substantive appeals against conviction as well. Article 21 does not stop short at the end of the trial but continues to extend its protective shield even after the post-conviction stage. Equally it has to be borne in mind that in the event of later acquittal by the appellate court the long incarceration in jail during the pendency of the appeals is inherently incompensatable in terms of money. In any case it is a virtually legal impossibility to secure monetary damages against the State for wrongful or false imprisonment in such cases. Added to this is the fact that both for under trials, and for convicts, in jails within the State the conditions are admittedly sub-human. All these are poignantly prominent factors to which one cannot possibly turn the proverbial Nelson's blind eye or to gloss over them as something either inevitable or insoluble. Indeed these considerations become even more relevant where prolonged detentions are by the law agency's own default either by way of inordinately delayed trials extending over years, or in the appellate forum by the High Court's own inability to dispose of even substantive criminal appeals in capital cases expeditiously. These are factors which directly and pristinely enter into consideration, and more so in the context of now a consitutional right to speedy trial for the purpose of grant of bail during the pendency of

a substantive appeal. One may for emphasis hearken back to *Gupteshwar Barhi's case* (supra) as a concrete and typical example where refusal to grant bail had led to a travesty of justice and a person innocent in the eye of law was obliged to undergo the full sentence of life imprisonment. Within this jurisdiction that case was in no way a solitary or exceptional example but was, perhaps, a typical one three years ago where the convicts were obliged to undergo substantial parts of their sentence because of grievous delay in the hearing of the criminal appeals by the High Court. Though fortunately that crisis situation has now been crossed, nevertheless the problem still remains albeit to a lesser degree, even today as yet a delay of three years or more in the hearing of such appeals at the Patna Bench seems inevitable. There is thus no option but to hold that the issue of delay occasioned by the High Court's own inability to hear the substantive appeals expeditiously enters directly and materially for consideration in the grant of bail to the convicts. This is a factor independent and de hors the individual merits of each case.

16. In fairness to Mr. Lala Kailash Bihari, learned counsel for the State I must notice his vehement opposition to the stand taken on behalf of the petitioner and against grant of bail during the pendency of the appeals even irrespective of the delay in the hearing. With some regret it appears to me that ingrained in a somewhat older and fossilised approach he, perhaps, as yet could not rise to the higher pedestal of the constitutional right to speedy public trial by virtue of the expanded interpretation of Article 21 nor could he hearken to the voice of the new criminal jurisprudence interpretatively created under the said article

by the Supreme Court. Unmindful of the developing role of the law, Mr. Kailash Bihari in a groove repeatedly slipped back and stuck to a moribund procedural approach for contending that no consideration other than the one under Section 389 of the Code for suspension of sentences could come in despite Article 21 and the mandate of speedy public trials and appeals thereunder. In fact he went to the extreme length of contending that after trial and conviction there was no right to bail at all, whatever be the delay even if it be to the extent of undergoing the whole of the sentence imposed. It was contended that the suspension of sentence was entirely an issue of the merits of the case and the question of delay while undergoing sentence was wholly irrelevant to the issue.

17. I regret my inability to take such a myopic view of Section 389 of the Code which was sought to be projected on behalf of the respondent-State. I am unable to see how the issue of inordinate delay in the hearing of the substantive appeals can be hermetically sealed out of consideration even for the purpose of suspension of sentence under Section 389 of the Code. Neither the principle nor precedent could be cited for any such constricted and, if I may say so, a callous interpretation of the language of this provision. To my mind, clearly enough even under section 389 of the Code inordinate delays in the hearing of the substantive appeals because of the Court's own inability to do so would be an extremely relevant factor for the grant of bail. The said section mentions the recording of reasons for suspending the sentence and undoubtedly it would be a good reason to state that there is no practicable possibility of expeditious hearing of the appeal. This apart, even assuming entirely

for the sake of argument (without in the least holding so) that Section 389 of the Code does not envisage the questions of delay, the applicability of Article 21 and the right of speedy trial and expeditious hearing of substantive appeals cannot be possibly excluded from this arena. It was rightly and forcefully advocated on behalf of the petitioner that the constitutional mandate of Article 21 and the enshrined principle of personal liberty and of speedy trial thereunder cannot be overridden by any sub-servient legislation like sec. 389 of the Code. If there is any conflict with the constitutional rights flowing from Article 21 and the provisions of section 389 of the Code or any other law, then the constitutional right has to override and the legislative provisions have to give way thereto. There is no question of harmonising a constitutional mandate with the supposed limitation under the Code. The supreme law does not need to be harmonised with the subservient one and indeed calls for pristine enforcement and it is the legislative provisions which have to be read down or bend to the constitutional mandate. What appears to me as a hypertechnical stand taken on behalf of the State in this context must necessarily fall and is hereby rejected.

18. Now apart from principle, it appears to me that the proposition that the issue of delay in the hearing of appeals de hors the merits is directly and materially relevant for the question of grant of bail to the convicts is equally borne out by persuasive and indeed binding precedents. The question was directly raised before the Division Bench in the case of *Harbhajan Singh & others* vs. *The State of Punjab* (1) to which I was a party. After

(1) (1977) Cr. L.J 1424

examination of the principles and precedent it was concluded therein as follows:-

"I believe that in an issue of this nature, the attitude of this Court cannot necessarily remain static. It is not possible to lose sight of the fact that in normal routine at present the criminal appeals filed in the year 1973 are as yet being listed for hearing. Indeed, as many as 40 life sentence appeals of that year are still pending disposal. In order to avoid any invidious distinctions this Court has rightly adhered to the practice that normally all these life sentence appeals are to be listed and heard strictly in accordance with their number and in the order in which they are filed. That being so, the case of the petitioners connected as it is with their co-appellants who have been sentenced to life imprisonment is unlikely to be listed for hearing till the passage of another year or two. Nor do we see the chance of any favourable dramatic change in the context of hearing these appeals in the foreseeable future. That being so, the petitioners who have been sentenced to seven years' imprisonment would have undergone nearly the whole, or in any case, a substantial part of their sentence by that time. That is a factor which we are unable to ignore in the present case. Nor can we accede to the stand of the respondent that the delay in this context is irrelevant to the issue."

However, the authority which seems to me as clinching the issue is that of the final Court itself in *Kashmira Singh* vs. *The State of Punjab* (1) directly in the context of special leave appeals pending before their Lordships. What was said there, to my mind, is doubly

(1) (1977) A.I.R (S.C.) 2147

and even more forcefully applicable to the substantive criminal appeals pending before the High Court. To recall the memorable words therein in extenso whilst abondoning the long standing, fossilised practice of declining bail in such cases Bhagwati, J (the learned Chief Justice as he then was) observed as followes:-

"The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life-imprisonment for an offence under section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. *It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence*

which is ultimately found not to have been committed by him.Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: `We have admitted your appeal because we think you have a primafacie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent? What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. *Would a judge not be over-whelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it?* It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

19. The observations aforesaid were made nearly a decade ago and have since been consistently followed by the final Court. I think that the time has come and, indeed, the earlier the better that the High Courts should equally modulate their practice on identical lines spelt out

by the final Court itself. This really seems to be the more so in the expanded concept or liberty under Article 21 and the now universally accepted right of a speedy public trial thereunder. Recasting the words of their Lordships above, if the High Court is not in a position to hear the appeal of an accused within a reasonable period of time, it must ordinarily (unless there are cogent grounds for acting otherwise) release the accused on bail in cases of substantive appeals on capital charges pending before it.

20. That brings us to a question as to what is the reasonable period of time within which such appeals must normally be heard. This task is again rendered somewhat easy due to the indications available from the observations of their Lordships of the Supreme Court themselves. Mr. Rash Bihari Singh, learned counsel for the petitioner, had forcefully contended that delay in the hearing of appeals on capital charges beyond one year is patently unreasonable and a refusal of bail meanwhile would involve the infraction of the letter and spirit of the rule of speedy trial as it includes within its sweep substantive appeals as well. In particular, he highlighted that where, as here, there is a delay of 3 or 4 years in the hearing of a substantive appeal itself owing to the High Court's inability to do so then the denial of bail in the ordinary run of the mill capital cases would indeed amount to a denial of justice itself. It was pointed out that not unoften some of these appeals end either wholly or partially in acquittal. In the conditions existing in our State, it is not unusual for even sessions trials to have dragged on for 4 or 5 years in which the primal accused are normally denied bail in capital offences. Therefore, if an accused person was obliged to undergo 8 or 9 years of incarceration during the pendency of the trial

and the substantive appeal directed against his conviction which is allowed and he is ultimately acquitted, the same would undoubtedly result in a travesty of justice. Counsel highlighted that no recompense can possibly be made for such long incarceration which may well include the best years of a convict's life in such cases. Primal reliance was placed on *Hussainara Khatoon and others* v. *Home* Secretary, *State of Bihar* (supra) and *Kadra Pehadiya and others* v. *State of Bihar* (1).

21. In making the aforesaid submission, learned counsel for the petitioner appears to me, on plausible and, indeed, impeccable grounds. So long as the spectrum of delays in hearing the substantive appeals in capital cases still extends to a period of nearly 3 or 4 years, this High Court cannot possibly avoid the issue and refuse to consider the prayer for bail when the delay in hearing the appeal is beyond its own control.

22. As to what would be the period beyond which the delay must be considered as unreasonable and unjustifiable, one may first instructively refer to *Hussainara Khatoon's case* (supra) wherein it was observed as under:

"Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice."

However, more directly and particularly in the context of sessions trials and inevitably of appeals therefrom are the observations in *Kadra Pehadiya's case* (supra)

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(1) (1981) A.I.R (S.C) 939

"We had occasion in Hussainara Khatoon's case (1980) 1 Scc 31 : (AIR 1980 SC 1360) to criticise this shocking state of affairs and we hoped that after the anguish expressed and the severe strictures passed by us, the *justice system in the State of Bihar would improve and no one shall be allowed to be confined in jail for more than a reasonable period of time, which we think cannot and should not exceed one year for a Sessions trial* but we find that the situation has remained unchanged and these four petitioners, who entered the jail as young lads of 12 or 13 have been languishing in jail for over eight years for a crime which perhaps ultimately they may be found not to have committed. It is obvious that after so many years of incarceration awaiting trial, either their spirit must be totally broken or they must be seething with anger and resentment against the society. *We fail to understand why our justice system has become so de-humanised that lawyers and Judges do not feel a sense of revolt at caging people in jail for years without a trial.*"

23. Now, once it is authoritatively held as above that even a sessions trial with all its necessary trappings including the service on witnesses, their production, recording of evidence and so many other factors must be completed in one year, then there must be the least reason to hold otherwise in the context of a substantive appeal from the said sessions trial. It may sometimes, for exceptional reasons. be not possible to adhere to such a time frame but there appears to be no gainsaying the fact that the reasonable period prescribed by their Lordships for sessions trail, namely, one year would be equally applicable to appeals therefrom as well. Beyond that, the delays, if they occur, must be termed as unreasonable and

must be avoided. It can, therefore, be said authoritatively both on larger principle and equally on binding precedent that the reasonable period for hearing of such appeals is not to be extended beyond one year. Delay beyond that period is contrary to the principles of criminal jurisprudence and would now run counter to the law and spirit of the constitutional mandate of speedy public trials and consequently must be termed as unreasonable.

24. Mr. Lala Kailash Bihari Prasad, appearing for the State, was at least fair enough to concede that delay in the hearing of appeals might at least be one of many grounds for suspension of sentence meanwhile. However, it was on the quantum of the delay that he took up a stand which appears to me as somewhat retrograde. He was firm in contending that a period of five years for the hearing of appeal in capital offences by the High Court could be termed as a reasonable one and meanwhile no bail be granted on this score. Reliance was sought to be placed on *The State (through Deputy Commr. of Police Special Branch, Delhi)* v. *Jaspal Singh Gill (1)* and ILR (1980) 2 Delhi 1169.

25. It appears to me that the somewhat surprising stand taken on behalf of the State runs in the teeth of the binding precedent of the final Court and contrary to the letter and spirit of the constitutional right to speedy trial. That Article 21 as guarantor of personal liberty would be equally attracted in such kind of grant of bail seems to be authoritatively spelt out by the following observation in *Babu Singh and others* v. *The State of Uttar Pradesh* (2) :-

(1) (1984) A.I.R (S.C) 1503

(2) (1978) A.I.R (S.C) 527

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art. 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by 'law'. The last four words of Art. 21 are the life of that human right."

In the light of the above, one has to regretfully notice that if such a stand of the State were to be accepted then even where an unfortunate convict had remained in custody for well-nigh four or five years during the trial (which despite recent expedition is still not very unusual within this State), he must as yet for another five years be in custody during the pendency of appeal if it cannot be heard till then. This would involve an incarceration of nearly ten years or more which undoubtedly is a substantial part of the sentence of the whole of life imprisonment. If thereafter he would be acquitted and it has been held that little or nor compensation either in money or emotional terms can be rendered in such a situation then it cannot but be termed as travesty of justice. I find myself wholly unable to accede to such a callous argument reaised on behalf of the State.

26. Learned counsel for the respondent State placed reliance on AIR 1984 SC 1503 (supra) is somewhat misplaced. That was a case of the grant of bail during the

pendency of trial on the substantive charge under section 3 of the Official Secrets Act relating to military affairs. That considerations for the grant of bail during the pendency of the trial may vary from those for the suspension of sentence after conviction is too well known to deserve any great elaboration. Nor do I find anything in the said judgment which, even remotely, runs contrary to the mainstream of the findings arrived at by me earlier. With the deepest respect, I am unable to concur with the view in The *State (Through Deputy Commr. of Police Special Branch, Delhi* v. *Jaspal Singh Gill* (supra), which with great reverence appears to me as having some what misconstrued the underlying ratio of *Kashmira Singh's case* (supra)

27. To reiterate, it must be held that barring exceptions the reasonasble period of time for the hearing of substantive appeals on capital charges pending in the High Court must be broadly placed at one year. Once this is so fixed, it is plain that on the ratio of *Kashmira singh's case* (supra) an appellant would become entitled to claim bail on the ground of the delay in hearing the appeal itself unless there are cogent grounds for acting otherwise. As was forcefully said in the case aforesaid, it is not open to the High Courts to fold their hands and helplessly tell the appellant insisting for the hearing of his appeal that "We have admitted your appeal but unfortunately we have no time to hear it for three years as yet and you must remain in jail even though you may later be found innocent". That is what their Lordships called a travesty of justice. Poignantly enough, such a travesty has been sought to be strongly advocated on behalf of the State before us. One cannot but reject such a stand. It is right to recall the observations in *Kadra pehadiya's* case that our justice

system has become so dehumanised that the lawyers and judges do not feel a sense of revolt in caging people in jail for years including those during the pendency of substantive appeals. In this context, one is equally reminded of the famous dissent of Lord Atkin in 1942 Appeal cases 206 *(Liversidge v. Sir John Anderson and another)* in the following words :

" I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than executive It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority, we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

26. In concrete terms, therefore, it must be held that it would be sound practice that unless there are cogent grounds for acting otherwise, on conviction an appellant on a capital charge perhaps having already been through the mill of a delayed trial would become entitled to a favourable consideration for his liberty and grant of bail when even after one year of incarceration and pendency of the appeal the High Court is unable to bring it to a final hearing. Indeed, I am of the view that so long as the delay in the hearing of such appeals extends to three or four years, the persons who are vicariously convicted on capital charges with the aid of section 34 or 149 of the Indian Penal Code may well be granted bail on the admission of

the appeal itself during the pendency of its hearing after such time. It is, however, made clear that this can apply only to the ordinary run of the mill cases and not to the peculiar and cxeptionally heinous crimes outlined hereinafter.

29. However, the cases of convicts to whom the primal role in the capital crime is attributed and are held guilty on the substantive charge of murder or other capital offences are undoubtedly on a somewhat different footing and the same concession may not be extended to them in routine. However, it seems equally impossible that having gone through the mill of a trial extending over two to five years, they should still be denied bail and continue in further incarceration for three or four years awaiting the hearing of the appeal. Even in their cases after the period of one year of the pendency of the appeal the issue would have to be considered on the basic ground of delay in the light of the inability of the Court it self to hear and dispose of the appeal. To my mind, barring the peculiarly heinous crimes shocking the very conscience of the society and the Court, There will be no alternative but to extend the concession of bail, under this class of cases as well if the insistent claim of the convicts for hearing of the appeal cannot be acceded to and their appeals are not adjudicated upon within the reasonable time frame of one year.

30. A strong note of caution, however, must be loudly sounded and the exceptions to the general rule be clearly laid down. Even in *Kashmira Singh's case* their Lordships laid down a rule ordinarily, unless there were cogent grounds for acting otherwise. What indeed would be these

cogent grounds? Plainly enough, no exhaustive definition there of is either possible or desirable. However, it would suffice to say that what has been held above is only in the context of the ordinary run of the mill cases in capital crimes. There is no gainsaying the fact that inevitably all crimes which are visited by capital punishment are brutal and the most seriously frowned upon by the law. Nevertheless, even herein there is a difference of great degree where capital crime may further be horrendously brutal in its nature and shocking to the conscience of the Court and society in general. In such a case there is a societal interest involved. Convicts therein would not, in my opinion, be ordinarily entitled to such concession of bail once they have been held guilty by the trial court of such grievous crime. Not only would it be dangerous to enlarge them on bail but it would also hurt the heart and sentiment of the society and the victims of such crime in particular, that convicted criminals of such crimes should still be enjoying their liberty pending the hearing of their appeals because of the Court's inability to dispose them of in reasonable time. Herein, there fore, the only alternative is that the substantive appeals of this nature for peculiarly heinous crimes, where the grant of bail is inappropriate, should be listed out of turn and disposed of within the time frame of one year or as nerely thereto as would be within the bounds of possibility.

31. Coming now to the horrendous capital crime which is shocking to the consience of society, it is neither possible nor, perhaps, desirable to frame an exhaustive categorisation. However, a bird's eye view of such like crime with particular reference to our own State has perforce to be attempted. Within our State, perhaps, it would deserve

highlighting that multiple and mass murders on caste and tribal considerations, which have become the horror of the day, appear to be the first in this category. These are recently exemplified in *Parasbigh'as case (Shyam Sunder Sharma & Others* V. *The State of Bihar)* in Criminal Appeal Nos. 460, 473, 480, 481, 482, 483, 484, 486, and 485 of 1984, disposed of on 3rd July 1986, where in the Bench itself described the crime as under:

"Tension was prevailing in the village and for that armed force was posted but, unfortunately, it was withdrawn at the time of Parliamentary election. Madan Mohan Sharma and his associates, thus, got an opportunity and a free hand and collected a mob of about two to three hundred persons all armed with rifles, guns and other weapons and attacked the sleeping village. They acted in a most cruel and brutal manner and burnt houses, killed thirteen persons and injured six. The houses and heaps of straws were burnt by sprinkling kerosene oil and some of the injured persons were also thrown in the said fire, Result was that a number of villagers lost their entire belongings including cattle and animals. The withdrawal of force from the village was a Himalayan blunder on the part of the administration. If this step would not have been taken then this mass killing could have been avoided."

In such like cases bail was rightly denied to all the appellants though the appeal was heard out of turn by the High court and disposed of within eight months. It is somewhat plain that in such like heinous crimes involving multiple murders and originating from caste, tribe or primordial viciousness, the convicts cannot possibly claim or be granted bail after a recorded conviction by the trial court. However, in the event of such denial they may well

insist and claim an out of turn hearing of their appeals and their disposal with in the time-frame of one year.

32. Yet another crime of considerable frequency within our State is dacoity coupled with murder. This merges the two ultimate extremes of crime against the human body as also against property. This apart, it is a repeatable offence which may well be perpetrated afresh where a dacoit-convict has been granted bail during the pendency of his appeal. It is plain that dacoity is not the work of an amateur nor it is committed on impulse but involves pre-meditation, conspiracy and co- ordination as also the choice of the victims and the time for its commission. in appeals directed against convictions under section 396 of the Indian Penal Code an expedition or their disposal within one year would be desirable and release of the convicts during the pendency of the appeal is clearly fraught with danger and has to be avoided.

33. From time immemorial society has deeply frowned and rightly abhored crimes against the weaker sex. Rape with murder is one which excites the rage and deep abhorence or all organised society. Here in also deterrence is called for and to enlarge a rapist- murderer during the pendency of an appeal even after conviction, would hardly be desirable. yet again, we have discovered a peculiar veniality affecting our society of late, which surprisingly even breeds within the bounds of matrimony and has been conveniently styled as 'bride-burning' or 'bride-murder' for extortion of dowry. That the curse of dowry has come tc afflict our society is one thing, but the same leading to the murder of helpless and young women excites the deep abhorence of social mores and after

conviction it would not be easy to release such a convict unless acquitted finally by the court of appeal.

34. Yet again, one may notice the recent rise of sensational crime for gain and greed which would also, to my mind, come within the category of exceptions where bail after conviction is uncalled for. In this class, perhaps, the rise and incident of terrorist crime committed defiantly and in *terrorum* in the society is the first that comes to mind. Similarly, sensational crimes like daylight bank robbery; abduction for ransom followed by murder; indiscriminate use of firearms and bombs in murders disturbing public order; are all crimes of a nature which shock the conscience of society and persons convicted in a trial therefor cannot rightfully claim their liberty during the pendency of their appeal and till they are either purged of the crime by serving their sentence or acquitted there of.

35. It bears reiteration that any exhaustive classification of such like horrendous crime is neither possible nor desirable and at best the broad contours therefor can be possibly indicated. Indeed, applying the above, it would appear that the case of the present petitioner presents yet another category of exceptional crime in which the suspension of sentence during the pendency of appeal would be uncalled for. The broad finding arrived at by the trial court is that the petitioner and his co-accused launched a defiant attack on the law-enforcing agencies itself whilst attempting to perform their duty and in broad day light assaulted and murdered a policeman, namely, Havildar Prahlad Shukla of the Homeguards and attempted to snatch away their arms and

causê injuries to the other members of the police party. Law and society have always severely scorned crime directed against persons who are even acting under the colour of their office apart from actually doing so. Indeed, in many advanced western countries, where the death penalty has been otherwise abolished, it has nevertheless been retained in the context of the murder of a policeman. To turn against the administrators of the law and order agency itself and to fatally injure any one of them is a crime which, to my mind, yet again comes in the category of an exception to the general rules enunciated above. The prayer for bail, therefore, must be declined for this particular reason.

36. However, in line with what has been held above, it is directed that the appeal of the petitioner and his co-accused should be heard forthwith and be listed before the Criminal Bench subject to part-heard.

N.P. Singh, J. I agree

S.H.S.Abidi,J. -

37. I have gone through the judgment of the Honble the Chief Justice where in his Lordship has been pleased to observe that unless there are cogent grounds for acting other-wise an appellant on conviction on a capital charge having already been through the mill of a delayed trial would become entitled to a favourable consideration and pendency of the appeal the High Court is unable to bring it to a final hearing. With great respect and regret I am not able to agree that if an appeal is not disposed of within a period of one year the appellant may be considered for release on bail on the ground of delay in the disposal of the appeal, even though on merits he is not entitled to the

grant of bail. I am giving out my own reasons hereinafter.

38. Adminstration of justice is the maintenance of right within a political community by means of a physical force of the State. It is a device adopted by the modern and civilised community in replacement of the primitive working of private vengeance and valiant services. This administration of justice is divided into two parts namely (1) administration of civil justice and (2) administration of criminal justice. The former is dealt with civil proceedings and the other with the criminal proceedings, and both of them are administered in different sets of circumstances. In the earlier decrees are granted, claims are allowed and specific performance, restitution, injunctions and the like are the result of the civil proceedings while in the criminal proceedings inflictment of punishment from the sentence of death to fine and binding over for a particular period to keep peace and release on bail, probation and admonition are the outcomes. Crime and punishment are the matters which has got an effect on the basic structure of a community and the science which seeks the root cause of such effect to ensure security to the society and individual are the matters of criminology and penology. In connection with crime and punishment detentions are inevitable. Detention is also of two kinds- (1) preventive detention and (2) punitive detention.

39. Preventive detentions are those which are resorted to before the crime is committed to prevent a person from committing offences. It is not based on rational evidence but also on suspicion. Preventive detention is not by way of punishment at all. The power of preventive detention has been recognised as a necessary evil and is

tolerated in a free society in the larger interest and security of the State and maintenance of public order. It is a drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in times of war or aggression. But our Constitution does recognise the existence of this power, but it is hedged in by various safeguards set out in Articles 21 and 22 of the Constitution. Article 21 lays down restrictions on the powers of preventive detention. In the exercise of this power the preventive detention Act and the other detention laws have been framed. A perusal of the same will show that everywhere delays have been forbidden and expeditious disposal of the proceeding is the theme. But in spite of these things no period has been fixed. No definite time limit has been allowed when a representation is to be dealt with. No hard and fast rule has been provided and every matter has to be dealt with as expeditiously as possible and every case has to be examined on its own merits and demerits & facts and circumstances. In the case of *Mst. L.M.S. Ummu Saleema* Vs. *B.B. Gujral & another* (1) their Lordships of the Supreme Court referring to the observations in *Francis Coralie Mullin* Vs. *W.C. Khambra* (2) observed that- "the time imperative can never be absolute or obsessive. The occasional observations made by this court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formulae, the slightest breach of which must result in the release of the detenu. Law deals with the facts of life. In law, as in

(1) (1981) A.I.R (S.C) 1191

(2) (1980) A.I.R (S.C) 849

life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae". Thus even in the preventive detention no time limit has been fixed. The courts have been holding that the disposal should be as early as possible. But time is given to the reasonable procedure and no magical formulae or despotic rules have been framed the breach of which may cause release of the detenu.

40. In this way the case of preventive detention is no better than the case of punitive detention where a person is held up during trial before conviction and then after trial on being convicted upon consideration of the evidence led by the parties. After conviction sentences are awarded which include death sentence, imprisonment for life, binding the accused for fixed and specified period and also fine. It is true that anguish and suffering - mentally, physically, emotionally and in many other ways are the inevitable consequences of every type of sentences. These sentences have been tolerated but the prolongation of it beyond the period necessary has not been tolerated by any provision of law and it has been branded as cruel and dehumanising. But at times delays are inevitable for which neither the accused is held responsible nor the persons disposing of their matters are guilty . For some inevitable delays some reasonable allowance has to be given and has always been given considering the circumstances surrounding the same.

41. The undertrial as well as the convict both are entitled to all the fundamental rights guaranteed in the various Articles of the Constitution, specially Chapter III and all of them are parts of a great scheme to secure some

basic rights of the citizen and they are intended and designed to be expanded and not curtailed. The observations of their Lordships of the Supreme Court in the case of Bhuwan Mohan Patnaik Vs. State of Andhra Pradesh (A.I.R.1974 S.C. 2092 which have been referred in the case of *Sunil Batra Vs. Delhi Administration* (1) and have been reproduced in the decision of *T.V. Vatheeswaran* Vs. *State of Tamil Nadu* (2) are as follows :-

"Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they othewise possess. *A compulsion under the authority of law, following upon a conviction, to live in a prison house entails by its own force the deprivation of fundamental freedoms like the right to move freely through out the territory of India or the right to 'practise' a profession.* A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law".

42 Further, there is a case of a person sentenced to death. In a Division Bench case i.e. *State of Bihar* Vs. *Ramdaras Ahir* (3) Chief justice Sandhawalia observed

(1) (1978) A.I.R (S.C.) 1675

(2) (1983) A.I.R (S.C) 361, aT P. 365

(3) (1984) B.B.C.J 749

that delay in disposal is an added punishment.

43. In the case of *T.V. Vatheeswaran* Vs. *The State of Tamil Nadu* (1) where the question of quashing the death sentence arose on account of prolonged delay of two years in execution of the death sentence, Their Lordships of the Supreme Court referred to their earlier decisions at page 366 which is as follows :-

"What may be considered prolonged delay so as to attract the constitutional protection of Article 21 against the execution of a sentence of death is a ticklish question. In Ediga Anamma's case (A.I.R. 1974 S.C. 799) two years was considered sufficient to justify interference with the sentence of death. In Bhagwan Bux's case (A.I.R 1978 S.C. 34), two and a half years and in Sadhu Singh's case (A.I.R. 1978 S.C. 1506), three and a half years were taken as sufficient to justify altering the sentence of death into one imprisonment for life. The Code of Criminal procedure provides that a sentence of death imposed by a court of session must be confirmed by the High Court . The practice, to our knowledge, has always been to give top priority to the hearing of such cases by the High Courts. So also in this Court. There are provisions in the Constitution (Articles 72 and 161) which invest the president and the Governor with power to suspend, remit or commute a sentence of death. making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21

(1) (1983) A.I.R (S.C) 361 = (1983) Cr.L.J 481

and demand the quashing of the sentence of death".

44. In the case of *Sher Singh* v. *State of Punjab* (1) their Lordships of the Supreme Court considering the question of delay in execution of death sentence and also referring to the decision in the case of *T.V. Vatheeswaran* v. *State of Tamil Nadu* (supra) held that :-

"Delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Art. 21 and demand the quashing of the sentence of death. That a period far exceeding two years is generally taken by those courts together for the disposal of matters involving even the death sentence and so the fixation of the time limit of two years does not seem to us to accord with the common experience of the time normally consumed by the litigative process and the proceeding before the executive."

At page 472 (in para 20) it was observed :-

"Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula as a matter of "quod errat demonstrandum."

(1) (1983) A.I.R (S.C.) 465

45. Let us see what is the position of the cases pending in the court and how far their speedy trial is possible and if not possible, then what are the main reasons. In the case of *Hussainara Khatoon* Vs. *State of Bihar* (1) the Supreme Court observed (at page 1364) :-

"Even a delay of one year in the ocmmencement of the trial is bad enough :how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years, speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutional guaranteed rights ".

Later at page 1376 their Lordships observed:

"The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing,the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the Courts, appointment of additional Judges and other measures calculated to ensure speedy trial".

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(1) (1979) A.I.R (S.C.) 1360

46. In the case of *Kadra Pehadiya* v. *State of Bihar* (1) their Lordships of the Supreme Court observed that within one year period the session trial should end. In the case of *G. Narasimhulu* v. *Public Prosecutor*, A.P. (2) it was observed as follows :-

"The petitioners have suffered imprisonment around a year and a reasonable prediction of the time of the hearing of the appeal may take us to a few years ahead. Which means that incarceration during that period may possibly prove an irrevocable injury if the appeal ends in their favour. The Magistrate's report about the conduct of the petitioners while in sub-jail is not uncomplementary".

47. With all these observations one cannot forget the observations made in the case of *Mst. L.M.S. Ummu saleema* V. *B.B. Gujaral* (supra) about the occasional observations and a magical formulae, the slightest breach of which must result in the release of a detenu, and that law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere despotic formulae.

48. If the facts of life and the interest of the society are kept in mind and in that the position of an individual is considered then we will have to see how far the interest of the society and the interest of the State and the interest of the individual can go together. In the case of *Motilal* v. *State of Bihar* (3) their Lordships of the Supreme Court observed as follows :-

" Individual liberty is a cherished right : one of the

(1) (1981) A.I.R (S.C.) 939 at p. 940

(2) (1978) A.I.R (S.C) 429, at p. 434

(3) (1968) A.I.R. (S.C) 1509

most valuable fundamental rights guaranteed by our constituion to the citizens of the country. If that right is invaded, excepting strictly in accordance with law, the aggrieved party is entitled to appeal to the judicial power of the State for relief. The interest of the society is no less important than that of the individual. Our Constitution has made provisions for safeguarding the interests of the society. Its provisions harmonise the liberty of the individual with social interests. The authorities have to act solely on the basis of those provisions. They cannot deal with the liberty of the individual in a casual manner. Such an approach does not advance the true social interest. Continued indifference to individual liberty is bound to erode the structure of our democratic society".

49. In the case of *Shivaji Sahabrao* v. *State of Maharashtra* (1) which arose out of an appeal against acquittal, the Supreme Court observed at page 2626 in para 6 as follows :-

"Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace

(1) (1973) A.I.R (S.C) 2622

every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person lightheartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltness. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ...." In short our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents".

50. Thus considering the position of the system of working in our courts, it appears that there are some reasonable causes for the delay and in spite of best efforts of the courts delays have become inevitable. When a criminal trial did not commence for a year in Husainara Khatoon case the court called it bad enough. So in Kadra Pahadiya's case the court said that sessions trial should

end in a year, but in spite of that, the occasional observations about the magical formulae the slightest breach of which must result in the release of the detenu as said in the case of *Ummusalima* is also there. The considerations about the early disposal cannot be delinked with the position of an individual in the society, as the interest of the society and the State both go together. With all these, individual liberty which is a cherished and one of the most valuable fundamental rights cannot be put in jeopardy as continued indifference to individual liberty is bound to erode the structure of our democratic society.

51. The American Constitution which appears to be a big gateaway and attractive makes a provision for speedy trial and a breach of which entitles an accused person to the dismissal of the indictment or the vacation of the sentence which is apparent from the observations of the Supreme Court in the case of *State of Maharashtra* v. *Champalal* (1) . Efforts have been made to follow strictly the American Constitution but how far the American Constitution can be followed and adopted in our Indian settings for that in the case of *A.K. Roy v. The Union of India* (2) it was observed :-

"For reasons ..... the decisions of the U.S. Supreme Court which turn peculiarly on the due process clause in the American Constitution cannot be applied wholesale for resolving questions which arise under our Constitution, specially when, after a full discussion of that clause in the Constituent Assembly, the proposal to incorporate it in Article 21 was rejected. In U.S.A. itself Judges have

(1) (1981) A.I.R (S.C.) 1675

(2) (1982) Cr. L.J. 340

expressed views on the scope of that clause, which are not only divergent but diametrically opposite.

It is only proper tha · · we must evolve our own solution to problems arising under our Constitution without, of course, spurning the learning and wisdom of our counterparts in comparable jurisdictions".

52. In the case of *State of Maharashtra* v. *Champalal* (Supra) their Lordships of the Supreme Court observed at page 1677 in para 2 as follows :-

" what is the remedy if a trial is unduly delayed? In the united States, where the right to a speedy trial is a constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence. But in deciding the question whether there has been a denial of the right to a speedy trial, the Court is entitled to take into consideration whether the defendant himself was responsible for a part of the delay and whether he was prejudiced in the preparation of his defence by reason of the delay. The court is also entitled to take into consideration whether the delay was unintentional, caused by over- crowding of the Court's Docket or under-staffing of the prosecutors, Strunk v. United States (1973) 37 Law Ed 2d 56 is an instructive case on this point. As pointed out in the first Hussainara case (A.I.R. 1979 S.C. 1360), the right to a speedy trial is not an expressly guaranteed conitutional right in India but is implicit in the right to a fair trial which has been held to be part of the right to life and liberty guaranteed by article 21 of the Constitution. While a speedy trial is an implied ingredient of a fair trial, the converse is not necessarily true. A delayed trial is not

necessarily an unfair trial. The delay may be occasioned by the tactic or conduct of the accused himself. The delay may have caused no prejudice whatsoever to the accused. The question whether a conviction should be quashed on the ground of delayed trial depends upon the facts and circumstances of the case. If the accused is found to have been prejudiced in the conduct of his defence and it could be said that the accused had thus been denied an adequate opportunity to defend himself, the conviction would certainly have to go. But if nothing is shown and there are no circumstances entitling the court to raise a presumption that the accused had been prejudiced there will be no justification to quash the conviction on the ground of delayed trial only".

53. In a full bench decision of *State of Punjab* v. *Bachittar Singh* (1) Sandhawalia, J. (as he then was) considered about the pendency of the cases and observed that the disposal of the appeals against conviction and acquittal took a period of about four years and so if a person was refused bail, then it would involve a detention for the whole of such period and that is why an unfettered power u/s 427 (old code) Cr. P. C. was provided for grant of bail, even in appropriate cases under capital charges.

Later in the same decision Gujral, J. also considered the matter and held at page 351 as follows :-

"Besides the main objects of the detention of an accused person during his trial referred to above, it is also in the public interest that a person against whom serious allegations are levelled which carry the sentence of death

(1) (1972) Cr.L.J. 341

or life imprisonment is not at large till his case is finally decided. Leaving the question of public policy apart, even the consideration that an accused ought to be available to abide by and serve out the sentence which may ultimately be imposed has to be viewed in the context of the nature of the accusation and the punisment which will ultimately be imposed and also the character, status and means of the accused."

Later on in the Division Bench case of *Harbhajan Singh* v. *State of Punjab* (1) S.S. Sandhawalia, J. (as he then was) again considered the question of delay in disposal of appeals and found that the appeals although filed in 1973 were not being disposed of till 1977 as in order to avoid any invidous distinction the life Sentence appeals was being listed strictly in accordance with their numbers and orders in which they were filed, and so for that reason those appellants to whom seven years sentences were awarded, would serve out substantially the period of sentence when the appeals will be heard.

54. Thus following these observations it is quite clear that the courts are very jealous and also zealous in guarding the individual liberty that is a cherished right and a very valuable fundamental right. Courts are always on guard and vigilant that there is no invasion on this right, but the Courts are always alive to the facts of the life and society and the citizens as a whole. The Courts have also considered social interest and have adopted an attitude which advances the social interest and does not jeopardise it or restrict the same. The Courts also feel that they have a social accountability and the courts have always tried to

(1) (1977) Cr.L.J. 1424

strike down the balance between the interests of the individual and the society without any jeopardy or invasion on the fundamental and basic rights of liberty and without any damage to the society and social interest. Courts have also guarded the society as a whole where both, the crimnals and law abiding citizens live. The innocent law abiding and peaceful citizens are also protected by the State and in doing the same the courts do not tilt towards any side; otherwise the attitude will be deemed to be a disbalanced and the same may be called a dehumanising and callous attitude not only towards the accused but to the peace loving and law abiding citizens. Under these considerations the courts are also to look into the hard facts of life and the prevailing conditions and situations. They have also to see that the cases of the accused are decided as soon as possible without any damage to their life and without any incarceration and sufferings to them, but in so doing they will have to keep their eyes open to the situation that with the increase of the population, with the increase of the legislation, with the increase of the diverse relations, all sorts of disputes have multiplied day and night; but the courts have also to see as to whether the provisions for the settlement of disputes of every nature have been made in the same ratio as that of increase in population, litigation and disputes. In the society whether this ratio has been maintained? Courts have observed from time to time as mentioned above that the arrears are there and there are shortage of Judges and lack of parapharnelia and so in that event delays in disposal of cases are inevitable. As a matter of fact the delays are not to be looked but its causes should be removed by providing speedy justice. It will be denial of justice or distortion of

justice if the courts with a view to clear up the arrears and to cover up the lapses on the part of State clear off the cases in hasty and slip-shod manners and so the criminals are let loose and they go scot free. This is not the purpose of the law and the Constitution of a civilised society in which we are living. Here both, the criminals as well as those who are innocent are equally protected within their legal, constitutional and human limits. Orders for bail or orders for abatement of appeals on the ground of delays may create paradise for criminals and expose the law abiding and peaceful citizens to horrors and dangers.

55. Now let us see what are the provisions of bail. Bail is granted before a person is convicted and also when he has been convicted by the trial court. The Code of Criminal Procedure makes provisions about the same in sections 436, 437, 438, 439, *389." Bail and not jail" is the cry of the time. But if the jail is necessary, then under what circumstances? Every citizen is presumed to be innocent, unless it is proved to the hilt by the cogent reliable and trust worthy evidence that he is guilty of any offence. The burden of such strict proof is on the prosecution and any other person who alleges that any offence has been committed by the innocent person. Every citizen is entitled to live in liberty till he commits an offence, but as soon as an accusation is made against any person his right to live in liberty comes in cloud. His right to live in liberty is over shadowed by the accusation in the shape of F.I.R,. complaint and any other such material and then the collection of incriminating materials starts by the investigating agency when an F.I.R. is lodged and before a Magistrate when a complaint is filed and the complainant leads evidence and the court after considering the same

issues processes. There after curtailment of liberty starts as law permits arrest before final decision of the guilt. If on the consideration of the facts it is found feasible that the man should be let off, then he is allowed to go on bail which is subject to all reasonable restrictions imposed by the Court. But if the Court finds, keeping in view the allegations, that the accused will not be available to law when required in court or when required after cancellation of bail then the accused is refused bail. In both the situations the court following the law and seeing the interest of the citizens, their constitutional rights and also the interest of the society does not tolerate any deviation or slightest breach of the constitution.

56. Later on when the evidence is collected by the prosecuting agency or the courts on the evidence led by the complainant and witnesses, the courts come to the conclusion that the accused is not guilty then charges are not framed and the person concerned is acquitted. But if after the collection of the evidence by the prosecution and the evidence adduced in court, the court comes to the conclusion that the evidence is clinching and the guilt of the accused is proved beyond any shadow of reasonable doubt and to the hilt then the accused has to face the punishment for the offence. His liberty then comes under eclipse till the period of sentence lasts, though during this period also he enjoys the legally and constitutionally available rights to the fullest. If against the conviction an appeal is filed then question of suspension of the sentence till the final disposal of the appeal of the convict is provided under law with considerations and after the appeal is disposed of by the last appellate court then the question of execution of sentence arises and then all considerations

of fundamental rights of the convict except to move out are strictly followed. These are the various considerations which have been provided under law as well as followed and observed by the court from time to time and the same find expression in the judicial pronouncements.

57. Courts in India following the law have been laying down the criteria for granting bail, both at the stages of pre-conviction and post-conviction.

58. As regards pre-conviction stage the decisions in the case of *State* v. *Jagjit Singh* (1), *State of Punjab* v. Bachittar Singh (2), a Full Bench decision of Punjab High Court, *State of Rajasthan* v. *Balchand* (3), *Guru Charan Singh* v. *State of Delhi Administration* (4), *Gudi Kanti Narsimhulu & others* v. *The Public prosecutor, A.P* (5), *Babu Singh* v. *State of U.P.* (6), *State through the Dy. Commissioner of Police special Branch v. Jaspal Singh Gill* (7), besides many other cases have laid down various criterions which may be summarised by borrowing their languages. For granting bail at the pre-conviction stage various consideration such as nature and seriousness of the offence, the character of the evidence, circumstances with are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the

(1) (1962) A.I.R. (S.C.) 253
(2) (1972) Cr. L.J. 341
(3) (1977) A.I.R. (S.C.) 2447
(4) (1978) A.I.R. (S.C.) 179
(5) (1978) A.I.R. (S.C.) 429
(6) (1978) A.I.R. (S.C.) 527
(7) (1984) A.I.R. (S.C.) 1503

trial, reasonable apprehension of witnesses being tampered with, larger interest of the public or the State, the nature and gravity of the circumstances in which the offence was committed, the position and status of the accused with reference to the victim and the witnesses, the likelihood of the accused fleeing from justice or repeating the offence or jeopardising his own life, history of the case as well as the investigation, whether the presence of the accused will be secured to take judgment and serve out sentence in the event of court punishing him with imprisonment, the antecedant of the accused and likelihood to commit serious offences while on bail, whether the thoughtless bail order would enable the bailee to exploit the opportunity to inflict further crimes on the members of the society as it has been found from the criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of the society and such other similar considerations which the court may think fit and proper in the circumstances of the case. The granting of bails on the considerations that there was no likelihood of the respondents absconding or he being well connected or that the trial was likely to take considerable time shoud not be the only consideration with the courts in non-bailable cases. Courts have said that bails should be granted to persons if they are below 16 years of age or is a woman or a sick or an infirm person. No seeker of justice should be allowed to play confidence tricks on the court or community. Grant of bail is a judicial process. There cannot be inflexible rules for the exercise of the judicial discretion and no hard and fast guidelines can be laid down.

59. Reasonableness is the criterion for the exercise of the judicial power and that reasonableness postulates intelligent care and predicates that the deprivation of freedom by refusal of bail is not for the punitive purpose but for the bi-focal interests of justice to the individual involved and society affected. All deprivation of liberty is validated by the social defence and individual correction along an anti- criminal direction. public justice is central to the whole scheme of bail law. Fleeing justice has been forbidden but punitive harshness has been minimised. Exercise of power of bail should be judicial and not capricious. Powers of the Sessions Judge and the High Court for this exercise of judicial discretion are very wide, but they are fettered by reasonableness and interest of justice, both for the accused as well as the society affected.

60. As regards the question of grant of bail after conviction the position becomes different. The evidence is produced in court by both the parties and after consideration of that evidence by the court with the valuable assistance to the best of their ability by the counsel of both the sides the court after exercising its judicial mind to the best of its capacity passes a judicial order which may end in acquittal or may end in conviction. If acquittal's reasons are given which may not appeal to the appellate court later on, but they stand good when the acquittal order is passed. Similarly when the conviction order is passed court gives its own cogent reasons based on materials on the records and legal position and that reasons stand till up-set by the appellate court. Even after conviction one cannot be and is not deprived of his liberty and he files appeal. The appellate courts are to exercise

their powers and they do exercise their powers. For that provision has been made in the Code and section 389 (old S. 426) Cr, P. C. is there which is relevant to be quoted here :-

> " (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded in writing order that the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or on his own bond".

61. Thus after appeal the court can suspend the execution of the sentence and order for the release of the appellant on bail till the disposal of the appeal on any such condition as the court thinks fit and proper to impose. For this the court is to record the reasons, Sandhawalia, J. (as he then was) in the full Bench decision of *State of Punjab* v. *Bachittar Singh* (supra) has observed that comparing the two provisions (Ss. 426 and 427 Cr. P. C. old) it is obvious that while section 426 Cr. P. C. envisages the recording of the reasons for the suspension of the sentence and the grant of bail while no such restriction or qualification has been imposed by law under section 427 Cr. P.C. In the case of *Bhola & others* v. *State* (1) Hari sarup, j. has observed that for the grant of bail the appellant has to make out a case for the exercise of the discretion of suspension of sentence and if the court is satisfied that such reasons exist then it would proceed to consider the question of grant of bail to the appellant, though both the orders, that is suspension of sentence and granting of bail are passed simultneously and they

(1) (1974) Cr. L.J. 1318

involve two separate mandatory processes and in both the processes the basis is only the merits of the case and the degree of the probability of the appeal standing at the final stage besides the other factors like nature and gravity of the offence and the age and the health of the accused. He has further observed that the remaining of the accused on bail or in jail during the trial in the court below cannot of course be a relevant reason for suspending or not executing the sentence because this circumstance has no nexus with the execution or suspension of the sentence after conviction order has been recorded and circumstances stand neutralised, and after conviction the man in Jail and the man on bail stand on the same footing and so the classification of the appellants on their being on bail or in jail would be unreasonable. He also held that the extent and period of sentence and the quantum of punishment cannot be a relevant reason for the suspension of sentence, though it can be a relevant factor only if prima facie it is shown that it was illegal, improper or excessive and not otherwise. He also held that the principle of irreparable injuries as is a criteria in civil decrees cannot be applicable as it is bound to cause injury which is irreparable.

62. The Supreme Court in the case of *Gudi Kanti Narsimhulu & others* v. P.P, A.P. (supra) has observed that when a case is finally disposed of and the person is sentenced to incarceration things stand on a different footing and the period of incarceration during the period of suffering imprisonment which may be irrevocable injury if the appeal ends in acquittal. Even after the conviction when the courts suspend the execution and sentence and grant bail, the merits of the case and the possibility of the

conviction being maintained in the last remain basic considerations for the court.

63. While considering the merits of the case the court is also to consider the nature and the seriousness of the offence, character of the offence circumstances which were peculiar to the accused, the presence of the accused being secured to serve out the sentence, the larger interest of the public and the State. The court is also to see the age and the condition of the health. It is also to be seen in case of a woman whether it is fit to keep her in jail it, has also to see the welfare of her family. Court's powers in grant of such bail are fettered only with reasonableness, propriety and the interest of the accused and the society at large. Bail can be refused only when the offences are heinous, shocking to the judicial conscience or the shocking to the society and dangerous to the interest of society consisting of the law abiding citizens. Such cases cannot be categorised but can be mentioned only for example sake like mass killings, broad day light murders, train robbery and decoity with murders accompanied by all sorts of tortures, gang rape and murders, offences against the brides their burning and other tortures for reasons of dawry or other wise, rapes on minor children and the types such are the considerations both at the pre- conviction and post-conviction stages.

64. In spite of the facts that an offence has been grave, serious and heinous and so against the interest of the accused and the society and so the court refuses to suspend and also refuses to grant bail after suspending the sentence, yet is the accused liable to be kept indefinitely

in jail when he is ready with his appeal and the court is not finding opportunity to hear the same for no fault of his ? Such a question arose in the case of *Kashmira Singh* v. *State of Punjab*(1), where even after the grant of special leave the court was not able to hear the appeal for a period of four and half years. It was observed in that case that "the practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in the Supreme Court on the basis that once a person has been found guilty and sentenced to life imprisonment he should not be let loose so long as his conviction and sentence are not, set aside, but the underlying postulate of this practice was that the appeal of such person should be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for 5 or 6 years " The Supreme Court held further. It is, therefore, absolutely essential that the practice which this court has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time the court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

65. Thus from these observations it appears that a person who has been found guilty and sentenced to life

(1) (1977) A.I.R (S.C.) 2147

imprisonment should not be let loose so long as his conviction and sentence are not set aside and that this rationale of the practice should not apply when the court is not in a position to dispose of the appeal for 5 or 6 years. Now the question is what is the reasonable period of time. In Kashmira Singh's case (supra) no reasonable period of time has been fixed, though it has been observed the rationale of refusal of bail should not apply where the court is not in a position to dispose of the appeal for 5 or 6 years. In Hussainara's case (supra) it has been said that the delay of one year in the commencement of the trial was bad enough and in Kadra Pehadiya's case (supra) period of one year for sessions trial was expected and on account of sessions trial not being completed within such a period the system of justice was thought to be dehumanised and against which Judges and lawyers were asked as to why they do not revolt. On account of these observations the learned counsel for the appellant suggested that a period of one year is equally applicable to the appeals also and My Lord the Chief Justice in this case accepting the arguments of the learned counsel for the appellant has suggested a period of one year as a reasonable time. He has observed that-

" Unless there are cogent grounds for acting otherwise, on conviction an appellant on a capital charge perhaps having already been through the mill of a delayed trial would become entitited to a favourable consideration for his liberty and grant of bail when even after one year of incarceration and pendency of the appeal the High Court is unable to bring it to a final hearing. Indeed, I am of the view that so long as the delay in the hearing of such

appeals extends to three or four years, the persons who are vicariously convicted on capital charges with the aid of sections 34 or 149 of the Indian Penal Code may well be granted bail on the admission of the appeal itself during the pendency of its hearing after such time. It is, however, made clear that this can apply only to the ordinary run of the mill cases and not to the peculiar and exceptionally heinous crimes outlined hereinafter.

However, the cases of convicts to whom the primal role in the capital crime is attributed and are held guilty on the substantive charge of murder or other capital offences are undoubtedly on a some what different footing and the same concession may not be extended to them in routine. However, it seems equally impossible that having gone through the mill of a trial extending over two to five years, they should still be denied bail and continue in further incarceration for three or four years awaiting the hearing of the appeal. Even in their cases after the period of one year of the pendency of the appeal the issue would have to be considered on the basic ground of delay in the light of the inability of the court itself to hear and dispose of the appeal. To my mind, barring the peculiarly heinous crimes shocking the very conscience of the society and the Court, there will be no alternative but to extend the concession of bail, under this class of cases as well if the insistent claim of the convicts for hearing of the appeal cannot be acceded to and their appeals are not adjudicated upon within the reasonable time frame of one year."

His Lordship further considering the horrendous capital crimes which are shocking to the conscience of the society, though did not frame exhaustive categorisation

but on a bird's eye view found the several crimes as the shocking to the conscience of the society and the court such as multiple and mass murders on caste and tribal consideration which have the horror of the day, dacoity coupled with murders, crimes against weaker sex like rape with murder, bride burning or bride murder for extortion of dowry, terrorists crime, sensational crime like day light bank robbery, abduction for ransom followed by murders, indiscriminate use of fire arms and bombs in murders disturbing public orders and lastly crimes against the law enforcing agencies while performing the duties. I am not able to accept the contention of the learned counsel for the appellant for fixing the period of one year with a despotic formulae or the observations of his Lordship in respect of offences both, for the shocking as well as non-shocking. If the ground of delay is the consideration without keeping in view the merits of the case in the case of non-shocking cases then why there should be no consideration of delay in the case of those persons in respect of whom conscience is shocked. In both the cases delay in the disposal of the case may entitle the appellants for consideration of the bail when they appear before the court and demand the early hearing of the case, but the court is not able to do so.

66. The main question is what is the measurable distance of time. It is true that a person who has been accused in an offence and whose liberty is invaded starts suffering incarceration from the day the invasion on his innocence is made. This is so not only in heinous crimes but also in lesser crimes. But when an offence is committed and law is violated the prosecuting agency attacks the innocence and gathers evidence and presents before the

court the entire matters and the court after applying its judicial mind and with giving full hearing to the parties concerned to present their cases to the best of their capacity, comes to a judicial finding about the guilt of the accused and the court after considering the matters on merits and the interest of the parties concerned including the society and the State considers that it is not a fit case to grant bail, then by fixing despotic period of one year without any basis or criteria without looking to the conditions of the court and the alarming decrease in the number of courts and with the best possible efforts of the Government including the head of the judiciary to provide the judicial system with proportionate and proper parapharnalia, will be to set at naught the considerations at the time of refusing suspension of sentence and grant of bail.

67. In the case of *Gora* v. *State of West Bengal* (1) where Bhagwati,J. (as he then was) considered the question of proximity of time and the like link between the grounds of criminal activities and the purpose of detention and the intervals and un-explained delay in between the two and observed that-66 "no authority acting rationally can be statisfied subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the intervals is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking

(1) (1975) A.I.R. (S.C.) 473

preventive action ..... There is, there fore, no hard and fast rule that merely because there is a time lag of about six months between the 'offending acts' and the date of the order of detention, the casual link must be taken to be broken and the satisfaction claimed to have been arrived at by the District Magistrate must be regarded as sham or unreal ..... The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the 'offending acts' and the order of detention ".

68. Thus mere counting of months and fixing a period without any basis cannot be a measurable distance of time. One cannot lose sight of the provisions in the Code of Criminal Procedure like section 167 Cr.P.C. about the submission of charge sheet within sixty days and 90 days and provisions contained in section 468 Cr.P.C.C. when a period of limitation for launching the prosecution has been provided. The Legislature in its wisdom did not think proper to fix any priod, otherwise it would have been possible for the legislature to have fixed a period. As mentioned earlier in cases of preventive detention as well as the execution of death sentence which definitely are more serious and urgent than a person in jail after conviction, no specific period has been fixed by the courts or by law and the matters have been left to the judicial discretion in every case and ever case has to be decided on its own conditions and circumstances. The drastic power of detention has been tolerated and so his case and also that of a person who remains in death cell for twenty three and half hours daily waiting for the confirmation of the death sentence and thereafter for repraive, have been considered but in none of them any fixation of time is there and it has been

left only to the reasonableness of the persons concerned who are expected to dispose of the matters as quickly and as expeditiously as possible, without any mechanical counting of days or months.

69. In the Chapter XII Rule 17, Sub-rule (c) of the Patna High Court Rules says :-

> "The Registrar shall have the paper Book of the cases in Part II of the monthly Cause List and Weekly supplements thereto prepared strictly in order of issue of notice and receipt of records and this order shall not be deviated from in the absence of a special direction with regard to any particular case from the Registrar or Bench :
>
> Provided that -
>
> *Death Reference cases, bail petitions, Cases in which bail has been refused, applications for transfer of cases, cases admitted on question of extent and legality of sentence, petitions for restoration of cases dismissed for non-prosecution and all cases (appeals, applications and motions) which after admission and passing of the interim orders hold up proceeding before lower courts shall have precedence over other cases in preparation for hearing and the Registrar shall have the paper book in such cases prepared at once according to the prescribed rules. In all such cases the word "Expedition" shall be marked boldly in red ink in front page of the order sheet."*

70. In view of this provision the cases in which bail has been refused to the appellant after conviction can be given priority and precedence in hearing and they can be heard earlier than those cases in which bail has been granted by the court and if this rule is strictly followed then the appeals in which the convicts are in jail can be heard

within a very reasonable period of time which may in cases come down to less than a year. It appears that this rule has been observed more in breach resulting in inability of the courts to hear the appeals. It appears from the judgment of *Har bhajan Singh* vs. *State of Punjab* (supra) that in order to avoid any individuous distinction that the court had adhered to the practice that normally all these life sentence appeals were listed and heard strictly in accordance with their number and in the order in which they were filed and so for that reason the case of the appellants convicted with life imprisonment could not be listed for long time and when the judgment was passed it was expected that the appeals filed in the year 1973, and by which time 40 life sentence appeals were pending for disposal, were not likely to be disposed of for the next one or two years. The court had to observe that the person who has been sentenced to 7 years rigorous imprisonment would have undergone nearly the whole or in any case a substantial part of the sentence by the time. When a provision exists in the Patna High Court Rules about the early listing as "expedition" it could be resorted to and if it is resorted to then no such situation can arise for fixing a period.

71. In a case against acquittal in the *State of U.P. v. Hari Ram* (1) the Supreme Court observed "lastly Mr. Garg appealed to this court not to interfere in this case as the accused have been subjected to a waiting period of about 15 years starting from the institution of the case till the judgment of this court. We are afraid it is not possible to concede to the request of the counsel because once

(1) (1983) A.I.R. (S.C.) 1081

we find that the respondents are guitly of the offence of murder, whatever be the nature of the time lag. between the prosecution and conviction the law must take its course".

Applying this principle that a person who has been found guilty of an offence by a court, the nature of time lag between the prosecution and conviction will not come in way and law will take its own course, in the case of a person who has been convicted in a case of heinous offence and whom the court has not found fit to be released on bail or suspending the sentences then the time lag between their prosecution from the stage of the court below till the disposal of the appeal will not come in way and the law will have its own course. The law has made a provision for early disposal in its Rule. Without following that rule if the accused found guilty in accordance with law and moreover again found unfit for release on bail by the High Court are enlarged on bail simply because the period of one year has elapsed, it will be something to deviate from the provision of law as well as the judicial pronouncement of the highest court of law. It is for the court to see that the cases of those persons who are in jail are listed with top priority and precedence without regard to the year of filing and if the procedure is followed it will be in accordance with law and Rules and will not be individuous distinction.

72. I may add as a word of caution that if a period of one year is fixed for the disposal of the appeals then in the event of inability of the court to dispose of the appeals on account of the reasons beyond its control would be giving a lever even to those persons who are convicted of

heinous offences and very shocking to the society and the Court to approach for bail. And there will be a further controversy as to which is a very shocking and heinous crime as for one it may be very shocking but for the other it may not be so and the categorisation and classification of such cases will further entail the delay in the disposal of the appeal itself.

73. In the latest decision of the Supreme Court in the case of *Sheela Barse* v. *Union of India* (1) where the Supreme Court has been approached under Article 32 of the Constitution for the release of the children within the age of 16 year detained in jails at different stages of the country and for production of the complete information of the children who are in jail, the Supreme Court considered the question of speedy trial again for which the entire para 12 of that case is essential to be seen which is :-

"We would also direct that where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation shall be completed within a period of three months from the date of filing of the complaint or lodging of the first Information Report and if the investigation is not completed within this time, the case against the child must be treated as closed. If within three months, the charge-sheet is filed against the child in case of an offence punishable with imprisonement of not more than 7 years, the case must be tried and disposed of within a further period of 6 months at the *outside* and this period should be inclusive of the

(1) (1986) A.I.R. (S.C.) 1773

time taken up in committal proceedings, if any. We have already held in Hussainara Khatoon v. Home Secretary, State of Bihar, (1979) 3 SCR 169 : (AIR 1979 SC 1360) that the right to speedy trial is a fundamental right implicit in Art. 21 of the Constitution. If an accused is not tried speedily and his case remains pending before the Magistrate or the Sessions Court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held upon account of some interim order passed by a superior court or the accused is responsible for the delay in the trial of the case. The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right. One of the primary reasons why trial of criminal cases in delayed in the courts of Magistrates and Additional Sessions Judges is the total inadequacy of Judge-strength and lack of satisfactory working conditions for Magistrates and Additional Sessions Judges. There are courts of Magistrates and Additional sessions Judges where the work load is so heavy that it is just not possible to cope with the work load, unless there is increase in the strength of Magistrates and Additional Sessions judges. There are instances where appointments of Magistrates and Additional Sessions Judges are held up for years and the courts have to work with depleted strength and his affects speedy trial of criminal cases. The Magistrates and Additional Sessions Judges are often not provided adequate staff and other facilities which would help improve their disposal of cases. We are, therefore, firmly of the view that every State Government must take necessary

measures for the purpose of setting up adequate number of courts, appointing requisite number of judges and providing them the necessary facilities. It is also necessary to set up an Institute or Academy for training of judicial Officers so that their efficiency may be improved and they may be able to regulate and control the flow of cases in their respective courts. The problem of arrears of criminal cases in the courts of Magistrates and Additional Sessions Judges has assumed rather disturbing proportions and it is a matter of grave urgency to which no State Government can afford to be oblivious. But, here, we are not concerned with the question of speedy trial for an accused who is not a child below the age of 16 years. That is a question which may have to be considered in some other case where this Court may be called upon to examine as to what is reasonable length of time for a trial beyond which the Court would regard the right to speedy trial as violated. So far as a child accused of an offence punishable with imprisonement of not more than 7 years is concerned, we would regard a period of 3 months from the date of filing of the complaint or lodging of the First Information Report as the maximum time permissible for investigation and a period of 6 months from the filing of the charge-sheet as a reasonable period within which the trial of the child must be completed. If that is not done, the prosecution against the child would be liable to be quashed. We would direct every State Government to give effect to this principle or norm laid down by us in so far as any future cases re concerned, but so far as concerns pending cases relating to offences punishable with imprisonment of not more than 7 years, we would direct every State Government to complete the investigation within a period of 3 months from

today if the investigation has not already resulted in filing of charge-sheet and if a charged-sheet has been filed, the trial shall be completed within a period of 6 months from today and if it is not, the prosecution shall be quashed."

74. The Supreme Court has fixed a period of 3 months for completion of the investigation and 6 months for the completion of the trial in the cases involving punishment for imprisonment of not more than 7 years. The Supreme Court has said that it was not concerned with the question of speedy trial of an accused who is not a child below the age of 16 years and that question will have to be considered in some other case as to what will be the reasonable lenth of time for a trial beyond which the court would regard the right to speedy trial as violated.

75. The courts have been the guardian of the Constitution and sentinals of the rights and liberties of the citizens and they have been guarding the same through the judicial process. They have looked to the interest of the citizens even if there is no specific provision for the same as it is apparent from the cases decided by the Courts specially the Supreme Court from time to time and they have tried to protect the interest of the society as the aim of law is to harmonise the social interest and that is why the courts have administered justice even without law but on other considerations quite within the ambit of law and Constitution. Though the courts have power to fix any period as has been done in the case of Sheela Barse v. Union of India (supra), but the courts have also refrained from doing so unless there are adequate provisions for the same. How far the provisions for the early disposal of cases and the appeals are lacking, have been mentioned

from time to time by the Courts and that is the reason why in the case of Kashmira Singh and later on in Sheela Barse the Courts have refrained from fixing period and so in the case of appeals against conviction on capital charges it will be prudent, reasonable and in consonance with the lacking and wanting conditions of the Court that the resort should be had to the Rules of the Court which provided for the expeditious disposal of the appeals of the persons in jail and giving them precedence over those who are out side the jail; rather fixing the despotic period of one year in those cases in which the conscience is not shocking and denying the period of one year to those in cases in which conscience of the society is shocked. So if the Rules are strictly followed then it is possible that the appeals of all the convicts who are not entitled to bail on merits whether shocking to conscience or not will be disposed of within a period of even less than one year. One cannot forget that this is a society consisting not only of the criminals alone but innocent and law abiding, and law fearing people, also, whose interest is also to be safeguarded side by side and the interest of the criminals who have been convicted in accordance with law.

S.P.J. *Order accordingly*

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